MASARYK UNIVERSITY
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Ilona Jančářová,
Jana Dudová et al.

SUSTAINABLE DEVELOPMENT AND CONFLICTS OF INTERESTS IN NATURE PROTECTION

IN CZECHIA, POLAND AND SLOVAKIA

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LIST OF ABBREVIATIONS

CAP	Code of Administrative Procedure (CR: Act No. 500/2004 Coll.) (Poland: Code of Administrative Procedure of 14. 07. 1960, (Journal of Law 2017, item 1257, with amendments),
CAPY	Common Agricultural Policy
CBD	Convention on Biological Diversity, signed on 5 June 1995 r, Journal of Laws of 2002 No. 184, item 1532.
CJEU	Court of Justice of European Union
CPUTWIL	Convention on the Protection and Use of Transboundary Watercourses and International Lakes, signed on 17 March 1992 in Helsinki, Journal of Laws of 2003 No. 78, item 702.
CR	Czech Republic (Czechia)
CTC	Czech Tourists Club
EC	European Commission
EFTA	European Free Trade Association
EIA	Environmental impact assessment
EIAA	Environmental Impact Assessment Act (CR: Act No. 100/2001 Coll.)
ELC	European Landscape Convention, signed on 20 October 2000 in Florence, Journal of Laws of 2006 No. 14, item 98.
ENLPA	Act No. 114/1992 Coll., on Nature and Lanscape Protection, valid and effective until 31 May 2017
EU	European Union
EU MS	European Union Member States

ESD Education for Sustainable Development

FAO Food and Agriculture Organization

GDOŚ General Director for Environmental Protection (Generalny Dyrektor Ochrony Środowiska)

GMO Genetically modified organisms

HELCOM Convention on the Protection of the Marine Environment of the Baltic Sea Area, done in Helsinki on 9. 04. 1992,

ICC-MAB Programme
International Coordinating Council of the MAB Programme

IUCN International Union for Conservation of Nature

KRNAP National Park Krokonoše

KRP Constitution of the Republic of Poland (Konstytucja Rzeczypospolitej Polskiej) of 2 April 1997, Journal of Laws of 1997 No. 78, item 483 with amendments.

MAB the Man and the Biosphere

MARD Mutual Assisstance for the Recovery Directive (2010/24/EU)

MoE Ministry of Environment

NCA Act of 16 April 2004 on Nature Conservation (NCA – Poland)

NGO Non-governmental organization

NLPA A) Act No. 543/2002 Coll., on Nature and Landscape Protection, as amended (Slovakia)
B) Act No. 114/1992 Coll. on Nature and Landscape Protection, as amended (Czechia)

NM Nature monument

NNM National nature monument

NNLPA Act No. 114/1992 Coll., on Nature and Lanscape Protection, valid and effective as of 01 June 2017

NR Nature reserve

NNR National nature reserve

NP National Park

NPA Nature Protection Authority

NWPS National Wilderness Preservation System

PEEN Pan-European Ecological Network

PES Payment for ecosystem services

PLA Protected landscape area

PTRB "Polesie Zachodnie" Agreement between the Government of the Republic of Poland, the Government of the Republic of Belarus and the Cabinet of Ministers of Ukraine of 28 October 2011 on creating the Transboundary West Polesie Biosphere Reserve, Official Journal of the RP (Monitor Polski) of 2013, item 18.

RDOŚ Regional Director for Environmental Protection (Regionalny Dyrektor Ochrony Środowiska)

RDP Rural Development Program

SAC Supreme Administrative Court

SDG Sustainable Development Goal

SFWNBR Statutory Framework of the World Network of Biosphere Reserves, United Nations Educational, Scientific and Cultural Organization, Records of the General Conference, Twenty-eighth Session, Paris, 25 October to 16 November 1995, Volume 1 – Resolutions, http://unesdoc.unesco.org/images/0010/001018/101803e.pdf

SR Slovak Republic (Slovakia)

SSBR The Seville Strategy on Biosphere Reserves, United Nations Educational, Scientific and Cultural Organization, Records of the General Conference, Twenty-eighth Session, Paris, 25 October to 16 November 1995, Volume 1 – Resolutions, http://unesdoc.unesco.org/images/0010/001018/101803e.pdf

TFEU Treaty on the Functioning of the European Union, Journal of Laws of 2004 No. 90, item 864.

UIAA Union Internationale des Association d'Alpinisme

UK United Kingdom

UN United Nations

UNCCD United Nations Convention to Combat Desertification, signed on 17 June 1994 in Paris, Journal of Laws of 2002 No. 185, item 1538.

UNDP United Nations Development Programme

UNECE United Nations Economic Commission for Europe

UNEP United Nations Environment Programme

UNESCO United Nations Educational, Scientific and Cultural Organization

UNESCO Constitution
Constitution of the United Nations Educational, Scientific and Cultural Organization signed on 16 November 1945 in London, Journal of Laws of 1958 No. 63, item 311, with amendments.

UNFCCC United Nations Framework Convention on Climate Change, signed on 9 May 1992 in New York, Journal of Laws of 1996 No. 53, item 238.

UNO United Nations Organization

UNU United Nations University

UOL Act on Forests (Ustawa o lasach) of 28 September 1991, unified text Journal of Laws of 2017, item 788 with amendments.

UPŁ Act on Hunting (Ustawa Prawo Łowieckie) of 13 October 1995, unified text Journal of Laws of 2017, item 1295 with amendments.

UPZP Act on Spatial Planning and Development (Ustawa o planowaniu i zagospodarowaniu przestrzennym) of 27 March 2003, unified text Journal of Laws of 2017, item 1073 with amendments.

USA United States

UUM Act on International Agreements (Ustawa o umowach międzynarodowych) of 14 April 2000, Journal of Laws 2000, No. 39, item 443 with amendments.

UWNOK Act amending certain acts in relations to strengthening landscape protection tools (Ustawa o zmianie niektórych ustaw w związku ze wzmocnieniem narzędzi ochrony krajobrazu) of 24 April 2015, Journal of Laws 2015, item 774.

WHC UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, signed in Paris on 16 November 1972, Journal of Laws of 1976, No. 32, item 190 with amendments.

WNBR World Network of Biosphere Reserves

WPP Wind power plant

ZDPR Common Good Agricultural Practice

INTRODUCTION

The significance of natural ecosystems and biodiversity was stressed already in many international conventions. Some of these conventions are potentially applicable to all species and habitats on the planet such as Convention on biological diversity (Rio de Janeiro, 1992), the others are aimed at protection of all species and habitats within a particular region (Convention on the Preservation of European Wildlife and Natural Habitats (Berne 1979), and there are treaties which are applicable at the regional or global level but which have as their objective the conservation of particular habitat or species types (1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, for example). These conventions were adopted mainly in 70s of the last century and their obligations along with international environmental law principles formed a basis of either EU or national legislation on nature protection. Still nowadays "*we noted with great concern the rapid decline of populations of rare and even common wild animals and plants, and the progressing disappearance of wild species. As evidenced by official reports this is due to a number of factors including the complexity and lack of transparency of the relevant law in particular at national level, the poor enforcement of the relevant laws both on the EU and MS levels, and the ever expanding human encroachments on wild animal and plant populations and habitats*".[1]

States in Central Europe often cope with very similar environmental problems. This book reflects experience of environmental law representatives of three countries – Poland, Slovakia and Czechia who in their joint effort point out at current legal problems related to nature protection in their countries.

In all countries concerned it is widely agreed upon that preservation of nature is a public interest. Nature protection and interest in developmental activities along with exploitation of natural resources should converge; this is the basic principle of sustainable development. Still we witness developmental projects that were carried out without regards to this principle, because the

1 On the state of species and habitat protection law in the European Union. Conclusions of the Avosetta meeting of 26/27 may 2017 in Krakov. Available at: http://avosetta.jura.uni-bremen.de/conclusions2017.pdf [cit. 7 October 2017].

economic interests outweigh the interests in nature protection. Therefore, authors of this book focus on problems of conflict of these interests from different point of views. The aim of this book is to demonstrate the difficulties in achievement of sustaninable development, to identify possible solutions supporting nature protection in new legislative approaches to land usage or to the concept of specially protected areas and to its administration, and to refer to gaps and discrepancies in existing legislation or obstacles to its effective application.

The problems of sustainable development is addressed by **Karolina Karpus** in the first chapter devoted to UNESCO's Man and Biosphere Programme, since biosphere reserves should be the "*sites of excellence to explore and demonstrate approaches to conservation and sustainable development on a regional scale*". The author shares her apprehension in problems with defining legal status of a UNESCO's biosphere reserve. She presents the difficulties to establish the Polish legal path of forming individual biosphere reserves and is rather pessimistic regarding to achievement of the objectives of the Man and Biosphere Programme in Poland by the year 2025.

Even though the term "wilderness" is not defined in the Czech legislation, it is more and more discussed and used by environmental law experts and professionals. The general concept of wilderness and its development on global scale is presented by **Jiří Zicha**. The author devotes his attention to the concept of wilderness in Europe, even though he admits that there are relatively few areas in Europe where true wilderness can be found. Still, this concept acquired the attention of the European Commission, which has developed guidelines on management of terrestrial wilderness and wild areas within NATURA 2000. Finally, the author considers the introduction of the concept of wilderness to the Czech legal system, as it was proposed by Czech NGO Hnutí Duha and lays down the main question if wilderness should be understood only as a way of a management of the nature or if it is to be introduced as a potentially new category of protected areas.

The idea of wilderness is further developed by **Jana Dudová** in respect to quiet territories in national parks. This term was brought to the Czech Nature and Landscape Protection Act by its latest amendment. The author is pointing at the problem of excessive visitation of some most valuable

parts of national parks and to the possibilities to restrict free movement of visitors throughout the national park. According to her opinion, the amendment of the Nature and Landscape Protection Act is beneficial for the nature protection, however, it brings some uncertainties regarding to its interpretation and application.

The above mentioned quiet territories are mentioned in following chapter by **Kateřina Švarcová** who concentrates on the role of municipalities in national parks. She points out at the conflict of interests at the municipal level, since municipalities perform the state administration in the field of nature protection in their territory in national parks and, at the same time, they are executing self-government with the aim of economic prosperity of the municipality. In reaction to legislative changes, the author provides the overview of different possibilities of a municipality to participate in establishment and management of national parks and she points out at the conflict of interests in different roles of a municipality and at the need to search for a compromise solution.

In the fifth chapter, **Ivana Průchová** and **Dominik Židek** are dealing with another specific form of protected areas in the Czech legislation called natural parks, which, as they say, have very specific position in the system of protection of nature and landscape areas. There is no doubt that they contribute also to the quality and diversity of the European landscape. Even though the legal form of natural parks was established already in 1992 by the former Nature and Landscape Protection Act, this form of nature protection was dealt with only marginally both in scientific literature and in judicial practice. The authors analyze possibilities and limits in the system of instruments for protection of the nature and the landscape from the perspective of the Czech law. They devote attention to relations of natural parks to the other instruments aimed at nature protection, such as national parks and other protected areas or significant landscape components. Based on judicial findings the authors analyze the processes regulated by the Building Code in the context of natural parks. The problems of conflicting interests in nature/landscape protection and human rights in respect to property rights are stressed.

The conflict of interests in nature protection and development is presented by **Tomasz Bojar-Fijałkowski** as an environmental hard case on the example of Vistula Spit case in Poland. The author explains the concept of "*hard cases*" at first using selected examples to demonstrate the problem. Special attention is given to Vistula Spit cross-cut project which raises tremendous emotions, since it will be the investment with significant negative impacts on the environment, including NATURA 2000 sites. The author focuses on the special law which is to enable the project to be carried out and concludes that this is not the first time the Polish legislature confirms that effective implementation of important and technically complicated infrastructure investments cannot be based on universally binding provisions.

In the seventh chapter **Zbigniew Bukowski** thinks over the concept of sustainable development in Poland. Based on the search for this term in different legal acts he came to surprising conclusion that the impact of sustainable development on Polish legislation regarding to nature conservation can be assessed as moderate.

Care programmes for protected bird areas are depicted by **Jana Šmelková** as significant conception tool enhancing the level of protection of rare birds in Slovakia for a period of 30 years. These programmes serve as a reference documents for further legal and political development of nature and landscape conservation. So far they encompass a set of measures for preservation of rare bird species in 5 selected areas. The author devotes specific attention to the Care Programme for Protected Bird Area Kráľová.

Alien species of plants and animals represent major threat to native species and ecosystems and to biodiversity in general. Since the Regulation 1143/2014 on the prevention and management of the introduction and spread of invasive alien species laid down only few provisions directly applicable to individuals, the ninth chapter by **Ilona Jančářová** is focused on further possibilities the Czech national legislation offers to cope with invasive alien species, especially regarding to their management. Because obligations related to detection, surveillance, adoption of emergency measures, eradiction and restoration of the damaged ecosystems are imposed on EU Member States, the Regulation 1143/2014 seems to have rather character of a directive then regulation and the EU Member States have to adopt

implementing legislation to ensure fulfilment of the Regulation's requirements. The author concludes that the current Czech legislation cannot satisfy the EU law requirements in respect to duties imposed on individuals. The draft of the new act is currently under preparation and the new regulation is supposed to be adopted as an amendment to the existing Nature and Landscape Protection Act and to other correlative laws.

Next chapters are devoted to specific activities which may pose a threat to natural ecosystems and to nature as the whole. One of the most burdensome activity in this respect is undoubtedly agriculture. Still the law is capable to restrict agricultural activities for the sake of nature protection. The author of the tenth chapter **Monika A. Król** devoted her attention to development of legal regulation aimed at environmental protection in respect to agricultural activities and to Polish legislation providing for conservation of natural resources against excessive use of chemicals in agriculture and of genetically modified organisms. The author also emphasizes the agri-environmental programmes, codes of good farming practices and financial support for management in disadvantaged areas that have a positive effect on biodiversity of agricultural land.

Another activity which poses a significant threat to nature preservation usually in local scale is the mining activity and vice versa, the interest in nature and landscape protection is one of the most important public interest that may be threatened by mining of minerals. The eleventh chapter is focused at solving of the conflict of both these interests in Czechia. The author **Ondřej Vícha** points out that both public and private laws provide with regulations aimed at solution of these conflicts. Protective provisions of Nature and Landscape Protection Act are emphasized in relation to procedures regulated by the Mining Act including to licensing procedure. The possibilities to adopt administrative agreements between mining company and public authorities are analyzed.

Jakub Strouhal and Vojtěch Vomáčka are authors of the twelfth chapter which is devoted to problems with wind mills. The objective of this chapter is to find out, how their interference with the landscape character and valuable natural parts is solved by the Czech law. Therefore, the Czech legislation regarding to establishment of wind power plants is analyzed from

the nature protection point of view. The authors identified different legal tools that are contained in regulation of landscape planning, environmental impact assessment and in regulation on protection of specially protected species and NATURA 2000.

In the next chapter, **Jana Tkáčiková** analyzed the legal framework for performance of outdoor activities. She comes out of basic human rights and freedoms and shows that restrictions to the freedom of movement is necessary for the sake of nature protection, beside others. Such restrictions are laid down by different laws. Moreover, the author is dealing with protective conditions in the regime of Nature and Landscape Protection Act. Its amendment is considered as the step in the right direction to achieve the balance between the protection of nature and its use for outdoor activities.

The last chapters are devoted to protection of trees. Since trees may be a part of the forest or they may grow outside the forest, their protection is governed by two different regimes in all 3 states. Forests represent specific ecosystems supporting many species of animals and plants. **Michal Maslen** describes the impact of logging in Slovakia on these ecosystems. Special attention is devoted to protected bird area Muráň Plain-Stolica as a habitat for wood grouse. The author stressed that forests fulfill productive and non-productive functions, which are no less important. The legitimate interests of forest owners must be balanced to the interest in preservation of forests. Based on the case of the Muráň Plain-Stolica, the legislation aimed at protection of forests and nature is analyzed to find out that logging in this area is in contradiction to requirements of the Directive 2009/147/EC and even to Slovak national legislation.

In the last two chapters by **Martin Dufala** and **Gabriel Radecki**, it is interesting to compare the Polish and Slovak legal regulation on protection of trees growing outside the forest. While Slovak author Martin Dufala found some defficiences mainly in application of the law by nature protection authorities, Gabriel Radecki described rather turbulent development of legislation in this area in Poland. He criticizes that legislative changes were adopted without prior consultations and public debate. What matters the most is the lack of one consistent vision regarding protection of trees and of the necessary degree of restrictions.

1 UNESCO'S MAN AND THE BIOSPHERE PROGRAMME IN THE FRAMEWORK OF POLISH LEGISLATION – CURRENT AND FUTURE CHALLENGES FOR NATURE PROTECTION AND LAND USE

1.1 Nature Conservation in Poland – General Legal Overview

The conservation of nature by legal means in Poland has a long and glorious tradition. The first act on nature conservation was adopted in 1934, whereas the present act originated in 2004. Nature conservation is a notion of environmental protection, stressing the so-called conservation approach (protective, striving to maintain in the best shape) towards natural elements in place in which they occur (*in situ*). Beside the protection *in situ*, to which the Polish legislator pays special attention, also issues concerning the so-called protection *ex situ* (e.g. creation and management of botanical and zoological gardens, or the trade in plant, animal and fungi species in danger of extinction) undergo regulations in NCA of 2004.

In the Polish NCA of 2004 the main terms determining the scope of legal protection are animate nature, inanimate nature and landscape. Literally, according to article 2 section 1 of NCA, nature protection "lies in preservation, sustainable use and renewal of natural resources, creations and components". As a public task, nature conservation is subject to the principle of decentralization of public authorities, expressed in article 15 of KRP, which means that from the legal point of view, the task is conducted in Poland both by government administration and self-government administration. The analysis of the division of competence between those two administrative sectors within nature conservation does not give a clear answer, which criterion the Polish legislator uses in that division. From among three levels of self-government bodies in Poland (gmina self-government, poviat self-government and voivodship self-government) only two were given competence within nature conservation by the legislator, i.e. voivodship self-government (e.g. creation of landscape parks and areas

of protected landscape, voivodship landscape audit) and gmina self-government (e.g. creation of natural monuments), whereas poviat self-government bodies were only given competence in this scope incidentally.

Government administration authorities and their competence within nature conservation raise an interesting issue concerning particular approach of the Polish legislator. Since 2008 there have been government administration bodies which are specialised, i.e. serve as environmental protection directors: GDOŚ (as a central body subject to the minister responsible for environmental protection issues) and 16 RDOŚ, as bodies of local government administration in a voivodship. As a rule, directors are responsible for nature conservation issues, impact assessment on environment and environmental damage. Beside the directors there are administrative bodies of nature conservation in Poland, which are narrowly specialized. Among them, in the first place there is forest administration (the State Forests Holding – "State Forests" – UOL) and so-called park administration (National Park Service and Landscape Park Service). A special solution functions in UPŁ, where game management[2] was given to the Polish Hunting Association, i.e. "an association of natural and legal persons who perform game management by way of breeding and harvest of game as well as act towards conservation of wild game by way of regulating the numerical strength of the game population" (article 32 section 1 of UPŁ). The Polish legislator assumed that the expert and scientific support within nature conservation should be given to the main bodies by the so-called consultative and advisory bodies: i.e. 1) the State Council for Nature Conservation (a body distinguished for the implementation of nature conservation principles in Poland in the 1920s and 1930s), 2) regional council for nature conservation, 3) scientific council of a national park, 4) council of a landscape park (article 95 of NCA).

Taking into consideration forms of nature conservation used in Poland, one may indicate that within conservation *in situ* the following forms may

2 Game management means "activities within the scope of conservation, breeding and harvest of wild game" (article 4 section 1 of UPŁ), whereas "hunting" as "as an element of conservation of natural environment, in the meaning of the Act shall be understood as conservation of game animals (wild game) and managing their resources in accordance with the principles of ecology and of rational agricultural, forestry and fishery management" (article 1 of UPŁ).

be distinguished: special conservation (article 6 of NCA) and universal conservation[3] (conservation of green areas and afforestation – article 78–90 of NCA). Special protection oriented toward the preservation of the most precious natural elements covers: 1) territorial forms of nature conservation (national park, nature reserve, landscape park, protected landscape area, Natura 2000 areas), 2) object-oriented forms of nature conservation, 3) species protection. Territorial forms should be included in the so-called special areas, which constitute "legal institution of the Polish material administrative law understood as areas not being objects, found in the borders of law and jurisdiction of the Republic of Poland, distinguished by legal acts on account of the realization of priority public tasks in those areas, where a special legal regime is in force, which limits or broadens former universal law".[4] UNESCO biosphere reserves were not indicated directly in NCA of 2004 as another and independent type of territorial form of nature conservation in Poland.[5] Thus, they are an example of international obligations implemented in a non-standard way, i.e. without establishing individual legal bases of their creation and management. In practice, UNESCO biosphere reserves in Poland have, as a rule, a joint status, i.e. a status within the MAB Programme and a status of one or more Polish territorial forms of nature conservation or a status within another international network. Currently, there are six UNESCO national biosphere reserves (Białowieża Forest – 1977, Babia Góra – 1977, Łuknajno Lake – 1977, Słowiński – 1977, Kampinos Forest – 2000, Tuchola Forest – 2010) and four cross-border (East Carpathian: Poland-Slovakia-Ukraine – 1992, Karkonosze – 1992, Tatra Mountains – 1992, West Polesie: Poland-Ukraine-Belorussia – 2002/2012).[6]

3 RADECKI, W. *Ustawa o ochronie przyrody. Komentarz*. Warszawa: Difin, 2008, pp. 64–65. ISBN 978-83-7251-852-1.

4 ZACHARCZUK, P. *Obszary specjalne w polskim materialnym prawie administracyjnym*. Warszawa: C. H. Beck, 2017, pp. 81–82. ISBN 978-83-255-9582-1.

5 ZIELIŃSKA, A. Rola rezerwatów biosfery w realizacji idei ekorozwoju. *Ekonomia i Środowisko*. 1999, No. 2, p. 152; RADECKI, W. *Ustawa o ochronie przyrody. Komentarz*. Warszawa: Difin, 2008, p. 69. ISBN 978-83-7251-852-1.

6 DENISIUK, Z. Polskie rezerwaty biosfery – oczekiwania i nie spełnione nadzieje, *Roczniki Bieszczadzkie*. 2003, Vol. 11, p. 209, 211–212.

1.2 UNESCO's Man and the Biosphere Programme and Poland's experience

1.2.1 Legal Background of the MAB Programme

The leading role from the point of view of the environment and its protection in the system of the United Nations Organization is played above all by the agency called UNEP, which was established in December 1972 after the Stockholm Conference.[7] Also, UNESCO, acting on the grounds of the UNESCO Constitution of 1945, has been interested in the cooperation in the scope of the environment and its protection. Poland has been the party to the Constitution since 6 November 1946. According to article I of the Constitution, the purpose of UNESCO is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the people of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations. The Polish National Commission for UNESCO has been operating since 1956. The Commission is an advisory body to the Council of Ministers and fulfills advisory, coordinating and information function towards governmental and non-governmental institutions in Poland (directive No. 61/2005).

A significant moment for the international cooperation within the environment and its protection, which occurred at the beginning of the 1970 s perceptibly had its impact on UNESCO works. The evidence of it may be a concern for the protection of natural heritage of the planet, reflected in WHC. The other evidence is the second initiative of UNESCO from that period, i.e. the MAB Programme, established by the UNESCO General Conference in 1971. The aim of the programme was "to develop and implement an international programme of interdisciplinary research, which results would be the basis for the rational and sustainable use the resources of the biosphere. (…) The sites of the research, as well as of environmental monitoring, were to be the biosphere reserves, which should be representative of their biogeographic region,

7 KENIG-WITKOWSKA, M. M. *Międzynarodowe prawo środowiska. Wybrane zagadnienia systemowe*. Warszawa: Wolters Kluwer business, 2011, pp. 85–86. ISBN 978-83-264-0651-5.

established by the states taking part in the programme".[8] In Poland, the activities in that scope are conducted by the National UNESCO-MAB Committee of Poland, acting within the Polish Academy of Sciences.

Special attention within the cooperation with the MAB Programme should be paid to SSBR and SFWNBR, adopted by UNESCO in 1995. SFWNBR[9] unifies basic terms and definitions essential to a discussed issue. According to article 1 of SFWNBR "Biosphere reserves" are "areas of terrestrial and coastal/marine ecosystems or a combination thereof, which are internationally recognized within the framework of UNESCO's programme on Man and the Biosphere (MAB), in accordance with the present Statutory Framework". In article 2 section 2, WNBR has been defined as a network that "constitutes a tool for the conservation of biological diversity and the sustainable use of its components, thus contributing to the objectives of CBD and other pertinent conventions and instruments". Article 3 indicates that "in combining the three functions below, biosphere reserves should strive to be sites of excellence to explore and demonstrate approaches to conservation and sustainable development on a regional scale: (i) conservation – contribute to the conservation of landscapes, ecosystems, species and genetic variation; (ii) development – foster economic and human development which is socio-culturally and ecologically sustainable; (iii) logistic support – support for demonstration projects, environmental education and training, research and monitoring related to local, regional, national and global issues of conservation and sustainable development".

Moreover, two more key issues were included in SFWNBR – criteria of qualifying an area as a biosphere reserve (article 4) and a procedure within that scope (article 5). According to article 4 section 1 of SFWNBR an area may be considered to be a biosphere reserve if it fulfills the following conditions: 1) encompasses a mosaic of ecological systems representative of major biogeographic regions, including a gradation of human interventions; 2) is of significance for biological diversity conservation; 3)

8 SYMONIDES, E. *Ochrona przyrody*. Warszawa: Wydawnictwo Uniwersytetu Warszawskiego, 2014, p. 181. ISBN 978-83-235-1344-5.

9 Zob. BREYMEYER, A. *Warunki naturalne w Europie, Polsce i sieć rezerwatów biosfery MAB*. In: BREYMEYER, A. (ed.). *Rezerwaty biosfery w Polsce*. Warszawa: Polski Komitet Narodowy UNESCO-MAB, 1997, pp. 11–13. ISBN 83-86902-71-X.

provides an opportunity to explore and demonstrate approaches to sustainable development on a regional scale; 4) has an appropriate size to serve the three functions of biosphere reserves, as set out in Article 3 of SFWNBR. Furthermore, article 5 section 4 of SFWNBR presents recommendations referring to a spatial form of a biosphere reserve, which is to be designated taking three zones into consideration: a) a legally constituted core area or areas devoted to long-term protection, according to the conservation objectives of the biosphere reserve, and of sufficient size to meet these objectives; b) a buffer zone or zones clearly identified and surrounding or contiguous to the core area or areas, where only activities compatible with the conservation objectives can take place; c) an outer transition area where sustainable resource management practices are promoted and developed. According to article 4 section 6, while designating a biosphere reserve it is necessary to ensure involvement and participation of a suitable range of, inter alia, public authorities, local communities and private interests. In comparison, article 4 section 7 presents minimal requirements referring to the management of a biosphere reserve, i.e. the necessity to ensure: a) mechanisms to manage human use and activities in the buffer zone or zones; b) a management policy or plan for the area as a biosphere reserve; c) a designated authority or mechanism to implement this policy or plan; d) programmes for research, monitoring, education and training.

According to article 5 of SFWNBR, the body responsible for issuing a decision on qualifying an area as a biosphere reserve and at the same time as a part of WNBR is ICC-MAB Programme. The procedure of qualification, presented in article 5 section 1, includes the following stages. Firstly, States, through National MAB Committees where appropriate, forward nominations with supporting documentation to the secretariat after having reviewed potential sites, taking into account the criteria as defined in Article 4 of SFWNBR. Secondly, the MAB secretariat verifies the content and supporting documentation: in the case of incomplete nomination, the secretariat requests the missing information from the nominating State. Thirdly, nominations are considered by the Advisory Committee for Biosphere Reserves for recommendation to ICC and lastly, ICC-MAB Programme takes a decision on nominations for designation, which the Director-General of UNESCO

notifies the State concerned. Article 5 sections 2-3 of SFWNBR presents transitory decisions, encouraging states to check and adapt existing biosphere reserves to current requirement, as well as to consider the necessity of broadening the area of national reserves, which should be made according to article 5 section 1. At the same time, it was accepted that biosphere reserves designated before accepting SFWNBR automatically became a part of WNBR.

Beside SSBR and SFWNBR, other acts showing the direction of activities of the MAB Programme may be indicated, e.g. the Madrid Action Plan 2008–2013; the MAB Strategy 2015–2025; the Lima Action Plan for UNESCO's Man and the Biosphere Programme and its World Network (2016–2025); the Lima Declaration on the UNESCO Man and the Biosphere Programme and its World Network of Biosphere Reserves of 17 March 2016.[10] The strategic objectives of the MAB Programme for the period 2015–2025 are as follows: 1) to conserve biodiversity, restore and enhance ecosystem services, and foster the sustainable use of natural resources; 2) to contribute to building sustainable, healthy and equitable societies, economies and thriving human settlements in harmony with the biosphere; 3) to facilitate biodiversity and sustainability science, ESD and capacity building; 4) to support mitigation and adaptation to climate change and other aspects of global environmental change.

In reflection of the aims presented above, the implementation of the MAB Programme requires the consideration of the achievements of international cooperation within environmental protection at various forums – organizational and conventional. Because of this, UNESCO was summoned in the Lima Declaration "to continue to improve the effectiveness of collaboration with relevant specialized agencies and programmes of the UN system, in particular UNDP, FAO, UNU and UNEP, and with active NGOs, with the aim of enabling Member States to use biosphere reserves as priority places to demonstrate and promote the achievement of the SGD and related targets, as well as relevant goals, targets and objectives specified under the CBD, the UNFCCC and the UNCCD" (point 23).

10 UNESCO, A *New Roadmap for the Man and the Biosphere (MAB) Programme and its World Network of Biosphere Reserves*. Paris, 2017. ISBN 978-92-3-100206-9 [online]. Available at: http://unesdoc.unesco.org/images/0024/002474/247418E.pdf

1.2.2 The MAB Programme in Polish Nature Conservation Law

Trying to establish legal frameworks of functioning of UNESCO biosphere reserves A. Breymeyer enumerates international environmental conventions and other agreements, on which, according to her, the MAB Programme is based and whose aims it pursues.[11] She distinguished two fundamental groups of acts, including global cooperation (Ramsar Convention; World Heritage Convention; MAB Programme; Bonn Convention; CBD) and European. Within the second group, A. Breymeyer divides the acts depending on a given forum of cooperation: within the UNECE (CPUTWIL), Council of Europe (PEEN[12]; European Diploma for Protected Areas[13]; Bern Convention; European Network of Biogenetic Reserves), within countries of given European regions (Barcelona Protocol; HELCOM Convention;) and within the European Union (Bird Directive; Habitats Directive). Accepting such an assumption, in its most important parts of her work referring to hard law acts of international public law (conventions) and EU directives, the author does not deal with the question of legal basis of the MAB Programme from the point of view of the system of Polish law sources, which from practical point of view may be explained by the fact that UNESCO biosphere reserves most often have the so-called joint status.

Not questioning the above assumption, it may be indicated at the beginning that in the UNESCO resolutions adopted for the MAB Programme, the issue of a joint status of a biosphere reserve (beside the MAB Programme also as an area proposed within the frames of an environmental convention or included in another nature network) was accepted as a solution coherent with the aims of the programme. The joint status or solely the MAB Programme status was not the issue of the utmost importance

11 BREYMEYER, A. Transboundary Biosphere Reserves on the EU East End. The Present and Projected Management. In: BREYMEYER, A., ADAMCZYK, J. (eds.). *Transboundary Biosphere Reserves at the Eastern End of European Union. People and Ecological Dilemmas*. Warszawa: National UNESCO-MAB Committee of Poland, 2005, p. 26. ISBN 83-899961-56-3.

12 Creating PEEN was one of the priorities of the Pan-European Biological and Landscape Diversity Strategy, adopted by European environmental ministers in 1995; GORIUP, P. The Pan-European Biological and Landscape Diversity Strategy: integration of ecological agriculture and grassland conservation. *Parks*, 1998, No. 3, pp. 38–39.

13 The Council of Europe's award for adequately protected natural or semi-natural areas of exceptional European interest from the point of view of conservation of biological, geological or landscape diversity. Available at: http://www.coe.int/en/web/bern-convention/european-diploma-for-protected-areas

in the UNESCO works. In cooperating states, biosphere reserves are established in various ways and the attempts to unify that issue in legal dimension within the MAB Programme are hard to notice.[14] In Poland, the status of a UNESCO biosphere reserve is combined with territorial forms of nature conservation: national park, nature reserve or landscape park, e.g. Łuknanko Lake Nature Reserve and Słowinski National Park have both the status of the MAB Programme and the status of the area of Ramsar Convention. Moreover, the joint status may be of alternating character, meaning that it is possible that the area of a given UNESCO biosphere reserve in Poland is subject to several forms of nature conservation at the same time. Additionally, it is possible that a part of a UNESCO biosphere reserve is situated in areas which are not under special protection.[15]

The UNESCO resolution on the MAB Programme as an act of *soft law* of international public law is binding for the Polish state only under article 9 of KRP, according to which Poland "shall respect international law binding upon it". However, from the formal point of view, the implementation of international obligations requires the implementation of an international law act to the Polish law system, which would be the basis of such obligations. According to article 87 section 1 of KRP the sources of universally binding law are ratified international agreements, published in the Journal of Laws of the Republic of Poland (article 91 section 1 of KRP). The agreements are ratified by the President of the RP in two modes taking into account the subject of the agreement: upon prior consent of the Parliament or without the consent if it is not required (article 89 sections 1-2 of KRP). UNESCO Constitution of 1945 fulfils the criteria of the first mode, but the UNESCO resolution on the MAB Programme for obvious reasons (*soft law* act) could not undergo that procedure. Additionally, a resolution cannot be judged as a special exception in the Polish Constitution, allowing the law established by an international organization to be applied directly in Poland, because according to article 91 section 3 of KRP it is only possible "if it results from an agreement, ratified by the Republic of Poland,

14 UNESCO. *Biosphere reserves: The Seville Strategy and the Statutory Framework of the World Network*. Paris: UNESCO, 1996, p. 4.

15 CELIŃSKI, F., DENISIUK, Z. Polskie rezerwaty biosfery czekają na możliwość pełnienia swoich funkcji. *Chrońmy Przyrodę Ojczystą,* 1993, No. 2, pp. 23–24.

establishing an international organization", but the UNESCO Constitution of 1945 does not include such decisions. As a result, it must be accepted that the sole legal basis of Poland's cooperation within the MAB Programme is the UNESCO Constitution of 1945. So far, the Polish legislator has not attempted to adopt the results of that cooperation into the Polish legal system, continued pursuant to other UNESCO resolutions (*soft law* acts) concerning biosphere reserves. The legislator has not done it despite the fact that ten Polish areas had been proposed to WNBR, including four transboundary areas and despite the works of the National UNESCO-MAB Committee of Poland, which is unequivocal with one-sided submission of the Polish public administration to an interior act (resolution) of an international organization, which is formally not binding. The problem with defining the legal status of a UNESCO biosphere reserve has also an additional "internal" dimension beside NCA of 2004. It is difficult to establish the Polish legal path of forming individual biosphere reserves, because there is only one such act in the legal system, the PTRB "West Polesie", which according to article 15 section 1 of UUM has the status of a technical international agreement, not ratified in any way, but only approved by the Council of Ministers, which means that it can only be treated as a *soft law* act.

