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CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE AND NATURAL HABITATS

LEGAL FRAMEWORK OF THE EMERALD NETWORK – CHALLENGES ENCOUNTERED BY PARTIES AND POSSIBLE WAYS FORWARD

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1. INTRODUCTION

At its 41st meeting in 2021, the Standing Committee of the Bern Convention decided that Contracting Parties and Observers should be invited to identify what “*problems or challenges*” they face with “*implementing relevant elements of the Convention and other measures in place for Emerald Network sites, including in the frame of case-files.*”¹ The purpose of the present document is to report on the responses of Parties to this question, and to reflect on possible ways forward to address the problems identified. To do this in a meaningful way, it is necessary also to provide an overview of the various other ways in which attention has been paid in recent years to the clarification and possible further development of the obligations of Contracting Parties regarding the conservation of the Emerald Network sites within their territories. The most recent consultation, reported on here, is part of a longer process focusing on the Emerald Network’s legal framework.

2. LEGAL FRAMEWORK OF THE EMERALD NETWORK – STATE OF PLAY

In 2020, a legal analysis was commissioned and conducted by an independent legal expert (also the author of the present report) on the obligations of Bern Convention Contracting Parties regarding the conservation of the candidate and adopted Emerald Network sites on their territories.² The outcomes of the report were presented to, and discussed by, the Group of Experts on Protected Areas and Ecological Networks (GoEPAEN) and the Standing Committee. At its 40th meeting, the Standing Committee welcomed the study and mandated the Secretariat to “*elaborate proposals to complement the legal framework of the Emerald Network.*”³

In 2021, several steps were undertaken in this regard. Firstly, a follow-up document was drawn up by the same legal expert to help facilitate an informed decision by the Contracting Parties on the way forward.⁴ It outlines basic options to further consolidate, clarify, adjust and/or complement the legal framework, while indicating suitable formats for implementing each option. Secondly, the Secretariat sought the views of the Contracting Parties on ways forward.⁵ 19 Parties responded, including 9 non-EU Member States, 9 EU Member States and the EU itself. 8 of them supported the further clarification of existing rules, which may be done through the creation of a short document summarizing obligations of Parties concerning Emerald Network sites, based on the 2020 legal study.⁶ 12 Parties, including 5 non-EU Parties, (also) supported a further development of applicable rules to achieve closer alignment with the regime applicable to Natura 2000 sites under the Habitats Directive.⁷ Thirdly, the way forward was discussed by the GoEPAEN, which was followed by a written consultation amongst participants.⁸ Of 14 Contracting Parties represented at the GoEPAEN meeting, 9 responded. These responses suggest that the GoEPAEN “*supports the view that the*

¹ Secretariat of the Bern Convention, *Report of the 41st Meeting of the Standing Committee (29 November – 3 December 2021)*, T-PVS(2021)28, par. 5.8.1(a).

² 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.

³ 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).

⁴ Arie Trouwborst, *Future work on the legal framework of the Emerald Network – possible next steps*, T-PVS/PA(2021)01.

⁵ Secretariat of the Bern Convention, *Future work on the legal framework of the Emerald Network – outcomes of the consultation of Contracting Parties on how to follow up on the conclusions of the 2020 legal analysis*, T-PVS/PA(2021)02.

⁶ Id.

⁷ Id.

⁸ Secretariat of the Bern Convention, *Outcomes of the written consultation of the participants in the Group of Experts on Protected Areas and Ecological Networks: proposals for further elaborating the legal framework of the Emerald Network and aspects to focus on*, T-PVS/PA(2021)09.

