

Strasbourg, 23 July 2020
[pa01e_2021.docx]

T-PVS/PA(2021)01

CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

Standing Committee

41st meeting

Strasbourg, 29 November - 3 December 2021

**FUTURE WORK ON THE LEGAL FRAMEWORK OF THE
EMERALD NETWORK – POSSIBLE NEXT STEPS**

Discussion paper

*Document prepared by
Mr Arie Trouwborst
Associate Professor of Environmental Law, Tilburg Law School, The Netherlands*



on behalf of the Secretariat of the Bern Convention

1. INTRODUCTION

In 2020, a report entitled “*Obligations of Bern Convention Parties regarding the conservation of candidate and adopted Emerald Network sites: a legal analysis*” was commissioned and written by an independent legal expert.¹ The outcomes of the report were presented to, and discussed by, the Group of Experts on Protected Areas and Ecological Networks (October 2020) and the Standing Committee (November-December 2020). As the report of the 40th meeting of the Standing Committee recalls:

“The Standing Committee ... welcomed the comparative legal study on the obligations of Contracting Parties towards the Emerald Network. It mandated the Secretariat to elaborate proposals to complement the legal framework of the Emerald Network, after consultation with the Group of Experts on Protected Areas and Ecological Networks on the recommendations of the study, and to present proposals at the meeting of the Group of Experts on Protected Areas and Ecological Networks in 2021, and following that group’s further evaluation to submit proposals for consideration by the Standing Committee.”²

The purpose of this concise document is to help facilitate an informed decision by the Contracting Parties on the way forward in this regard.³ It outlines basic options to further consolidate, clarify, adjust and/or complement the legal framework regarding candidate and adopted Emerald Network sites, while indicating the most suitable format for implementing each option. The various options are not mutually exclusive, and it is very well possible to combine them if the Parties so wish.

2. CONSOLIDATING AND CLARIFYING THE CURRENT LEGAL FRAMEWORK

A first possibility is to clearly confirm the scope of Contracting Parties’ current obligations regarding candidate and adopted Emerald Network sites, in order to promote the effective and uniform implementation of the Convention. This requires cogently distinguishing between legally binding requirements and non-binding recommended actions. The aforementioned legal analysis was conducted to attain as much clarity as feasible in this regard.⁴ Using standard international law research methodology, relevant Bern Convention provisions and other relevant documents were analysed as comprehensively as possible, to determine what can presently be stated with confidence regarding Parties’ obligations regarding Emerald Network sites, and what remains less certain.

The report’s principal conclusion is that under Article 4 of the Convention, each Contracting Party has a general obligation of result with regard to the conservation of the candidate and adopted Emerald Network sites on its territory. Regarding all such sites, Parties shall take those measures which are necessary and able to effectively ensure the conservation of the habitats of species and natural habitats involved. Ultimately, Parties must do what it takes, and do whatever works, to achieve the result of safeguarding (or restoring) the “*abiotic and biotic features which form*”⁵ the habitats concerned. The existence of this obligation follows straightforwardly from the application of the general rules of treaty interpretation to the language of Article 4, as informed by the objectives of the Convention, unambiguous interpretive statements recorded by the Standing Committee in Resolution No. 1 (1989), and various other Resolutions and Recommendations. What it takes precisely to meet this obligation will depend on the circumstances pertaining to the sites in question. Generally, however, with regard to the sites involved, Article 4 will require the application of a suitable site protection regime, the taking of the management measures necessary for its preservation or restoration, a sufficient degree of monitoring, the active screening of potentially harmful projects or activities, the assessment of their impacts, and the prevention of projects and activities that are incompatible with the conservation requirements flowing from Article 4. Exceptions to these requirements may only be allowed under the terms of Article 9 of the Convention. These legally binding requirements apply with regard to both candidate and adopted Emerald Network sites. Additional, *non-binding*

¹ Arie Trouwborst, *Obligations of Bern Convention Parties regarding the conservation of candidate and adopted Emerald Network sites: a legal analysis*, T-PVS/PA(2020)07.

² Directorate of Democratic Participation, *Report of the 40th Meeting of the Standing Committee (30 November – 4 December 2020)*, T-PVS(2020)10, par. 5.7.1(a).

³ The present document builds on, and should be read in conjunction with, the aforementioned legal analysis.

⁴ Trouwborst, *supra* note 1.

⁵ Resolution No. 1 (1989), par. 2(c).

commitments apply with respect to adopted Emerald Network sites, regarding *inter alia* stakeholder involvement, reporting on conservation status every six years, and informing the Secretariat of important changes affecting the ecological character of sites.⁶

A **first option** would be for the Standing Committee to adopt a Resolution that merely recapitulates and confirms the aforementioned requirements, clearly distinguishing between binding and non-binding ones. This would promote clarity regarding the scope and extent of the requirements presently flowing from Article 4 and 9 of the Convention, without adjusting the legal framework in any way. Because this concerns the provision of further **interpretive clarity on existing obligations and a consolidation of the *status quo*** instead of additional recommended actions, a Resolution (rather than a Recommendation or a guidance document) would appear to be the most appropriate instrument.