Comparing legal solutions for UNESCO biosphere reserves adopted in Poland with other international environmental obligations concerning the establishment of special areas it may be stated that the situation is exceptional. For instance, Natura 2000 areas underwent full implementation path from TFEU, Bird and Habitats Directives to NCA of 2004. Then, the Polish wetlands on the list of Wetlands of International Importance, similarly to UNESCO biosphere reserves have not been included directly in NCA of 2004, however, they are directly rooted in the *hard law* act, i.e. the Ramsar Convention and not only in *soft law* acts, i.e. UNESCO resolutions. It means that in the main act of the Polish nature conservation law, the NCA of 2004, UNESCO biosphere reserves (definition, protection objectives, management rules) have not been implemented so far as an independent type of territorial form of nature conservation according to article 6 of NCA. Additionally, the term "UNESCO biosphere reserve" was implemented in Poland into legislative acts only in 2015. While implementing the European Landscape

Convention, the Polish legislator introduced new tools of nature conservation (UWNOK), adding a new article 38a in the UPZP, considering the so-called voivodship landscape audit, which must consider such reserves.

1.3 Conclusion: MAB Biosphere Reserves, Ecosystem Services and New Opportunities for Land Use

Does the current lack of independent legal basis for UNESCO biosphere reserves in Poland negatively impact the realization of tasks resulting from Poland's obligations within the MAB Programme? The answer to this question is not easy for a number of reasons. On one hand, the fact of the joint status of UNESCO biosphere reserves mentioned above seems to minimise the lack of independent legal bases. For instance, the legal form of a national park undoubtedly in combination with legal instruments allows for an effective protection and management of a valuable natural area. However, it is indicated that in the situation when the area of a UNESCO biosphere reserve is subject to various legal forms of territorial protection (including Natura 2000) it may come to the divergences between the objectives of national forms and Natura 2000 and the objectives of the MAB Programme. It is pointed out that the MAB Programme more strongly than other forms beside preservative nature conservation pays attention to the significance of sustainable development of a protected area taking into consideration the role of local societies.[16] Moreover, taking into account the technical side of establishing UNESCO biosphere reserves, embracing three zones: core zone, buffer zone and transition zone, the incompatibility of that solution with the logic of the Polish forms of territorial nature conservation or Natura 2000 may be indicated. In the Polish conditions, within the frames of a given territorial form, the legislator focuses above all on the designation of a core zone, requiring the designation of a buffer zone obligatory only in the case of a national park, and optionally in the case of a nature reserve or a landscape park. The third type of a zone, the "transition zone",

16 WITKOWSKI, Z., MROCZKA, A. Positives and negatives of coexistence of two networks: the Natura 2000 and the biosphere reserves in Poland. In: BREYMEYER, A. (ed.). *Międzynarodowe sieci obszarów chronionych w Polsce: światowa sieć rezerwatów biosfery UNESCO-MAB i Europejska Sieć Natura 2000*. Warszawa: Polski Komitet Narodowy UNESCO-MAB, 2011, pp. 38–40. ISBN 978-83-7585-141-0.

is unknown in the Polish nature conservation law. Meanwhile, the interpretation of the three zones of the MAB Programme is in practice sometimes conducted in Poland in a completely different way. The example of it may be the Bory Tucholskie Biosphere Reserve, where the core zone includes the Bory Tucholskie National Park and 25 nature reserves, the buffer zone includes four local landscape parks, whereas the transition zone includes the area of 22 neighbouring gminas, situated outside the indicated national park and landscape parks.[17] Such a broad approach to designating three zones of a UNESCO biosphere reserve must bear, beside the doubts of legal nature, a lot of practical difficulties, taking for example into account the necessity of cooperation between a large group of administrative bodies, which are responsible for those conservation forms and areas.[18] It is also assessed that the lack of independent legal bases for UNESCO biosphere reserves in Poland results in their omission in the process of widely understood environmental planning, regional and spatial development.[19] However, there is a chance that the situation will improve to some extent on account of the landscape audit in voivodships.

To sum up, the current legal state of UNESCO biosphere reserves in Poland constitutes a factor weakening the opportunities to fully use those areas in such a way as required in the MAB Programme. There is no doubt that within ten Polish reserves, out of three functions indicated in article 3 of SFWNBR, the conservation function is realized most efficiently, whereas the realization of the two others (development and logistic support) encounters a lot of difficulties, the source of which is in the first place legal insecurity, carrying with it both organizational difficulties and the lack of an independent financial source necessary to fulfill those functions.[20] In the light

17 Rezerwat Biosfery Bory Tucholskie. Available at: http://www.pnbt.com.pl/rezerwat_biosfery_bory_tucholskie-309

18 ANTCZAK, A. Biosphere reserve management: a necessity or an extravagance? In: BREYMEYER, A. (ed.). *Międzynarodowe sieci obszarów chronionych w Polsce: światowa sieć rezerwatów biosfery UNESCO-MAB i Europejska Sieć Natura 2000*. Warszawa: Polski Komitet Narodowy UNESCO-MAB, 2011, pp. 98–99. ISBN 978-83-7585-141-0.

19 DĄBROWSKI, P. *Factors hampering the functioning of the Polish biosphere reserves*. In: BREYMEYER, A. (ed.). *Międzynarodowe sieci obszarów chronionych w Polsce: światowa sieć rezerwatów biosfery UNESCO-MAB i Europejska Sieć Natura 2000*. Warszawa: Polski Komitet Narodowy UNESCO-MAB, 2011, pp. 122–123. ISBN 978-83-7585-141-0.

20 DENISIUK, Z. Polskie rezerwaty biosfery – oczekiwania i nie spełnione nadzieje. *Roczniki Bieszczadzkie,* 2003, Vol. 11, pp. 225–226.

of the MAB Strategy 2015–2025, requiring among other things that "states and other entities with territorial and governance competences explicitly integrate biosphere reserves into national and regional development, territorial planning, environment and other sectoral legislation, policies and programmes, and support effective governance and management structures in each biosphere reserve" (Strategic line of action – A.1.) – the Polish state once again is facing the challenge of elaborating well-thought and coherent legal basis of the functioning of UNESCO biosphere reserves.

Meanwhile, the analysis of the MAB Strategy 2015–2025 provides foundation to indicate that a significant attention is paid in that period to the "development" function of biosphere reserves (Strategic Action Area A "The World Network of Biosphere Reserves consisting of effectively functioning models for sustainable development"). From the Polish perspective, it may be interpreted as an impulse to double the effort – to resolve the problem of the lack of independent legal basis not only by recognizing the construction of biosphere reserves in the Polish law, but also by broadening the regulation of that issue, among others, by introducing the ecosystem services. According to the Lima Action Plan (2016–2025), reserves should be "recognized as sources and stewards of ecosystem services" (outcome A.7 of Strategic Action Area A) through the following actions: "identification of ecosystem services and facilitation of their long-term provision, including those contributing to health and wellbeing; implementation of mechanisms for the equitable payment for ecosystem services (PES); implementation of programmes to preserve, maintain and promote species and varieties of economic and/or cultural value and that underpin the provision of ecosystem services".

In the simplest way "ecosystem services" are defined as "the benefits people obtain from ecosystems", distinguishing their types: 1) provisioning services, 2) regulating services, 3) cultural services, 4) supporting services. Whereas, PES is defined as "arrangements between buyers and sellers of environmental goods and services in which those that pay are fully aware of what it is that they are paying for, and those that sell are proactively and deliberately engaging in resource use practices designed to secure the provision of the services".[21]

21 GLOBAL ENVIRONMENT FACILITY. *GEF Investments on Payment for Ecosystem Services Schemes*. World Bank: Washington, DC, 2014, [online]. Available at: https://openknowledge.worldbank.org/handle/10986/20681; License: CC BY 3.0 IGO; p. 3.

The following types of PES systems may be distinguished: 1) public payment schemes (government pays land or resource managers to enhance ecosystem services on behalf of the wider public); 2) private payment schemes (self-organised private deals in which beneficiaries of ecosystem services contract directly with service providers); 3) public-private payment schemes (both government and private funds pay land or other resource managers for the delivery of ecosystem services).[22] The concept of ecosystem services and PES are the object of naturalists' and economists' interest in Poland, however, they are not of great interest to lawyers. In an interesting way, the conception in legal aspect is characterized by J. Salzman, who says that it provides an alternative to current models of legal regulations of environmental protection, based on the "polluter pays" principle. Within the concept of ecosystem services a desired environmental effect is achieved as an agreement with land or resources managers, who are no longer treated *en block* as "polluting" environment. Through conscious and environmentally friendly conduct they become holders of goods and services, for which they can obtain remuneration ("beneficiary pays" approach). According to J. Salzman, treating those ruling the earth's surface, on which there are natural elements, as "contractors" meeting the objectives of environmental protection in their individual dimension, has one more advantage – it offers a chance to extend the areas under desired protective actions and environmentally friendly management, especially the areas which are usually under stronger human pressure.[23] In the case of UNESCO biosphere reserves it especially applies to the areas situated in the transition zone.

The Lima Action Plan (2016–2025) indicates exactly this direction of shaping the relationship between human and the environment in land use as desired for further development of UNESCO biosphere reserves. In Polish conditions, taking into account the difficulties connected to the location of the MAB Programme in the Polish legal system, as well as the lack of detailed legal analyses dedicated to the concept of ecosystem services and its meaning in land use, the prospects of fulfilling the objectives of the MAB Programme by the year 2025 should be judged pessimistically.

22 UK Department for Environment, Food and Rural Affairs. *Payments for Ecosystem Services (PES): best practice guide*, 2013 [online]. Available at: https://www.gov.uk/government/publications/payments-for-ecosystem-services-pes-best-practice-guide; p. 16.

23 SALZMAN, J. A Field of Green? The Past and Future of Ecosystem Services. *Journal of Land Use and Environmental Law,* 2007, Issue 2, pp. 138–139, 147.

2 PAST, PRESENT AND FUTURE OF THE CONCEPT OF WILDERNESS

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain.

2.1 Concept of Wilderness and its Development

The poetic definition of wilderness as quoted above has been provided for by the Wilderness Act[24] which was adopted in the USA in 1964. By doing so, the United States have become the first country in the world to define and designate wilderness areas through law. The Act further defines wilderness as *an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.*[25] On the basis of the Act the National Wilderness Preservation System (NWPS) has been developed.[26] When the Wilderness Act was passed in 1964, 54 areas in 13 states were designated as wilderness. Since 1964, the NWPS has grown almost every year and now includes 765 areas in 44 states and Puerto Rico, covering about 5% of the entire territory of the United States. However as almost half of the area is located in Alaska, only about 2.7% of the contiguous United States is protected as wilderness.[27] Nevertheless, the Act is still seen as one of the most successful U.S.

24 Act to establish a National Wilderness Preservation System for the permanent good of the whole people, and for other purposes, Pub. L. 88–577.

25 Section 2(c) of the Wilderness Act.

26 The NWPS is managed by four Federal agencies: National Park Service, U.S. Fish and Wildlife Service, U.S. Forest Service, Bureau of Land Management.

27 Wilderness Connect: *Fast facts.* Available at: http://www.wilderness.net/NWPS/fastfacts [cit. 14 August 2017].

environmental laws, standing for more than 50 years without a substantial amendment, and, as such, continues to be the guiding piece of legislation for all wilderness areas.[28] But the Donald Trump's presidency ushers in a new era of serious threats to American conservation.[29]

The adoption of the Wilderness Act was, needless to say, not the first attempt to define wilderness. We might go much deeper into history of the New World and the Western civilisation to find examples of the definition of wilderness. The landscape of continents has been shaped by humans for centuries. Consequently, the wilderness has not only been physically diminished on many continents, but has also receded somewhat from human minds and experiences. The Czech economist Tomáš Sedláček reminds us that probably the oldest known work of literature, the Epic of Gilgamesh, which was written more than four thousand years ago in Mesopotamia, has served as an inspiration for many subsequent stories and continues to dominate current mythology, to varying degrees.[30] One aspect addressed in this epic work is the change in our external environment from nature to city, which closely reflects the internal change from a savage to a civilized person. There are wild creatures similar to the savage Enkidu living in nature and it is where one goes to hunt, collect crops, or gather the harvest. Nature is perceived solely as the provider of our needs. One returns to the city to sleep and be 'human'. In addition, evil resides in nature, which is typified by Humbaba, who lives in a cedar forest and therefore needs to be eradicated. The unspoken message of the entire epic is that civilization and progress are confined to cities, which are the true 'natural' dwelling-place of the people, and in the end cities prove not only to be the home of people but also of the gods.[31] In accordance with the basic idea of the Epic of Gilgamesh, the word 'wilderness' has been translated into Czech – and, with some minor variations into most Slavic languages – as 'divočina'

28 Wilderness Connect: *What is wilderness?* Available at: http://www.wilderness.net/NWPS/WhatIsWilderness [cit. 14 August 2017].

29 Wilderness Society: *Trump era officially arrives – how we will defend our wildlands.* Available at: http://wilderness.org/trump-era-officially-arrives-how-we-will-defend-our-wild-lands [cit. 14 August 2017].

30 SEDLACEK, T. *Economics of Good and Evil: The Quest for Economic Meaning from Gilgamesh to Wall Street.* Oxford University Press, 2011, p. 19. ISBN 978-0-19-976720-5.

31 Ibid., pp. 31–32.

or 'pustina', which means a desolate, wild and unpopulated part of the world. It is understood as a dangerous and unfriendly place where large predators and many strange creatures are considered to live and is accordingly located well away from our homes. Our ancestors fought against the wilderness in order to define their cultural space, their community. And the scholars such Aristotle, Thomas Aquinas, John Locke and many others provided arguments and explanations regarding dominion of man over other creatures.[32] As summarized by Aldo Leopold in 1925: 'From the earliest times one of the principal criteria of civilisation has been the ability to conquer the wilderness and convert it to economic use.'[33]

The shift from unbridled conquering to protection or even restoration of wilderness is linked to development of nature protection and conservation. The designation of first protected areas in 19th and 20th century included also wilderness. The very first official protected area were primeval forests of Žofín and Hojná Voda reserved for protection by J. F. Buyuoy in Austro-Hungarian monarchy in 1838, or first national parks that have beed designated all around world: Yellowstone in USA (1872), Royal National Park in Australia (1879), Tongariro in New Zealand (1894), Banff in Canada (1898), or nine Swedish national parks designated as the first in Europe in 1909. All these were dedicated to preservation of wild nature. However, it has taken several more decades to get general overview of distribution of wilderness. The first map of patterns of wilderness at a global scale was prepared by McCloskey and Spalding for the 4th World Wilderness Congress[34] in 1987, including areas greater than 400 000 ha in size and more

32 For more details see BASTMEIJER, K. Introduction: an international history of wilderness protection and the central aim of this book. In: BASTMEIJER, K. (ed.). *Wilderness protection in Europe: the role of international, European and national law*. Cambridge University Press. 2016, pp. 3–8. ISBN 978-1-107-05789-0.

33 LEOPOLD, A. Wilderness as a Form of Land Use. *The Journal of Land & Public Utility Economics*, 1925, 1, 4, p. 398.

34 The World Wilderness Congress is the world's longest-running (since 1977) international, public environmental forum, facilitated by the WILD Foundation (WILD) to unite conservation scientists, practitioners, government representatives, artists, indigenous peoples and local communities and to debate and act on issues threatening wilderness and to share and create solutions to "make the world a wilder place." WILD is the only international organization dedicated entirely to protecting wilderness and wild-nature around the world. Founded in South Africa in 1974, WILD is an US-registered non-profit entity located in Boulder, Colorado. Available at: http://www.wild.org [cit. 16 August 2017].

then 6 km from any recorded human feature. The striking fact revealed by this early map was that roughly 37 % of the world's land surface can be classified as wilderness, although 41 % of this total is disproportionate large area found in the Arctic and Antarctic.[35] During 1990's and 2000's, the mapping of wilderness with set of spatial attributes and wilderness models has been developed also on regional and national level, e.g. in Australia, United States, the UK, Austria and Barents region.[36]

With the intention to create a common understanding of protected areas, both within and between countries, the International Union for Conservation of Nature (IUCN) was adopted in 1994 and amended in 2008 the Guidelines for Applying Protected Area Management Categories.[37] It includes also the category of wilderness area (Ib) which is defined as *usually large unmodified or slightly modified areas, retaining their natural character and influence, without permanent or significant human habitation, protected and managed to preserve their natural condition.*[38] Its primary objective is to protect the long-term ecological integrity of natural areas that are undisturbed by significant human activity, free of modern infrastructure and where natural forces and processes predominate, so that both the current and the future generations have the opportunity to experience such areas. The other objectives include to provide for public access at levels and of a type which will maintain the wilderness qualities of the area for present and future generations; to enable indigenous communities to maintain their traditional wilderness-based lifestyle and customs, living at low density and using the available resources in ways compatible with the conservation objectives; to protect the relevant cultural and spiritual values and non-material benefits to indigenous

35 CARVER, S., FRITZ, S. *Mapping Wilderness: Concept, Techniquies and Applications*. Springer, 2016, p. 5; the map is available e.g. from KUN, Z. *World Wilderness Distribution* at https://www.slideshare.net/zkun1971/mapping-wilderness-in-europe/5-World_wilderness_distribution_After_McCloskey [cit. 16 August 2017].

36 CARVER, S. Mapping Wilderness in Europe. In: BASTMEIJER, K. (ed.). *Wilderness protection in Europe: the role of international, European and national law*. Cambridge University Press. 2016, pp. 49–51. ISBN 978-1-107-05789-0.

37 DUDLEY, N. (ed.). *Guidelines for Applying Protected Area Management Categories*. Gland, Switzerland: IUCN, 2008; with STOLTON, S., SHADIE, P., DUDLEY, N. IUCN WCPA Best Practice Guidance on Recognising Protected Areas and Assigning Management Categories and Governance Types. *Best Practice Protected Area Guidelines Series,* Switzerland: IUCN, No. 21, Gland, 2013. ISBN 978-2-8317-1636-7.

38 Ibid., at 14.

or non-indigenous populations, such as solitude, respect for sacred sites, respect for ancestors etc.; and to allow for low-impact minimally invasive educational and scientific research activities, when such activities cannot be conducted outside the wilderness area.[39] While comparing the wilderness area to the category of strict nature reserve (Ia), these are generally with only limited human visitation and often (but not always) relatively small, in contrast to Ib. There would usually not be human inhabitants in category Ia, but use by indigenous and local communities takes place in many Ib protected areas. Compared to national parks (II), categories Ib and II are often similar in size and in their aim to protect functioning ecosystems. But whereas II usually includes (or plans to include) use by visitors, including supporting infrastructure, in Ib visitor use is more limited and confined to those with the skills and equipment to survive unaided.[40] Within implementation of protection of different categories of protected areas, including wilderness areas, also the distinction between management and governance needs to be taken into account. Management is about what is done in pursuit of given objectives, and about the means and actions to achieve such objectives. Governance is about who decides what the objectives are, what to do to pursue them, and with what means, how those decisions are taken, who holds power, authority and responsibility, and who is (or should be) held accountable.[41] IUCN defines four governance types: governance by government, i.e. by federal or national ministry and/or agency in charge or government-delegated management (e.g. to NGO); shared governance, i.e. collaborative, joint and/or transboundary management; private governance by individual owners, non-profit or profit organisations; governance by indigenous peoples and local communities.[42]

39 Ibid.

40 Ibid., at 15.

41 BORRINI-FEYERABEND, G., DUDLEY, N., JAEGER, T., LASSEN, B., PATHAK BROOME, N., PHILLIPS, A., SANDWITH, T. Governance of Protected Areas: From understanding to action. *Best Practice Protected Area Guidelines Series,* Switzerland: IUCN, No. 20, Gland, 2013. ISBN 978-2-8317-1608-4.

42 Ibid., at ii.

2.2 Current State of Wilderness in Europe

A wilderness is an area governed by natural processes. It is composed of native habitats and species, and large enough for the effective ecological functioning of natural processes. It is unmodified or only slightly modified and without intrusive or extractive human activity, settlements, infrastructure or visual disturbance.[43]

There are relatively few areas of Europe where true wilderness can be found, at least in the sense of the IUCN classification as described above, or in the sense of the above mentioned EU definition that both refer to large areas that are untouched by human activities. Thousands of years of human activity, from early settlement and forest clearance for agriculture to the urbanisation and industrialisation of the 19th and 20th centuries, has created a rich and varied, but highly modified landscape mosaic across much of the continent. However, wilderness conditions can be seen in certain high-latitude and high-altitude areas, such as parts of Scandinavia and the mountains of central and southern Europe. For example, the Nordic mountains contain by far the largest proportion (28 %) and area of wilderness of all mountain areas in Europe; there are notable proportions in other massifs including the Pyrenees (12 %), eastern Mediterranean islands and the Alps (9 %), and the British Isles (8 %). In addition, smaller, more fragmented wildland areas can be found over a range of intermediate landscapes across the whole of Europe where the original natural ecological conditions have only been slightly modified by grazing, forestry, recreation or isolated human developments.[44]

Of all regional legal instruments concerning European nature conservation, the Bern Convention has the broadest scope, both in terms of participation and objectives. The Convention has three main characteristics: the emphasis on transboundary cooperation, the strictness of obligations and the institutional mechanism to oversee implementation. Wilderness protection as such is not included within the Convention aims, which more narrowly focus on the protection of wild animals, plants and their habitats. This is not to say,

43 EUROPEAN COMMISSION. *Guidelines on Wilderness in Natura 2000: Management of Terrestrial Wilderness and Wild Areas within the Natura 2000 Network. Technical Report 2013-069*. Brussels, 2013, p. 10. ISBN 978-92-79-31157-4.

44 EUROPEAN ENVIRONMENT AGENCY. *Europe's ecological backbone: recognising the true value of our mountains*. Luxembourg: Office for Official Publications of the European Union, 2010, pp. 193–194. ISBN 978-92-9213-108-1.

the Convention is of no relevance from the wilderness point of view; quite the contrary.[45] The large carnivoresm, e.g. bear, wolf, lynx and wolverine, as an example can be mentioned. These species stand out for their marked 'international' nature (more populations are shared between two or more countries)[46] and for their elevated human-wildlife conflict potential (primarily in the sphere of livestock depredation and, for some of them, human safety). Large carnivores have traditionally been strongly associated with wilderness, and the notion that these species need wilderness in order to survive is still prevalent amongst the general public. In Europe, however, many populations of these species – especially wolves – have adapted themselves capable of surviving in landscapes with different levels of human influences.[47] It is difficult to measure the effectiveness of the Bern Convention with any accuracy, whether in overall terms, for wilderness protection generally or for large carnivores. Across the board, however, its effectiveness appears to be less than that of EU Birds and Habitats Directives (which benefit from the elaborate EU enforcement toolbox), but greater than that of most other international wildlife treaties.[48]

One of the largest mountain ranges in Europe, the Carpathians, known as a 'Kingdom of Carnivores' are shared by seven Central and Eastern European countries. The region supports their viable populations, an estimated 8000 bears, 4000 wolves and 3000 lynxes. The Carpathians also contain virgin forests, some of the last in Europe. In 2008, the University of Padova provided an overview of how the total virgin area of more than 300 000 ha is spread within the Carpathian countries: 463 ha in the Czech Republic, 55 645 ha in Poland, 207 500 ha in Romania, 3 248 ha in Serbia,

45 TROUWBORST, A. Wilderness protection under the Bern Convention. In: BASTMEIJER, K. (ed.). *Wilderness protection in Europe: the role of international, European and national law*. Cambridge University Press, 2016, pp. 161–162. ISBN 978-1-107-05789-0.

46 Of the 33 populations that we identified, only four occur within a single country, implying that 88 % are transboundary in nature. Some of the populations span 8 countries. See LINNELL, J., SALVATORI, V., BOITANI, L. *Guidelines for population level management plans for large carnivores in Europe. A Large Carnivore Initiative for Europe report prepared for the European Commission*. 2008, p. 10.

47 TROUWBORST, A. Wilderness protection under the Bern Convention. In: BASTMEIJER, K. (ed.). *Wilderness protection in Europe: the role of international, European and national law*. Cambridge University Press, 2016, pp. 170–171. ISBN 978-1-107-05789-0.

48 Ibid., at 175.

15 428 ha in Slovakia and 40 300 ha in Ukraine.[49] To serve as a transnational framework for the sustainable management of the Carpathians has been set up the Carpathian Convention. As a framework convention, it includes general principles and objectives that are further specified by its protocols. In regard to virgin forests, the Protocol on Sustainable Forest Management is relevant, as it defines virgin forests and requires designation of protected areas in sufficient size and number, and preservation of genetic resources of natural, especially virgin forests.[50]

In 2007, a broad coalition of NGOs in Europe addressed a resolution to the European Commission and the EU Member States on the preservation of wilderness areas. This was followed by Report on Wilderness in Europe adopted by the European Parliament in 2008.[51] The Parliament has called *on the Commission and the Member States to develop wilderness areas; stresses the need for the provision of special funding for reducing fragmentation, careful management of re-wilding areas, development of compensation mechanisms and programmes, raising awareness, building understanding and introducing wilderness-related concepts such as the role of free natural processes and structural elements resulting from such processes into the monitoring and measurement of favourable conservation status; considers that this work should be carried out in cooperation with the local population and other stakeholders.*[52] In 2009, the conference on Wilderness and Large Natural Habitat Areas was organised by the Czech EU Presidency.[53] It brought together about 250 participants from 36 countries, including officials of government ministries, nature conservation agencies and NGOs, academics and interested partners from landholders, forestry, business and other sectors. A key outcome was the 'Message from Prague', containing 24 recommendations identified by the participants, including policy development, research and awareness

49 University of Padova, Dept TeSAF. *Report on Current State of Forest Resources in the Carpathians.* Carpathian Project Activity 2.7: Forestry and Timber Industry. Legnaro: University of Padova. 2008, p. 18.

50 EGERER, H., GWEE, C. L., MUSCO, E., KOECK, M. Wilderness protection under the Carpathian Convention. In: BASTMEIJER, K. (ed.). *Wilderness protection in Europe: the role of international, European and national law*. Cambridge University Press. 2016, pp. 223–232. ISBN 978-1-107-05789-0.

51 EUROPEAN PARLIAMENT. *Report on Wilderness in Europe (2008/2210(INI)).*

52 Ibid., para. 4 and 5.

53 See EU2009.cz. *Conference on Wilderness and Large Natural Habitat Areas with the participation of Václav Havel.* Available at: http://www.eu2009.cz/en/news-and-documents/news/conference-on-wilderness-and-large-natural-habitat-areas-wit-22879/index.html

building as key elements.[54] The Wild Europe initiative was also formally launched at the conference.[55]

To tackle the relation between the concept of wilderness and Natura 2000, the European Commission has developed in 2013 guidelines on management of terrestrial wilderness and wild areas within the Natura 2000.[56] The EU definition of wilderness, as quoted at the beginning of this subchapter, includes four qualities of wilderness: a) naturalness, b) undisturbedness, c) undevelopedness and d) scale.[57] According to the guidelines, Natura 2000 is generally not a network of strictly protected areas in which no economic activities should take place. Therefore, in most Natura 2000 sites, a wilderness approach will not be the most appropriate form of management. However, in specific cases, a wilderness approach can be the most appropriate or even necessary management approach for those specific Natura 2000 sites hosting habitat types and species of Community interest whose maintenance or restoration to a favourable conservation status is dependent on some degree of wilderness qualities and natural processes.[58]

While categories of protected areas in European countries usually correlate well with the IUCN categorisation, wilderness has received explicit legal attention in only a very few jurisdictions. The Icelandic Act on Nature Conservation of 2013 provided the Minister for the Environment and Natural Resources with the competence to designate and formally protect 'uninhabited wilderness'. The other example of explicit wilderness legislation is the Finnish Act on Wilderness Reserves, although the act doesn't only

54 WILD EUROPE. *EC Presidency Conference on Wilderness and Large Natural Habitat Areas*. Available at: https://www.wildeurope.org/index.php/about-us/history-key-events/wild-europe -events/prague-conference [cit. 21 August 2017].

55 Originally established in 2005, the Wild Europe initiative promotes a coordinated strategy for protection and restoration of wilderness and large wild areas of natural process and habitat, addressing the threats and opportunities facing them. The Wild Europe initiative currently includes representatives and individuals e.g. from Birdlife International, Council of Europe, European Commission, European Wilderness Society, IUCN, UNESCO or WWF; see WILD EUROPE. *About Wild Europe*. Available at: https://www.wildeurope.org/index.php/about-us/wild-europe [cit. 23 August 2017].

56 EUROPEAN COMMISSION. *Guidelines on Wilderness in Natura 2000: Management of Terrestrial Wilderness and Wild Areas within the Natura 2000 Network*. Technical Report – 2013 – 069. Brussels, 2013. ISBN 978-92-79-31157-4.

57 Ibid., at 10.

58 Ibid., at 6–7.

relate to the protection of wilderness qualities but rather aims to establish a balance between 'the protection of wilderness characteristics' and 'human use of nature as a source of livelihood or based on Sámi culture', a balancing of interests that may well lead to the acceptance of activities that would not otherwise be allowed in strict protected zones of national parks or natural reserves. Some European countries have adopted explicit policies (but not laws) on wilderness protection, often as part of a broader approach to nature conservation and spatial planning; this is the case of concept of wilderness in Norway[59] and the National Strategy on Biological Diversity Germany.[60] The other countries use, for various historical and political reasons different categories with differing names and conservation objectives. However, there are three specific categories that may be generally considered as most relevant for protecting areas with relatively high wilderness qualities: namely national parks, nature reserves and *zapovedniky* (the instrument used in nature conservation law in Russia and number of other former soviet countries).[61] This is relevant also for legal regime in the Czech Republic which doesn't explicitly refer to wilderness. However, the regime of protected areas established by the Nature and Landscape Protection Act, in combination with detailed conservation regulations in the designation decrees and management plans, can function as an alternative 'legal toolkit' for protecting the main wilderness qualities; this is particularly true in relation to national nature reserves and national parks.[62]

59 Wilderness protection has been on the agenda of the Norwegian administrative authorities for several decades. One early definition of 'wilderness' was developed in the 1970 s by Statistics Norway for a committee established to propose reforms to the country's nature protection policy. A new approach to wilderness issues can be derived from the Norwegian Nature Index, which was first published in 2010 and which provides a general overview of the status and trends of ecosystems based on expert opinions of natural scientists. Among its purposes is to serve as a tool for decision-making authorities. For more details see FAUCHALD, O. E. Wilderness protection in Norway. In: BASTMEIJER, K. (ed.). *Wilderness protection in Europe: the role of international, European and national law*. Cambridge University Press, 2016, pp. 387–387. ISBN 978-1-107-05789-0.

60 *By the year 2020, throughout 2 % of Germany's territory, Mother Nature is once again able to develop undisturbed in accordance with her own laws, and areas of wilderness are able to evolve.* National Strategy on Biological Diversity, Adopted by the Cabinet on 7 November 2007, p. 36.

61 BASTMEIJER, K. Conclusions. In: BASTMEIJER, K. (ed.). *Wilderness protection in Europe: the role of international, European and national law*. Cambridge University Press. 2016, pp. 574–578. ISBN 978-1-107-05789-0.

62 KŘENOVÁ, Z., ZICHA, J. *Wilderness Protection in the Czech Republic*. In: BASTMEIJER, K. (ed.). *Wilderness protection in Europe: the role of international, European and national law*. Cambridge University Press, 2016, p. 285. ISBN 978-1-107-05789-0.

Notwithstanding the very limited legal attention to wilderness in Europe, the concept of protecting relatively large, ecological intact and undeveloped natural areas has received increasing attention over the last decade. Stimulated by the resolution of the European Parliament, governments, universities, NGOs and individuals have invested substantial efforts in developing a definition of wilderness, inventorying the remaining wilderness and promoting protection of these areas. On a positive note, the legal frameworks provide many tools to protect areas with relatively high wilderness qualities without necessarily making explicit reference to the term 'wilderness'. However, this positive message should not hide the clear and, unfortunately, more negative fact that European societies are strongly focused on economic growth, where systems are based on 'balancing of interest' and where general public appears to have limited interest in joint actions against development with an impact upon wilderness.[63]

2.3 Conclusion: Wild Perspectives

Thousands of tired, nerve-shaken, over-civilized people are beginning to find out that going to mountains is going home; that wilderness is a necessity; and that mountain parks and reservations are useful not only as fountains of timber and irrigating rivers, but as fountains of life.[64]

More than hundred years old words of John Muir seem to be still valid, even more today than in his times. Numbers of hikers, mountaineers and other tourists roaming natural areas all around the globe are growing, stimulated by travelling and outdoor companies, enabled and simplified by better equipment and modern technologies and means of transport. And then, paradoxically, facing a crowd while taking selfies. They does contribute to changing or even threatening the place and its natural conditions. In other words, tourism is one of the world's fastest growing industries. It is also a source of increasing stress on fragile ecosystems. Its social, economic and environmental impacts are immense and complex, not least because tourism concentrates on vulnerable

63 BASTMEIJER, K. Conclusions. In: BASTMEIJER, K. (ed.). *Wilderness protection in Europe: the role of international, European and national law*. Cambridge University Press, 2016, pp. 604–606. ISBN 978-1-107-05789-0.

64 MUIR, J. *Our National Parks*. Cambridge: The Reverside Press, 1901, p. 1.

natural and cultural sites. Short-term gains may take precedence over long-term environmental considerations, such as the conservation and sustainable use of biological diversity.[65] If people were seen as over-civilized a century ago, what are they now? Is wilderness still a necessity? And beside tourism, what about the other, less or even non-anthropocentric, aspects?

Ex definitione wilderness cannot be created, it can be only admitted.[66] The term 'rewilding' is being recognised and acknowledged more widely and more frequently in Europe, as many initiatives and organisations have started to use it. The working definition provided by the initiative Rewilding Europe[67] is that *rewilding ensures natural processes and wild species to play a much more prominent role in the land- and seascapes, meaning that after initial support, nature is allowed to take more care of itself. Rewilding helps landscapes become wilder, whilst also providing opportunities for modern society to reconnect with such wilder places for the benefit of all life.*[68] Rewilding can occur in all types of landscapes, on a small and a large scale. While a formal protected status is not required, some form of it is often desirable to assure continued, long-term benefits of rewilding. It is future-oriented, and works towards the return of natural processes and wildlife within our modern social context, creating new opportunities to link human activities to such wilder, natural landscapes. Rewilding is not geared to reach any certain human-defined 'optimal situation' or end state, nor to only create 'wilderness' – but it is instead meant to support more natural dynamics that will result in habitats and landscapes characteristic of specific area(s), with abiotic, biotic and social features that together create the particular 'Sense of the Place'.[69] Currently, the initiative puts this vision into practice through its work in eight large areas all around Europe; these

65 Secretariat of the Convention on Biological Diversity. *Guidelines on Biodiversity and Tourism Development*. Montreal, 2004, p. 1. ISBN 92-807-2468-1.