*Emerald Network legal framework not only be consolidated but also that unclear aspects of the requirements are to be further clarified.”*⁹

Fourthly, the Standing Committee, at its 41st meeting, took note of the outcomes of these consultations with the Parties and with the GoEPAEN, noting a preference for “*further clarifying currently unclear aspects of requirements*” and that “*all legal aspects (i.e. results to be achieved under Article 4 of the Convention, monitoring and reporting, site protection status, site management measures, assessment and authorization of projects, scope for exceptions under Article 9 of the Convention) should be taken into account.*”¹⁰ Given a “*divergence of views of several parties on the next steps,*” the Standing Committee agreed on several ensuing steps, including the organization of a dedicated session on the Emerald Network’s implementation during the 2022 GoEPAEN meeting, aimed at identifying any problems or challenges faced by Parties in connection with “*implementing the relevant elements of the Convention and other measures in place for Emerald Network sites,*” and to “*discuss possible solutions to address the problems/challenges identified.*”¹¹ By way of preparation, the Secretariat was mandated to seek answers from Parties and Observers to the following question: “*Please identify what problems or challenges you face with implementing relevant elements of the Convention and other measures in place for Emerald Network sites, including in the frame of case-files.*”¹²

In 2022, however, little progress was made (with only one Party, the United Kingdom, responding to the consultation). The Standing Committee expressed strong regret in this regard, given the “*key importance*” of providing further guidance to Parties on the “*management of sites and the assessment of impacts of projects and plans on the sites’ integrity and related permitting procedures.*”¹³ The Standing Committee encouraged Parties to provide a swift response to the outstanding consultation, and instructed the GoEPAEN to “*give the highest priority*” to the topic of the Emerald Network’s legal framework and to submit a proposal for the consideration of the Standing Committee at its next meeting.¹⁴

In 2023, unfortunately, the GoEPAEN did not meet, and therefore had no occasion to follow up. Several Parties did, however, submit responses to the consultation. These are considered below.

⁹ Id.

¹⁰ T-PVS(2021)28, par. 5.8.1(a).

¹¹ Id.

¹² Id.

¹³ Secretariat of the Bern Convention, *Report of the 42nd Meeting of the Standing Committee (28 November – 2 December 2022)*, T-PVS(2022)31, par. 6.8.1.

¹⁴ Id.

3. PROBLEMS, CHALLENGES AND POTENTIAL SOLUTIONS

The question to which the Secretariat invited replies from all non-EU Contracting Parties was phrased as follows:

*“As part of this process,¹⁵ non-EU Contracting Parties are kindly asked to **identify what problems or challenges they face with implementing relevant elements of the Bern Convention and other measures in place for Emerald Network sites, including in the frame of case-files.***

*To help structure their replies and to ensure they are relevant and specific, Parties are invited to **relate their answers to the following elements**, which correspond with requirements of the Convention already identified:*

- * Results to be achieved under Article 4 of the Convention*
- * Monitoring and reporting*
- * Site protection status*
- * Site management measures*
- * Assessment and authorisation of projects*
- * Making exceptions under Article 9 of the Convention*
- * Other aspects*

In other words, what particular problems or challenges (if any) have you experienced with respect to the above elements, and which of these do you consider most important?”

Altogether, replies were received from only 5 Contracting Parties, namely, Georgia, Iceland, Norway, Serbia, and the United Kingdom.

The **United Kingdom** (UK) based its response on elaborate analyses it undertook to find answers, the results of which are annexed to its reply. These results confirmed that the information relevant to the establishment and management of Emerald Network sites is “*scattered across numerous Resolutions and Recommendations*” in addition to the Convention text.¹⁶ In the words of the UK’s reply, there is currently “*no single document*” that draws all relevant information together “*in a way that provides clarity to Parties.*”¹⁷ This lack of clarity, in turn, “*makes it very difficult for Parties to understand the full extent of what is required to fulfil obligations under Article 4.*”¹⁸ However, “*changing the requirements of the Convention to mirror the EU Directives*” would, according to the UK, not help resolve this.¹⁹ In the UK’s view, “*further work should be undertaken to clarify requirements and provide guidance to parties,*” and the analyses conducted by the UK may help in shaping this.²⁰ Notably, the UK suggests considering an integration of all detailed guidance into “*one easily accessible document*” that is regularly updated.²¹ By the time any such revised guidance is ready, the UK recommends that Parties be given a period of 5 years to implement it, followed by a gathering and review of Parties’ experiences.²²

¹⁵ I.e., the ongoing reflection on whether obligations of Contracting Parties towards their Emerald Network sites need to be clarified further or (also) complemented.