A **second option**, which is related, would be to provide **further clarity and consistency regarding aspects that are currently still less than clear**. A good example is the precise nature of the result to be achieved under Article 4 in Emerald Network sites. This result is defined in Resolution No. 1 as the safeguarding or restoration of those “*abiotic and biotic features which form the habitat of a species or a natural habitat*,”⁷ but has subsequently also been expressed by the Standing Committee in terms of the maintenance (or restoration) of the sites’ ecological character or integrity, the satisfactory or favourable conservation status of the species and natural habitats involved, or the latter’s long term survival.⁸ Such clarification could again be most effectively achieved using a Resolution, but in this case it would also be possible to employ a Recommendation. In either case, general statements in the Resolution or Recommendation concerned could be supplemented with specific guidance – as detailed as the Parties wish – in an annex.

3. COMPLEMENTING AND ADJUSTING THE LEGAL FRAMEWORK

It is another small step towards a **third option**, involving the actual **adjustment of the legal requirements themselves** in order to ensure a more effective pursuit of the Convention’s objectives and/or, if the Parties so desire, a closer alignment of the Convention’s requirements with the obligations of EU Member States under the Habitats Directive’s provisions regarding Natura 2000 areas.⁹

For instance, the Habitats Directive’s derogation clause regarding Natura 2000 sites allows the authorisation of harmful projects only for “*imperative reasons of overriding public interest*” and on condition that “*all compensatory measures necessary*” to ensure the coherence of the Natura 2000 network are taken.¹⁰ Article 9 of the Bern Convention has a longer list of eligible reasons for the granting of exceptions, and does not expressly require compensation. Leaving aside the possibility of amending the Convention text, a closer resemblance could be achieved by the Standing Committee through the adoption of a Resolution with strong interpretive statements regarding the scope and meaning of Article 9.¹¹

In concrete instances, the boundaries between the aforementioned three options will not always appear razor sharp. Thus, in some cases, it may not be entirely clear which (combination) of the three options a particular statement adopted by the Standing Committee would represent. For instance, when it is apparent that a proposed project is incompatible with the conservation requirements flowing from Article 4 of the Convention for a particular Emerald Network site, then in principle, the competent authorities in the Contracting Party involved must prevent the project from proceeding – unless an exception in conformity with Article 9 can be made. Some uncertainty appears to remain, however, regarding any particular thresholds of significance or proof to be applied in this connection. For instance, if the Standing Committee were to adopt a statement that potentially harmful projects may only be allowed to proceed if and when the authorities concerned have made certain that the project

⁶ For more detail, see Trouwborst, *supra* note 1.

⁷ Resolution No. 1 (1989), par. 2(c).

⁸ Trouwborst, *supra* note 1, par. 3.2.

⁹ Council Directive 92/43/EC on the Conservation of Natural Habitats and of Wild Fauna and Flora (21 May 1992), [1992] OJ L206/7 (Habitats Directive).

¹⁰ Habitats Directive, Art. 6(4).

¹¹ An illustrative example of draft language that could achieve this is given in Trouwborst, *supra* note 1, par. 8.

will not impair the conservation status of the species or habitats for which the site in question was selected, or the site's ecological integrity, this could be argued to represent a consolidation or clarification of the law, or be viewed as a modification, depending on one's assessment of the law as it stands. Presently, the latter does not appear to be crystal clear on this count.¹² However, adopting a specific statement that such certainty only exists where no reasonable scientific doubt remains as to the absence of adverse effects, would appear to go beyond a mere consolidation of current requirements, as it would generate interpretive precision that did not previously exist, and could perhaps even be considered to modify the extent of Parties' obligations as such.

A **fourth option** would be for the Standing Committee to adopt **further non-binding guidance**, supplementing the existing binding requirements. For instance, Parties could be recommended to adopt, on a voluntary basis, the aforementioned evidentiary standard of 'no reasonable scientific doubt' when considering potentially harmful projects in or near Emerald Network sites, or similarly be called on to allow exceptions under Article 9 of the Convention only for imperative reasons of overriding public interest, and on condition that associated habitat loss is compensated. The most appropriate instrument to implement this option would be the Recommendation, whether or not in combination with one or more guidance documents.

4. CONCLUDING OBSERVATIONS

It is up to the Contracting Parties to determine what **aspects** of the legal framework for Emerald Network sites, if any, merit steps to consolidate, clarify, adjust and/or complement this framework. Candidates include, but are not limited to, a more precise determination of the result to be achieved in Emerald Network sites according to Article 4 (involving concepts such as satisfactory or favourable conservation status, and sites' ecological character or integrity);¹³ monitoring and reporting;¹⁴ site management measures;¹⁵ the assessment and authorisation procedure for potentially harmful projects;¹⁶ and the scope for exceptions under Article 9.¹⁷

As discussed above, **options** to elucidate or elaborate on any such aspects of the legal framework include (1) providing interpretive clarity on existing obligations, consolidating the *status quo*; (2) providing further clarity and consistency regarding aspects that remain unclear; (3) adjusting certain aspects of the legal requirements themselves; and (4) adopting further non-binding guidance, supplementing existing binding requirements. The most suitable instrument for the former three is the Resolution. In principle, it would be possible to realise all three options in a single Resolution. The fourth option can be implemented through a Recommendation, and this can also be done in parallel with any or all of the first three options.

¹² Id., par. 6.3.

¹³ Id., par. 3.2

¹⁴ Id., par. 5.

¹⁵ Id., par. 4.2.

¹⁶ Id., par. 6.1-6.3.

¹⁷ Id., par. 6.4.