66 MÍCHAL, I. Divočina jako kulturní subjekt: chráněná území a spontánní vývoj. *Vesmír*, 1981, 81, p. 187. ISSN 0042-4544.

67 Rewilding Europe is a foundation under Dutch Law, established in 2011. The foundation has also created a limited company, which is fully owned by the foundation. However, the main capacity of Rewilding Europe is in the rewilding areas. All areas have a dedicated Rewilding Area Team Leader and technical and communications staff in place. REWILDING EUROPE. *The Foundation.* Available at: https://www.rewilding-europe.com/about-us/the-foundation/ [cit. 25 August 2017].

68 REWILDING EUROPE. *What is Rewildering?* Available at: https://www.rewilding-europe.com/about/what-is-rewilding/ [cit. 25 August 2017].

69 Ibid.

include for example Lapland (Sweden and Norway), Oder Delta (Germany and Poland), Danube Delta (Romania and Ukraine), Rhodope Mountains (Bulgaria and Greece) or Western Iberia (Portugal and Spain).[70]

Similar approach is promoted by the Czech NGO Hnutí Duha which has carried out an analysis of conditions and suitability for leaving selected areas to spontaneous development.[71] It contains proposal of five areas in different parts of the country (Beskydy – Makyta, Chřiby – Salaš, Krušné Hory – Jezeří, Libavá – Peklo a Litovelské Pomoraví – Litovelské Luhy), with approximately 1000 ha of size for each of them that could be left to spontaneous natural processes.[72] With the purpose to promote the concept of wilderness, the organisation has also initiated a public campaign 'Czech Wilderness'[73] which includes appeal to legislative and executive bodies, reasons for development of the concept and enlargement of areas with spontaneous development, and also tips and recommendations regarding sustainable tourism. Organised and trained 'wilderness guides' have been also operating in the National Park Šumava for nearly a decade.[74]

National Biodiversity Strategy of the Czech Republic 2016–2025[75] contains four priorities, each of them further developed into specific targets. One of the priorities is 'Long-term prosperous biodiversity and protection of natural processes', which includes, among other targets related to natural habitats, also development of analysis related to possible future designation and development of areas of spontaneous development of natural processes, and to initiate expert discussion among relevant state authorities.[76]

70 REWILDING EUROPE. *Annual Report 2016*. Nijmegen, The Netherlands, 2017, p. 10.

71 HNUTÍ DUHA. *Česká divočina: Analýza podmínek na území ČR z hlediska biodiverzity a vhodnosti pro ponechání samovolnému vývoji*. Brno, 2016. ISBN 978-80-86834-59-7.

72 Ibid., at 21–66.

73 See http://ceskadivocina.cz. In a near future, Hnutí Duha should also start implementation of LIFE project focused on wilderness; MINISTERSTVO ŽIVOTNÍHO PROSTŘEDÍ. *6 žadatelů z programu LIFE obdrží příslib dotací z MŽP ve výši 53 milionů korun*. Available at: http://mzp.cz/cz/news_170817_LIFE_6_novych_projektu [cit. 29 August 2017].

74 NÁRODNÍ PARK ŠUMAVA. *Průvodci divočinou 2017*. Available at: http://www.npsumava.cz/cz/1081/sekce/pruvodci-divocinou-2017/ [cit. 28 August 2017].

75 Adopted by the Czech Government in March 2016; first version of the Strategy for years 2005–2015 was adopted in May 2005.

76 MINISTERSTVO ŽIVOTNÍHO PROSTŘEDÍ. *Strategie ochrany biologické rozmanitosti České republiky 2016–2025*. Praha, 2016, p. 51. ISBN 978-80-7212-609-5.

Another relevant measure is included in the priority 'Sustainable use of natural resources' among targets related to conservation and restoration of ecosystems, and it requires to increase the proportion of land reclamation after mining by spontaneous succession.[77]

Notwithstanding the ongoing activities and the above-mentioned definitions and documents, it is still not fully clear how exactly the concept of 'wilderness' should be treated and developed. The absence of a legal definition and specific legal framework leaves space for further considerations. The main question is, whether it should be communicated and understood only as a way of management of nature (spontaneous development of natural processes), or whether it should be introduced as a potentially new category of protected area (as already defined by IUCN and in several national jurisdictions). Alternatively, whether it should be kept it just as a general expression or "brand" to by freely used by nature conservation authorities and other organisations promoting higher level of nature protection, as well as travel companies and developers attracting higher number of clients. It seems that we may await some wild discussions yet.

77 Ibid., at 82.

3 QUIET TERRITORIES IN NATIONAL PARKS AS AN EFFECTIVE TOOL FOR PROTECTING WILDLIFE?

3.1 Introduction

The term "wilderness" is frequently discussed and used in widely varying discussions today among the professional and lay public alike, particularly in relation to the latest amendment of Act No. 114/1992 Coll., on nature and Landscape protection(the "Nature and Landscape Protection Act" or "NLPA") by Act No. 123/2017 Coll. (the "amendment to the NLPA").[78] This usually occurs with reference to protection (and on the contrary also to providing access) to core nature zones in national parks. One may encounter, inter alia, the commercial offer relating to wilderness guides.[79] In the given context, the issue of quiet territories is also discussed. A key question remaining meanwhile is whether, in our country, it is possible to truly designate any territories as wilderness. We encounter the term wilderness when we need to express something naturally formed (in forest management, for example, we imagine unmanaged forest growths left to their own fate when referring to this term).[80] Our valid legislation does not define the term "wilderness". The first country to define this term by law was

78 Compare e.g.
- http://www.ceskadivocina.cz/cs/clanek/clanky/novy-serial-s-cim-prichazi-novela-zakona-o-narodnich-parcich
- http://www.ceskadivocina.cz/cs/tip-na-vylet/np-ceske-svycarsko-kus-ceske-divociny-plny-prekvapeni
- http://neviditelnypes.lidovky.cz/ekologie-divocina-na-sumave-dpc-/p_politika.aspx?c=A170610_154342_p_politika_wag
- https://www.novinky.cz/cestovani/438648-pruvodci-zavedou-turisty-do-divociny--na-sumave.html
- http://www.kulturni-noviny.cz/nezavisle-vydavatelske-a-medialni-druzstvo/archiv/online/2016/56ae6e986dba9/divocina-mezi-poslanci-aneb-spor-o-prava-prirody
- Conference "Wilderness and Large Natural Habitat Areas" (Czech Presidency of the EU, May 2009, Praha, CZ)
- http://www.wildeurope.org

79 Http://www.npsumava.cz/cz/1459/1907/clanek/

80 MOLDAN, B. et al. *K udržitelnému rozvoji České republiky: vytváření podmínek, svazek 4: Vzdělávání, informace, indikátory*. Praha: Centrum pro otázky životního prostředí, 2002, 407 p. ISBN 80-238-8378-X.

the United States of America. Pursuant to the USA's Wilderness Act of 03 September 1964 "A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; has outstanding opportunities for solitude or a primitive and unconfined type of recreation[81], has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value".[82]

Within the territory of the CR (for its very locality in the middle of civilized Europe), it is difficult to find such areas which would preserve their original character and would not be changed and influenced by humankind sooner or later.[83] Wilderness in the true essence of the word therefore apparently does not exist in our conditions. However, it is certainly necessary and wise to protect our preserved natural heritage (if possible by means of effective legal instruments).[84] In a broad sense of the word, it is possible to term relatively pristine (or nearly pristine) nature "wilderness". From an entire series of legal instruments coming into consideration, attention will continue

81 Compare with Oxford Advanced Learner's Dictionary. In: *Oxford University Press* [online] © 2017 Oxford University Press. Available at: http://www.oxfordlearnersdictionaries.com/definition/english/camping [cit. 20 August 2017].

82 For more see https://www.justice.gov/enrd/wilderness-act-1964 [cit. 17 August 2017].

83 DROBNÍK, J., DVOŘÁK, P. *Lesní zákon: Komentář*. 1st ed. Praha: Wolters Kluwer Czech Republic, 2010. pp. 112–114. ISBN 978-80-7357-425-3.

84 MIKO, L. and coll. Nature and Landscape Protection Act [online]. 2nd ed. Praha: Publish house C. H. Beck, 2007, p. 356. ISBN 978-80-7179-585-8.

to focus on the issue of quiet territories in national parks.[85] Quiet territories will be examined with regard to their potential for protecting "wilderness". If the term "wilderness" is stated further in this chapter, it will be so with regard to preservation of sustainable development of the most valuable parts of nature and the landscape.

3.2 Quiet Territories and Wilderness Protection in National Parks

The aim of national parks declared long ago is the protection of "wilderness" (a core nature zone) of no less than 50 % of its total territory[86]. Meanwhile, it is expected that clear rules for individual nature conservation zones will be determined. Pursuant to the amendment of the NLPA, national parks will be divided into four zones (instead of the existing three): a nature zone with "wilderness"; a zone close to nature which is to be reclassified to a nature zone in the near future; a zone of concentrated care

85 Meanwhile, the size of quiet territories in national parks is not yet known. For example, in NP Šumava, one may estimate that its size could fluctuate around 20 % of its territory. Currently, only 13 % of the territory of NP Šumava is inaccessible (i.e. The existing first zone of the NP). This however is utterly abnormal and an unsustainable situation for protecting nature. Up until 2009, access of visitors was limited to 23 % of the territory (quiet territories plus first zones). Then the Supreme Administrative Court annulled this regulation (or quiet territories). In consequence, the national part administrator has lacked a legislative tool in recent years for regulating the entrance of people (with the exception of the general prohibition on entering fist zones, which however are small in size and fragmented). It is essential to add several key issues to regulating entrance of visitors to national parks. In 2015, a representative survey of attitudes of the Czech public towards protecting wilderness performed by experts from Masaryk University determined what rules should apply in wilderness territories. A full 78 % of people agree that rules and regulations should apply in these territories (other 15 % don't know), and 74.4% of people think that it should be forbidden to walk off of the path or trail (other 15 % don't know). A similar quiet territory exists in Germany's Bavarian Forest NP. There, 45 % of its territory involves quiet territories. Surveys have shown that the vast majority of visitors understand such access limitation. A full 94 % do not feel hindered by the protective NP statute. From this we see that the public has a clear understanding why access in national parks is limited. For more see https://www.muni.cz/kalendar/archive-58649810

86 Compare the provisions of 15(3) and (4) of the NLPA as amended, according to which the long-term aim of protecting national parks is especially preserving or gradual restoration of natural ecosystems including assurance of the uninterrupted course of natural events in their natural dynamic over the majority of the territory in national parks, and preservation or gradual improvement of the condition of ecosystems, whose existence is conditional to human activity, which are important in terms of biological diversity, over the remaining territory of national parks.

for nature where interventions will be performed for a long period or, in case of special care of threatened species of flora or fauna (for example, a care for valuable non-forested space), even permanently; and a cultural landscape zone – space for communities and permanent agricultural or forest management.[87] The amendment to the NLPA also defines so-called quiet territories. Pursuant to the provisions of Sec 17 of the NLPA, quiet territories of a national park mean territories with limited movement of persons with the aim of enabling uninterrupted development of ecosystems or their components which are sensitive to excessive movement of persons and vulnerable due to disturbing influences in consequence thereof.[88] In quiet territories of a national park, it is prohibited to leave the path or route as defined by the NPA, with the exception of owners and renters of grounds upon entering their grounds, members of basic units of the Integrated Rescue System, municipal police forces, the Armed Forces of the Czech Republic, the Customs Administration of the Czech Republic, the Prison Service of the Czech Republic, staff of other public authorities, staff of a specialized organization of state monument care, veterinary service staff, staff of watercourse managers and operators of water mains and sewers, power systems, oil pipelines, product pipelines and public road networks, in order to fulfill their tasks. When defining a path or route, the NPA may determine the conditions that concern the extent, method and time of movement along this path or route.[89] The Ministry of Environment determines quiet territories of a national park by a measure of a general nature.[90] The boundary of quiet territory of a national park and information on conditions of movement on paths or routes in a quiet territory of a national park is marked by the NPA in the terrain in a manner determined by the regulation of the Ministry of Environment.[91] While in the wording of the immediately preceding legislation, access was prohibited over the entire territory of first zones (with the exception of marked hiking routes), after the adoption of the amendment, conditions are created for such a regime where

87 Http://www.mzp.cz/cz/news__170531_ZOPK_plati [cit. 5 August 2017].
88 Compare the provisions of Sec 17(1) of the NLPA.
89 Compare the provisions of Sec 17(2) of the NLPA.
90 Compare the provisions of Sec 17(3) of the NLPA.
91 Compare the provisions of Sec 17(4) of the NLPA.

entry would be limited only in places where humans would demonstrably threaten rare flora and/or fauna. Until the new zoning is implemented, quiet territories will copy the regime of the existing 1st zone, where movement is only permitted along marked routes.

Pursuant to the provisions of Sec 20 the NLPA, the NPA is obliged to reach an agreement with the National Park Council on a draft proposal of quiet territories of a national park, paths and routes designed to be reserved in quiet territories of the national park and places designed for reservation. Council members are, inter alia, delegated representatives of all municipalities and regions within whose territory the national park and its protected zone lie. In case the park administration declares such quiet territories that are unjustifiably large, the Council members (especially municipal representatives) have a relatively strong instrument to influence the result, and in an extreme case a court may annul such a decision.[92] The legislation in question however has its clear deficiencies. It does declare that "wilderness" will be protected in national parks over most of their territory, but it does not establish any time frames for doing so.[93] In the most strictly protected natural zone, it enables, e.g. under the pretext of "preventative measures against fires"[94], retention and maintenance of otherwise unnecessary asphalt paths above the framework of hiking and cycling trails, as well as the building of water reservoirs (it is, therefore, rather debatable whether under such conditions, it is still possible to use the term "wilderness" for such a territory).

For clarity and illustration of certain problematic contexts, attention will now focus on the Šumava National Park.

92 The institute of a measure of a general nature was introduced into the Czech legal system by Act No.500/2004 Coll., Code of Administrative Procedure (CAP), in the provisions of Sec 171 to Sec 174, and it is characterized as a measure that is neither a legal regulation nor a decision. The measure of a general nature is, in other words, an administrative act with a specifically determined subject and generally defined range of addressees (Sec 101a, 101 b, 101d of the CAP). Regional courts deciding in administrative justice are competent for proceedings on repeal of a measure of a general nature or part thereof. In their deliberation, they judge the compliance of the measure of a general nature with the law, and also whether the entity issuing it proceeded within the limits of its powers and authority, and whether the measure of a general nature was issued in a legally prescribed manner. The Supreme Administrative Court rules on cassation complaints (Sec 110 of the CAP) against decisions of regional courts.

93 DUDOVÁ, J. Ochrana před hlukem v přírodě a udržitelnost kvality života. *Acta Universitatis Carolinae Iuridica,* 2/2015, pp. 135–139.

94 Compare the provisions of Sec 18a(1)(b) of the NLPA.

3.3 Quiet Territories in NP Šumava and Visitor Rules

Quiet territories existing today in Šumava National Park were established by the park visitor rules within the framework of the previous regulation.[95] The issue of visitor rules represents a new concept pursuant to the amendment of the NLPA. While according to the previous legislation the visitor rules could implement further potential instruments of environmental protection, according to the amendment of the NLPA, the visitor rules are only an informative document. It is no longer a legally binding instrument, but is only supposed to clearly summarize individual protection instruments that apply to the territory of a national park, meaning, inter alias, also quiet territories. Until now, the visitor rules could establish a relatively wide range of regulations. Then if disputes arose regarding one part of the draft of visitor rules, this prevented the adoption of the visitor rules as a whole. Pursuant to the valid legislation, specific prohibitions and limitations are resolved by measures of a general nature, the visitor rules should clearly state prohibitions, limitations, etc., arising from law, issued decisions, or (if they concern quiet territories) measures of a general nature. However, a problem may occur if the requirements which are reflected in the visitor rules are changed. Since the act places upon the NPA the obligation to publish visitor rules in the form of an electronic document on its Website, one may expect that citizens will preferably abide by visitor rules, and not by e.g. individual measures of a general nature. In the case of a change of a rule (e.g. even in quiet territories), which will not be implemented into the visitor rules, the situation may occur in which persons will behave according to the visitor rules, but perhaps contrary to the current measure of a general nature itself. Considering thus brings us mainly to the fact that the law does not place on the NPA any time frame (term) for elaborating changes into the visitor rules. It remains a question how such situations will be dealt with in practice. Examining the provisions of Sec 19 of the NLPA, it will be deduced that the NPA has this obligation without needless delay, from the very nature of the visitor rules as an informative document. At this moment

95 This concerns the locations Modravská slať and Plesná-Ždánidla, the Křemelná river canyon, Zhůřecká slať, Mezilesní slať, Vltavský luh and the territory Trojmezná-Plechý-Smrčina.

it is possible to mention that ignorance of the law is no excuse, but if the aim of visitor rules is to clarify the system of applicable rules, it is necessary to pursue this aim.

The issue of visitor rules (and visitor access) to the most precious parts of Šumava National Park is often associated in relevant case law with protection of a critically threatened species – the wood grouse (*Tetrao urogallus*). In the given context, two case studies with differing legal conclusions will be examined to illustrate the diverse and often complicated decision-making practice.

According to the ruling of SAC case No. 7 Ao 6/2010 of 15. 12. 2010, the Supreme Administrative Court came to the relevant conclusion that it was obvious that, in the light of existing case law of the Constitutional Court and SAC itself, in all cases of the regulation by which the visitor rules had been determined, it concerned a measure of a general nature, because it involved acts with a specific subject of regulation (relating to a certain specifically defined territory) and abstractly defined range of addressees. Since declaration of a national park leads to limitation of freedom of individuals in relation to the territory where it is established, this act undoubtedly represents determination of the obligation to endure limitation of this freedom, and is or can be interference in their constitutionally guaranteed fundamental rights. It is therefore necessary for the declaration of a national park to fulfill the above-described constitutional safeguards both in the material level (especially the existence of true reasons for such an intensive nature conservation method), and in the formal level (declaration of this limiting institution by an act as well as by determination based on law of the authorities of administrative authorities to oversee compliance with limitations arising from the declaration of a national park), the aforementioned constitutional safeguards were fulfilled.[96] On the material level, the NPA is authorized to limit or (if limitation does not suffice) prohibit access to certain territories or their parts, of course only upon fulfillment of the condition of potential damage threatening the territory in national parks. The law mentions an example of excessive visitation as the reason for such a threat. Thus in the court's opinion, the aforementioned provision does not allow

96 GERLOCH, A. *Teorie práva*. 6th ed. Pilsen: Aleš Čeněk, 2013, p. 210. ISBN 978-80-7380-454-1.

for limiting or prohibiting access to certain territories or their parts according to administrative consideration (e.g. because in the past, for whatever reason, the given territories of a national park were inaccessible), but only if legally based facts are accomplished. Their accomplishment must be ascertained and substantiated by evidence in the procedure of issuing regulations. If this is not the case, it concerns illegal acts because conditions for their issue have not been not fulfilled. From evidence presented in proceedings before the Supreme Administrative Court, it allegedly did not arise that upon adoption of the regulation (visitor rules), the strict conditions laid out in the provisions of Sec 64 of Act No. 114/1992 Coll. were examined, let alone that their due fulfillment was ascertained and proven. Meanwhile, it is the court's opinion that from evidence presented it is not seen that such materials exist from which it would be clear that without almost complete closure of territories defined in the visitor rules, such disturbance of the wood grouse would occur, which would significantly impact their numbers, stability and ability of its population to thrive in the Šumava Mountains. The court is of the opinion that general considerations that the presence of visitors can damage certain vegetation or disturb some animal species do not suffice as support of such causal relationship, because they are only a message of notoriety that the burden of civilization can lead to environmental damage. Determination regarding limitation or prohibition of access to certain territories under the provisions of Sec 64 of Act No. 114/1992 Coll., if its true aim is preserving factual denial of access to a certain territory without supporting the fulfillment of substantive conditions for applying the mentioned provisions, is, according to the conclusion of the court, factual circumvention of the rules on zoning of the NP Šumava and a departure from the powers conferred by law.

In our opinion, it is not possible to fully identify with the conclusion of the court mentioned above. Questions of provision of access (or on the contrary prohibition of access) to the most precious parts or territories of a national park (or using the institute of quiet territory) should be approached after complex consideration of an entire series of related legal correlations (see further).

3.4 Quiet Territories in NP Šumava and Providing Access to Hiking Paths

We will consider the ruling of the Regional Court in České Budějovice of 8 July 2013, case No. 10 A 4/2013 in which the plaintiffs complained about the decision of the Ministry of Environment in affiliation with the decision of the NP Authority. By these decisions, the request of the Czech Tourists Club (CTC) was satisfied, and taking into account Sec 44(3) of the NLPA, the consent with marking out a hiking route of the crossroads Březník – Modrý sloup with a standardized CTC marking was provided. The plaintiffs considered the challenged decisions to be illegal because, in their opinion, this constituted interference in protected conditions of specially protected species without issue of an exception to the prohibition. Critically endangered species exist in the given locality. The plaintiffs further stated that the Šumava National Park is included in the system NATURA 2000. The first-instance decision led to approval of the intention to mark out hiking trails that lead through the territory of the 1st zone of the Šumava National Park, as well as the Šumava Bird Area and the European Site of Community Importance Šumava, and at the same time specially protected species appear in these areas, among others the wood grouse. The wood grouse is a species that is extraordinarily sensitive to being disturbed. In the opinion of the plaintiffs, making a hiking path accessible has an irrefutably negative impact on the biotope of the wood grouse.

The court concluded that the challenged decisions are burdened with flaws and illegalities, so it returned the case to the defendant for further proceedings.

The court mainly justified its conclusions by the fact that marking out the hiking route of the crossroads Březník – Modrý Sloup in the Šumava National Park indisputably leads to more intensive movement of persons in the natural environment of specially protected species, namely the wood grouse. Based on certain professional studies[97], the increased movement of persons can disturb specially protected species living there, and thus have a damaging impact on their natural development. Such a manner of use is banned

97 See e.g. the Czech-German monitoring of the wood grouse by authors J. Müller and S. Rösner of 2012 or the professional study of prof. RNDr. V. Bejček of 2006 in the file of the Regional Court České Budějovice, case No. 10 A 4/2013.

by the provisions of Sec 50(2) of the NLPA. Strict prohibitions concerning protection of specially protected animal species need not be complied with by the determination of an exception to the prohibition with the consent of the NPA (Sec 56 of the NLPA). With regard to the fact that the route of the crossroads Březník – Modrý Sloup is found in Šumava National Park and is thus a part of the European Site of Community Importance Šumava, it is necessary to also consider the provisions of part four of the NLPA implementing the Habitats Directive. In the provisions of Sec 45c(2), the general obligation is determined to protect a European Site of Community Importance from damage and destruction; this provision however is not applied in case that the given locality is concurrently also a specially protected territory (fourth sentence of the cited provision), nevertheless the applicability, inter alia, of Sec 45h and Sec 45i of the same act is not ruled out thereby. The aforementioned provisions regulate the question of assessing the results of the concept and aims in European Sites of Community Importance. The provisions of Sec 45h(1) of the NLPA state that *"any concept or aim, which independently or in affiliation with others can influence the favorable condition of the subject of protection or integrity of the European Site of Community Importance or bird area, is subject to assessment of its impacts on this territory and the condition of its protection from the mentioned aspects."* The court further dealt with the objection of the plaintiffs regarding the illegality of the challenged decision involving the fact that by first-instance decision, which was confirmed by the challenged decision, approval occurred of the aim to mark out the hiking path, without there having been granted an exception by a procedure foreseen in the provisions of Sec 56 of the NLPA. The court found the plantiffs' objection to be reasonable. Under Sec 50(2) of the NLPA *"it shall be prohibited to intervene in the natural development of specially protected animals, especially to catch them, hold them in captivity, disturb, injure or kill them."*

The NLPA then in Sec 56(1) regulates: *"In cases where other public interests significantly outweigh the nature conservation interests, the nature conservation authorities shall permit exceptions to prohibitions concerning noteworthy trees and specially protected plant and animal species and mineral types, under Sections 46(2), 49, 50 and 51(2). For specially protected species of plants and animals forming the subject of protection according to EU law, an exception according to the first sentence can be permitted only if one of the reasons is given as stated in paragraph 2, there exists no other satisfactory*

solution, and the permitted activity does not influence the achievement or maintenance of the favorable condition in terms of protection." According to paragraph 2 of the cited provision, a relevant reason is, inter alia, one of a social or economic nature. It is indisputable that marking out a hiking path on the route of the crossroads Březník – Modrý Sloup, which runs through the territory of the first zone of Šumava National Park, leads to making the given locality accessible to a larger number of visitors. This could potentially appear negatively later as a threat due to intervening in the natural development of specially protected animals, namely the native and critically threatened wood grouse. The court also did not agree with the argumentation of the defendant that the prohibition of damaging intervention in the natural development of specially protected animals under Sec 50 of the NLPA is not formulated as a prohibition of an activity that *could* have a damaging impact, but such an activity that in fact *is* a damaging intervention. In the court's opinion however, the very eventuality of intervening is a reason for commencing proceedings on an exception under the provisions of Sec 56(1) of the NLPA, because in the framework of such proceedings, the probability and level of damage potential of the assessed activity can be duly and qualitatively evaluated. By teleological interpretation of the NLPA, the court concluded that commencement of proceedings on granting an exception under Sec 56 of the NLPA is controlled by the principle of officiality and for administrative authorities, represents an obligatory procedure even in cases when intervening in the natural development of specially protected animals is only probable**.** The fact that administrative authorities ignored the procedure foreseen by the provisions of Sec 56 of the NLPA, they burdened the proceedings with a serious procedural defect. Granting consent with marking out a hiking route of the crossroads Březník – Modrý Sloup within the territory of the Šumava National Park is an aim pursuant to Sec 45h(1) of the NLPA and Sec 4(1)(e) of the Environmental Impact Assessment Act, because it concerns activity that independently or in affiliation with others can influence the territory of the European Site of Community Importance or the Šumava Bird Area (specifically a threat could occur to the population of wood grouse, a specially protected animal). At this point, the court found it necessary to point out that the reason for annulling the decision was not the *"mere"* absence of an opinion under Sec 45i(1) of the NLPA, which

could perhaps be considered administrative misconduct and consequent termination of the decision for this defect as excessive clinging to procedural form. The decisive reason for the court's decision was the fact that by ignoring the procedure anchored in Sec 45i(1) of the Nature and Landscape Protection Act, it was no longer possible to apply the assessment and evaluation process within the framework of the system NATURA 2000, as well as EIA assessment. Those are the very procedures that take into account all (negative and positive) influences of the aim for the assessed area (here even an area of exceptional natural value). In the assessed case, the administrative authorities decided without having available a proper opinion under Sec 45i(1) of the NLPA. Thus it was not assessed whether marking out the route of the crossroads Březník – Modrý Sloup independently or cumulatively with other aims has a meaningful influence on the favorable condition or integrity of the European Site of Community Importance and Šumava Bird Area.[98] Consent with marking out the hiking route was therefore issued without upholding compliance with the legal condition under Sec 45 g of the NLPA, which according to the court's conclusion causes illegality of the first-instance decision for its conflict with substantive law.

With regard to the amendment to the NLPA, it is appropriate to at least briefly outline the relevant legal procedure according to the valid legislation. Under the provisions of Sec 43(3) of the NLPA, marking out places and routes (with regard to exceptions from the prohibition in specially protected territories), the NPA establishes measures of a general nature. This also concerns exceptions in relation to quiet territories (compare the provisions of Sec 17(2) of the NLPA). The NPA may only permit such exceptions in case when a different public interest outweighs the interest of nature, or it is in the interest of protecting nature, or if the permitted activity does not significantly influence the preservation of the condition of the subject of protection of a specially protected territory. Pursuant to the provisions of Sec 56(1) of the NLPA, an exception to the prohibition concerning, inter alia, protection from disturbance (Sec 50(2) of the NLPA) of specially protected species, the NPA provides permission in cases, when a different public interest outweighs the interest of nature, or it is in the interest

98 PRCHALOVÁ, Jana. *Zákon o ochraně přírody a krajiny a NATURA 2000*. 2nd ed. Praha: Linde, 2010, pp. 417–419. ISBN 978-80-7201-806-2.

of protecting nature. For such specially protected species, which are the subject of protection under the EU law, permission is possible if it concerns a reason stated in Sec 56(2) of the NLPA.[99] The NPA may, pursuant to the provisions of Sec 56(3) of the NLPA in deciding on an exception, determine the obligation of marking the animal of a specially protected species with an unambiguous and irremovable mark, and may also determine conditions for possible performance of the permitted activity. The NPA may decide on such an exception that concerns an indefinite range of persons by a measure of a general nature. In the case of an exception from the prohibition under Sec 45 g of the NLPA (i.e. if it concerns a European Site of Community Importance or bird area), serious or irreversible damage to natural habitats and biotopes of species, for whose protection the European Site of Community Importance or bird area is determined, must be ruled out.[100] Furthermore, the expectation must be met that systematic or long-term disturbance of species for whose protection these territories are determined does not occur.

3.5 Conclusion

In our conditions, the amendment of the NLPA represents a benefit to protection of nature and its most valuable parts in particular. However, it also brings certain uncertainties which actual practice will have to deal with in the future. To what extent quiet territories will truly act as an effective tool in wilderness conservation is still too difficult to predict. The amendment of the NLPA lacks specific time frames by when this aim is to be achieved

99 It is possible to grant an exception to the prohibition among specially protected species of plants and animals in the interest of protecting wild flora and fauna and protection of natural habitats, in the interest of preventing serious damage mainly to crops, livestock, forests, fisheries, waters and other types of property, in the interest public health or public safety or from other urgent reasons outweighing the public interest, including reasons of a social and economic nature and reasons with favorable consequences of indisputable importance for the environment, for purposes of research and education, resettlement of a certain territory with a population of a species or reintroduction in the original area of the species and the breeding and cultivation necessary for such purposes, including artificial propagation of plants, in the case of specially protected bird species for the capture, possession or other use of birds in small quantities.

100 DUDOVÁ, J. *Právní aspekty ochrany veřejného zdraví před environmentálním hlukem*. 1st ed. Brno: Masarykova univerzita, 2013. Acta Universitatis Brunensis Iuridica, Editio S, No. 450, pp. 128–130. ISBN 978-80-210-6522-2.

in individual national parks. Minimum sizes of wilderness below which the wilderness territory may not drop also remain undetermined. This means that certain, even today's most valuable places of national parks, could lose protection. It will be necessary to enrich the framework law with specific content as soon as possible. Moreover, the missing zoning and principles of care are also closely related to quiet territories.[101]

The amendment of the NLPA now newly allows for an exception, in the form of a measure of a general nature, for a further undetermined range of persons – also from the regime of quiet territories. Since the conditions stated above must be fulfilled also for such granting of an exception, it is a question of who in practice will prove fulfillment of these conditions. Upon the request for the granting of an exception, the onus is on the applicant requesting the exception for a certain reason.

With regard to a procedure for a measure of a general nature, it is also a question as to how far the range of persons who can file objections and submit comments reaches. If it concerns e.g. an exception to the prohibition of entering quiet territories (e.g. in a certain period), practically anybody can submit comments (the interest of anybody can be affected because everyone can use this exception). The NPA must then settle these comments. If we take this situation to absurdity, a case could arise where such a quantity of persons submits comments and files objections that it would be practically impossible to settle each one of them, or proceedings would be needlessly drawn out for this reason. One may label the previous construction of granting exceptions in the form of an individual administrative act as clearly more advantageous with regard to the character of this institution.

Currently, with regard to a series of unresolved question, it is not possible to assess the benefit of quiet territories and their application into practice. First the relevant case law should be unified. An entire series of implementing legal regulations is missing. The potential to protect wilderness is started however by the amendment to the NLPA, and one may only hope that protection of valuable wilderness does not remain just an empty political declaration.

101 DUDOVÁ Jana. Několik poznámek k právní vynutitelnosti veřejného zájmu na ochranu zdraví před hlukem. *Právní rozhledy*, Praha: C. H. Beck, 2012, No. 21, p. 755–758. ISSN 1210-6410.

4 MUNICIPALITIES LOCATED IN NATIONAL PARKS

4.1 Introduction

An amendment to Act No. 114/1992 Coll., on Nature and Lanscape Protection, as amended, came into effect on 1 June 2017, and was published in the Collection of Laws under No. 123/2017 Coll. (hereinafter the "amendment"). The impulse for the change in legislation came from, inter alia, comments provided by the municipalities[102]. According to statements in the media, the amendment strengthens the rights of municipalities to comment on the issue which immediately concerns them because within their territorial district, they are becoming the body concerned under Act No. 500/2004 Coll., Code of Administrative Procedure, as amended, which applies to discussing all proposals for measures of a general nature. This in turn leads to strengthening the role of local self-government[103].The version approved by the Chamber of Deputies means stability and development of protection of nature, as well as for municipalities; the amendment strengthens the role of municipalities when deciding on national parks; it eliminates pointless prohibitions of certain activities in the territory of municipalities located in national parks[104]. The amendment was adopted in the version of the Chamber of Deputies, even though the Senate version explicitly emphasized that one of the purposes of a national park, "in relation to municipalities", is the support of sustainable development of municipalities inside national parks and the necessary consent of local municipalities to establishing individual zones of parks, and not just park councils[105].

102 GOVERNMENT OF THE CR. Explanatory report to Act No. 123/2017 Coll., amending the Nature and Landscape Conservation Act. [online]. Apoptosis o/ dok. *Government of the CR* © 2017 [cit. 14 July 2017]. I. General part, pp. 38, 42.

103 Government of the CR Bohuslav Sobotka: Nový zákon o ochraně přírody pomůže přírodě, turistům i obcím [online]. *Government of the CR* (c) 2009–2017, Published 01 March 2017 [cit. 18 August 2017].

104 Sněmovna odmítla senátní úpravy pravidel pro národní parky [online]. *ekolist.cz*. Published 1. 3. 2017 [cit. 18 August 2017].

105 Ibid.

What changes did the amendment bring concerning municipalities located in national parks? Did the role of municipalities strengthen upon measuring the interest in nature conservation and rights of municipal self-government? The present paper analyzes the impact of the amendment on municipalities, or rather on the activity in the territory of municipalities located in national parks, and names the principle communal aspects of the amended legislation.