¹⁶ Reply to the consultation by the UK.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Id.

The UK's analysis highlights many elements of the Emerald Network legal framework eligible for further clarification or consolidation.²³ At the same time, the UK reports that many of the identified issues with the implementation and management of sites reflect *“the sort of challenges that would be faced with implementing and managing any form of protected site network”* and are therefore not specific to the Emerald Network.²⁴ Particularly regarding case files, the UK notes the lack of a *“clear process to follow,”* and observes that the *“instructions given to experts providing independent analysis could be more explicit and follow a more structured approach.”*²⁵ Also, the UK notes that a *“mechanism for drawing long-standing and intractable cases to a close is a missing element of the process.”*²⁶

In its reply to the consultation, **Georgia** stresses that the wording of Article 4 of the Convention *“may be interpreted subjectively country by country”* and that it may be useful to provide clear, successful examples of the correct implementation of this provision.²⁷ Likewise, Georgia submits it would be helpful to have a non-binding guidance document clarifying what precisely amounts to a ‘favourable conservation status’ for species and habitats, and what criteria and thresholds apply in this regard.²⁸ It would also appreciate clearer guidance or assistance, for instance through a digitized tool, regarding the interpretation of EUNIS classifications as regards the Bern Convention and the Habitats Directive.²⁹ It furthermore reports a lack of financial and human resources in connection with the implementation of the Emerald Network in Georgia, including a dearth of resources needed for systematic monitoring, and would welcome the establishment of a long-term financial mechanism supporting the Convention's implementation.³⁰

Regarding site management, Georgia sees an *“essential”* need to adopt clear guidelines with regard to management plans for Emerald Network sites.³¹ Likewise, according to Georgia it would be useful to have guidelines containing an up-to-date clarification of requirements concerning the assessment and authorization of potentially harmful projects.³² As concerns the way forward generally speaking, Georgia supports a mandate to draw up a Resolution that *“recapitulates and confirms the requirements of parties, clearly distinguishing between binding and non-binding provisions.”*³³ Alternatively, a brief, clear guidance document on the main binding and non-binding provisions would, in Georgia's view, also add great value.³⁴

Iceland, in its reply to the question posed by the Secretariat, reports a lack of human resources with relevant expertise in the country, due among other things to *“knowledge leaks”* when relevant experts leave or retire.³⁵ Furthermore, awareness of the Bern Convention's requirements and the Emerald Network in particular is low in Iceland, including at the political stage and within institutions working on nature conservation.³⁶ Iceland agrees with the UK that Bern Convention requirements regarding Emerald Network sites are not easy to interpret, given *inter alia* that they are spread across the Convention text, different resolutions, recommendations and guidance documents.³⁷ In Iceland's view, this makes it *“difficult for parties to apply the requirements consistently and coherently.”*³⁸

²³ Id., particularly Annex 5.

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ Reply to the consultation by Georgia.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Id.

³³ Id.

³⁴ Id.

³⁵ Reply to the consultation by Iceland.

³⁶ Id.

³⁷ Id.

³⁸ Id.