The following abbreviations are used in the paper: the *existing* Act No. 114/1992 Coll., on Nature and Lanscape Protection, valid and effective until 31 May 2017 (the "ENLPA"); the *new* Act No. 114/1992 Coll., on Nature and Lanscape Protection, valid and effective as of 01 June 2017 (the "NNLPA"); if a change did not occur to Act No. 114/1992 Coll. as of 1 June 2017, and this also concerns legislation valid and effective after 1 June 2017, then the abbreviation "NLPA", Act No. 500/2004 Coll., Code of Administrative Procedure, as amended ("Code of Administrative Procedure"), or Act No. 123/2017 Coll., amending Act No. 114/1992 Coll., on Nature and Lanscape Protection, as amended (the "amendment").

4.2 Participation of Municipalities in Protection of Nature in National Parks

Municipal self-government and protection of nature in national parks is based on international, domestic constitutional and embodied legislation. The participation of municipalities in nature conservation in national parks involves the performance of independent competence, because they perform state administration of nature conservation in the territory of national parks and their protected zones in the scope of municipal authorities, authorized municipal authorities and municipal authorities of municipalities with expanded competence – the national park administration as the nature conservation authorities[106]. When performing independent competence, the municipality acts as an institutionalized form of the pubic – the citizens of the municipality, and defending the not entirely "pro-environmental"[107] interests of municipal self-government.

106 The provisions of Section 78 of the NNLPA.

107 Regarding this, see e.g. JANOUŠ, V. Šumavští starostové vyzvali politiky: umožněte kácet, nebo zrušte park. *iDNES.cz* [online] Published 29 July 2011; or Národní park? Až se obce a úřady shodnou, vzkazuje ministerstvo. *Starostove-nezavisli.cz* [online] Published 20 May 2013 [cit. 18 August 2017].

These come into conflict with the interests of protecting nature in national parks. It is necessary to search for a compromise solution between the interests of municipalities and protection of nature in national parks.

The provisions stipulated in Section 71 of the NLPA are key for participation of municipalities in nature conservation in national parks. Under Section 71(1), through their bodies, municipalities engage in protection (conservation) of nature and the landscape in their territories. They express opinions on establishment and revocation of the status of especially protected territories and their protected zones. Under legislation effective until 31 May 2017[108], national parks, as well as their protected zones, were established by law. This specification was not accurate since only one national park – Czech Switzerland National Park, was established by a separate act, whereas other three national parks were established by government regulations (Šumava National Park, Podyjí National Park and Krkonoše National Park). As of 01 June 2017, all four national parks, along with their protected zones[109], are established by the NNLPA (compare Sections 15a, 15 b, 15c, and 15d, along with appendices No. 1–4 of the NNLPA). If the need arises to establish a new national park, municipalities will participate in negotiating the aim to establish a national park under Section 40 of the NNLPA (more on this hereunder), and thus to express their opinion under the rules of the legislative process (by commenting)[110].

Under Section 71(2) of the NLPA, nature conservation authorities are obliged to cooperate with municipalities, to submit the required materials and information to them; to provide explanation for interference with nature and the methods of its conservation, especially if they could adversely affect the environment in the municipality or limit the exercising of rights enjoyed by its inhabitants. Regarding national parks, the obligation laid down by this act applies, inter alia, in a "qualified form", in form of cooperation with national park councils. Here, municipalities are represented by delegated

108 The provisions of Section 15(5), in connection with Section 37 of the ENLPA.

109 Note – currently Podyjí National Park and Krkonoše National Park have protected zones.

110 Regarding this, see the Government Legislative Rules approved by Government Decree No. 188 of 19 March 1998, as amended [online]. In: *Beck-online* [online legal information system]. Publishing house C. H. Beck, 2007 [cit. 18 August 2017].

representatives. Nature conservation authorities are obliged to seek out solutions to the benefit of municipalities and the interests protected in the territory of national parks. This should be perceived positively by the municipalities[111].

Under Section 71(3) of the NLPA *"Municipalities shall be participants in administrative proceedings within their territorial district under this Act if they do not decide on the same matter as nature conservation authorities."* Municipalities located within the territory of national parks are not nature conservation authorities (see above). As a participant in the proceedings, the municipality is represented by its assembly or council[112]. Such participation in administrative proceedings is related to the reality of the impact on the territory of the municipality[113].

Under Section 71(4) of the NNLPA *"Upon negotiating a drafted measure of a general nature under the third part of this Act* (note. Section 14 – 45), *municipalities in their territory hold the position of the body concerned under the Code of Administrative Procedure."* Relating to this position are rights of municipalities extended to the bodies concerned upon negotiating on a measure of a general nature (Section 136), Section 171 – 174 of the Code of Administrative Procedure). Key elements are the local ties of municipalities and how much their territory is affected. This amendment leads to strengthening of the role of municipalities when negotiating proposals for a measure of a general nature[114]. Municipalities hold the position of the body concerned, and the NPA is obliged to negotiate with them on the draft measure of a general nature before it is delivered by public notice for commenting to other entities[115]. However, has the amendment brought a significant change since 1 June 2017 to the position of municipalities as the body concerned when negotiating measure of a general nature?

111 STEJSKAL, V. Zákon o ochraně přírody a krajiny. Komentář. In: *ASPI legal information system*. Wolters Kluwer ČR, 2016, To Section 71.

112 Ibid., To Section 71.

113 Note. Regarding municipal participation in administrative proceedings, which develop from the municipality's ownership of land determined to fulfill the function of a forest in the 2nd zone of Šumava National Park, compare the Decision of the Supreme Administrative Court of 04 April 2013, case No. 3 As 51/2012-129.

114 GOVERNMENT OF THE CR. Explanatory report to Act No. 123/2017 Coll., amending the Nature and Landscape Conservation Act. [online]. Apoptosis o/ dok. *Government of the CR* © 2017 [cit. 14 July 2017]. II. special part. To point 18 (change Section 71).

115 Ibid.

Bodies concerned uphold the interests entrusted into their powers. Pursuant to Section 136(1), (2) of the Code of Administrative Procedure, bodies concerned are authorities determined by a special law; administrative bodies and other public bodies competent to issue binding opinions or statements that are basis for decision of an administrative body; furthermore territorial self-governing units, if the matter concerns the right of the territorial self-governing unit to self-government. So if it concerns a matter regarding the rights of the territorial self-governing unit to self-government and the municipality is not a participant in these proceedings (regardless of whether e.g. it has "classic" participants of proceedings – typically adoption of a measure of a general nature), the municipality will have the position of the body concerned under the above-mentioned Section 136(2)[116], with rights under Section 136(4) of the Code of Administrative Procedure (to right to examine the file, receive a copy of materials and express their statement)[117], or others. Under Section 172 of the Code of Administrative Procedure regulating the procedure for adopting a measure of a general nature, the administrative body will discuss the draft measure of a general nature with the bodies concerned under Section 136 of the same act, then follow the procedure given under Section 172 *et seq*. By interpretation *in favorem* of municipal self-government, municipalities as bodies concerned could become involved in negotiations on a measure of a general nature concerning nature conservation even before 1 June 2017. The key – more than anchoring of Section 71(4) of the NNLPA – is introduction of more frequent usage of a measure of a general nature while protecting the environment in national parks.

4.3 National Parks – Legislation with Effect from 1 June 2017

The Explanatory Report names the benefits of the amendment for municipalities (reduction in excessive protective conditions in municipalities; the lack of opportunity to change principles of care for national parks based on elaboration of conditions after negotiating with municipalities; municipalities

116 Regarding this, see the Decision of the Supreme Administrative Court of 22 July 2013, case No. 8 Afs 49/2011-75.

117 JEMELKA, L., PONDĚLÍČKOVÁ, K., BOHADLO, D. *Správní řád. Komentář*. 5th ed. Praha: C. H. Beck, 2016, pp. 654–658.

as bodies concerned when negotiating a draft measure of a general nature in their territory)[118]. The following subchapters provide an overview of changes to the legislation effective as of 1 June 2017, along with the ties to municipalities whose territory lies in the given national park (affected municipalities).

4.3.1 Declaration of National Parks, or Changes and Revocation of this Special Protection of Nature

Fundamental change lies in the actual establishment of national parks, or their protected zones itself (compare Section 15a, Section 15 b, Section 15c, and Section 15d, along with appendices No. 1–4 of the NNLPA). When aiming to establish a new national park, it is necessary to proceed pursuant to Section 40 of the NNLPA. It will then be established by this act.

The Ministry of Environment[119] ensures processing of the plan to establish a national park, or its protected zone. Negotiation of the aim is regulated by Section 40 of the NNLPA, and in relation to municipalities, it concerns the following. The Ministry of Environment (MoE) will send the plan to establish a national park, or its protected zone, to municipalities, whose territory the plan concerns. Municipalities may also act in the position of owners of immovable property registered in the Land Register who is affected by this plan. Then the MoE will deliver to the municipalities written notice of submittal of plan for negotiation (deliberation), in the form of a public notice, along with information on when it is possible to become familiar with its consolidated version, and who is entitled to file objections to it – if these are the affected municipalities and owners of immovable property – and when the term expires for filing objections. It will also publish this information at the public administration portal. At the MoE's request, the affected municipalities will publish the notice within 5 days of its delivery to them on their public notice boards[120]. Written objections to the submitted plan may be filed by additional municipalities within a term of 90 days from obtaining the aim, and by owners of immovable property within 90 days of the date of delivery of notification

118 GOVERNMENT OF THE CR. Explanatory report to Act No. 123/2017 Coll., amending the Nature and Landscape Conservation Act. [online]. Apoptosis o/ dok. *Government of the CR* © 2017 [cit. 14 July 2017]. I. General part, p. 39.

119 As a Nature Protection Authority, compare Section 79(3)(e) of the NNLPA.

120 The provisions of Section 40(3) of the NLPA.

by public notice at the public administration portal (Section 40 (4) NNLPA). Objections shall be submitted to the MoE; objections filed after the stated deadline are not considered. The owner is entitled to submit objections only against such a proposed method or the scope of conservation, by which it has been affected in exercising its rights or obligations. Objections will be decided upon within 60 days of expiration of the final deadline for exercising objections; the plan will be brought in line with approved objections.

Pursuant to Section 40(5) of the NNLPA, each party – including the municipalities – must refrain from interventions that would negatively alter or damage the preserved natural state of the territory proposed for special protection in the period from the time of publishing the plan for establishment of a part of nature as a national park until its actual establishment, but no longer than over two years.

Under Section 41 of the NNLPA, upon a change in demarcation, in closer protective conditions of a national park and its protected zone, or activity tied to the consent in its protected zone, this change is negotiated upon in a similar manner, but only with those municipalities, which the change concerns. Revocation of the status of a national park and its protected zone is regulated in Section 45 of the NNLPA. This is only possible by law after negotiating on the aim to revoke such status for reasons by which it is possible to grant an exception under Section 43, or if the reason for special conservation no longer exists. Here too municipalities will participate by expressing objections.

4.3.2 Protective Conditions of National Parks

Protective conditions of national parks must reflect the European standard of developing nature in the territory of national parks. They must balance nature conservation and municipal development. The basic protective conditions were originally – utterly uselessly – derived from zoning of a national park. New criteria involve "the entire territory of a national park" (Section 16(1) of the NNLPA) and "territory of a national park outside built-up municipal land and built-up area of the municipality (so-called municipal territory)" (Section 16(2) of the NNLPA). Useless prohibitions disappear in the municipal territory[121].

121 GOVERNMENT OF THE CR. Explanatory report to Act No. 123/2017 Coll., amending the Nature and Landscape Conservation Act. [online]. Apoptosis o/ dok. *Government of the CR* © 2017 [cit. 14 July 2017]. I. General part, p. 38.

Prohibitions under Section 16(1) of the NNLPA, augmented according to current experience in practice are fundamental for municipal territories (mainly prohibition to set off fireworks or use entertainment pyrotechnics, placing light sources outside closed buildings that feed their light flow above a level plane running through the middle of the light source)[122].

The amendment revoked certain protective conditions in the municipal territory, for example prohibition of "camping and making a campfire outside of places designated by the NPA", prohibition of "holding and organizing mass sports, hiking or other public events", or "driving motor vehicles off of main and local roads". The provisions of Section 16(2) of the NNLPA lists activities that can be performed in the municipal territory in national parks. For detailed comparison of protective conditions, compare Section 16(1), (2) of the NNLPA, and Section 16(1), (2) of the ENLPA.

Further protective conditions under Section 16a to 16d of the NNLPA[123] are also crucial for municipalities. These reflect the specifics of natural conditions of a particular national park. Further protective conditions augment basic ones and generally apply throughout the territory of national parks. In case of Czech Switzerland National Park, further protective conditions differentiate prohibitions valid throughout the entire territory and those that apply outside built-up territories of municipalities, when free movement of pets is permitted in municipalities of Czech Switzerland National Park[124]. Under Section 16a(3)(d) *"Within the entire territory of Czech Switzerland National Park, it is possible only with the consent of the NPA to change the types and methods of use of land outside a built-up territory of municipalities and buildable area of municipalities."* The same applies to Krkonoše National Park, Podyjí National Park and Šumava National Park[125]. In Šumava National Park, it is also prohibited to build new or reconstruct existing surface drainage of land outside of built-up territory of municipalities and buildable area of municipalities (Section 16d)(b) of the NNLPA).

122 GOVERNMENT OF THE CR. Explanatory report to Act No. 123/2017 Coll., amending the Nature and Landscape Conservation Act. [online]. Apoptosis o/ dok. *Government of the CR* © 2017 [cit. 14 July 2017]. II. special part, to Section 16.

123 Note. Section 16a of the NNLPA is effective only after 01 January 2018. The provisions of Section 16 b to Section 16d of the NNLPA are effective as of 01 June 2017.

124 The provisions of Section 16a(2) of the NNLPA.

125 The provisions of Section 16 b(a), Section 16c(a), Section 16d(c) of the NNLPA.

4.3.3 Zoning of National Parks, Quiet Zones

Zoning of a national park is the exclusive tool of differentiated care of its territory[126]. The territory of a national park has always been divided into three zones, but effective as of 1 June 2017, such territory is now divided into four zones (the natural zone, the close proximity zone, the concentrated nature care zone and the cultural landscape zone).

As previously, the Ministry of Environment determines the definition and changes of individual zones by decrees[127]. The original drafted bill proposed determination of zones in the form of a measure of a general nature[128]. A change in zoning is possible after 15 years, after the first notice had become effective (pursuant to the conceptually permanent approach to nature conservation).

On built-up and developable municipal land determined for permanently sustainable development and in areas where there is a predominance of ecosystems altered by man and that are determined for permanent use by man, this can be defined as a so-called cultural landscape zone[129]. Under Section 18(2), (3) and (4) of the NNLPA, it is also possible to include into zones of national parks such territories that do not correspond to the legal characteristic of zones, but their creation is necessary for maintaining the unified method of care for the zone, and achieving the goal of maintaining the integrity of the area of the zone segment. Municipal territory may thus come under a zone that is not a cultural landscape zone. The provisions of Section 18(7) of the NNLPA stipulate non-inclusion of part of the territory of a national park into any of its zones.

Under the temporary provisions of the amendment, Article II, paragraphs 2, 3, 4, protection of nature of national parks continue to apply. The first zones of nature conservation of national parks are considered natural zones; built-up territory of municipalities and built-up area of municipalities in the territory of national parks are considered a cultural landscape zone; this

126 GOVERNMENT OF THE CR. Explanatory report to Act No. 123/2017 Coll., amending the Nature and Landscape Conservation Act. [online]. Apoptosis o/ dok. *Government of the CR* © 2017 [cit. 14 July 2017]. II. special part, to Section 18 and Section 18a.

127 The provisions of Section 18(5), Section 79(3)(g) of the NNLPA.

128 Ibid.

129 The provisions of Section 79(3)(e) of the NNLPA.

applies until the time of demarcation of zones of a national park by a procedure pursuant to Section 18 of the NNLPA. Under Article II paragraph 5 of the amendment, negotiations on demarcation of zones of a national park under the NNLPA must be commenced no later than within two years following the effective date of the amendment (i.e. until 1 June 2019). *"The basic criterion for including areas into individual zones will be the long-term aim of nature conservation (e.g. spontaneous development, permanent care, environmentally friendly management). Another criterion is the level of alteration of ecosystems by human activity (natural, partially altered, significantly altered)."*[130] The proposal of zones must be agreed upon with the national park council, whereas the municipality participates in zoning by means of delegated representatives.

The provisions of Section 18a of the NNLPA determine legal prohibitions of activities in individual zones. In terms of conservation of national parks, it is worth to discuss Section 18(6), under which in the territories classified as the nature zone, the close proximity zone or the concentrated nature care zone under Section 18(3) – which may be this very municipal territory, the regime of zones determined in paragraphs 1 to 3 does not apply, and it is possible to implement measures or intervention in them, which do not threaten the subject of conservation of a national park and fulfillment of aims of conservation of a national park.

The regime of zones adds to the basic and further protective conditions of national parks, but a higher standard of basic and further protective conditions must always be maintained.

Marginally, one may mention the legally determined conditions of exercising hunting and fishing rights in national parks (Section 21 of the NNLPA), where the municipality will be the body concerned upon issuing a measure of a general nature under Section 21(3) of the NNLPA. There are also legally determined conditions of use of forests in national parks (Sections 22, 22a of the NNLPA), and use of agricultural land in national parks (Section 22 b of the NNLPA), which concern municipalities mainly as owners.

130 GOVERNMENT OF THE CR. Explanatory report to Act No. 123/2017 Coll., amending the Nature and Landscape Conservation Act. [online]. Apoptosis o/ dok. *Government of the CR* © 2017 [cit. 14 July 2017]. I. General part, point 3.1.1.

Under Section 17, movement of persons is newly resolved by regulation of "quiet territories". These are determined by the Ministry of Environment in the form of a measure of a general nature. Here, the municipality holds the position of the body concerned, and a draft of quiet territories and reserved paths and routes must be agreed upon with the national park council. Under the temporary provisions of Article II, paragraphs 6 and 7 of the amendment, until the time of demarcation and designation of a quiet territory, the quiet territory is considered a territory of the first zone of a national park defined and designated under existing legal regulations. Proceedings on demarcation of a quiet territory must be commenced by no later than two years of the effective date of the amendment. Until the time of demarcation and designation of paths in the quiet territory, demarcated and designated paths are considered those paths with existing designation having obtained the consent of the NPA.

4.3.4 Exceptions to Prohibition, Demarcation of Places and Paths

It is possible to grant an exception from the legal prohibitions by a procedure following Section 43 of the NNLPA. This is supposed to preserve the maximum effectiveness of this nature conservation method in terms of efficiency upon fulfillment of legal conditions[131]. Until 31 May 2017, granting of exceptions was only possible in individual cases, by decision of the Ministry of Environment under the approved government decree, or by decision of the competent NPA – the particular national park administration[132]. Now the option of granting an exception for a further unspecified circle of persons by a measure of a general nature enhances the efficiency of this method of special protection of nature. This also applies for demarcation of places and paths under Section 16a(1)(c), Section 16(2, Section 17(2, a Section 37(3)(a) a d) of the NNLPA. *"The existing governmental interference with decision-making and granting of exceptions from prohibition in specially protected territories shall be deleted… These provisions were the… subject of criticism for… its unsystematic and inconsistent nature with the principles of administrative proceedings*

131 GOVERNMENT OF THE CR. Explanatory report to Act No. 123/2017 Coll., amending the Nature and Landscape Conservation Act. [online]. Apoptosis o/ dok. *Government of the CR* © 2017 [cit. 14 July 2017]. II. special part, to Section 16.

132 On this Section 43(1), (2) of the ENLPA.

and constitutional nonconformity due to negation of procedural rights and participants in administrative proceedings"[133]. Exceptions or demarcation of places and paths under Section 43 are still only granted by the NPA – the national park administration[134]. Exceptions in the form of a measure of a general nature are conceptual; their absence in the existing legal regulation must be perceived as one of the key problems of granting exceptions.

4.3.5 National Park Council

Municipalities participate in protection of nature in national parks by means of national park councils, representing a qualified form of participation. *"For negotiation on and assessment of all important documents on conservation and management of a national park and its protected zones, especially classification of territory of a national park into nature conservation zones and principles of care for the national park, the Nature Protection Authority shall create a national park council as an initiative and consultation body for matters of the relevant national park"*[135]. Their members continued to be, inter alia, delegated representatives of municipalities. Under Section 78(11) of the NNLPA, national park administrations establish a council for the national park and appoint and remove their other members.

All important documents are discussed with the council – a draft proposal for zones of a national park, quiet territories of a national park, paths and routes and places proposed for demarcation, and a draft proposal on care for the national park (Section 20(3) of the NNLPA). If agreement is not reached by the NPA and the council, the council shall submit, by means of the NPA, its statement of dissent along with its binding opinion to the Ministry of Environment, which may modify the draft based on assembled materials. It shall then inform the council of a change to the draft (Section 20(4) of the NNLPA).

4.3.6 Visitor Rules of a National Park

The concept of the visitor rules has completely changed, where up until now, by establishment of visitor rules declared by a measure of a general

133 GOVERNMENT OF THE CR. Explanatory report to Act No. 123/2017 Coll., amending the Nature and Landscape Conservation Act. [online]. Apoptosis o/ dok. *Government of the CR* © 2017 [cit. 14 July 2017]. II. Special part, On point 12 (change Section 43).

134 The provisions of Section 78(2), (3)(h), (i) of the NNLPA.

135 The provisions of Section 20(1) of the NNLPA.

nature, conditions of regulation of a national park were established (e.g. demarcation of areas for navigating or for cycle tourism). *"In its visitor rules of the national park, the NPA shall publish the conditions of limitation and the list of hiking and recreational activities that are prohibited or limited within the territory of a national park by legislation, measures of a general nature or decisions issued under this Act or under other legislation"*[136]. Conditions of regulation are newly established by "special" administrative acts; the visitor rules form an informative document introducing a group of all prohibitions and limitations in the national park[137]. One of the visitor rules will be to provide comprehensive and up-to-date information on the possibilities of use of the territory of a national park. One can only recommend that the affected municipalities publish the visitor rules themselves on their websites.

Under temporary provisions of Art. II, point 9, the existing visitor rules of national parks are valid for the time stated therein, but no longer than 3 years from the date that this law comes into effect.

4.3.7 Protected Zone of a National Park

The protected zone forms territory, in which defined activities and interventions are bound to prior consent of the NPA – the national park administrator. The protected zone of a national park is defined by this act[138] (note currently only Podyjí National Park and Krkonoše National Park have a protected zone).

Under Section 37(2) of the NNLPA, the NPA's consent is necessary for performing the activities stated therein. In the protected zone of a national park, the national park administrator's consent is required for example for camping outside areas designated by the NPA by a measure of a general nature and outside built-up territory of municipalities, or for organizing mass sports events, hiking and other public events outside the area reserved by the NPA by a measure of a general nature and outside built-up territory of municipalities (Section 37(3) of the NNLPA). Consent is issued

136 The provisions of Section 19 of the NNLPA.

137 GOVERNMENT OF THE CR. Explanatory report to Act No. 123/2017 Coll., amending the Nature and Landscape Conservation Act. [online]. Apoptosis o/ dok. *Government of the CR* © 2017 [cit. 14 July 2017]. I. General part, point 4.1.1.

138 The provisions of Section 37(1), Sectionond sentence of the NNLPA.

by decision for by a measure of a general nature (Section 37(4) of the NNLPA). The affected municipality in such case is either a participant of the proceedings or the body concerned.

4.3.8 Principles of Care for National Parks

"A new document is introduced for care of national parks due to distinguishing its form from care plans of a PLA[139] *and a small, specially protected territory"*[140]. For national parks, care plans no longer apply but rather principles of care for national parks. *"Principles of care will be a professional framework document whose content shall be determination of principles and aims of management"*[141].

Principles of care for national parks and their protected zones are conceptual professional documents. The national park administration sees to their elaboration (Section 38a(2), Section 78(8) of the NNLPA). This administration, with the consent of the Ministry of Environment, issues a notice of the possibility of becoming familiar with the draft principles of care, and besides publishing it on the public administration portal, the MoE will then send to it to municipalities for publishing on their official notice boards. Everyone, just like the municipalities, can file comments on this draft within a term of 60 days from the date of its publishing on the public administration portal. The national park administration settles the comments (settlement of publishing at their website and public administration portal), modifies the draft principles of care according to them, and "agrees" upon this modified draft principles of care with the council. *"It is newly established that the document shall be discussed with municipalities after completion of its discussion with the public and land owners. This eliminates the risk (arising e.g. in NP Šumava),*

139 PLA means protected landscape area.

140 GOVERNMENT OF THE CR. Explanatory report to Act No. 123/2017 Coll., amending the Nature and Landscape Conservation Act. [online]. Apoptosis o/ dok. *Government of the CR* © 2017 [cit. 14 July 2017]. II. special part, K point 5.8 (new Section 38a) – principles of care for a NP.

141 GOVERNMENT OF THE CR. Explanatory report to Act No. 123/2017 Coll., amending the Nature and Landscape Conservation Act. [online]. Apoptosis o/ dok. *Government of the CR* © 2017 [cit. 14 July 2017]. I. General part, point 8.2.2.

where a care plan would be agreed upon by representatives of the municipalities in the NP council, and would then be modified over the course of legal commenting and approved in an altered form" [142].

If agreement is reached, the draft principles of care are submitted to the Ministry of Environment for approval[143] (approved for a period of 15 to 20 years). The approved principles are not only stored in a central list of nature conservation, but are also handed over in electronic form on a technical data carrier to the municipalities concerned.

If agreement is not reached, the council submits forthwith by means of NPA its statement of dissent along with its binding opinion to the Ministry of Environment, which may modify the draft based on assembled materials. It shall then inform the council of a change to the draft (Section 38a(5) of the NNLPA).

"The principles of care shall be approved by the Ministry of Environment by a process identical to the current approval of care plans (i.e. after prior negotiations with concerned entities, including municipalities and regions)"[144]. For this reason, the municipality comes into the process of adopting the principles of care for a national park not only by its commenting, but also in a qualified form.

Under temporary provisions of Article II. paragraph 8 of the amendment, care plans for national parks and their protected zones with existing approval remain valid for the period stated therein, but no longer than 10 years following 1 June 2017, or until the time when principles of care are adopted for the national park under this amendment.

4.3.9 Further Methods of Municipal Participation in Nature Conservation in National Parks

To ensure comprehensiveness of this paper, it is necessary to name further manners of participation of the municipality in nature conservation

142 GOVERNMENT OF THE CR. Explanatory report to Act No. 123/2017 Coll., amending the Nature and Landscape Conservation Act. [online]. Apoptosis o/ dok. *Government of the CR* © 2017 [cit. 14 July 2017]. II. special part, K point 5.8 (new Section 38a) – principles of care for a NP.

143 The provisions of Section 79(3)(j) of the NNLPA.

144 GOVERNMENT OF THE CR. Explanatory report to Act No. 123/2017 Coll., amending the Nature and Landscape Conservation Act. [online]. Apoptosis o/ dok. *Government of the CR* © 2017 [cit. 14 July 2017]. I. General part, point 8.2.2.

in national parks. This concerns municipal land ownership rights in the territory of national parks and right of first refusal of the state (to this Section 61 of the NNLPA), a legislation-preferred solution *in favorem* of nature conservation, upon prohibition of confiscation of land in national park owned by the state (originally the amendment drafted this prohibition with the exception of built-up territory of municipalities and built-up area of municipalities). It further concerns protective conditions under Section 44 b, where the municipality may participate as a participant of the proceedings or the body concerned. It also involves limiting or prohibiting public access to national parks or their part if there is a potential of damage to the territory (excessive visitation, etc.) – after consulting with the municipalities concerned by a measure of a general nature[145].

For these reasons, we must add that under Section 84 of the NNLPA, the NPA may, of their own initiative or upon a proposal after the held proceedings, change or possibly annul their issued decision or measure of a general nature under the conditions under letters (a) to (e),(1) of the stated provision. Even in such case, the municipality will participate as a participant or the body concerned.

4.4 Conclusion

The legislation governing "national parks" has undergone fundamental changes which also concern municipalities found within their territorial district. Indirectly – by virtue of their ties to the municipal territory – these municipalities are affected in principle by each change of the amended legislation of national parks. The paper discusses the manners in which municipalities participate in nature conservation in national parks and what changes to the legislation regulating national parks, upon the given method of participation, the municipalities must reflect after 1 June 2017 (from establishment of national parks, or changes and revocation of this special protection, through individual methods of their protection – basic and further protective conditions, quiet zones, zoning, principles of care for national parks, the visitor rules, exceptions, etc.). Pursuant to the text

145 The provisions of Section 64, Section 78(3)(l) of the NNLPA.

of the legislation, preference was given to municipal self-government over nature conservation, by establishing the criterion of "municipal territory" upon establishment of protective conditions of national parks or reduction of such conditions. When negotiating the methods of conservation of national parks issued in the form of a measure of a general nature, municipalities hold the position of the body concerned. The same applies for changes and annulment of such measures of a general nature. The NPA is first obliged to negotiate with them over the draft of such a measure of a general nature. Though this was indicated as the most fundamental step towards strengthening the role of municipalities, by interpreting Section 172(1), Section 136 of the Code of Administrative Procedure, affected municipalities would come into the same position as the body concerned without the need for explicit regulation in Section 71(4) of the NNLPA (because in principle, a measure of a general nature in nature conservation in the territory of a national park, though indirectly, always concerns the rights of the municipality to self-government). So the key rather is the growth in use of the measures of a general nature in the framework of this special protection of nature. Municipalities continue to participate in special protection of nature in general, possibly in a qualified form by means of representatives delegated in national park councils.

Fulfillment of the aim of the amended legislation, specifically assuring stability and permanently sustainable development of municipalities, as well as the "communal word" upon deciding on national parks, is sufficiently anchored on the legislative level. Though the amended legislation attempts to alleviate the conflicting tendencies of the interest in nature conservation and the interest of municipalities, this concerns only sensitive competitive interests that it can only assess the quality of this legislation after being put into practice.

5 NATURAL PARKS – POSSIBILITIES AND LIMITS IN THE SYSTEM OF INSTRUMENTS FOR THE PROTECTION OF NATURE AND LANDSCAPES FROM THE PERSPECTIVE OF THE LAW

5.1 Introduction – Natural Parks as Part of System of Instruments for Protection of Nature and Landscape

Natural parks have a specific position in the system of instruments for protection of nature and landscape.[146] The lawgiver has created the legal institution of natural park to **protect the character of landscape**.[147] It became part of the Czech legal order pursuant to Nature and Landscape Protection Act, based in particular on Section § 12, Para 3, NLPA. It is, however, important to emphasize that before the adoption of the Nature and Landscape protection Act the so-called rest areas had similar (but not exclusive) functions.[148] The lawgiver, therefore, decided to transform the legal structure of rest areas into natural parks.[149] As a result, there are two types of parks in the Czech Republic. They can be distinguished according to their origin; the first type being the parks that emerged from the transformation of the rest areas, the second type being the parks which were founded[150] according to the provisions set forth in the

146 The term "landscape" is defined in § 3 Para. 1 of NLPA. According to it, the landscape is a "*part of the Earth's surface, with a characteristic relief, formed by a complex of functionally integrated ecosystems and elements of civilization.*"

147 The term "landscape character" is not defined in the Nature and Landscape Protection Actas one of the basic terms in § 3 Para. 1 of NLPA. It is found directly in the provision of § 12 Para.1 of NLPA, which deals with protection of the landscape character and with establishing the institution of natural park. According to it, the landscape character is a "*natural, cultural and historical character of a place or area*".

148 The expert literature, including comments on the Nature and Landscape Protection Act, deals with rest areas while emphasizing their *ex lege* transformation into natural parks.

149 See § 90 Para. 10 of NLPA.

150 The term "founding" (in the sense of natural park) is for us parallel to the term "establishing" (in the context of the environment mentioned in the Nature and Landscape Protection Act when dealing with specially protected areas). By using the term "founding", the lawgiver, in our opinion, wanted to express the fact that the natural park is a different thing and an instrument of general protection of the environment and landscape. In contrary, the specially protected area is a special instrument of a special territorial protection of the environment.

Nature and Landscape Protection Act[151]. As for the parks founded according to the provisions of the Nature and Landscape Protection Act, it is necessary, with regard to the development of public administration in the Czech Republic, to distinguish natural parks founded by generally binding ordinances or regulations of district authorities, and those founded by regulations of regional authorities after the district authorities seized to exist in the Czech Republic[152].

Most of the sources[153] dealing with protection of landscape character mention natural parks only marginally. The same applies to judicial decisions concerning landscape character, significant landscape components, planning, and granting planning permissions. This fact has inspired the authors to deal with the topic of natural parks in the Czech Republic. In order to do so, the authors contacted, among others, all the regional authorities in the Czech Republic and the Prague City Hall, asking for up-to-date information on natural parks within their territories.[154] Here we should point out that there are currently 153 natural parks in the territory of the Czech Republic, and the founding of 13 more parks and the expanding of 5 of the existing parks is under consideration – this only confirms the fact that founding a natural park is an important nature protection instrument. For this reason, we believe that special attention should be paid to whether the legal regime (regulation) of the natural park is designed properly.[155] Although it might seem

151 For the process of the founding of natural parks – see more in subchapter 5.4.3.

152 District authorities in the Czech Republic were cancelled on 31 December 2002.

153 Compare, for example KNOTEK, J. Ochrana krajinného rázu [online]. In: *Fórum ochrana přírody*. Available at: http://www.forumochranyprirody.cz/ochrana-krajinneho-razu; STEJSKAL, V. *Zákon o ochraně přírody a krajiny. Komentář.* Praha: Wolters Kluwer, 2016, p. 576. ISBN 978-80-7552-229-0; MIKO, L., BOROVIČKOVÁ, H. et al. *Zákon o ochraně přírody a krajiny. Komentář.* 2nd ed. Praha: C. H. Beck, 2007, 607 p. ISBN 978-80-7179-585-8; PEKÁREK, M. et al. *Zákon o ochraně přírody a krajiny (komentář).* IURIDICA BRUNENSIA, 1999, 1995 p., pp. 35–36. ISBN 80-85964-17-1; VOREL, I., KUPKA, J. *Aktuální otázky ochrany krajinného rázu* [online] ČVUT in Prague, p. 183. ISBN 978-80-01-04537-4. Available at: http://www.krajinnyraz.cz/KuKr2010/

154 Information on natural parks, their founding acts and plans for the possible founding of new natural parks were provided on the basis of a request for information according to the Act on the Right to Environment Information, § 123/1998 Sb., as amended. The information was provided by all the regional authorities and the city hall of the Capital city of Prague. The information was used by the authors for the writing this text. They plan to make use the information in their further professional activities. Here, the authors would like to express their gratitude to all the information-providing entities.

155 When dealing with natural parks, we do not analyze in detail the terms of landscape, landscape character, or the assessment of landscape character. For an analysis of these term, se the sources mentioned above.

that natural parks are an instrument of general territorial protection on the "level of regions", it is evident that in the general context they affect the landscape character of the whole of the Czech Republic. There is no doubt that they also contribute to the quality and diversity of the European landscape, and also to fulfillment of the aims set by the European Landscape Convention.[156]

5.2 The Notion, Objective and Function of Natural Parks

The notion of natural park which the lawgiver chose for designating a territorial instrument of nature protection was supposed, in our opinion, to emphasize the "beauty and aesthetics" of the territory, hence the word "park"[157], the attribute "natural" reflecting a direct connection with nature protection. In our view, classifying natural parks as part of the general territorial protection is suitable as it can properly complement the network of especially protected areas and the Natura 2000 network.

While it is necessary to consider the protection of landscape character as the main objective of natural parks, there is no doubt that it has additional functions in the system of nature and landscape protection. In order to justify the existence of a particular natural park, it is crucial that the territory where the park was/is/should be/ located has a landscape with significant aesthetic and natural values. Of course, such features may also be found in the territories that are, for many other reasons, proclaimed to be specially protected areas – this mainly concerns large-scale protected territories (protected landscape areas, national parks). Logically, no natural parks are proclaimed within those territories (the lawgiver specifically establishes this in § 12, Para 3, NLPA). However, a very close local connection may exist between territories with the founded natural parks and the specially protected areas (primarily the large-scale areas). One can thus imagine a situation, when a large-scale

156 A note of the Ministry of Foreign Affairs No. 12/2017 which alters and complements the note of the Ministry of Foreign Affairs No. 13/2015, which proclaims the new wording of the Czech translation of the European Landscape Convention, adopted on 20 October 2000 in Florence, which replaces the Czech translation of the Convention proclaimed under No. 13/2005.

157 The term "park" in relation to greenery is usually used, for example, for classic parks in cities or forest-parks.

specially protected area could be connected to the territory of a natural park. As an example, we can mention the situation on the territory of the Pilsen Region[158] after the establishment of the protected landscape areas of Český les and Brdy, when parts of the original natural parks of the same name were included in the territory of the protected landscape areas, and beside the newly created protected landscape areas, there remained the territories of the existing natural parks – The Natural Park of Český les-Domažlice, The Natural Park of Český les-Tachov, and The Natural Park of Brdy.

As for the legal regime of protection, a significant relationship can also arise from the territorial connection of the natural parks and the Natura 2000 network, especially where a territory included in the Natura 2000 network does not have the status of a specially protected area.

As already mentioned above, natural parks can and do fulfil several other functions – we shall mention at least the functions of recreation, education and scientific research.

From the perspective of the general territorial protection, there is a complicated relationship among individual significant landscape components (regardless of whether existing *ex lege* or being registered[159]) which are found in the territory of natural parks. The reason for that is, first of all, that both of them are institutions of general nature protection. Secondly, it is the fact that both have a direct relationship with the landscape and landscape character. We suppose that it can be generally stated that any significant landscape component has its own importance and contributes to the overall character of the landscape. However, not every significant landscape component plays this role to the same

158 The information was provided by the Regional Office of Pilsen Region based on the request for providing information according to the Act on the Right to Environment Information, § 123/1998, as amended.

159 A significant landscape component (SLC) is defined in § 3 Para 1, Sub-Para b) NLPA as "*environmentally, geomorphologically or aesthetically valuable part of the landscape, creating a typical appearance of the landscape, or contributing to its stability.*" SLCs are divided into two levels: SLCs "by law" – all the forests, bogs, water streams, ponds, lakes and valleys areas; "registered' SLCs – these can be other parts of the landscape such as wetlands, step lawns, draws, permanent grasslands, deposits of minerals and fossils, artificial and natural rock formations, outcrops or exposed areas, or even valuable areas of vegetation in built up areas, such as historical gardens or parks (historical gardens or parks can also be immovable monuments under the Act 20/1987 on State Monument Care, as amended). Other parts of the landscape can also be registered as SLC, but a specially protected part of the environment is excluded from this definition.

extent. The legal instrument for the protection of significant landscape component from interventions that could endanger or weaken it is the binding opinion of a NPA, pursuant to § 4, Para 2, NLPA.

The legal instrument for the protection of landscape character relating to the placement and approval of constructions as well as other activities that could decrease or affect the landscape character is the necessary approval of a NPA[160]. If a territory with the landscape character of high aesthetic and natural values is in question, the exploitation of the territory of the natural park is restricted in order to protect the character of the landscape. This is set forth in the founding act of the natural park. Typically, these are "exemplary" (demonstrative) activities the implementation of which requires the consent of the NPA. In our opinion, it could be deduced from what was mentioned above that using the institute of natural park fulfills the function of rationality and transparency, especially in the decision-making processes of the Public Building Law and the Mining Law.

The problems relating to the application of § 4, Para 2, and § 12, are also demonstrated in the relevant case law which is discussed in detail in subchapter 5.6.

Last but not least, it should be mentioned that the territories of natural parks contain diverse plant and animal species and trees. Due to the set "limitations" of exploitation of natural parks, they are also able to protect these species. It is also important to emphasize the relationship between the institute of natural park, as an instrument for protection of landscape character, for the protection of civilization and cultural values, and the buildings that are situated on the territory of natural parks and that may be subject to conservation.

5.3 Natural Parks in the Territory of Czech Republic, in Individual Regions, and in the Capital City of Prague

It is evident from the information received from the regional authorities and the Prague City Hall that there are currently 153 natural parks in the territory of the Czech Republic, several of them being created by transformation

160 The consent of the nature protection authorities has – when it is the basis for final decision – the character of a binding opinion; if it were not followed by the final decisions, the consent would have the character of a decision.

from the original rest areas. The transformation into the current natural parks pursuant to the Nature and Landscape Protection Act and the founding of new natural parks is complicated by the complexity of the procedural rules (for more info – see subchapter 5.4.3). Just to make it clear from the start, the number of natural parks in individual regions and the capital of Prague and the number of plans for founding new natural parks is given in the table below. In the new development plans, the abbreviation "PTD" stands for the regions in which such plans (proclamations) are incorporated into the principles of the territorial development of the given region according to the information provided.

Natural parks in the Czech Republic – table:

Name of region	Number of existing natural parks	Plans (proclamations) for founding new natural parks
South-Bohemian Region	14	3
South-Moravian Region	20	
Karlovy Vary Region	11	
Hradec Kralove Region	5	
Liberec Region	3	
Moravian-Silesian Region	5	3 (PTD)
Olomouc Region	6	
Pardubice Region	10	4
Pilsen Region	25	1 (PTD)
Central Bohemian Region	20	
Ustí nad Labem region	7	
Vysočina Region	9	2 (+ 5 suggestions for extension)
Zlin Region	6	
The City of Prague	12	
Total:	**153**	**13**

It can be seen from the obtained data that, as to the number of the existing natural parks, there are quite significant quantitative difference among the regions. An analysis of this situation should deserve, according to the authors, a discussion at the national level.

For the purposes of this chapter, we consider it appropriate to specifically highlight certain facts that emerged from the data provided.

From the provided founding acts it is worth emphasizing that some selected regions consider "to re-register" the original rest areas later transformed *ex lege* into natural parks by regulations of regional authorities, the aim of which is to revise the content of the original founding acts and to specify the scope of limitations in their territories. Such a complex "re-registration" of the original rest areas into natural parks was carried out on the territory of the capital city of Prague, where founding all of 12 natural parks by a single regulation of the capital city of Prague (No. 10/2014) was chosen a preferable manner.[161]

Furthermore, we take it as relevant (even if mentioned explicitly only for the territory of a single region – the Vysočina Region) that extending of some already existing natural parks is under consideration.

It was not evident from the information provided whether some of the regional authorities or the capital city of Prague are considering cancellation of a natural park as whole "without a replacement", i.e. in the form of returning the territory into the ordinary territorial regime. Parts of natural parks (for example, in the Pilsen region) were cancelled in the situation when the "cancelled' part of the natural park became part of a specially protected area.

It is evident from the content of the information provided that the nature protection authorities at the regional level are considering a revision of natural parks in their territories. We believe that such a revision should be performed in connection with the territorial planning processes and during the preparing and updating of the Nature and Landscape Protection Conceptions. Such conceptions are worked out by the regional authorities in cooperation with the Ministry of Environment according to § 77a, NLPA. We believe that the revision should result in the following conclusions in respect to the parks: 1) maintaining their current status; 2) extending the territory of the selected natural park; 3) founding new natural parks; 4) cancelling the entire natural park, or a part of it, due to a territory being

161 Regulation No. 10/2014 on founding natural parks on the territory of the capital city of Prague. Available at: http://www.praha.eu/file/1864583/narizeni_c._10.pdf

appropriate to be included into the category of a specially protected area; 5) cancelling the natural park "without replacement" and returning the territory into the "ordinary" regime.

5.4 Founding Act

5.4.1 Legal Character of Founding Acts

The legal character of the founding acts of natural parks corresponds to the period when these acts were adopted. Founding acts on natural parks dating from the period before the Nature and Landscape Protection Act came in force are generally binding regulations of the district national committees existing at that time. Founding acts on natural parks established after the Nature and Landscape Protection Act coming in force have the legal character of ordinances of the district authorities, and, finally, natural parks established after the cancellation of the district authorities have the legal character of regulations of the regional authorities and of the capital city of Prague. In practice, a nature and landscape protection authority carries out the so called "re-registration" of natural parks founded in the past either by generally binding regulations of the district national committees or ordinances of the district authorities in the form of a regional regulation. As mentioned above, this solution has been carried out on the territory of the capital city of Prague by the regulation No. 10/2014. This regulation replaced all the existing founding acts. As for the future development, it would be appropriate to gradually unify and revise the individual natural parks on the territory of the respective regions and "re-register" them in the form of a regulation of the region. However, we are aware of procedural processes that would be associated with such a step. Therefore, we understand the fact that this practice is not adopted everywhere.

As for the founding act having the form of a regional regulation, we believe that this is an appropriate form which should be maintained, having in mind that in the Czech legal order this alternative usually take precedence over

the using of normative acts.[162] We are convinced that the form of a normative act is appropriate for specially protected areas and for natural parks as an instrument for the general territorial protection of nature. This, however, applies only to the situation (see below) when during the process of founding (or, in specially protected areas, proclaiming) the interests of the persons concerned are adequately taken care of (namely, municipalities and land owners).

5.4.2 Content of Founding Acts

The contents of individual founding acts differ. An important distinguishing criterion for assessing their content is, once again, the time of the adoption of the founding act. All founding acts include the definition of a particular territory and formulation of the goal, which always means preserving the biological, landscape and aesthetic values of the area, and enabling its use for recreation and education. The founding acts referring to the original rest areas (subsequently, transformed *ex lege* into natural parks) usually contain rules aimed at achieving these goals. The rules might be divided into the following groups: a) rules on limitation of construction; b) rules on agricultural and forestry management; c) rules on the conduct of tourist or other persons entering the area; d) rules on the movement of motor vehicles; e) rules on sports activities. Activities under categories c), d) and e) are, in the opinion of the authors, very similar to those mentioned in the provisions of the "Visitor Rules" of the specially protected areas. Some founding acts include a building ban. The legal scope for this solution was set by the wording of the former provision of § 33, Para 3, Act No. 50/1976 on Land Use, Planning and Construction Rules (Building Code). According to this Act, national committees, which were the building authorities, and later, until the end of 2002, district authorities, could proclaim a building ban by a generally binding regulation. In practice, this done in such a way that the building ban became part of the founding act.

162 The legal nature of the founding acts of specially protected areas, also with regard to the material concept of measures of a general nature, is discussed by Lenka Bahýľová, among others. Her conclusions are useful also for founding acts of natural parks. Cf.: BAHÝĽOVÁ, Lenka. *Opatření obecné povahy a řešení střetů zájmů v území* [online]. Brno, 2013 [cit. 3 July 2017], pp. 143–145. Available at: http://is.muni.cz/th/100388/pravf_d/. A dissertation. Masaryk University, Faculty of Law. Supervisor Milan Pekárek.

Currently, considering the changes in the Public Building Law, we must assume that founding acts of natural parks in the form of regional regulations could, to our knowledge, restrict the exploitation of the territories of natural parks, as per § 12 Para 3 NLPA. We consider the establishing of "absolute" bans problematic. If these bans should be part of a regional regulation, they could only be included, according to us, in a situation where they would have support of other legal acts (normative and mixed). As an example, one can imagine the "ban" of a construction which would result from the content of the content of the building ban in the sense of the provisions of § 97–99, Act No. 183/2006 on Land Use Planning and Construction Rules, as amended (hereinafter referred to as the "Building Code"), which is now issued in the form of regulations of a general nature[163]. The situation can be dealt with in practice in such way that the founding act will contain a rule that a construction or the completion of a construction in the territory of the natural park is only allowed if it is in accordance with the territorial planning documentation, or other relevant territorial planning instruments.

5.4.3 On the Process of Adopting the Founding Acts in the Form of Regulations of Regional Authorities

The Nature and Landscape Protection Act does not contain (unlike the procedure for proclaiming specially protected areas) special rules regarding the procedural steps associated with the intention of establishing a new natural park. Thus, the general rules for issuing regulations of the regional authorities and of the capital of Prague shall apply, which are derived from the Act on the Regions and the Act on the Capital City of Prague. The question is whether it would not be more appropriate to consider, *de lege ferenda* (according to the designed law), the evidently "analogous" implementation of the provisions proclaiming specially protected areas. It is possible to support this opinion by the fact that, in addition to the regulations on founding natural parks, the regional authorities issue regional regulations on the establishment of natural reservations and natural monuments as specially protected areas. A counter-argument to these suggestions might be that this

163 The building ban is discussed in more detail in subchapter 5.6.2.

would eliminate the difference between natural parks as instruments of the territorial general nature protection and specially protected areas. However, it should be kept in mind that the absence of procedural rules for the proclamation of natural parks can lead, as a consequence, to the frustration of the proclamation purpose. This may easily happen, since "the persons concerned" – e.g. municipalities, landowners – can modify their attitudes during the process of creating a regional regulation according to the general rules until they are be able, for example, to "veto" the founding of a new natural park or to modify the existing ones. Transparency of the process, e.g. with an explicit grounding of the institute of objections available for the affected municipalities or land owners could, in our opinion, contribute to handling situations of conflicting interests of the persons concerned and thus to the successful implementation of the intention to found a natural park.[164]

5.5 Register of Natural Parks and Information about them

Unlike the specially protected areas, the current legislation does not contain rules on the registration of natural parks and information about them. Individual regional authorities and the capital city of Prague provide different information available via the Internet. The founding acts are not always available neither the characteristics of the natural park. It should be appreciated that in the geoportals of individual regions and the capital city of Prague the maps of natural parks can be found. We believe that attention should be paid to the register of the natural parks, both at the level of the individual regions and the capital of Prague, and at the level of the Czech Republic as a whole. We are convinced that in this respect it is not necessary to wait for a possible amendment of the Nature and Landscape Protection Act. The method and the content of the register, as far as its unification is concerned, could be guided methodically by the Ministry of Environment – for example, by issuing a methodological instruction. In our view it would

164 In order to support these views, it is worth mentioning that some problems with realization of the plans to found natural parks were mentioned also in the replies to our request for providing information on natural parks. Among others, they were from the Vysočina Region and the Pilsen Region.

be ideal if there were a unification of the manner and the content of the registration (a minimum one) on the websites of individual regions and the capital city of Prague. Also, it would be worth considering the possibility of establishing a "central" register through the Agency for Nature Conservation and Landscape Protection. Such a unified "regional" as well as "national" register of natural parks could be expanded with further data (the written data, the turnover information, maps, etc.) which would characterize individual nature parks in more detail.

5.6 Relationship to the Processes under the Building Code in the Light of the Selected Judicial Acts of the Administrative Courts

The following subchapter aims to define the regulation of the protection of natural parks in connection to processes of within the Public Building Law (also taking into account the limitations and conditions arising directly from the founding acts of natural parks). At the same time, its main purpose is to analyze the relatively extensive case law of the administrative courts that deals with the problematics of territorial planning, localization of constructions and Building Codeivities in the territory of natural parks. Our goal is to provide generalizing conclusions arising from the case law related to this phenomenon.

5.6.1 Natural Park as Part of Territorial Planning Process

This part deals with how (if at all) the natural parks are defined in various territorial planning documents and what their role is in individual territorial planning processes.

In the **territorial development policy** (as revised in the 2015 update[165]), we do not find a single explicit mention of the existence of natural parks. This is obviously due to their character (see the previous text of this chapter) and to the nature of the territorial development policy as an instrument that sets out the Czech Republic priorities for territorial planning. The

165 *The Territorial Development Policy, as amended No. 1.* [online]. Ministry for Regional Development. 2015 [cit. 19 July 2017]. Available at: https://www.mmr.cz/getmedia/e7ff2b3b-b634-425f-8fa5-6699b8d2f755/2015_VI_8_cistopis_apur_1.pdf?ext=.pdf

planning ensures sustainable development of the territory and defines areas with increased demands for territorial changes which, due their importance, go beyond the boundaries of one region[166]. This is not the case of natural parks. On the other hand, it should be noted that the protection of some of the natural parks will be immanently linked to the protection of the so-called specific areas. Those areas are defined within the policy (among others, the Specific Area of Šumava, the Specific Area of Beskydy or the Specific Area of the Jeseníky Mountains-Králický Sněžník). In the case of these areas it is mentioned that during the decision-making and assessing intentions for territorial changes it is necessary to primarily bear in mind a better and more sustainable use of the natural conditions for the development of the territory, which will undoubtedly include protection of natural parks. Despite this, the explicit protection of natural parks is not mentioned in the territorial development policy.

A different situation, however, is in the case of the **Principles of Territorial Development** of individual regions. These policy documents explicitly count with the existence and protection of natural parks. As an example, we would like to mention the Vysočina Region[167]. This region, in its development principles, clearly defines that landscape values are valuable parts of the cultural landscape including the natural and cultural components while explicitly mentioning natural parks. The protection of the natural parks at this level is then ensured in such a manner that these principles establish, in connection with the protection and development of landscape values, the principle of preserving the identity and typical features of the territory, including natural parks, from destruction. This is then achieved by ensuring the protection of positive features of the landscape character of the given territories, and of the scale and the structure of the landscape, including positive relations with the surrounding territory. In addition, the protection of natural

166 Territorial Development Policy of the Czech Republic – general information [online]. *Ministry for Regional Development*. 2017 [cit. 19 July 2017]. Available at: https://www.mmr.cz/cs/Uzemni-a-bytova-politika/Uzemni-planovani-a-stavebni-rad/Koncepce-Strategie/Politika-uzemniho-rozvoje-Ceske-republiky

167 *Principles of territorial development of the Vysočina Region* [online]. Vysočina Region. 2016 [cit. 19 July 2017]. Available at: http://extranet.kr-vysocina.cz/download/odbor_uzemni/pravni_stav/I_ZUR_pravni_stav_po_vydani_akt/1_Textova_cast/II_ZUR_Vysocina_PRAVNI%20STAV.pdf

parks includes the protection of the landscape character with regard to the placement of high-rise buildings, which could cause visual degradation of typical views from inside of the given areas onto the surrounding scenery, or of the landscape sceneries within the given area. It can be seen from the text that the protection of natural parks is very closely linked to the protection of the landscape character. This is typical of the protection of natural parks (this will be discussed further in the text). It should be remembered that the existence of natural parks is obviously linked to the graphical part of the Principles of Territorial Development, where natural parks are clearly defined in the maps. The Principles of Territorial Development of the Vysočina Region also set other territorial planning tasks for the "lower" level of planning documentation, i.e. in the land plans, which is related with the protection and development of landscape values, including national parks. In this way the protection of natural parks is ensured at the level of the territorial planning of individual municipalities.

Similarly, the existence and protection of natural parks is ensured (of course, with certain deviations) also in the Principles of Territorial Development of other regions. Interestingly, some Principles of Territorial Development (e.g. those of the Moravian-Silesian Region[168]) include, at the level of the regional conceptual documentation, the obligation not to allow the expanding of the existing building sites and the emergence of new ones for recreational purposes. At the same time, there is a ban on further constructions in these locations (this applies to the Podbeskydí Natural Park). As can be seen from the examples above, just for this reason it is necessary to monitor the conditions of protection of all natural parks already at the level of the Territorial Development Principles of the individual regions. Nevertheless, the limitations mentioned above should be undoubtedly reflected in the territorial plans of individual municipalities.

Actually, we could find particular conditions for protection of natural parks in terms of territorial planning in the **Land Exploitation Plans** issued

168 *Principles of territorial development of the Moravian-Silesian Region* [online]. Moravian-Silesian region. 2015 [cit. 19 July 2017]. Available at: http://www.msk.cz/assets/uzemni_planovani/01_e_ochrana_hodnot.pdf

by individual municipalities[169]. They include certain conditions such as some bans (related to processes of the Public Building Law; for example, a ban on the placement of buildings and a building ban in natural parks). An appropriate ruling, in our opinion, was made by the Supreme Administrative Court on 28 January 2015, No. 6 As 155/2014-73, on the Territorial Plan of the Municipality of Petrov u Prahy: *"This municipality is also a part of a natural park, and it contains two significant locations on the European level, therefore, it would be correct to emphasize in the territorial plan the protection of nature and the preservation of the existing character of the territory and suppress earlier plans for mass construction*." In our opinion, the Supreme Administrative Court therefore correctly emphasized the importance of the existence of natural parks as a specific regulating instrument in the territory, which could, in justified cases, lead to a building ban in the territory of a natural park through the territorial plan. Further, according to the decision of the Regional Court in Prague of the 17 October 2014, No. 50 A 7/2013-162[170], in the case of defining a building plot in the territory of the natural park (the Natural Park of Hřebeny), under the situation where the defining of such a plot is completely inconsistent with the reasons for which the natural park was established and the landscape character is put in danger, and, moreover, in the situation when such a building plot is not necessarily needed for the municipal development – there is a need to consistently overcome the above mentioned facts and it is necessary to consider consistently the existence of the natural park in relation to the definition of the building plot. On these grounds, inter alia, the Regional Court in Prague cancelled a part of the territorial plan of the municipality of Černolice for the lack of a proper explanation. Similarly, the decision of the Municipal Court in Prague of the 26 April

169 The regulation is then found in Annex 1 of the Ordinance No. 500/2006, on territorial analytical documents, territorial planning documentation and on the recording methods of territorial planning activities, as amended. It sets forth that the natural park is an obligatory observed phenomenon in the materials for an analysis of the sustainable development of the territory. The issue of sustainable development of the territory is discussed in detail for example in PRŮCHOVÁ, I., ŽIDEK, D. Ochrana životního prostředí v procesech podle stavebního zákona. In: JANČÁŘOVÁ, I. et al. *Právo životního prostředí: Obecná část.* 1st ed. Brno: Masaryk University, 2016, 716 p., pp. 441–456. ISBN 978-80-210-8366-0.

170 The judgment was made on the basis of the binding legal opinion of the Supreme Administrative Court expressed in the decision of 28 August 2014, No. 9 Aos 2/2013-118.

2013, No. 9 A 113/2012-163 (confirmed by the decision of the Supreme Administrative Court from the 26 February 2014, No. 6 Aos 2/2013-95) cancelled a change of the territorial plan of the capital of Prague. This plan was supposed to enable the location of a large residential area of about 27 hectares in a non-building area in proximity to the existing residential area of Uhříněves, which is a part of the Botič-Milíčov Natural Park. The project included the construction of approximately 1,200 flats for about 4,000 people and 1,800 parking spaces nearby. In that matter, the administrative courts stated that the justification for the change in the land exploitation plan in question[171] was, considering the general priorities of respecting the conditions of the nature and landscape protection, very inadequate as it was only a description of the situation, not a statement of reasons that had led to the change in question, taking into consideration protection of natural conditions (including the natural park).

From the above mentioned legal opinions we may make two generalizations on the definition of natural parks in the land exploitation plans. First, the judicial practice of the administrative courts *a priori* does not exclude a building ban in the territory of natural parks at the level of the land exploitation plans. Second, when defining a building plot in the territory of a natural park with a regulated land exploitation plan, this has to be carefully and reasonably justified by taking into account the founding acts of the individual parks and the opinions of the relevant authorities.

5.6.2 Natural Park in the Territorial Decision-making Processes and in the Building Permit Procedures

Restrictions in the Founding Acts of Natural Parks

As we have already mentioned in the previous subchapters, various restrictions and bans may be specified in individual founding acts of natural parks. They limit the activities that legal persons are allowed to carry out in natural

171 Compare the paragraph explaining the change: *"The decision on the new territorial arrangement is firmly connected with the functioning of natural park which cannot be endangered. The change has a contradictory orientation of the conceptual concept in the organization and use of the territory concerned, it consolidates the trends of urban development and weakens the functions of natural environment. The location is part of the urban development axis Měcholupy – Uhříněves – Kolovraty – Říčany. However, at the same time it is situated in the territory of the established natural park Botič – Milíčov".*

parks. Bans may also include such ones that have a direct connection to processes of the Public Building Law.

The most typical restriction is that the permission and placement of new buildings can only be occur with the consent of a NPA, and founding acts often refer to the provision of § 12 NLPA (as an example, cf. the regulation on the founding of the Doupovská Pahorkatina Natural Park). In such a case (and, in our opinion, also in the case of lack of an explicit reference to the provision of § 12 NLPA – see e.g. the ordinance on founding the Natural Park of Džbán, or the regulation on founding and defining the Natural Park of Želechovické paseky), the NPA will grant a consent pursuant to the provision of § 12 NLPA (for more details, see the further text of the subchapter). The consent given pursuant to § 12 NLPA differs from the "ordinary" consent in the fact that the NPA must, in this case, explicitly deal with the existence and conditions of protection of the natural park in question. Nevertheless, when issuing the consent, the NPA may be bound by other legal restrictions resulting from the founding act. One of such typical limitations is that new constructions "*must not be in conflict with the purpose of the natural park"* (for example, see the regulation on founding of the Natural Park of Dolní Poohří). When giving a consent in such case, the NPA must evaluate and specifically justify the reason for acceptability of the building plan, taking into consideration the purpose of the natural park in question. A certain exception to the mentioned provision of the founding act is a situation when a consent is not required. This applies to cases when the plan is in accordance with an approved land exploitation planning documentation (for example, see regulation on founding the Natural Park of Doupovská Pahorkatina). If this is the case, the influence of the plan on the natural park will not be assessed separately, which, however, will not affect in any way, in our opinion, the assessment of the plan from the viewpoint of the "general" landscape character pursuant to the provision of § 12 NLPA (for more details, see the following text of the subchapter). The necessity of compliance with the approved land exploitation planning documentation is then also expressed in other founding acts of natural parks (compare, for example, the regulation on founding the rest area of Balinské údolí – today a national park [the authors' comment]).

Another restriction related to the processes of the Public Building Law is the establishing of the so-called building ban in the territory of the natural park. This creates a situation when the founding act bans both placement and permission of future constructions. These building bans can be then *de facto*[172] obligatory for new constructions (as it is the case of the regulation on founding natural parks in the territory of the capital city of Prague establishing 12 natural parks[173]), or they may be conditional, which is typically regulated in the founding acts of natural parks in the manner that it is prohibited to place or permit new buildings with the exception of those proposed in accordance with the previously approved land exploitation planning documentation (compare e.g. the regulation on establishing conditions in the Natural Park of Písecké hory). The conditional nature of the building ban may also be expressed by banning the placement and permit of only certain types of constructions. An example of this is the regulation on founding of the Natural Park of Bohdalovsko which establishes that "*no new industrial, mining or other facilities which would interfere with the natural environment of the park can be situated on the territory of the natural park.*" Or, as in the case of the Natural Park of Střední Pojihlaví, the building ban established for facilities serving the individual or mass recreation. For the sake of completeness, please note that the Building Code also recognize the possibility of obtaining an exception to the building ban – according to the provisions of § 99 Para 3 of the Building Code.[174]

172 Of course, certain exceptions are always possible: for example, in the regulation on founding natural parks in the territory of the capital city of Prague, it was set forth that *"No new buildings shall be placed in the territory of natural parks with the exception of buildings, constructions and other measures for agriculture, forestry, water management, mineral extraction, nature and landscape protection, for public transport and technical infrastructure, for reducing the risk of ecological and natural disasters and for eliminating their consequences, and further more with the exception of expanding of building as described in Paragraph 3."* Paragraph 3 then establishes that *"In the territory of natural parks, it is only allowed to expand the existing residential unit in such a way which is in accordance with valid planning documentation and under the condition that it should not impair the character of the location and it shall completely respect its architectonic and urbanistic values and cultural identity, as well as its distinctive landscape and natural features. This also includes the existing horizons and, typical silhouettes of individual landscapes, and similar place and territorial characteristics. The residential unit is any unit which is closed and spatially separated from other units."*

173 These are the natural parks: Botič – Milíčov, Drahaň – Troja, Hostivař – Záběhlice, Klánovice – Čihadla, Košíře – Motol, Modřanská rokle – Cholupice, Prokopské and Dalejské údolí, Radotínsko-Chuchelský háj, Rokytka, Říčanka, Smetanka and Šárka – Lysolaje.

174 For details, see, for example, ŽIDEK, D. Výjimky jako specifický nástroj při ochraně životního prostředí. In: *České právo životního prostředí: časopis České společnosti pro právo životního prostředí*, Praha: Česká společnost pro právo životního prostředí, 2016, Volume 16, No. 3, pp. 11–29. ISSN 1213-5542.

The legality of the building bans was also reviewed by the Supreme Administrative Court. By its decision of the 22 April 2011, No. 5 Ao 2/2011-30 the Court first cancelled the 1986 regulation on the building ban in the rest area of Hostýnské vrchy (today a natural park – the authors' comment) emphasizing the temporary nature of the building ban[175]. In this decision, the Supreme Administrative Court emphasized that "*The issuing of the building ban is only possible in a situation where the area concerned needs to be maintained in terms of building for a transitional period of time in a certain state for the future use according to the land exploitation planning documentation that is being prepared., if the preparation of this documentation has already progressed at least to the stage of the approved assignment, or according to another decision or measure on the use of the territory. […] The building ban in question, as proclaimed by the Regulation of the District National Committee in Kroměříž, is therefore contrary to the substantive law since it does not meet the requirements on the temporary nature of the building ban resulting from the provisions of the Building Code (moreover, Art. 4 of the Regulation for the reason mentioned above is contrary to the constitutional order). In view of this fact, it was no longer necessary for the Supreme Administrative Court to examine this building ban in terms of the principle of proportionality."* Nevertheless, in its newer decision-making practice, the Supreme Administrative Court, in our opinion, correctly developed the legal opinion in its decision of the 23 February 2017, No. j. 2 As 197/2016-49, when stating: *"The material concept of the original institute of rest area shifted from a special building ban targeted at a relatively broad protection of specific areas to the institute of landscape protection with a strictly defined subject of protection, which is the landscape character. Similarly to other institutions of nature and landscape protection (with the exception of, for example, territorial system of environmental stability), it creates a protective regime for natural parks outside of land exploitation planning. Therefore, we cannot apply to it the same requirements as to the "regular" building bans. As the municipal court states, this is a protective regime meant to be permanent or a long-term one. […] If a regulation on founding of the rest area regulated the building ban beyond the protection of landscape character, it would*

175 The Supreme Administrative Court, in its decision, dealt also with the relationship of building bans issued according to the 1976 Building Code in the light of the Building Code of 2006 and stated that: *"If the building ban issued under § 33 Para. 3 of the Building Code of 1976 in the form of a generally binding regulation is to be valid in the situation when the 2006 Building Code is in force, it has to meet its requirements from the substantive law point of view."* Hereinafter we refer to the text of the relevant decision in more detail.

necessary to assess the regulation in this scope from the point of view of the requirements of proportionality and the limited time duration of the ban. Generally, in such case, the existence of a building ban is only possible for the necessary time needed to discuss and issue this land exploitation planning documentation. Otherwise, the character of the building ban would be completely contradicted as an exceptional and temporary measure (see the decisions of the Supreme Administrative Court of 23rd October, 2013, No. 4 Ao 9/2011-191, and of 21st February 2013, No. 4 Ao 8/2011-69) and taking over the regulation in the new regime of national parks would cause an undesirable preservation of the original regulation, the application of which would become not only non-systematic but, over time, disproportionate or even unconstitutional. In other words, a regulation of natural parks can be regarded as permanent only to the extent that it coincides with the objectives of the protection of the landscape character. In fact, it can still be a building ban but, in a specific regime, acceptable and desirable for the nature and landscape protection." We believe that it is therefore necessary to interpret the above mentioned court decisions as follows: it is not *a priori* excluded for the founding acts of natural parks to include a building ban (that could be of a long-term character). However, it is essential that the building ban is consistent not only with the objectives of the protection of natural park as such, but at the same time, that it also consistent with the goal of protecting the landscape character as a whole. In other words, establishing a building ban on the territory of a natural park must not be pointless and unjustified. On the contrary, it must be proportional and respect, among others, the ownership rights of individuals[176]. Such building ban must be justified by the protection of the landscape character. By this conclusion, the Supreme Administrative Court unambiguously interconnected the institutions of the natural park and the landscape character, which is also apparent in other parts of this text.

176 Cf. the decision of the Supreme Administrative court of 23 February 2017, No. 2 As 197/2016-49, according to which: *"Protection of nature and the landscape is a legitimate reason for restricting the owners' rights, which is reflected in a number of conceptual instruments, including the area-based territorial protection."*

Natural Park as Part of Landscape Character [177]

The protection of natural park in relation to processes of the Public Building Law is also ensured in situations when the founding act of the natural park does not have any provisions that would regulate in some way the protection of the natural park in relation to the Public Building Law processes. In simple terms, the founding act of the natural park does not limit in any way the placement or construction of buildings in the territory of the natural park. In such a situation, the protection of the natural park is ensured by the institution of general landscape character in the sense of the provision of § 12 Para 1 and Para 2 NLPA[178]. However, even in a situation where the founding act would have a special provision on the necessity of the consent of a NPA with the placement or permission of a building (see above), this does not mean that the "other" landscape character would not be considered further. On the contrary, in our opinion, it would lead to situations where the NPA, when granting its consent as per § 12 NLPA, would consider the interference with the landscape character of the natural park (also with regard to the founding acts) as well as other characteristics that form the landscape character. We believe that in such a case only one common consent or disagreement of the NPA is then sufficient according to § 12 NLPA. The provision of § 12 Para 4 NLPA deals with the assessment of landscape character in an urban environment, which will be discussed below.