Also according to **Norway**, the fact that Contracting Parties' requirements regarding Emerald Network sites are spread across many different documents makes it "*quite overwhelming to figure out what is most important*."³⁹ At present, it is difficult to determine what precisely is "*good enough or necessary*" to comply with the obligation to take appropriate and necessary legislative and administrative measures to ensure the conservation of habitats, thus complicating evaluations as to whether expected results are achieved.⁴⁰ In the same vein, Norway observes that the requirements concerning monitoring and reporting are quite extensive and hard to fulfil.⁴¹ Norway recommends clarifying more precisely which of these requirements are legally binding and which are not.⁴² Regarding site protection and management, Norway doubts whether it is worthwhile to develop advanced management schemes regarding common species.⁴³ It would be useful in this regard to have confirmation that management measures are expected "*as appropriate*".⁴⁴

"*A useful approach could be to streamline the requirements in a simplified language*," Norway submits. Even if this is difficult and could create a risk of losing crucial nuance, without such streamlined guidance it would be hard to achieve an appropriate national prioritization regarding the Emerald Network's implementation.⁴⁵ In Norway's view, such a summary of requirements "*could be set up as a Resolution or a Recommendation*."⁴⁶ While thus suggesting various clarification exercises, Norway also emphasizes that in spite of the challenges identified, it is still "*possible to establish and develop the Emerald Network without further clarification of the framework*."⁴⁷

The main problem regarding the implementation of the Emerald Network indicated by **Serbia**, in its reply to the consultation, is the lack of an appropriate monitoring system in the country.⁴⁸ Monitoring is not done systematically, mostly due to a lack of adequate funding and human capacity.⁴⁹ Serbia recognizes that improved monitoring is necessary, among other things, for the proper operation of the derogation procedure under Article 9.⁵⁰

4. CONCLUSION

Various concrete suggestions concerning the way forward have thus been submitted by the Contracting Parties participating in the most recent consultation round, as reviewed in the present document. The UK suggests that further work be undertaken to clarify requirements and provide guidance, preferably resulting in a single document indicating as clearly as possible what is expected from Parties in order to meet their obligations concerning the implementation of the Emerald Network. Iceland likewise highlights the challenges raised by the current scattering of requirements regarding the Emerald Network across multiple documents. In this connection, Georgia supports recapitulating and confirming the obligations of Parties in one Resolution, distinguishing clearly between binding and non-binding requirements, or alternatively, to do this in a concise guidance document. Similarly, Norway advocates incorporating a streamlined statement of requirements in a Resolution or a Recommendation.

These responses complement the outcomes of the prior consultation of Contracting Parties in 2021, with 8 Parties supporting further clarification of existing rules, possibly through a concise document

³⁹ Reply to the consultation by Norway.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Reply to the consultation by Serbia.

⁴⁹ Id.

⁵⁰ Id.

summarizing obligations, and 12 Parties (also) supporting further development of the legal framework to align it further with the Natura 2000 regime; and the GoEPAEN consultation, suggesting support for consolidation of the legal framework as well as further clarification of certain aspects.⁵¹

Various tentative conclusions appear to follow from the joint results of the various consultations. First, there would appear to be significant support amongst Contracting Parties for drawing up and adopting a clear statement, in a single document, of what can presently be stated with confidence, on the basis of the Convention text and currently applicable Resolutions and Recommendations, about the obligations of Parties regarding their Emerald Network sites. Much groundwork for the compilation of such a statement has already been done in the 2020 legal analysis.⁵²

Second, as such there would likewise appear to be significant support amongst Contracting Parties for the further clarification of currently unclear aspects of the legal framework, as already signaled by the Standing Committee in 2021.⁵³ However, it has not yet become apparent which of the aspects outlined in the Standing Committee's question reproduced above, or indicated in Parties' responses to the various consultations, should be assigned priority in this regard.

Third, there would not yet appear to be a consensus amongst Parties regarding the desirability of aligning the legal framework of the Emerald Network more closely with the Natura 2000 regime established under the Habitats Directive.

⁵¹ See section 2 above.

⁵² T-PVS/PA(2020)07. Indeed, that elaborate legal analysis was conducted expressly to “*identify, as precisely as possible, the obligations of non-EU Contracting Parties to the Bern Convention with regard to the conservation of Emerald Network sites on their territories*” (p. 3).

⁵³ T-PVS(2021)28, par. 5.8.1(a).