As it is apparent from the wording of the relevant legislation, the placement (territorial decision) and approval of buildings (building permit) as well as other activities that could deteriorate or change the landscape character (including the removal of buildings) requires the consent of the NPA. Such consent shall be granted using the rules listed in the provision

177 The subchapter is based, among others, on the following publications: VOMÁČKA, V. Judikatura Nejvyššího správního soudu: Ochrana krajinného rázu. In: *Soudní rozhledy*, Praha: C. H. Beck., 2013, Volume 19, 11–12, pp. 385–389. ISSN 1211-4405; KNOTEK, J. Ochrana krajinného rázu [online]. In: *Fórum ochrana přírody*. Available at: http://www.forumochranyprirody.cz/ochrana-krajinneho-razu

178 The provision of § 12 Para 1 APN states: *"The landscape character, which is especially a natural, cultural and historical feature of a certain location, must be protected from activities that deteriorate its aesthetic and natural values. Interference with the character of the landscape, especially the placement and approval of buildings, may be carried out only with regard to preservation of significant landscape components, specially protected areas, cultural highlights, and harmonious standards and relations within the landscape."* The provision of § 12 Para 2 NLPA states: *"The approval of the nature conservation authorities is required for the placement of buildings which could impair or change the character of the landscape. Details for the protection of the character of the landscape may be specified by the Ministry of Environment in a generally binding regulation."*

of § 90 para 1 NLPA. If this consent is the basis for further decisions (typically under the Building Code, but also the Water Act or the Mining Act, etc.), it shall be granted in the form of a binding opinion according to the provision of § 149 of the Rules of Administrative Procedure. If this consent is not the basis for the decision, the consent shall be granted directly in the form of an administrative decision according to § 67 of the Rules of Administrative Procedure[179, 180]. It would be a mistake, however, to leave out the general premise expressed in the decision of the Supreme Administrative Court of the 28 December 2006 No. 6 A 83/2002-65) which is still valid and which rules that NPA shall be given the power to grant consent or disagreement with an intervention in the landscape character under these two conditions: the characteristics of the building can have an impact on the landscape character and, in addition, the building is to be located in a landscape characterized by landscape character. In our opinion, this is always (!) the case of the territory of natural park. This generally means that the consent or disagreement of the relevant authority is irrelevant if the nature and landscape protection act does not apply to specific legal relationships related to the building. This happens even when the building is placed in an environment that does not have any features of landscape in the sense of NLPA, and, therefore, has no landscape character[181]. But this, in our

179 STEJSKAL, V. *Zákon o ochraně přírody a krajiny. Komentář.* Praha: Wolters Kluwer, 2016, p. 115. ISBN 978-80-7552-229-0; MIKO, L., BOROVIČKOVÁ, H. et al. *Zákon o ochraně přírody a krajiny. Komentář.* 2nd ed. Praha: C. H. Beck, 2007, 600 p., p. 129.

180 Beware (in both the legal and verbal interpretations) of the overridden case law expressed, for example, in the decision of the Supreme Administrative Court of 28 December 2006, No. 6 A 83/2002-65, according to which: *"Granting or not-granting a consent by the nature and landscape conservation authority with the placement of a building that could deteriorate or change the landscape character (pursuant to § 12 Para 2 Czech National Council Act (*ČNR) No. 114/1992 Sb., on Protection of Nature and Landscape) has to take place in the form of the decision of the administrative authority."*

181 Those conclusions were applied by the Supreme Administrative Court in relation to planning in built-up areas – see, for example, the decision of the Supreme Administrative Court of 10 June 2009, No. 6 As 48/2008-210, the decision of the Supreme Administrative Court of the 28 June 2010, No. 8 As 34/2010-106, or the decision of the Supreme Administrative Court of 22 July 2009, No. 5 As 53/2008-243: *"In this case, we must take into consideration that the location in question does not have any protected landscape area or natural monument. Therefore, they cannot be affected by the placement of a shop. The court would like to add that the building is placed in an urban built-up area, and, without other facts being presented, we cannot consider the placement of such a building to be a disruption of the urbanized landscape character pursuant to NLPA. Such a fact and another situation would be if there were an important landscape element or even a specially protected area, a temporarily protected area, etc. However, this was not the case and the plaintiff did not even say that."*

opinion, cannot be the case of natural parks (for a comparison of landscape character in the urban environment see the following subchapter). Therefore, in a situation where the placement (or realization) of a building would occur in the territory of a natural park without the previous consent of the NPA pursuant to § 12 NLPA, it would be, in our opinion, an unlawful action, especially when applying the Supreme Administrative Court decision of 17 June 2011, No. 7 As 21/2011-87, according to which the consent in the sense of § 12 NLPA is *"needed for any intervention in which there is a significant probability that it shall result in a change of the landscape character (both positive or negative) or result in deterioration of the landscape character, i.e. the decreasing of its aesthetic or natural values, even if the landscape itself shall not change at the time"*. This, we believe, will always be the case of natural parks, of course, with the legal exception mentioned in the provision of § 90 Para 2 NLPA (dealing with activities carried out in the direct connection with ensuring the state defense or national security – e.g. building bunkers in a natural park in case of a war shall not require a consent pursuant to § 12 NLPA). When considering the reduction or alteration of landscape character, it is necessary to consider the conditions for which a particular landscape or its part has become unique (in the case of natural parks it is especially the aspect of nature) as well as the situation after placing the building in the landscape (cf. the decision of Supreme Administrative Court of 11 June 2014, No. 7 As 23/2014-57).

However, in the case of granting a consent to an interference with the landscape character of natural parks, the question of impartial consideration will be problematic. This is because, as it always goes in life, what is the landscape character cultivation for one person it may mean the landscape character destruction for another[182]. As aptly stated by Knotek: "*The problem is that the application of the landscape protection clause is based on a subjective assessment. This subjective assessment cannot be replaced in a simple objective way. The subjective factor can only be objectively modified, which is clearly desirable in a number of controversial cases. This can be accomplished, for example, by drafting several opinions (of course, only if they are not completely contradictory to each other, which, unfortunately, is quite possible in practice). An expert opinion must be then the essential basis for issuing*

182 As an example, see the discussion of Petr Holub and Antonín Buček *"Krajina versus globální změny klimatu"*. Available at: http://www.sedmagenerace.cz/text/detail/krajina-versus-globalni-zmeny-klimatu

a decision on an intervention with the landscape character in some cases."[183] However, such an expert opinion assesses only the facts, not the existence of the landscape character itself because according to the judicial practice of the Supreme Administrative Court (expressed, for instance, in the decision of the 5 November 2008, No. 1 As 59/2008-77; published in the Collection of SAC under the No. 1946/2009) it applies that *"An expert opinion (§ 127 Rules of Civil Procedure) is intended only to examine questions of facts. The expert, therefore, cannot assess the issue whether certain building modifications could deteriorate or change the landscape character (§ 12 of NLPA) since this a legal issue"*. The assessment of the extent and quality of an intervention with the landscape character cannot be taken away from the administrative authorities as they are the only ones (of course, subject to supervision of the administrative courts) authorized to asses (and to justify properly, as we add) the legal question whether or not there would be an interference with the landscape character.

An obvious question arises which aspects should be put on the imaginary scales when assessing the landscape character. Apart from consideration of the assessment of public interest in protection of the landscape, the economic aspect certainly comes into consideration. However, in the decision of the Supreme Administrative Court of 9 November 2007, No. 2 As 35/2007-75 (published in the Collection of SAC under the No. 1498/2008), which we fully agree with, it was ruled that: *"An interest in the economic benefits cannot outweigh the interest in the protection against disruptive interferences with the landscape character. Hereby, there is no legal obligation, in each individual case and irrespective of the nature and extent of the impact on the landscape, to examine whether the economic benefit of the building outweighs the impact on the landscape character. Therefore, in the procedure pursuant to § 12 Para. 2 NLPA, the assessment of economic benefits is not an equivalent question when examining possible deterioration or modification of the landscape character."* When assessing a possible interference with the landscape character, the economic effects should only play a minor role. However, we would like to emphasize that only issues related to landscape character should be taken into consideration when assessing an impact on the landscape character. Therefore, it is not possible to asses,

183 KNOTEK, J. Ochrana krajinného rázu [online]. In: *Fórum ochrana přírody*. Available at: http://www.forumochranyprirody.cz/ochrana-krajinneho-razu

for example "*objections aimed at assessing the impact and all the pollutants and risks which could be generated by the planned construction of a wasted nuclear fuel storage facility and a nuclear power plant, including the impact of a potential serious accident, as these issues go beyond the subject of the procedure on granting consent for the location of the given building in terms of its interference with the landscape character pursuant to § 12 Para. 2 NLPA"* (according to the decision of the Supreme Administrative Court of 14 February 2008, No. 9 As 38/2007-93). Of course, such irrelevant objections will be raised more often in practice.

The above-mentioned general premises arising from judicial practice are also reflected in the specific decision-making activities of the administrative courts concerning placement and implementation of building in natural parks. So, for example, according to the decision of the Municipal Court in Prague from the 11 April 2008, No. 7 Ca 219/2007-58 (published in the Collection of SAC No. 2108/2010), it is necessary to evaluate individually and in broad context each interference with the natural park (and the landscape character it creates). If there is an insufficient reasoning (explanation), such steps of the administrative authority should be rejected: *"It is obvious that an individual building will hardly affect the character of the entire natural park, but this is not the issue. In this case, it is necessary to assess the interference with the landscape character taking local conditions into consideration, not with respect to the entire nature park but to that specific place, and in the whole context. As it is visible from the photo-documentation, the building would, obviously, interfere with the greenery, and it would become a new dominant mark when looking from the pond next to the building of the former mill. Therefore, it is necessary to analyze all aspects very thoroughly, and in particular, it is necessary to assess the public interest in that case which is not mentioned at all among the grounds for the administrative decisions."* Such a sufficiently justified procedure of the administrative authorities considering the placement of a building into natural park is a part of the decision of the Municipal Court in Prague, issued on 20 May 2016, No. 5 A 134/2011-59 (an appeal was rejected by the decision of the Supreme Administrative Court of 23 August 2016, No. 9 As 167/2016-28). In that case, the administrative court confirmed the placement of a high voltage power line tower on the territory of the natural park of Modřanská rokle-Cholupice, since the NPA, in its opinion pursuant to § 12 NLPA, *"came to the conclusion that placing the structure*

in the landscape is acceptable, taking into account the fact that in immediate vicinity of the tower there is another power line tower, and the wooded slopes prevent the tower from being dominant in the landscape panorama". The Municipal Court in Prague stated that the administrative authorities had examined in detail the impact of the placement of the high voltage tower on the surrounding environment, including the territory of the natural park of Modřanská rokle-Cholupice, and that their legal conclusions did not need to be corrected. The importance of the need of the supporting expert documentation (including experts opinions) can be seen in the decision of the of the Supreme Administrative Court of 24 October 2013, No. 4 As 70/2013-49, which confirmed the legitimacy of a disagreement pursuant to § 12 NLPA concerning a plan to realize the construction of two electric windmills. Among others, this was because the windmills would have had a significant negative visual impact on the natural park of Ždánický les. This decision was also specific because despite the lack of a legal regulation on natural park protection zones, the Supreme Administrative Court, while referring to the supporting expert documentation (incl. experts' opinions), came to the conclusion that despite the fact that the natural park was situated about 5-6 km from the location in question, an assessment of the landscape has to be done from a distance of 8 km (according to some experts even from a distance of 15 km) from the planned building site, and as for an interference with the landscape character the existence or size of the protection zone is not decisive. What is decisive is the impact of the planned building on the natural, cultural and historical characteristics of the given place or area, in this case the natural park. The Supreme Administrative Court thus fully agreed with the conclusions of the administrative authorities and the Regional Court about the inappropriateness of the intended building project with regard to the existing natural park of Ždánický les. The purpose of the park is to preserve and promote the natural and cultural values of a balanced landscape with optimal conditions for sustainable individual recreation in nature. The construction of electric windmills is not compatible with this purpose. This opinion is also consistent with the decision of the Supreme Administrative court from 12 September 2008, No. 2 As 49/2007-191 (published in the Collection of SAC, File No. 2479/2012)

according to which: *"the construction may mean quite a significant interference with the landscape character if it is situated in locations visible from a long distance, if the density of the existing sparsely built up area increases due to the construction, or if it should situated in an area with a large number of natural components such as forests, distinctive slopes without buildings, watercourses, etc. It is always necessary to consider carefully to what extent an interference with the landscape is imaginable in a particular area when assessing individual types of constructions."*

From the above mentioned, we may make a generalizing conclusion, which is in agreement with the decision of the Supreme Administrative Court mentioned last, that both the administrative authorities (in particular the relevant NPAs) and the administrative courts must carefully consider and reasonably justify whether (and to what extent) such an interference with the landscape character (natural park) is possible. This should always be done with respect to local circumstances and the landscape character (natural park). At the same time, we believe that in practice, some planned projects might be simply impossible to realize in the natural landscape because of a significant interference with the landscape character. Such projects should then be realized in places without landscape character.

Natural Park in an Urbanized Environment

As we have already mentioned when referring to the case law, landscape character can be assessed only in places where it exists. This does not mean, however, that such landscape character cannot be found in an urbanized environment, i.e. in cities. In this respect, we agree with the Regional Court in Brno that stated in its decision from 5 October 2016 No. 31 A 68/2013-144[184] that landscape character can be found in the urbanized (i.e. city) environment, nevertheless, this only applies to *"places with unique natural, cultural or historical characteristics* [e.g. on a territory which creates landscape character – the authors' comment] *which are generally those places where the average person is happy to spend their leisure time, or places which can enrich them from the natural, cultural or historical point of view, or places which are otherwise exceptional – for example, the Pálava vineyards, historical town centers or parks in towns, or industrial monuments*

184 Confirmed by the Supreme Administrative Court by its decision of the 5 October 2017, No. 7 As 303/2016-42.

such as the Ostrava Hradčany, etc." We would like to emphasize that not all undeveloped places in the city have the landscape character. We agree with Mazancová[185] that the landscape character is to be taken into consideration in the urbanized landscape in cases when the given environment meets the legal requirements for the landscape (it has a characteristic relief and a set of functionally connected ecosystems and civilization elements can be described in it) and, at the same time, (other) natural, cultural and historical values can be recognized in it. One of such natural values is undoubtedly natural parks.

The lawgiver introduced, with the effect since 1 January 2007, into the legislation the provision of § 12 Para 4 NLPA, according to which the landscape character *'is not examined in built up territories and in areas suitable for building*[186] *for which a territorial or land exploitation plan establishes a surface and spatial arrangement and conditions for protection of the landscape character agreed on with a."* From the above mentioned two conditions follow that must be met so that the provision in question may be applied and so that the landscape character need not be assessed. First, a territorial or land exploitation plan must clearly determine the surface and spatial arrangement of the territory (this usually does not make any problems in practice). Second, the territorial plan must include conditions for protection of the landscape character which were agreed with a. Neither the Act nor the implementing regulations specify the form of establishing the conditions of protection of landscape character, which should be agreed on with a. In our opinion, this is not a specific agreement (or contract) concluded between the and the planning documentation drafter but what is sufficient is the mere existence of the fact (presented in the written and verifiable form) that while drafting the territorial or regulatory plan, the drafter and the have agreed on the conditions of the landscape

185 MAZANCOVÁ, E. Posuzování krajinného rázu v urbanizovaném prostředí [online]. In: *Fórum ochrana přírody*. Available at: http://www.forumochranyprirody.cz/posuzovani-krajinneho-razu-v-urbanizovanem-prostredi

186 The provision of § 2 Para 1, Sub-Para d), Building Code, states that *"a built-up area means an area defined by the land exploitation plan or by a procedure pursuant to this Act; if the municipality has not a defined built up area, the built up area is the developed part of the municipality defined as such as of 1st September 1966 and marked in the real property registration maps (hereinafter referred to as "urban area").* The provision of § 2 Para 1, Sub-Para j) Building Code states that *"a built up area means an area defined for development in the land exploitation plan or in the planning principle of a particular location."*

character which could, among other things, include a natural park. In practice, this can be, for example, the minutes of a joint meeting, or a statement of the as another motion under Part Four of the Rules of Administrative Procedure.[187] The purpose of the legislation in question is, among others, stripping the of the necessity to decide twice in the same matter (assessing the landscape character)[188], i.e. when making the land exploitation plan and when assessing the application for a planning permission. If this agreement is not part of the land exploitation or regulatory plan, the consent of the is required for the placement and permitting of buildings in areas that may be built up. The consent may be applied for and granted in the procedure described in the previous subchapter.

5.7 Conclusions

On the basis of an analysis of the legal regulation and valuable data obtained from all regional offices of the Czech Republic and the city hall of the Capital City of Prague, which replied to our request to provide data on natural parks in the territory of individual regions of the Czech Republic and the Capital City of Prague pursuant to the Act on Right to Environment Information No. 123/1998, as amended, it is possible to conclude that natural parks in the territory of the Czech Republic are a significant instrument of the general territorial nature protection suitably complementing the network of specially protected areas and the Natura 2000 areas.

187 Cf. the decision of the Regional Court in Brno of 5 October 2016, No. 31 A 68/2013-144, which we agree with: *"If, as it follows from the presented evidence, there was a joint meeting on this matter on 8th April 2008 (the court emphasizes that the provision of § 12 Para. 4 NLPA came into force on* 1 January *2007, although the land exploitation plan was approved before that date, but the change in the land exploitation plan was only made after that date) and after this joint meeting the NPA sent, on 22nd April 2008, the above mentioned requirements which clearly set the conditions for the protection of all the interests under the Nature and Landscape Protection Act in the planned change of the land exploitation plan, and these conditions were fully respected by the maker of the land exploitation plan as can be seen in the presented evidence, so the court came to the conclusion that, when dealing with a Change of the City Plan of the City of Brno 2006 – I – 22, there was an agreement on the conditions for the protection of all interests protected under the Nature and Landscape Protection Act (including the landscape character), and, therefore all the conditions pursuant to § 12 Para 4 NLPA were met."*

188 Cf. HANÁK, J. Územní ochrana přírody. In: JANČÁŘOVÁ, I. et al. *Právo životního prostředí: Zvláštní část*. 1st ed. Brno: Masaryk University, 2015, 624 p., p. 235. ISBN 978-80-210-8041-6.

The legal regulation included in the Nature and Landscape Protection Act is quite brief, which by itself may not automatically be an obstacle to application of the institution of natural park in practice. However, we believe that, *de lege ferenda* (according to the designed law), the procedure of dealing with plans to proclaim new natural parks, or the procedure relating to "re-registering" the existing natural parks created by the *ex lege* transformation of the former rest areas founded under different social conditions, should be considered in terms of more precise legal definitions. Furthermore, in our opinion, attention should also be paid to the unification of the methods of registering natural parks and to the content of this register, both at the regional and national levels. This could be possible by means of a unifying methodology instruction issued by the Ministry of Environment which, after evaluating its effectiveness, could become an impulse for the more precise legal definition through an amendment of the Nature and Landscape Protection Act. What is crucial with respect to the main substantive objective, achieving protection of the landscape character, which is materialized in the institution of natural parks, is, in our view, to consider properly all the limitations relating to all processes set forth in the Building Code.

The analysis of the judicial practice of the administrative courts concerning natural parks allows, in our opinion, to make the following generalizing conclusions. In the case of any future building project in the territory of a natural park it is necessary to recommend the prospective applicant (builder) to read thoroughly the founding act of the natural park to find out, in the first place, whether the act contains some bans or limiting conditions that could prohibit the construction or, at least, to complicate it significantly. Then it is necessary to find out whether his plan for the territory of the natural park is consistent with the land exploitation planning documentation, and whether this documentation does not include some restrictive conditions for the implementation of his project. Only after verification of these facts, he should apply for the consent of the pursuant to § 12 of NLPA which then will be (as a binding opinion) the basis of the following procedure under the Building Code. In terms of the consent legality, it is necessary to emphasize that there must be, in our opinion, high demands for its justification. Moreover, it must be obvious that the has consistently

dealt with the proportionality between the protection of the natural park (or the landscape character created by such natural park) and the subjective rights of the various entities involved. As visible from the judicial practice of the administrative courts mentioned above, it will often be a difficult task in practice which can even lead to the annulment of the challenged decisions under the Public Building Law and to repeating the assessing process of the impact of an interference with the natural park (or the landscape character). In extreme cases, this could also mean an imaginary "stop" to the implementation of the project. As in other cases, it will always be an individual assessment of protected values and local circumstances, therefore it is impossible to make a simplistic conclusion on when the realization of certain projects is possible and when not.

6 ENVIRONMENTAL HARD CASES IN POLAND. SHALL VISTULA SPIT BECOME SECOND ROSPUDA VALLEY?

6.1 Introduction

The rise of numerous standards in the area of environmental protection, both EU and national, which we observe in recent years, sometimes causes difficulties in the economic activity. Increasingly, some legal norms are in a collision with others. Then it is necessary to decide which of the norms and the de facto law protected value takes precedence. In Poland, in the last few years, such conflicts have occurred several times, settled finally by the Constitutional Tribunal. It is worth considering the general nature of such issues and take a look at specific cases of investment implementation that require choice between environmental protection and economic development. Perhaps from their analysis we can draw conclusions and postulates for future law changes.

This study deals with the following issues. First of all, it explains the concept of hard case in order to illustrate further examples of such cases in the context of the practice of Polish law. The first case is associated with humane animal slaughter and is based exclusively on national regulations, but is interesting for its theoretical understanding of hard case, participation of constitutional court and instability of judicial decisions. Next one refers to the relationship between law and economics and is related to the transposition of EU regulations into the national legal order. The third of the cases, directly related to infrastructure investment in protected areas, which is in some measure a follow-up to the subject taken up by the author in the publication of the Masaryk University in Brno, a decade ago, when it was underway and is now complete, both legally and technically. The last described case is related to the investment that is currently being prepared. Analysis of all these cases also shows the evolution of the investors' approach, which in this case is the Polish state, to implement investments in protected areas and to environmental protection law. This thread is devoted to the last part of the paper.

The whole text was based on the literature of environmental law and administrative law and acts of international, EU and Polish law, valid on 15 August 2017.

6.2 Concept of Hard Cases

The term hard case derives from the common law[189] culture typical of the Anglo-Saxon countries, although it also imprints some marks on the legal system of the European Union[190]. In the common law system, almost in every case, the judge is forced not so much to use the law but to its creation in the process of justice. Hence, the need to weigh conflicting values is more common in that system than in the statutory law system we have traditionally dealt with in continental Europe. This does not mean, however, that hard cases cannot arise at all. This phenomenon in particular is analyzed, among others by J. Zajadło, also on the ground of continental law in the context of R. Dworkin, H. L. A. Hart's philosophy of law, and other thinkers who continue their work[191].

Difficult cases occur most often where the law comes into contact with other system of values such as: morality, religion, economics or ecology, although there are authors suggesting the possibilities of confrontation, within hard cases, of the law with slightly less respected areas like the media[192]. This does not exclude, however, the situation where a difficult case is due to a conflict of law with another law. Especially when conflicts of equivalent standards become a challenge, because the matter of contradiction of unequal standards is to be settled with a use of collision rules[193].

189 In this legal culture, the basic form of legislation is a precedent: an individual decision becoming a model in similar matters for equal and lower courts, where similar cases should be settled in the same way, with one case having many precedents and counter-precedents. Read more: KOSZOWSKI, M. *Anglosaska doktryna precedensu: Porównanie z polską praktyką orzeczniczą*. Warszawska Firma Wydawnicza, Warszawa, 2009. ISBN 978-83-61748-04-5.

190 According to Z. Brodecki, the judges of the Court of Justice of the European Communities create the Community precedents by way of sentencing in the form of direct complaints and preliminary rulings. BRODECKI, Z. *Prawo integracji w Europie*. Warszawa: LexisNexis, 2006, pp. 94–95. ISBN 978-83-7334-640-6.

191 ZAJADŁO, J. (ed.). *Fascynujące ścieżki filozofii prawa*, Warszawa: LexisNexis, 2008, pp. 7–18. ISBN 978-83-73348-69-1.

192 Read more: EZRA, O. Moral Dilemmas in Real Life. Current Issues in Applied Ethics. *Law and Philosophy Library*, 2006, Vol. 74, pp. 5–182.

193 Read more: JABŁOŃSKA-BONCA, J. *Wstęp do nauk prawnych*. Poznań: Ars Boni et Aequi, ,1996, pp. 159–160. ISBN 978-83-900964-9-8.

Hard cases show us the connection between ius and lex, where ius without lex turns out to be completely ineffective in achieving its goals, and lex without ius becomes technical, soulless, blind and often false, which we observe under law in Poland.

To sum up, hard cases are especially complex legal cases, catching the eye of the public, difficult due to the collision of values, norms or weighty matters, that are not always possible (on the ground of statutory law) to be attributed to a definite norm or attributed to a few, but contradict and, in common law system, do not match any previous precedent.

6.3 Selected Examples of Hard Case Conflicts with the Environmental Background in Poland

The most well known issue of hard case in Poland was the question of ritual slaughter. No one paid much attention to the problem of ritual slaughter despite the contradictory legal situation in this case, which lasted from 2004 until "Polityka" weekly publication in March 2012. At that time, an article of A. Sowa[194] made the public opinion aware of the scale of the problem, both quantitatively in terms of dozens of companies, hundreds of animals and millions of profits, as well as the quality of the harm done to animals and the ignorance in relation to the law and the principles of humanism.

The author of the article raised the theme of ritual slaughter and quite precisely described the process of killing animals to get a kosher[195] and halal[196] meat. The publication had wide repercussions and perfectly fulfilled the role of the so-called "fourth power" and forced the responsible authorities

194 SOWA, A. Horror na eksport. *Polityka*, 12 (2851), 21. 03-27. 03. 2012.

195 Kosher is a term referring to the rules in the Jewish law determining the types of products allowed to be consumed and the conditions under which they should be produced and consumed. The kosher principles derive from the Torah and they are strictly observed by orthodox Jews. Read more: BOHDANOWICZ, J. *Religia w dziejach cywilizacji*. Gdańsk: UG, 1995. ISBN 978-83-7017-614-3.

196 Halal or halaal, in Islam is the definition of all that is permitted in the light of sharia. This word is usually known as the name of a Muslim diet. Halal in Western culture, however, is known as a way of nourishing Muslims, similar to Jewish kosher. The Koran categorically prohibits the consumption of blood, pork, carcasses, and requires animals to be ritually slaughtered. Read more: *Ibidem*.

to analyze the legal status. What is more, not a voluminous but substantial article resulted in two judgments of the Constitutional Tribunal and several months of public discussion.

In multinational and multicultural Poland, before World War II, ritual slaughter was permitted on the basis of a state-regulated exception, due to the consumption targets of these groups of people, whose religion requires the use of special treatments at the slaughter like the Jews and Muslims especially. In the time of the People's Republic of Poland, this issue was not raised, because of the significant unification of society as a result of warfare and border changes, as well as the general, the lesser importance that the law applied to animal rights, the protection of the environment, or finally, human rights in the broad term[197].

By adopting the Animal Protection Act in 1997, the legislator anticipated the condition that animals should be stunned during the slaughter[198], but also introduced the exception that "it is not applicable (condition of stunning) when animals are slaughtered with methods provided for by religious rites"[199]. This regulation was amended in 2002 so that, among other things, the exception in question for ritual slaughter was removed, leaving exclusively the stunning order[200] before the slaughter as a rule.

For a law that has banned ritual slaughter since 2002, the Ministry of Agriculture and Rural Development issued an implementing regulation[201] in 2004 setting out detailed conditions for the movement, storing, immobilization and killing of animals. That regulation contained a paragraph stating that "Paragraph 1[202] shall not be applied to animals slaughtered

197 Nowadays animals are subject to legal protection as an animated element of the environment that is included in the third generation of human rights. HOŁDA, J., HOŁDA, Z., OSTROWSKA, D., RYBCZYŃSKA, J. A. *Prawa człowieka. Zarys wykładu*. Warszawa: Wolters Kluwer business, 2008, p. 11. ISBN 978-83-7526-403-6.

198 Article 34, paragraphs 1-3 of the Animal Protection Act of 21. 08. 1997, (Journal of Laws No. 111, item 723, with amendments).

199 Article 34, paragraph 5 of the aforementioned act.

200 Article 1 point 27 of the Act amending the Animal Protection Act of 6.062002 (Journal of Laws No. 135, item 1141).

201 Regulation of the Minister of Agriculture and Rural Development of 9.092004 on the qualification of persons entitled to professional slaughter and the conditions and methods of slaughter and killing of animals (Journal of Laws No. 205, item 2102).

202 Establishing that equine animals, ruminants, pigs, rabbits and poultry are immediately stunned before slaughter.

in accordance with the religious practices of registered religious unions"[203]. Thus, the Minister issued a regulation contradictory to the act of law, which is inconsistent with the hierarchy of legal acts and the constitutional principles of the statutory delegation to issue executive regulations. This regulation was twice amended[204]. Although the changes related to another thread, none of them contradicts § 8 point 2 of the art. 34 act.

Directing social attention by the "Polityka" weekly to the case resulted in the Prosecutor General's request to the Constitutional Tribunal to declare the unconstitutionality of § 8 point 2 ministerial regulation. The Constitutional Tribunal, by its judgment of 27 November 2012[205], considered that the aforementioned provision to be incompatible with the Animals Protection Act, in its wording after 2002, and consequently from art. 92 sec. 1 Constitution of the Republic of Poland[206]. As a result of the verdict, the statutory provisions of the regulation lost legal validity on 31 December 2012.

Therefore from 1 January 2013 in Poland, there was no legal possibility of slaughtering animals without stunning, so ritual slaughter was not legal. And here we come to the first ritual slaughter dispute, the choices between the values of humanism and the protection of animals against the economic profits of the meat sector from exports to kosher and halal consumer countries. This controversy, which may have grown, with another distribution of public likings, to a significant hard case has already been resolved by the Constitutional Tribunal in 2012 in favor of animal rights, at least in the context of the necessity for compliance with the law.

203 Par. 8 sec. 2 of the above regulation.

204 Regulation of the Minister of Agriculture and Rural Development of 11. 08. 2006 changing the regulation on the qualification of persons entitled to professional slaughter and the conditions and methods of slaughter and killing of animals (Journal of Law No. 153, item 1096) and Regulation of the Minister of Agriculture and Rural Development Rural Development of 16. 07. 2009 changing the regulation on the qualification of persons entitled to professional slaughter and the conditions and methods of slaughter and killing of animals, (Journal of Laws No. 118, item 992).

205 Act ref. No. U 4/12.

206 Article 92 point 1 of the Constitution of the Republic of Poland of 2. 04. 1997 (Journal of Laws No. 114, item 946, with amendments), hereinafter referred to as "the Constitution of the Republic of Poland", says: The regulations are issued by the bodies indicated in the Constitution, on the basis of the detailed authorization contained in the law and in order to implement it. The authorization should specify the authority responsible for issuing the regulation and the scope of the issues to be addressed and guidelines on the content of the act.

The second area of conflict in the same matter has already been identified as a problem if the complete ban on slaughter without stunning, thus ritual slaughter, does not contradict the constitutional principle of freedom of religious practices. After the 2012 verdict of the Constitutional Court unfavorable for the producers of meat from not stunned animals and the Jews and Muslims, these people claim that, with such a state of law, Poland limits their ability to fulfill religious rites. The issue of the adversarial freedom of religious rituals and the protection of animals from slaughter without stunning has therefore returned to the Constitutional Tribunal, this time due to the request of the Jewish communities. The applicant showed that after the ruling of the Constitutional Court in 2012, the ritual slaughter ban reduced the possibility of religious practices. The Constitutional Tribunal, by judgment of 10 December 2014[207], ruled that the art. 53 of the Polish Constitution of these provisions of the Animal Protection Act restricts the freedom of religious rites due to the impossibility to perform ritual slaughter. Finally, in the Polish legal system, the change of law was executed so that it allows slaughter without stunning for the purposes of religious practices.

Another example of a hard case conflict, this time in the line of law – economics, was the issue of the welfare of poultry. In Poland, the conditions of keeping poultry were originally regulated by the Regulation of the Minister of Agriculture and Rural Development of 2003[208], which was also functioning long after the accession of Poland to the European Union. An important issue of this regulation was the way the poultry cage should be equipped. It should have the proper size and have a device for shortening the claws. According to the regulation in the cage, per square meter should be no more than 9 hens.

However, the European Union introduced its own standards governing the welfare of laying hens, Directive 1999/74/EC[209] as early as 1999, meaning five years before Poland's accession to the European Union, and about the

207 Act ref. No. K 52/13.

208 Chapter VII of the Regulation of the Minister of Agriculture and Rural Development of 2. 9. 2003 on the minimum conditions for the maintenance of particular species of livestock (Journal of Laws 2003, No. 167, item 1629).

209 Council Directive 1999/74/EC of 19. 07. 1999 laying down minimum standards for the protection of laying hens (OJ L 203, 3. 8. 1999).

same as before the adoption of the Polish regulation to the Polish law. Cages, according to EU law, were to be of a new type and at least 35 cm high. Since then, old, inadequate cages were to be banned. EU regulations explicitly indicated that as of 1 January 2002, all alternative production systems must meet the new requirements, and one year later, the same relates to system of not improved cages. These terms concerned newly created structures. In the case of items created before and in use the date of introduction of the absolute ban on such breeding has been indicated as 1 January 2012.

Meanwhile, Poland, acting after 2002 and after accession to the European Union, introduced in its legal order a deliberate regulation deviating from EU standards to the disadvantage of animal welfare. Including so gross a divergence as the number of hens per square meter, which only in the amendment of the regulation[210] was defined as "maximum" being so far a desirable value. Undoubtedly this solution, at least for several years met the expectations of poultry producers by limiting their investment expenditures. This situation continued despite the subsequent amendments to the regulation, which took place twice in 2005 and again in 2007.

Finally in 2010 the Department of Agriculture issued a new regulation[211] introducing EU rules on minimum standards for breeding animals, including laying hens. In the new regulation, the minister transposed the EU regulations, stating that their implementation must take place no later than 1 January 2012, although made possibile keeping up to 12 hens per square meter until the last day of 2011[212].

It seems that at least for some time the Polish government has decided to relieve the producers, but the date 1 January 2012 came inexorably. At the beginning of 2012, the European Commission initiated a penal

210 Regulation of the Minister of Agriculture and Rural Development of 8. 3. 2004 amending the ordinance on minimum conditions for keeping particular species of livestock (Journal of Laws 2004, No. 47, item 456).

211 Regulation of the Minister of Agriculture and Rural Development of 15. 2. 2010 on requirements and manner of behavior in the maintenance of livestock species for which protection standards have been laid down in European Union legislation (Journal of Laws 2010, No. 56, item 344).

212 The introduction of minimum livestock maintenance conditions was postponed to 1. 1. 2013.

law procedure against 13 member states that did not comply with Council Directive 1999/74/EC. Among these countries was also Poland, which did not adjust its internal regulations in time, thus not forcing manufacturers to invest.

Poland had a dozen or so years to implement EU legislation on minimum protection of chickens, but it did not. The slowness of the government surprises, which, knowing the legal consequences, only delayed in time, has chosen the economic interest of a narrow group of producers over animal protection and respect for the rules of the European Union.

In conclusion, the case above shows that the economic interest of poultry producers over the years has been a winner at the start not only with the Polish but also with the EU law, which Poland was obliged to incorporate and respect. Apart from the choice between economy and animal welfare, in this case of laying hens, that has been done several times by the Minister of Agriculture and Rural Development, it is evident that Poland is slow in transposing EU legislation. It is a pity, because such action, apart from presenting the attitude of the Polish state to the protection of animals, also presents the attitude of this state to the European Union.

6.4 Rospuda Valley Case

Hard cases in Poland do not only relate to the protection of animals. The most interesting ones concern infrastructure investments in protected areas. The route of the originally planned ring road of the city of Augustów, in northeastern Poland, ran through Natura 2000 sites[213]. The first decisions were made before Poland's accession to the European Union. Due to their repeated appeals to higher instances and administrative courts, the decision became final after 1 May 2004. In the meantime the amended regulations[214] required the conduct of an environmental impact assessment and insuance a decision on environmental conditions. Due to the change of legal

213 Special Protection Area of the "Ostoja Augustowska" (PLH 200005), Special Protection Area of the Birds of the "Puszcza Augustowska"(Augustów Forest) (PLH 200002) and Protected Landscape Area Dolina Rospudy ("Rospuda Valley").

214 Environmental Protection Law of 27. 4. 2001 (Journal of Laws 2017, item 519, with amendments).

status, additional requirements and procedures and the jurisdiction of the European Union's legal protection bodies, the issue of the ring road construction in the Rospuda Valley has become much more complicated[215].

The European Commission has accused the investor, the government agency – General Head Office for National Roads and Motorways, in a suit addressed to the Court of Justice of the European Union, of repeatedly violating EU law[216]. The European Commission indicated transgressions in issuing a permit for failure to comply with the "Habitats Directive", including inadequate protection of the Special Protection Area "Augustowska Forest". In the case of ring road of city of Wasilków, the next stage of the project, the European Commission accused Poland of incorrectly assessing the impact of this project on the Knyszyn Forest, a plan to implement the investment negatively affecting the integrity of the site, and the breach of Directive 92/43[217]. In addition, the European Commission has challenged the compensatory measure proposed by the Polish side for the afforestation of the Augustów Forest. According to the European Commission, the Republic of Poland has failed to fulfill its obligations under the "Habitats Directive", and in particular art. 6 sec. 2 and 3 in connection with art. 7[218].

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215 Read more: CIECHANOWICZ-MCLEAN, J., BOJAR-FIJAŁKOWSKI, T. Inwestycje na obszarach Natura 2000 w świetle prawa europejskiego i polskiego na przykładzie Doliny Rzeki Rospudyl. In: JANČÁŘOVÁ, I., SLOVÁČEK, J. (eds.). *Právní aspekty odstaňování ekologických zátěží s důrazem na staré zátěže a právní aspekty ochrany přírody*. Brno: Masarykova Univerzita, 2007, pp. 254–277. ISBN 978-80-210-4510-1; CIECHANOWICZ-MCLEAN, J., BOJAR-FIJAŁKOWSKI, T. *Obszary chronione w prawie międzynarodowym, europejskim i polskim na przykładzie Doliny Rospudy.* In: MIKOŁAJCZYK, B., NOWAKOWSKA-MAŁUSECKA, J. (ed.). *Prawo międzynarodowe, europejskiej i krajowe – granice i wspólne obszary. Księga jubileuszowa dedykowana Profesor Genowefie Grabowskiej*. Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2009, pp. 130–145. ISBN 978-83-226-1831-8; CIECHANOWICZ-MCLEAN, J., BOJAR-FIJAŁKOWSKI, T. *Działalność gospodarcza na obszarach Natura 2000*. In: JENDROŚKA, J., BAR, M. (eds.).*Wspólnotowe prawo ochrony środowiska i jego implementacja w Polsce trzy lata po akcesji*. Wrocław: CPE, 2008, pp. 133–148. ISBN 978-83-917518-4.

216 Case C-193/07: Commission of the European Communities versus Republic of Poland.

217 Council Directive 92/43/EEC of 21. 5. 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22. July 1992) hereinafter referred to as the "Habitats Directive".

218 In light of the interpretation of those provisions resulting from the judgment of 13. 1. 2005 in case C 117/03 Dragaggi and Others and the judgment of 14. 9. 2006 in case C 244/05 Bund Naturschutz in Bayern.

The European Commission in its lawsuit argued that the Augustowska Forest was an area inhabited by 41 bird species protected by 1st annex to Directive 79/409/EEC and 9 animal species and 8 plant species listed in Annex II, including one priority species. While the European Commission has confirmed that due to the initiation of the investment procedure before the accession of Poland to the European Union, the provisions of article 6, paragraphs 3 and 4 of the "Habitats Directive" do not apply in this case, the substantive provisions apply from the moment the state enters the European Union.

The construction of the ring road of Wasilków, which is threatening 37 species of birds according to the European Commission, was initiated after the accession of Poland to the European Union. It has a defective impact assessment and the authorities have not submitted any alternative route of investment and did not raise the issue of natural compensation in relation to the area "Knyszyn Forest".

Regarding the proposed compensation for the construction of the ring road of Augustów the European Commission cites interesting arguments in the suit. The Polish government has planned and started the project of afforestation of the Sejny Lake District as a compensatory measure. However, the European Commission assessed that this process not only would not compensate for natural losses caused by works in the Augustów Primeval Forest, but moreover would itself have negative natural effects. In the casus, commonly referred to as the "Rospuda Valley", European and national arguments, economic and ecological as well as human and legal ones meet together. Therefore, this is a typical hard case.

The legal proceedings before CJEU in the case C-193/07 was the first against Poland in the history of our membership in the European Union. By a decision dated 18 April 2007, CJEU suspended all investment and construction activities in the subject matter. Only on 29 December 2009, the Regional Director for Environmental Protection in Bialystok[219], basing on EU and national law, issued a proper decision on the environmental conditions for the construction of the ring road through the Valley of Rospuda River.

219 Local governmental administration, which has been taking environmental responsibility from Voivode of the Region since 01. 01. 2009 under the Act on the provision of information on the environment and its protection, public participation in environmental protection and on environmental impact assessments of 3. 10. 2008 (Journal of Laws 2017, item 1405, with amendments).

This was because, by letter of 27 April 2009, the European Commission withdrew its complaint against Poland, which CJEU accepted, with the consent of the defendant, by order of 25 August 2009. This was possible only by changing the approach of the investor, the Polish governmental institution, which in March 2009 withdrew the proposal with the original, disputed investment plan and developed alternative routes of its passage.

It should be expected that the decision of CJEU would be unfavorable for Poland, but it cannot be made certain due to the conciliatory settlement of the case. Its definitive decision would give the doctrine clear clues and could create a new precedent. Meanwhile, the only effect of the whole hard case of the "Rospuda Valley" is that ring road of Augustów was put into use in November 2014, which means at least 5 years after the date originaly planned.

6.5 Vistula Spit Cross-cut Project

The Vistula Spit is a sandy embankment on the southeastern shore of the Gulf of Gdańsk, stretching from Gdańsk in the west to Lochstedt behind the Piława in the Russian Federation in the northeast. It separates the Vistula Lagoon from the open waters of the Gulf of Gdańsk and the Baltic Sea. The spit is divided between the territory of Poland and the Russian Federation[220].

The Vistula Lagoon is a salt-water lagoon with an area of 838 km² (including within the bounds of Poland 328 km²), cut off from the Baltic Sea by the Vistula Spit. The lagoon is connected to the Gulf of Gdansk only through the Pilawa Straits that belongs to the Russian Federation[221]. Due to its high natural values, the entire Polish part of the Vistula Lagoon was covered by two Natura 2000 sites: PLH280007 (habitat "The Vistula Lagoon and the Vistula Spit") and PLB280010 (bird area "The Vistula Lagoon")[222].

220 *Wikipedia*, https://en.wikipedia.org/wiki/Mierzeja_Wi%C5%Blana [cit. 10. August 2017].

221 *Wikipedia*, https://en.wikipedia.org/wiki/Zalew_Wi%C5%Blana [cit. 10. August 2017].

222 Bigger part of the banks of the Vistula Lagoon is covered with a reed belt of up to several hundred meters in width, and in places, the rushes of the narrow barley or the lake lobe. Shallow bays in the western part of the Lagoon are rich in submerged and floating vegetation and extensive patches of yellow water lily and white water lily. At least 19 birds from Annex I of the Birds Directive have been identified in the Vistula Lagoon. Habitats were fixed on the basis of the number of 10 species (3 from Annex I DP): cormorant, gray heron, mute swan, white goose, brandy, blueberry, white-tailed deer, crayfish, coot, tern. The Vistula Spit itself is the so-called bottle-neck of the spring and autumn migration routes of birds, traversed by thousands of sensitive species of birds of prey.

The issue of navigation in the waters of the Vistula Lagoon is a disputable one in Polish-Russian relations, and earlier Polish-Soviet. At the beginning of May 2006, the Russians introduced a traffic ban on the Vistula Lagoon, for both passenger and commercial vessels, which made access from the Polish territorial waters of the Gulf of Gdańsk to the Polish waters of the Vistula Lagoon entirely impossible. In 2009, an intergovernmental agreement[223] was signed which allowed cross-border shipping for Polish and Russian flagged ships, with the exception of military and coast guard units. The current procedures provide for the possibility of shipping vessels flying the flag of a third country, including EU, to Polish ports, but is subject to an application for permission to the port master in Kaliningrad 15 days in advance prior to the planned entry into the Vistula Lagoon. This requirement of a 15-day term significantly limits irregular shipping.

The procedures imposed by the Russian side are contrary to the spirit of international law[224]. To provide comparison, we are dealing with a broader scope of navigational rights than in the vast majority of cases, even in international inland waterways that are navigable. The Russian administration may refuse consent; it also has the right to close the border on the Vistula Lagoon for defense, security or environmental reasons.

As a result of the above, the Polish government has taken steps to cross-cut the Vistula Spit and connect the Polish waters of the Vistula Lagoon with the Polish waters of the Gulf of Gdansk, i.e. the Baltic Sea. The planned shipping channel is to have a length of 1260 m, a lock, storm gates, two drawbridges, parkings and border crossing facilities. The width of the excavation is 60 m (at a certain section 200 m) and the depth is down to 5 m. The work will cover the soil quantities from less than one million to two million cubic meters. The investor, the Director of Gdynia Maritime Authority[225], is planning to complete the investment in 2022. Its cost is about 880 million zlotys, which will be covered by the state.

223 Agreement between the Government of the Republic of Poland and the Government of the Russian Federation on the Vistula Bay shipping (Kaliningradskij zaliw), signed in Sopot on 1. 9. 2009, (Monitor Polski 2009, No. 78, item 975).

224 Among others United Nations Convention on the Law of the Sea, drawn up at Montego Bay on 10. 12. 1982, (Journal of Laws of 2002, No. 59, item 543, with amendments).

225 It is a regional maritime administration in Poland under the minister competent for maritime affairs. Its activities are governed by the Act on maritime areas of the Republic of Poland and Maritime Administration of 21. 03. 1991 (Journal of Laws 2016, item 2145, with amendments).

This investment raises tremendous emotions. It has its devoted followers[226] as well as opponents[227]. Undoubtedly, this will be an investment with significant negative impacts on the environment, including Natura 2000 sites. It is a threat to the entire list of rare or protected species, as well as the difference in salinity and even the level of water on both sides of the Vistula Spit[228].

The basic economic benefits that will outweigh the cost of investment over the next 20 years result from the cost savings in transport and from economic development[229]. The Vistula Spit can prove to be another extremely interesting hard case on the line environment and the region's development, especially since the Russian side has already accused Poland of not respecting international conventions, including those contained within the HELCOM[230] Marine Environment Protection Commission. The Convention instructs signatories to consult and settle investments in the Baltic Sea area. The Polish side argues that the planned channel will not be built in the border area and there is no obligation to make any arrangements, information or consent.

226 The benefits shown by the investor in the years 2021–2040 are: revenues of the Elblag port will increase by 114,6 milions zloty; shipping will increase by at least 1.5 million tonnes; environmental savings are 73,2 millions zloty, and financial – about 948 millions zloty, the transit time from Gdansk to Elblag will be shortened by 9,5 hours; ships will save 250.000 hours, ie 373,6 millions zloty; passenger traffic will increase from 40.000 up to 210.000 people in 2040; 2.200 workplaces will be created, budget on savings and higher revenue will gain 900 millions zloty; the industrial sector will earrn an additional 276 milions zloty, and the number of tourists will increase what will bring 10bilions zloty over the next 20 years. 6.500 overnight places will be created and about 5.200 catering places.

227 The arguments widely quoted against the cross-cutting of the Vistula Spit are the following: the construction of the canal will cause devaluation of the landscape of the Vistula Spit "Mierzeja Wiślana" Landscape Park and is contrary to the objectives of its establishment; the area of storage of the spoil will amount from 300 to 530 ha, the landscape will change and reduce the value of recreation and tourism; the port of Elblag is a formal seaport and, in fact, large vessels have never sailed there and have not been proven to be justified; to compensate for the loss of protected natural habitats, we have to recreate about 100 hectares of rushes and enlarge the protected areas by nearly 414 hectares; economic benefits are negligible and uncertain, and environmental losses are high and certain.

228 According to the official description of the proposed "Vistula Bay" habitat area, 65 % of the area is a shallow coastal lagoon, the only marine and halophilous habitat that is listed as a priority on the Natura 2000 list. In the western part of the Vistula Lagoon, there is a spatula, which today forms the basis of fisheries in this area. Also, the presence of birds that qualify the lagoon to Natura 2000 site is due to habitat conditions, including food availability, safe hatchery areas and wintering time. Therefore, the quality and character of the communities growing at the bottom of the lagoon is of crucial importance and it is necessary to assess the damage done to them, preceded by an inventory of the current state.

229 *Gdynia Maritime Office*, http://www.umgdy.gov.pl/?page_id=8064 [cit. 9. August 2017].

230 Convention on the Protection of the Marine Environment of the Baltic Sea Area, done in Helsinki on 9. 04. 1992, (Journal of Laws 2000, No. 28, item 346, with amendments).

6.6 Special Law for Vistula Spit Cross-cut

The main source of law establishing the Polish legal system are acts. This is despite the fact that the highest sources of law is the Constitution[231], and only below that there are acts, ratified international agreements and regulations[232]. However, even the very Constitution of the Republic of Poland is very often referring to the acts[233] whose quantity and detailed scope of regulation determines, according to my assessment, the nature and characteristics of the main normative act shaping the Polish legal system. In a democratic legal state, as E. Ochendowski proves, the act constitutes the main form and means of implementing the sovereign settlement by the nation, through its representatives, the affairs of the state[234].

Acts are abstract and general, have generally binding efficiency, which can be described as spontaneous[235]. Sometimes, in order to distinguish from the Constitution, referred to as the "Essential Act", they are called ordinary acts[236]. It is an act created in a strictly defined mode and as accepted by practice[237] and requirements of the goal, quite difficult in the reception, form. The Sejm and the Senate play a basic role in the legislative process, and is complemented by the President of the Republic of Poland[238]. Exceptions to the drafting procedures are strictly limited to: changes to the Constitution

231 SKRZYDŁO, W. *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Kraków: Zakamycze, 1999, p. 127. ISBN 978-83-264-4223-0.

232 According to art. 87 point 1 of the Constitution of the Republic of Poland.

233 Read more: JASKIERNIA, J. Odesłania do ustawy w Konstytucji Rzeczypospolitej Polskiej. In: GARLICKI, L. (ed.). *Konstytucja – wybory – parlament. Studia ofiarowane Zdzisławowi Jaroszowi*. Warszawa: Liber, 2000, p. 83. ISBN 978-83-720-6055-6.

234 OCHENDOWSKI, E. *Prawo administracyjne. Część ogólna*. Torun: TNOiK, 2013, p. 52. ISBN 978-83-7285-689-0.

235 ZIMMERMANN, J. *Prawo administracyjne*. Warszawa: Wolters Kluwer business, 2016, p. 58. ISBN 978-83-8092-336-2.

236 The Polish legal system includes one type of law, apart from the constitution. Unlike the French model, for example, where the Parliament adopts three types of laws: constitutional, organic and ordinary. Constitutional laws regulate the constitution of the state, and organic laws are passed as a result of the implementation of constitutional proclamations. Read more: GDULEWICZ, E. *System konstytucyjny Francji*. Warszawa: Wydawnictwo Sejmowe, 2000. ISBN 978-83-7059-484-0.

237 Legislative mode is indicated in art. 118–122 of the Constitution of the Republic of Poland.

238 Read more: CHMIELNICKI, P. (ed.). *Konstytucyjny system władz publicznych*. Warszawa: LexisNexis, 2009, pp. 84–93. ISBN 978-83-7620-079-8.

of the Republic of Poland, ratification of international agreements and adoption of the budget act[239]. The foregoing considerations represent the fundamental role that acts play in the Polish system of law[240]. As a rule, acts should regulate some issues in a general, holistic and stable way. Especially the latter postulate is a sore place in the Polish legal system.

In addition to the term "act" (Polish: ustawa) in common language, the term "special act" (Polish: specustawa) is used. They are often talked about when regulating particularly important and debatable areas of economic and social life. "Specustawa" is, in the absence in the law system other acts than the basic and ordinary ones only the colloquial denominator of ordinary acts specifically relating to the principles of preparation and implementation of investments in some sphere of public life. This uniqueness usually refers to the very narrow scope of a legal act focused around an event, project or investment, its distinct time-constrained nature, and a large interference with the legislative content of other legal acts. Changes made with such a special act, for example, grant special favors to certain entities and institutions, expressly shorten certain time limits and simplify procedures, but only and exclusively for the indicated beneficiary group, while maintaining the basic subject matter for the other addressees of the legal norm. But neither the manner of their adoption, nor their form deviate from the other ordinary acts[241]. The Polish legal system includes, as yet, several laws of this type. These are so-called "specustawy" on: road[242], railway[243], airports[244], LNG

239 Read more: ZUBIK, M. *Budżet państwa w polskim prawie konstytucyjnym*. Warszawa: Wydawnictwo Sejmowe, 2001. ISBN 978-83-7059-528-6.

240 Read more: JABŁOŃSKA-BONCA, J. *Wstęp do nauk prawnych*. Poznań: Ars Boni et Aequi, 1996, pp. 44. ISBN 978-83-900964-9-8.

241 Also defined by the Act on the promulgation of normative acts and certain other legal acts of 20. 7. 2000, (Journal of Laws 2017, item 1523, with amendments).

242 Act on special rules for the preparation and implementation of investments in public roads of 10. 4. 2003, (Journal of Laws 2017, item 1496, with amendments).

243 Act on rail transport of 28. 3. 2003, (Journal of Laws 2016, item 1727, with amendments).

244 Act on special rules for the preparation and execution of investments in public airport areas of 12. 2. 2009, (Journal of Laws 2017, item 1122, with amendments).

port[245], flood[246], shipyard[247], againt the flood[248], EURO 2012[249] and nuclear power plant[250].

The latest special act concerns precisely the cross-cut of the Vistula Spit[251]. It specifies the principles of preparation, implementation and financing of investments in the construction of a waterway linking the Vistula Lagoon with the Gulf of Gdańsk required for the significant interest of state security and defines competent authorities in these matters[252]. The key subject of the "Specustawa" settlement is the decision to authorize the investment in access infrastructure to be issued at the request of the investor by the Voivode[253] of Pomorskie Region after consulting the Voivode of Warmińsko-Mazurskie Region regarding the part of the investment located in the Warmińsko-Mazurskie Region[254]. Even the name of the administrative decision which special act provides for the implementation of the investment is unusual. After all, standard investments, even of similar scale and difficulty, but based on standard procedures, provide for a "building permit"[255] rather than a "decision to authorize investment in access infrastructure". The opinion referred to the competent authority is to issue

245 Act on investments in the field of liquefied natural gas regasification terminal in Świnoujście of 24. 4. 2009, (Journal of Laws 2016, item 1731, with amendments), hereinafter referred to as "Special act on LNG port".

246 Act on special solutions related to the removal of flood effects from May and June 2010 of 24. 6. 2010, (Journal of Laws 2010, No. 123, item 835, with amendments).

247 Act on compensation proceedings in entities of particular importance to the Polish shipbuilding industry of 19. 12. 2008, (Journal of Laws 2016, item 592, with amendments).

248 Act on special rules for preparation of investments in flood protection structures of 8. 8. 2010, (Journal of Laws 2017, item 1377, with amendments).

249 Act on the preparation of the final UEFA EURO 2012 European Football Championship of 7. 9. 2007, (Journal of Law 2017, item 1372, with later amendments). Read more: BOJAR-FIJAŁKOWSKI, T. Specjalne regulacje prawne na UEFA EURO 2012 w Polsce In: BORUSZCZAK, M. (ed.). *EURO 2012 Polska-Ukraina. Aspekty organizacyjno-ekonomiczne.* Gdańsk: Wyższa Szkoła Turystyki i Hotelarstwa, 2012, pp. 13–22. ISBN 978-83-89081-38-4.

250 Act on preparation and realization of investments for nuclear power plant with accompanying objects of 29. 06. 2011, (Journal of Laws 2017, item 552, with amendments).

251 Act on investments in the construction of a waterway linking the Vistula Lagoon with the Gulf of Gdańsk of 24. 02. 2017, (Journal of Laws 2017, item 280, with amendments), hereinafter referred to as "Specustaawa" (Special Act).

252 Art. 1 point 1 Specustawa (Special Act).

253 Local government administration, government's representative in the region.

254 Art. 3 Specustawa (Special Act).

255 As defined in the Construction Law of 7. 07. 1994, (Journal of Laws 2017, item 1332, with amendments).

within a maximum of 21 days from the date of receipt of the application for its issuance. Moreover, failure to provide opinion within this deadline is treated as a lack of objection, which is rarely used in the Polish administrative procedure by tacit consent. Such an opinion, which appears at several points in the procedure established by "Specustawa", replaces all other agreements, permissions, traditional opinions, conditions, approvals or positions of competent authorities, as required by standard regulations.

"Specustawa" requires the Voivode of Pomorskie Region to issue a permit decision within 60 days of the date of application. What is unprecedented in the Polish administrative procedure, in the case of failure to take a decision within the specified time limit, the minister responsible for construction, planning and spatial planning and housing issues the Voivode of Pomorskie Region, by way of order, a fine of 1.000 zloty for each day of delay[256]. The standard provisions of the administrative procedure, neither general[257] nor specific, do not provide fines specifically set out for the failure of administrative bodies to issue administrative decisions within the statutory time limits.

Indicated to conduct proceedings on the decision to permit to cross-cut the Vistula Spit Voivode of Pomorskie Region informs the applicant and owners of the land that helps to accomplish the investment about the initiation of the proceedings. With this delivery, not the completion of the proceedings by a final decision, the sale of such land is frozen and possible administrative proceedings, to which the existing owners of land may be a party, are suspended. In violation of these rules, the law imposes sanctions for the nullity of legal acts made after notification[258].

The determination of the Polish legislator, who in this case is also a de facto investor through the governing body of the local state administration, is large enough that even the unregulated legal status of the real estate needed to carry out the investment or the lack of data in the cadastre allowing to settle the personal data of the landlord or perpetual usufructuary, does not preclude the initiation and conduct of a decision to authorize the

256 Art. 5 point 1 Specustawa (Special Act).
257 The Code of Administrative Procedure of 14 July 1960, (Journal of Law 2017, item 1257, with amendments).
258 Art. 6 point 1 Specustawa (Special Act).

execution of an investment. At the same time, the investor was relieved by special act to comply with regulations regarding, inter alia, land use spatial planning[259] and conservation of nature as to regulations for the protection of green areas and forestation[260].

It is impossible not to get the impression that the legislator drew conclusions from the case of "Rospuda Valley" preparing for the cross-cutting of the Vistula Spit. While the "Specustawa" procedure envisages the issuance of administrative decisions, such as a water permit or a decision on environmental conditions, this act facilitates and accelerates the acquisition by the investor. Hence, indicated by the "Specustawa" as competent to issue a water permit, the Marshal[261] of the Pomerskie Region shall issue a decision within 30 days of the application, subject to a penalty of 1.000 zloty for each day of delay[262]. Similarly strict conditions were imposed on the Regional Director for Environmental Protection in Olsztyn, which is to issue a decision on the environmental conditions for the aforementioned investment within the period of 90 days[263]. The investor is currently awaiting the decision of the Regional Director for Environmental Protection in Olsztyn about the scope of the environmental impact assesment report. It is impossible to disguise that the investor has been prepared in detail for environmental impact assessments, reports, studies or inventories of the natural environment of the investment site[264] in order to avoid the main errors made in the case of the Rospuda Valley.

What is interesting, the legislator envisages, at the occasion of the realization of the Vistula Spit cross-cut, the issuance of a concession for the extraction of minerals from the deposits during the implementation of the investment[265]. Accordingly, it establishes the regulations on concessions from the

259 Act on spatial planning and local development of 27 March 2003, (Journal of Laws 2017, item 1073, with amendments).

260 Chapter 4 of the NPA of 16 April 2004, (Journal of Laws 2016, item 2134, with amendments) with the exception of art. 88 and art. 89 concerning administrative fines.

261 The authority of the local self-government administration, derived from the elections of the residents, though indirectly the body managing the region/voivodship.

262 Art. 16 Specustawa.

263 Art. 17 Specustawa.

264 Full documentation is available on the website of the Maritime Office in Gdynia: http://www.umgdy.gov.pl/?page_id=8064 [cit. 9 August 2017].

265 Art. 18 Specustawa.

Geological and Mining Act[266]. Probably it is about the possibility of obtaining amber, which is obtained in large quantities in this region.

Looking at the special provisions of the "Specustawa", it is worth noting the point which provides specific objections relating to the decision, defining the substance and scope of the appeal being appealed, and pointing at the evidence supporting this request when appealing against the said permit decision[267]. Such requirements are not in the standard administrative procedure, where the appeal must only be an expression of dissatisfaction with the content of the decision issued[268]. There is no possibility in the appeal proceedings exercised in the "Specustawa" mode for the appeal body to stop the execution of the decision while the appeal is being processed[269]. Such measures are also provided for in other special acts[270].

"Specustawa" also rigidly specifies and shortens the time limits of court and administrative proceedings, so that the transmission of the court files and the answer to the complaint to the provincial administrative court takes place within 15 days of receipt of the complaint by the administrative body. This court handles the complaint within 30 days of receipt of the file together with the response, and the date of the cassation appeal for decisions by the Supreme Administrative Court is 2 months from the date of its filing.

This special law also includes solutions aimed at the extraordinary protection of the sustainability of the decision to allow the Vistula Spit cross-cut to be permitted, since the application for annulment of a decision can only be submitted within 14 days, whereas the norm is up to 10 years after the decision is issued. Moreover, the administrative court can only state that the decision violates the law, but not resume the proceedings 30 days after the start of construction works[271]. Additionaly, in the event of a declaration of invalidity being held not binding or in the event of finding that the

266 Geological and Mining Law of 9. 6. 2011, (Journal of Law 2016, item 1131, with amendments).

267 Art. 30 Specustawa.

268 Art. 128 CAP. Read more: WIERZBOWSKI, M., WIKTOROWSKA, A. (ed.). *Kodeks postępowania administracyjnego. Komentarz*, Warszawa: C. H. Beck, 2013, pp. 753–758. ISBN 978-83-2554-329-7.

269 What foresees in the standard procedure art. 135 CAP.

270 Like art. 34 point 3 of special act on LNG port.

271 Art. 32 Specustawa.

decision has been issued in breach of law, compensation for the damage arising in the execution of this decision can only be made by paying the appropriate amount to the injured party without reimbursement in kind.

In conclusion, the Polish legislator provided the investor of a cross-cut of Vistula Spit, meaning in fact a government administration directly subordinate to the Parliament, therefore the legislators, with particular privileges. "Specustawa" is designed to streamline and accelerate the administrative process associated with this investment. This special act does not interfere with the substantive requirements coming directly from European Union law, so even in spite of the extraordinary modes, the investment may find resistance both from the European Commission and on the basis of international law from the Russian Federation.

6.7 Conclusions

The above study leads to the following conclusions.

Difficult cases, Anglo-Saxon hard cases, also occur on the basis of statutory law, also in Poland, where a law creator or a law-enforcing authority sometimes has to make a decision concerning two legally protected values.

The most intense hard case in Poland concerned the protection of animals in terms of slaughter without stunning for religious purposes. This case, undoubtedly, brings to mind the hierarchy of the sources of law while resolving the constitutional dispute over the priority of animal protection or the freedom of religious practices in favor of the freedom of religious practices.

Many hard case issues in Poland involve a law vs. economics dispute as in the case of poultry welfare. Indolence of the governmental administration in this matter confirms not only the submission of economic interests over environmental law, in this case animal welfare, but also a specific approach to the implementation of European Union law. This case, unlike the legal action on ritual slaughter, has its power under European Union law.

A particular type of hard case is the creation of infrastructure in protected areas, particularly as they are also based on European Union law. For this reason, the construction of the ring road of Augustów through the Valley

of Rospuda River has been extended for several years and led Poland, for the first time, before the Court of Justice of the European Union in Luxembourg. What seemed like a lost case at the beginning was managed to end amicably only due to the investor's withdrawal from the initial investment plans in this valuable natural value area.

Even more risky, in terms of the European Union rules of nature protection, is the plan of the Polish government to cross-cut the Vistula Spit. However, this time the investor, which is the state, seems to be better prepared than in the case of the Rospuda Valley. The necessary inventories and studies were carried out to obtain a decision on environmental conditions and a water permit under European Union law, but these procedures are still before the investor.

Not for the first time, the Polish legislature confirms that effective implementation of important and technically complicated infrastructure investments cannot be based on universally binding provisions. Therefore, for the excavation of the Vistula Spit, the legislator provided the investor with another "Specustawa", special act that greatly improved the administrative procedures related to the investment. Its details in an exaggerated manner indicate the authorities, deadlines and even establish unheard-of standard financial penalties for delay. "Specustawa" aims to facilitate the investor's implementation of cross-cut of the Vistula Spit, but it mainly regulates procedural standards, in much less substantive extent, and only those that fall within the competence of the member state. Despite the special act, the cross-cut of Vistula Spit, like the investment in the Rospuda Valley, may lead Poland to the Court of Justice of the European Union, and even to international tribunals.

7 THE CONCEPT OF SUSTAINABLE DEVELOPMENT AND NATURE CONSERVATION IN POLISH LAW

7.1 Introduction

The concept of sustainable development is currently the key idea in view of socio-economic development. Therefore, it has to include issues regarding nature conservation and management as important elements of that development. As defined in Article 3 item 50 of the Act as of 27 April 2001 Environmental Protection Law[272], sustainable development shall mean such socio-economic development which integrates political, economic and social actions, while preserving the balance of nature and the sustainability of basic natural processes, with a view to ensure that the basic needs of individual communities or citizens, of both the present and future generations, can be satisfied. At this point, I will not address issues regarding different ways of understanding and practical implementation of this concept[273].

The inclusion of sustainable development relating also to nature conservation as stipulated under the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, pos. 43, and subsequent amendments) is of utmost importance also with regard to our entire legal system. It appears only once in this legal act — in Article 5. The importance of this provision is highlighted by the fact that it has been included in chapter one of the Constitution entitled 'Rzeczypospolita', introducing basic principles of the legal system[274]. Such placement of sustainable development principle is certainly of a fundamental importance from a legal point of view.

272 Journal of Laws 2017, item 519, with amendments.

273 BUKOWSKI, Z. *Zrównoważony rozwój w systemie prawa*. Toruń: Dom Organizatora, 2009, pp. 23–59. ISBN 978-83-7285-463-6.

274 WINCZOREK, P. *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* Warszawa: Liber, 2000, p. 13. ISBN 978-83-7206-048-7.

The issues relating to sustainable development are of interest to science[275], including law[276]. The article aims to analyze how the concept of sustainable development is recognized in Polish legislation on nature conservation.

7.2 The Concept of Sustainable Development in the NCA

The concept of sustainable development appears in the NCA[277] of 16 April 2004, in which it is used in a detailed manner, i.e. in a definition of a landscape park in relation to the purpose of its establishment (Article 16, section 1)[278]. As opposed to more stringent nature conservation types, such use of sustainability is to indicate the capacity for conducting normal business activity within the landscape park area[279], although with certain limitations regard-

275 POSKROBKO, B. (red.). *Sterowanie ekorozwojem*. Białystok: Wydawnictwo Politechniki Białostockiej, 1998. ISBN 8386272767; PIĄTEK, F. (red.). *Ekonomia a rozwój zrównoważony*. Białystok: Ekonomia i Środowisko, 2001. ISBN 8388771078; DOBRZAŃSKI, G. (red.). *Teraźniejszość i przyszłość ekorozwoju w Polsce*. Białystok: Wydaw. Politechniki Białostockiej, 2002. ISBN 8388229346; DOBRZAŃSKI, G. (red.). *Aplikacyjne aspekty trwałego rozwoju*. Białystok: Politechnika Białostocka, 2002. ISBN 867-096; CZAJA, S. (red.). *Zrównoważony rozwój – doświadczenia polskie i europejskie*. Nowa Ruda: Ekonomia i Środowisko, 2005. ISBN 8385773797; ZABŁOCKI, G. *Rozwój zrównoważony. Idee, efekty, kontrowersje*. Toruń: Wydaw. UMK, 2002. ISBN 8323114196; PODEDWORNA, H., RUSZKOWSKI, P. (red.). *Społeczne aspekty zrównoważonego rozwoju wsi w Polsce. Partycypacja lokalna i kapitał społeczny*. Warszawa: Wydawnictwo Naukowe Scholar, 2008. ISBN 9788373832688; BORYS, T. (red.). *Wskaźniki zrównoważonego rozwoju*. Warszawa – Białystok: Ekonomia i Środowisko, 2005. ISBN 8388771612; PAPUZIŃSKI, A. (red.). *Zrównoważony rozwój. Od utopii do praw człowieka*. Bydgoszcz: Oficyna Wydawnicza Branta, 2005. ISBN 8389073986; KOZŁOWSKI, S. *Przyszłość ekorozwoju*. Lublin: Wydawnictwo KUL, 2005. ISBN 837363312X; CZYŻ, M. (red.). *Wybrane aspekty równoważenia rozwoju*. Białystok: Wydawnictwo Ekonomia i Środowisko, 2005. ISBN 8388771639; POSKROBKO, B., KOZŁOWSKI, S. (red.). *Zrównoważony rozwój. Wybrane problemy teoretyczne i implementacja w świetle dokumentów Unii Europejskiej*. Białystok-Warszawa: Komitet "Człowiek i Środowisko" przy Prezydium PAN, 2005. ISBN 8392313909.

276 RÓWNY, K., JABŁOŃSKI, J. (red.). *Zasada zrównoważonego rozwoju w prawie i praktyce ochrony środowiska*. Warszawa: Wydaw. Prywatnej Wyższej Szkoły Businessu i Administracji, 2002. ISBN 838603193X; PYĆ, D. *Prawo zrównoważonego rozwoju*. Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego, 2006. ISBN 837326339X; CORDONIER SEGGER, M.-C., KHALFAN, A. *Sustainable Development Law. Principles, Practices & Prospects*. Oxford: Oxford University Press, 2004. ISBN 9780199276707; BUGGE, H. CH.,VOIGT, CH. (red.). *Sustainable Development in National and International Law*. Groningen: Europa Law Publishing, 2008. ISBN 9789076871844; BUKOWSKI, Z. *Zrównoważony rozwój w systemie prawa*. Toruń: Dom Organizatora, 2009. ISBN 978-83-7285-463-6.

277 Journal of Laws 2016, item 2134, with amendments.

278 The landscape park covers an area that is protected due to the value of the natural, historical and cultural and scenic landscape in order to preserve and promote these values in terms of sustainable development.

279 Article 16 section 6.

ing protection of that area[280]. It may be assumed that such a definition shall be a significant indication for the authority establishing a landscape park, for the purpose of demarcating the area required to be sustainably developed, while, for instance, under the constitutional provision, the requirement for such sustainable development refers to the entire country. Therefore, it shall rather be a rationale for the authority introducing restrictions within a given landscape park with regard to the scope of those restrictions in such a way that on one hand their protective function is realized and on the other hand that they allow for development in a manner that is environmentally sustainable.

In this Act as well as in other legal acts regarding nature conservation, the term sustainable appears with reference to a variety of issues. It indicates various ways of carrying out activities that are compatible with the concept of sustainability. In the NCA this concept refers to:

- sustainable use of resources, formations and natural ingredients (Article 2(1) of the Act),
- sustainable use of biological diversity (Article 3, item 4; Article 56, section 1, item 2; Article 96, section 3, item 3; Article 111),
- sustainable duration of populations of species and natural habitats, for the protection of which the Nature 2000 area is designed or designated (Article 5, item 1d),
- sustainable use of farmland and forestland (Article 24, section 1, item 6).

A sustainable use of natural resources, formations and components is one of the statutory concepts of nature conservation, which, in fact, is explicitly linked to the concept of sustainable development[281]. Given the above, Ciechanowicz-McLean rightly proposed that a general principle shall be identified under the nature conservation legislation[282]. Sommer defines it as a principle that ensures a sustainable use of nature components[283]. Both concepts appear to be identical despite two different names in use.

280 GRUSZECKI, K. *Ustawa o ochronie przyrody. Komentarz.* Kraków: Zakamycze, 2005, p. 92. ISBN 837444049X.

281 RADECKI, W. *Ustawa o ochronie przyrody. Komentarz*. Warszawa: Difin, 2006, p. 48. ISBN 8372516030.

282 CIECHANOWICZ-MCLEAN, J. (red.). *Polskie prawo ochrony przyrody*. Warszawa: Difin, 2006, pp. 33–34. ISBN 8372516235.

283 RADECKI, W. (red.). *Teoretyczne podstawy prawa ochrony przyrody*. Wrocław: Wydawnictwo Prawo Ochrony Środowiska, 2006, p. 100. ISBN 8360644012.

The concept of a sustainable use of biological diversity under the entire Constitution regards the act of planning, i.e. The Programme for conservation and sustainable use of biodiversity, along with Action Plan. This corresponds to the requirements arising from the Convention on Biological Diversity. The Programme for conservation and sustainable use of biodiversity along with Action Plan is regarded as a national law by the Polish Council of Ministers. The strategy is one method of achieving the statutory objective with respect to nature conservation. Its implementation shall be assessed by the Polish State Council for Nature Conservation.

It affects legal instruments set out in the Constitution and it may come to justify, for instance, granting permission for harvesting plants and mushrooms subject to the species protection, capture, fishing or killing animals under species protection and other activities that are subject to prohibitions or restrictions with respect to species under partial species protection. Gruszecki assumes that the concept of sustainable use shall be understood in the same way as sustainable development in a definition laid down in the Environmental Protection Law[284]. The argument seems reasonable because, given the concepts are not identical, in general, the use of *sustainable* shall indicate actions implemented in line with the concept of sustainable development, including its components, which, according to Polish law, are included within this definition.

Finally, sustainable use of farmland and forestland remains among acceptable objectives regarding changes in hydrology within protected landscape areas (as different from environment protection and sustainable water management). The provincial governor shall be responsible for carrying out checks on changes in hydrology made solely with respect to economic use of nature resources and its components (Article 123 of the Environmental Protection Law). Whether the implemented changes are sustainable or not shall be resolved under misdemeanor law (intentional infringement of prohibitions in areas of protected landscape under Article 127 shall be punished with arrest or a fine).

In conclusion, the NCA includes only one reference to sustainable development and many references to sustainable uses of different resources

284 GRUSZECKI, K. *Ustawa o ochronie przyrody. Komentarz*. Kraków: Zakamycze, 2005, pp. 452–453. ISBN 837444049X.

of nature and environment. With this in mind, J. Sommer validly concluded that the NCA refers to sustainable development defined in this Act as conservation and sustainable use of biological diversity[285]. However, defining it in a broader sense appears more correct. In the NCA sustainable development is defined as sustainable use of resources, goods and natural components, which is in line with the statutory definition of nature conservation and encompasses at the same time biological diversity. Moreover, taking into account sustainable development in the NCA is so important that it gave rise to the formulation of a general principle of nature conservation legislation and furthermore, subsequent approaches result from it, in which the concept of sustainability appears as highly compatible with international standards within that scope (sustainable use of biological diversity).

7.3 Sustainable Development in Other Legal Acts on Nature Conservation

Sustainable development appears particularly important when viewed with regard to the economic aspect of environment conservation under Act of 6 June 2001 on maintenance of national character of the country's strategic natural resources[286], the guiding principle of which was to prevent ownership transformation of those resources, which also made a reference to the principles of the management of this resource. Due to its scope and character, it shall be assumed that it defines general principles of country's strategic natural resources management in the following areas:

1. groundwater and surface waters in natural watercourses and sources in which those watercourses originate, in canals, lakes and natural reservoirs with a continuous water supply under the Act as of 18 July 2001, Water law;
2. Polish maritime areas with the coastal bands and their natural living and mineral resources as well as seabed natural resources and the earth's interior natural resources within the borders of those area under the Act of 21 March 1991 on the maritime areas of the Republic of Poland and maritime administration;

285 RADECKI, W. (red.). *Teoretyczne podstawy prawa ochrony przyrody*. Wrocław: Wydawnictwo Prawo Ochrony Środowiska, 2006, p. 88. ISBN 8360644012.

286 Journal of Laws No 97 item 1051, with amendments.

3. state forests;
4. mineral deposits not forming part of land property under the Act of 4 February 1994 the Geological and Mining Law;
5. National parks' natural resources (Art. 1).

The provisions of the aforementioned Act indicate that the management of strategic natural resources is carried out in compliance with the principle of sustainable development in the interest of general (societal) good (Article 3). The objective of this management was also indicated therein, that is the primacy of the public interest over individual interest. However, it must be assumed that this is a specific legal provision with regard to the principle of taking into consideration the public good ex officio and the legitimate interest of citizens as defined under Article 7 of the Code of Administrative Procedure. Generally, it may be assumed that with regard to the essences of sustainable development, the public good and the concept of sustainable development are compatible. Incidentally, a new concept appears, that is the interest of the public good, which is one of the categories of the public interest[287].

In order to achieve the above objective, as set out in Article 3 of the Act, competent public authorities and other entities, having – based on separate provisions – the management over the strategic natural resources, are obliged to:

1. maintain, augment and improve renewable resources
2. use minerals deposits, pursuant to the principle of sustainable development (Article 4).

Thus the management of the strategic resources was set out therein in accordance with the principle of sustainable development. Yet the second reference to the principle in item 2 of Article 4 in fine is redundant, as it refers once again to the same thing (because after all sustainable management means no less than sustainable use of mineral deposits). To sum up, the importance of the regulation within articles 3 and 4, it shall be indicated that the importance of the principle of sustainable development was stressed with regard to both the renewable and non-renewable resources under the Act.

287 DUDA, A.S. *Interes prawny w polskim prawie administracyjnym*. Warszawa: C. H. Beck, 2008. ISBN 9788374838832.

This Act, as a supreme legal instrument, is of particular importance within environmental law. Its regulations are generally recognized with respect to ownership transformation, while those regarding the management of the strategic country's natural resources and laying down within this scope general principles, with the principle regarding sustainable development at the front, are wrongly ignored.

Another legal act that constitutes the Polish environment law is the Forest Act of 28 September 1991[288]. There we do not find the concept of sustainable development, but such concepts as sustainable forest management (Article 6, item 1a; Article 7 section 1; Article 13a section 1; Article 13 b section 1) and sustainable use of forests and all its functions (Article 8, item 3) are used. Naturally, it does not mean the terms are identical to the concept of sustainable development. Each one has its individual marital content, yet, relating to the concept of sustainable development[289].

The concept of sustainable forest management has been defined in a legal Act[290]. It can be noted that a reference to three forest functions, namely natural, economic and social is made therein, with the first function as a dominant one (which, in fact, stays within the goals of that management). At the same time, it needs to be taken into consideration that the glossary differentiates between the terms sustainable forest management and forest management (implicitly, classical, not sustainable)[291].

Sustainable forest management is carried out in accordance with the implementation acts, that is a forest management plan and simplified forest management plan:

1. forests conservation and their beneficial effect on the particular components of the environment, namely the climate, air, water, soil,

288 Journal of Laws 2017, item 788, with amendments.

289 RADECKI, W. *Ustawa o lasach. Komentarz*. Warszawa: Difin, 2006, pp. 47–48. ISBN 8372516383.

290 Sustainable forest management means "(…) activity seeking to shape the structure of forests and make use of them in a manner and at a rate ensuring the permanent protection of their biological diversity, a high level of productivity and regeneration potential, vitality and a capacity to serve – now and in the future – all the important protective, economic and social functions at local, national and global levels, without harm being done to other ecosystems" (article 6, item 1, point 1a).

291 Silviculture (forest economy) means forestry activity in the field of management, protection and maintenance of forest, enlargement of forest resources and stands, game management, harvesting – save purchase – of wood, resin, Christmas trees, stump wood, bark, needles, game and the fruits of herbaceous cover, including the selling of these products in an unprocessed state as well as management of non-production forest functions.

living conditions and human health as well as preservation of natural balance between them;

2. forest conservation, particularly forests and forest ecosystems that are part of native environment or forests particularly valuable with regard to:
   a) preservation of biological diversity,
   b) preservation of forest genetic resources,
   c) landscape value,
   d) science needs;
3. soil protection and protection of other areas exposed to contamination or damage and of particular social importance;
4. protection of surface water and groundwater, water retention, and particularly on watershed areas and groundwater recharge areas;
5. production, based on rational management, of wood, raw materials and forest by-products.

This catalogue does not exhaust the entire spectrum of goals. Yet, it needs to be assumed that the above goals, as mentioned in the Act, are most important. The majority of them are environmental goals (items 1–4). At the very end, we find economic goals (item 5), while the social goal is set out within item 1, with regard to favorable impact on living conditions and human health.

The Acts also indicates certain specific tasks carried out pursuant to sustainable forest management[292]. An area-related educational instrument of such management has also been introduced[293].

292 Article 13a.
1. To ensure a sustainable forest management State Forests are obliged in particular to:
1) initiate, coordinate and make periodic assessments of the condition of forests and forest resources, and also forecasting potential changes in forest ecosystems
2) engage in the periodic, large-scale inventorying of the condition of forests and update records as regards forest resources
3) run a data bank on forest resources and the condition of forests.
2. The obligations (tasks) under section 1, item 2 and 3 apply equally to all forests, regardless of their form of ownership.

293 Article 13 b.1. In order to promote sustainable forest management and forest resources conservation, the Director-General of State Forests may, by resolution, establish promotional forests complexes.

The concept of sustainable use of all forest functions appears also in the Act on inland fishery of 18 April 1985[294]. The Act specifies:

1. terms and conditions for protection, fish-farming and fishing in surface inland waters, waters in installations and facilities assigned for fish-farming;
2. competence of administrative public bodies, proceedings, and the duties and responsibilities of organizational units and persons in respect of enforcement of the provisions of:
   a) Council Regulation (EC) No. 708/2007 of 11 June 2007 concerning use of alien and locally absent species in aquaculture (EU Journal of Laws L 168 of 28 June 2007, pp. 1 and subsequent amendments),
   b) Council Regulation (EC) No. 1100/2007 of 18 September 2007 establishing measures for the recovery of the stock of European eel (EU Journal of Laws L 248 of 22 September 2007, p. 17),
   c) EU Regulations issued under provisions as in the case referred to in points (a) and (b).

In Article 2a, the Act specifies that the protection and restoration of fish stocks in waters, except for species under protection, pursuant to the environment protection provisions, is ensured by means of sustainable management of resources, including actions undertaken to maintain, restore or reintroduce appropriate state of these resources and relationships among its individual components, in compliance with sustainable development.

Besides, in Article 4 b, section 3 the Minister responsible for fisheries may specify, by regulation, terms, particularly technical, organizational or economic, restocking fish, driven by the need to ensure protection of biological diversity, according to the principles and recommendations of good practice within sustainable use of living resources of waters at a level that allows their economic use by those authorized to fish in the future.

Except for the analysis of occurrence of sustainable development as a concept in Polish legal acts on environment protection, it is important to pay attention to the absence of the concept in the following legal acts:

- the Act on microorganisms and genetically modified organisms of 22 June 2001,[295]

294 Journal of Laws 2015, item 652, with amendments.
295 Journal of Laws 2015, item 806, with amendments.

- the Act on ecological agriculture of 20 April 2004,[296]
- the Act on protection of farmland and forest land,[297]
- the Hunting Law Act of 13 October 1995[298].

7.4 Conclusion

Sustainable development is a legal concept that appears in existing legal instruments. On that basis, two issues regarding the use of the concept in legal regulations can be identified, namely:

1. the use of the term of sustainable development itself in legal acts
2. the systematic use of the components of the concept of sustainable development in legal system, enabling the transposition of the goals and tasks set within its framework.

To sum up, the issue of sustainable development in legal acts regarding environment conservation is particularly important with respect to two Acts referring to natural environment that is the NCA and the Forest Act. The issue is even more significant with regard to the Act on maintenance of national character of the country's strategic natural resources. Finally, the Act on inland fishery merely makes a brief mention of the relevant issue, whereas the majority of legal acts regulating residual issues of nature conservation do not relate in any way to sustainable development.

When it comes to ways of using sustainable development (including also statements with sustainable), it is worth noting that it is mainly used as a general term (also as general principle), which of course requires its application to the entirety of particular regulations. It is also used with respect to particular planning acts, defining their scope or affecting their material content. Sometimes it is also a specific condition for appropriate actions to be undertaken. However, the impact of sustainable development on Polish legislation regarding nature conservation can be assessed as moderate (disregarding the impact of constitutional regulation in that respect).

296 Journal of Laws No 93, item 898, with amendments.
297 Journal of Laws 2017, item 1161.
298 Journal of Laws 2017, item 1295.

8 PROTECTION OF RARE BIRD SPECIES IN SLOVAKIA

8.1 Introduction

8.1.1 Legislation

The first part of this chapter is devoted to the basic theoretical and legal definitions of terms and sources of law relating to the nature and landscape protection with emphasis on the protection of birds in the Slovak Republic.

The basic law in the field of nature protection is the Act No. 543/2002 Coll. on Nature and Landscape Protection(Hereinafter NLPA), which aims at ensuring in the long term the maintenance of the natural balance and protection of the diversity of conditions and forms of life, natural values and beauties, and the creation of conditions for the sustainable use of natural resources and the provision of ecosystem services. The scope of the NLPA excludes the protection of agricultural crops, economically important species and families of plants and animals, plant and animal pests of external and internal quarantine, and plant and animal origin of diseases and diseases of humans and animals.[299] According to the NLPA, nature conservation means the care of the state and other persons about wild plants, wildlife and their communities, natural habitats, ecosystems, minerals, geological and geomorphological units as well as care for the appearance and use of the landscape in particular by limiting and controlling nature and landscape interventions, by supporting and cooperating with landowners and users, as well as by cooperating with public authorities.

The NLPA contains a general nature conservation duty, which is considered a part of the public interest. In addition to the general nature conservation duty, the NLPA established special nature conservation rules. Special nature conservation is a summary of over-standard rules that apply to exceptional and unrepeatable environmental compartments. Special nature conservation

299 § 1 The Act No. 543/2002 Coll. on Nature and Landscape Conservation. In: *Slov-Lex* [legal information portal] [cit. 25 August 2017]. Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/543/20171101

is divided into site related, species related and tree related protection.[300] Besides the NLPA at the Slovak national law level, the protection of bird species is governed by Act No. 15/2005 Coll. on the protection of species of wild fauna and flora by regulating trade therein, Act No. 274/2009 Coll. on hunting and by EU law, specially by the Directive 2009/147/EC on the conservation of wild birds and Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

At the international law level, the protection of bird species is covered by Convention on the Conservation of Migratory Species of Wild Animals, Memorandum of Understanding on the Conservation of Migratory Birds of Prey in Africa and Eurasia, African–Eurasian Waterbird Agreement (AEWA) and by Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

8.1.2 Definition of Terms

The bird species which this chapter is about, are defined by the NLPA as species of European interest, a species of wild birds naturally occurring in the European territory of the Member States of the European Union, which, taking into account the trends and variations in its population, are:

- endangered by extinction,
- vulnerable to specific changes in its habitat,
- rare due to its small population or limited expansion in that territory,
- species requiring special attention due to the specific nature of their habitat.[301]

The NLPA divides nature and landscape protection into a territorial one – defining 5 basic degrees of protection of the territory, as well as the protection of species – selected plant and animal species and the associated limitations of their use.

300 CEPEK, B. a kol. *Environmentálne právo. V šeobecná a osobitná časť*. Plzeň: Aleš Čeněk, 2015, 442 p., p. 261. ISBN 978-80-7380-560-9.

301 § 2 The Act No. 543/2002 Coll. on Nature and Landscape Conservation. In: *Slov-Lex* [legal information portal] [cit. 25 August 2017]. Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/543/20171101

The protected areas represent the territory of the country where the habitats of European or national significance and the habitats of the birds are located. Following types of protected areas are distinguished by the law:

a) protected landscape area,
b) national park,
c) protected area,
d) nature reserve, national nature reserve,
e) natural monument, national natural monument,
f) protected landscape element,
g) protected bird area,
h) general protected area.

A list of species of European interest, including priority species, species of national importance and species of birds protected by established protected areas, shall be laid down by a generally binding legal regulation issued by the Ministry of Environment of the SR (hereinafter referred to as "MoE").[302]

Protected bird areas are defined as habitats of migratory bird species and in particular their nesting, processing, wintering and resting areas on their migratory routes, and habitats of species of birds of European significance may be designated, by way of resolution, for the purpose of safeguarding their survival and breeding by the government on a proposal submitted by the MoE. The Government will then submit the approved list to the European Commission, (hereinafter "the Commission"). The territory declared as protected excludes the subsequent implementation of activities whose impact on the territory may be considered negative. The government of the Slovak Republic is empowered to proclaim biotopes of bird species of European importance and habitats of migratory species of birds listed in the approved list of bird areas as protected bird area. The government provides the delimitation of the boundaries of the protected avian territory and the list of prohibited activities.[303] These protected bird areas form

302 § 17 The Act No. 543/2002 Coll. on Nature and Landscape Conservation. In: *Slov-Lex* [legal information portal] [cit. 25 August 2017]. Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/543/20171101

303 § 26 The Act No. 543/2002 Coll. on Nature and Landscape Conservation. In: *Slov-Lex* [legal information portal] [cit. 25 August 2017]. Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/543/20171101

a part of the European Conservation Area and can be subdivided into zones if it is required for providing the necessary care.

The second part of conservation of nature and landscape in the sense of the NLPA defines the nature of the protected plant and animal species, which were labeled by the generally binding legal regulation of the MoE. These are the species of European and national importance. It is important to emphasize that all species of wild birds naturally occurring in the European territory of the Member States of the European Union are considered as protected animals. Animals designated as protected enjoy a special legal regime which prohibits their endangering, but this regime is not applied in general.[304]

The NLPA in Section 35 directly excludes:

a) to capture animals deliberately in their natural habitat,
b) to injure intentionally or to kill animals in natural habitat,
c) to disturb deliberately animals in their natural habitat, in particular during nesting, breeding, rearing, winter sleeping or migration,
d) crossing, including cross-species,
e) to hold, transport, sell, exchange or offer for sale or exchange,
f) to collect or deliberately harm or destroy the protected animal's eggs in its natural range in the wild or keep them, including empty eggs,
g) to remove or deliberately damage or destroy the nest of a protected animal in its natural habitat,
h) to harm or destroy the breeding sites or the resting place of the protected animal in its natural habitat.

8.1.3 Authorities in the Field of Nature Conservation

Pursuant to NLPA, state administration authorities implement nature and landscape conservation policy at different levels:

a) MoE,
b) Slovak Environmental Inspection (state supervision authority),
c) district office at the headquarters of the region,
d) district offices,

304 See more: § 35, § 40 The Act No. 543/2002 Coll. on Nature and Landscape Conservation. In: *Slov-Lex* [legal information portal] [cit. 25 August 2017]. Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/543/20171101

e) municipalities,
f) State Veterinary and Food Administration,
g) nature guard,
h) State Nature Conservation Agency.

The MoE is the central authority of state administration in the field of nature and landscape conservation, as well as the specific protection of birds. The MoE performs the tasks of the state supervisor, determines the direction of the ministry, performs central revisions of the status of specially protected parts of nature and the country, provides the concept of nature and landscape protection, and for our purposes, also important programs for the protection of protected bird areas as well as proposals for protected bird areas. The MoE receives and approves programs of care of territories of international importance and program of care for plant and animal species as well as other important documents. The MoE carries out other activities within the meaning of § 65 par. 1 of the NLPA. Other entities undertake their competence in this area according to the nature of the matter.

In the framework of the nature and landscape conservation in the conditions of the Slovak Republic, the State Nature Conservation Agency plays an important role as a contributing organization of the MoE with national competence.[305] Within its scope of activities in and outside of the protected areas, it carries out important tasks. In 2017, the priorities of this governmental organization in the field of bird protection were practical care for protected animals – treatment and improvement of nesting conditions, installation of bird booths, educational activities for the public, observation of birds, promotion of important conservation days, reporting to the Commission under the Birds Directive, including the processing of background and work in the expert group, monitoring of the criteria for the species of birds subject to protection, monitoring of species and biotops of European significance under the Birds Directive and meeting the tasks of Convention on the Conservation of Migratory Species of Wild Animals, Memorandum of Understanding on the Conservation of Migratory Birds of Prey in Africa and Eurasia, AEWA – African–Eurasian Waterbird Agreement, CITES – Convention on International Trade in Endangered Species of Wild Fauna.

305 See more: http://www.sopsr.sk/web/?cl=111 [cit. 25 August 2017].

8.2 Natura 2000 Network

In the field of nature and landscape conservation, Natura 2000 Network plays a significant role as a coordinated set of protected areas, representing the European set of protected areas. Natura 2000 Network stretching over 18 % of the EU's land area and almost 6 % of its marine territory, it is the largest coordinated network of protected areas in the world. Natura 2000 Network is a network of core breeding and resting sites for rare and threatened species, and some rare natural habitat types which are protected in their own right. It stretches across all 28 EU countries, both on land and at sea. The aim of the network is to ensure the long-term survival of Europe's most valuable and threatened species and habitats, listed under both the Birds Directive and the Habitats Directive.[306]

This system is proclaimed by the Member States of the European Union as an effort to preserve the most valuable and endangered species and biotopes in Europe. Natura 2000 Network consists of protected bird areas as defined by the Wild Birds Conservation Directive[307] and the European Area of Eligibility as defined by the Habitats Directive.[308] Until January 2017, 27 522 protected bird areas and territories of European significance were identified. The Slovak Republic has contributed to Natura 2000 Network with 41 protected bird areas and 473 sites of European significance.[309]

Because of the adoption of the Birds Directive is based on the decline in the number of bird species in the territory of the Member States, notably with migratory species which form part of the common heritage and its protection is essential in order to improve living conditions and sustainable development. The objective of protection is the long-term conservation and management of natural resources, while the protection of birds is not only

306 Available at: http://ec.europa.eu/environment/nature/natura2000/index_en.htm [cit. 25 August 2017].

307 The Directive 2009/147/EC on the conservation of wild birds. In: *Eur-Lex* [legal information portal] [cit. 25 August 2017]. Available at: http://eur-lex.europa.eu/legal-content/SK/TXT/?uri=celex%3A32009L0147

308 The Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora. In: *Eur-Lex* [legal information portal] [cit. 25 August 2017]. Available at: http://eur-lex.europa.eu/legal-content/SK/TXT/?uri=celex%3A31992L0043

309 Available at: http://www.minzp.sk/postupy-ziadosti/ochrana-prirody-krajiny/uzemna-ochrana-prirody/natura-2000/ [cit. 25 August 2017].

a conservation but also maintenance or restoration of the diversity and size of biotops.[310] This Directive is the basis for the protection of all species of wild birds, including the care, control and determination of the rules for their use. The protection includes, in addition to protection of individual specimen, their eggs, nests and habitats, these implementing measures:

a) establishment of protected areas;
b) maintenance and care in accordance with the ecological needs of biotops inside and outside protected areas;
c) restoration of destroyed biotops;
d) creation of biotops.[311]

The Directive also contains the list of species covered by specific measures to ensure their survival and reproduction. Under the Directive, Member States have a duty to establish a general system for the protection of bird species, which eliminates undesirable behavior in the interests of successful protection. The Directive also provides for derogation from the special protection regime and obliges the EU MS to submit a report to the Commission.

The above-mentioned directives can be considered as pillars of the EU's common biodiversity policy. Both directives have been identified as useful and appropriate in the context of the suitability in the light of the Commission's 2016 conclusions, but with the need to improve their implementation, which was the basis for the need to create an action plan. On 16/12/2016 the Commission has published the 'Fitness Check' evaluation of the EU Birds and Habitats Directives (the 'Nature Directives') and concluded that, within the framework of broader EU biodiversity policy, they remain highly relevant and are fit for purpose.[312]

In April 2017, the Commission approved an action plan to improve the conservation of nature and biodiversity in the EU. The Action Plan consisting of 15 measures aimed at more effective implementation of the Birds

310 The Directive 2009/147/EC on the conservation of wild birds. In: *Eur-Lex* [legal information portal] [cit. 25 August 2017]. Available at: http://eur-lex.europa.eu/legal-content/SK/TXT/?uri=celex%3A32009L0147

311 Art. 3 The Directive 2009/147/EC on the conservation of wild birds. In: *Eur-Lex* [legal information portal] [cit. 25 August 2017]. Available at: http://eur-lex.europa.eu/legal-content/SK/TXT/?uri=celex%3A32009L0147

312 Available at: http://ec.europa.eu/environment/nature/legislation/fitness_check/index_en.htm [cit. 25 August 2017].

and Habitats Directives. The deadline for implementation of the measures in question is 2019. The EU commissioners highlighted the need for the protection of the common heritage by involving the young generation as well as the key role of local and regional authorities in the Member States. The priority areas of the Action Plan were divided into four parts:

1. To improve guidance, deepen knowledge and ensure better alignment with wider socio-economic objectives.
2. To create political responsibility and strengthen compliance.
3. To encourage investments in Natura 2000 Network and improve the use of EU financial Instruments.
4. To improve communication and awareness that engages citizens, stakeholders and communities.

From these groups of measures, it is important to emphasize the improvement of cooperation and the Commission's support towards the Member States, the increase of the budget for nature conservation and biodiversity projects, the involvement of private sector investments and the support of nature projects in the field of research and innovation and the strengthening of links between natural and cultural heritage. As a new element, we see the involvement of young people in the protection of Natura 2000 Network sites, which will be promoted through the declaration of the European Natura 2000 Network. 21 of May is officially designated as "European Natura 2000 Day".[313] European Natura 2000 Day relates to the 21 May 1992, when both EU Habitats Directive and LIFE programme were approved. This Directive together with the Birds Directive (approved earlier in 1979) became a base of Natura 2000 Network and has successfully contributed to the preservation of our unique European natural heritage. Consisting of more than 27 000 sites, the Natura 2000 Network became one of the EU's most outstanding achievements.

8.3 Current Bird Protection Issues in SR

In 2013, the Commission sent to the Slovak Republic a Reasoned Opinion on the need for more effective protection of birds. The reason for this warning

313 Available at: http://europa.eu/rapid/press-release_IP-17-1112_sk.htm [cit. 25 August 2017].

was the drop in water bird species, in some cases up to 90 %. This situation was also caused by a change in legislation in the field of hunting. The formal appeal to remedy the deficiencies was sent back in 2007, in which it expressed the view that the Slovak Republic had failed to fulfill its obligations under Art. 4 ods. 1 and 2 of the Directive by failing to classify the most suitable territories as special protection areas according to the number and scope of protection of those species listed in Annex I to that Directive which are regularly found in the Slovak Republic and by failing to protect them. On this basis, the Commission has requested the inclusion of six additional territories in the national list and their declaration as a protected bird area in 2012. If the Slovak Republic as a Member State fails to comply with the Reasoned Opinion, the Commission may decide to bring the case before the Court of Justice.[314]

8.3.1 Care Programs for Protected Bird Areas

The current topics in the field of bird protection on the territory of the SR include the approval of five protection programs for protected bird areas in May 2017. These programs represent a set of measures for the preservation of rare bird species in selected 5 areas, namely Dolné Pohronie, Kráľová, Slňava, Špačinsko-nižnianske polia and the Veľkoblahov rybníky. The programs were adopted for a period of 30 years. The mentioned care programs are legally defined as documentation of nature conservation in accordance with Section 54 of the NLPA.[315] The elaboration and approval of the aforementioned care programs is based on the commitment of the Slovak Republic to declare together 41 protected bird areas included in the Natura 2000 Network.

Protected bird areas were declared in our conditions in 2005–2013[316] currently accounting for more than 26 % of the total area of the Slovak Republic. The last declared protected bird area was the Levočské vrchy. In protected bird areas the protection of bird species is ensured on the basis of the Program

314 Available at: http://europa.eu/rapid/press-release_MEMO-13-820_sk.htm [cit. 25 August 2017].

315 According to § 54 par. 5 of Act No. 543/2002 Coll. on Nature and Landscape Conservation, as amended: The Protected Areas Conservation Program is a document to ensure long-term continuous care for the protected area and its buffer zone; it is not developed for a protected landscape element, a natural creation, a general protected area and a private protected area. Operating permit decisions or plans and other documentation under specific regulations that may affect the protected area must be in accordance with the measures of the Programe.

316 See more: http://www.sopsr.sk/natura/index1.php?p=4&lang=sk&sec=1 [cit. 25 August 2017].

of care. Under the conditions of the Slovak Republic, 34 programs of care were elaborated from the defined 41 protected areas within the framework of the project of the operational program Environment, which was implemented by the State Nature Protection Agency. The outcome of the project which was named as "Development of care programs for selected PBAs – Stage 2" was elaboration of the professional design of care programs. The project was funded by the European Regional Development Fund and by the state budget. The project fulfilled specific objectives, such as defining the favorable status of selected bird species as the basis for the development of a care program, identification of current status and population trends and updating the methodology for long-term monitoring of selected species of birds.

Care programs as extensive professional documents are gradually discussed with stakeholders and their final versions are approved by the government in a resolution. Table No. 1[317] shows the current state of discussion, respectively approval of care programs on the date of submission of this chapter.

Name of protected bird area	Current state
Horná Orava	approved 25. 01. 2017
Sysľovské polia, Lehnice, Úľanská mokraď, Senianske rybníky	updating and formatting
Dolné Považie, Ostrovné lúky, Ondavská rovina, Poiplie, Košická kotlina, Parížske močiare, Žitavský luh, Dubnické štrkovisko	preparation for submission to the MoE
Tribeč, Laborecká vrchovina, Muránska planina–Stolica, Nízke Tatry, Slovenský kras, Slanské vrchy, Veľká Fatra, Vihorlatské vrchy, Volovské vrchy, Malá Fatra, Slovenský raj, Tatry, Chočské vrchy, Čergov, Levočské vrchy, Strážovské vrchy	at the pre-treatment stage
Poľana, Bukovské vrchy, Medzibodrožie, Cérová vrchovina–Porimavie	at the completion stage
Dolné Pohronie, Kráľová, Slňava, Veľkoblahovské rybníky, Špačinsko-nižnianske polia	approved 3. 6. 2017
Záhorské Pomoravie, Dunajské luhy, Malé Karpaty	-

8.3.2 The Care Program for Protected Bird Area – Kráľová

In order to clarify the approved care programs, we will focus on the content and form of the selected care program, namely, the Protected Bird Area Kráľová. Kráľová was declared a protected bird area by a Decree of the

317 Available at: http://www.sopsr.sk/web/?cl=23 [cit. 25 August 2017].

MoE No. 21/2008 Coll.[318] in order to ensure the favorable status of bird species habitats of European importance of "bučiak nočný"[319] and ensure the conditions for its survival and reproduction. The protected territory covers the area of 1215.82 hectares.[320] The list of prohibited activities along with the limits in this territory is set in the annex of the Decree.

The specific care program was adopted for the period 2017–2046. This program was approved by government resolution. The content of the program consists of several parts:

- basic data about the protected area, including natural conditions, the current state and the assessment of specific interests and results of forest status survey,
- sociological conditions (use of the territory and its surroundings), positive and negative factors, including the historical context and the proposal of the principle of measures,
- care goals and measures to achieve them (setting long-term and operational objectives, framework planning and management models, measures and timetables),
- the way of evaluating the fulfillment of the care program,
- attachments (maps, other documentation).

The program sets specific long-term goals by 2046, namely to maintain a favorable state of chavkoš nočný and increase the environmental awareness of local residents and improve cooperation with landowners and land managers in the protection of birds. These long-term goals are further projected into more specific operational objectives. In the program, the proposed measures, the timetable for their implementation and the designation of the entity responsible for their implementation are set out below. Some of the proposed measures have already been identified in the document pursuant to the MoE Decree No. 21/2008 Coll. Facultative measures, broken down by priority, are mentioned in the program, however, their

318 Act No. 506/2013 Z. from. amending Act No. 543/2002 Coll. on Nature and Landscape Conservation as amended, and amending certain laws, the legal form of a declaration of a protected bird area was changed from the original generally binding regulation of the Ministry to a Government Decree.

319 Later renamed as Chavkoš nočný (Nycticorax nycticorax).

320 § 1 Decree of the MoE No. 21/2008 Coll. which declares the Protected bird area Kráľová. In: *Slov-Lex* [legal information portal] [cit. 25 August 2017]. Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2008/21/20080201

performance depends on sufficient funding. The operational objectives for the current legislation call for its review. It is necessary to update the list of protection objects; to add "rybár riečny" between the objects of protection if it meets the criteria for classification of the species between the objects of protection and to submit a proposal of a generally binding legal regulation; also there is a need to review the current provisions of Decree of the MoE No. 21/2008 Coll. in terms of protection, in particular, at sites of colonies of protected species, in their vicinity and at borders and, if necessary, to propose an amendment to this generally binding legal regulation. At last, but not at least it is necessary to make land exchanges so that the land in protected bird area will be owned by the Slovak Republic and the land of other owners will be situated outside this territory.[321]

The implementation of activities to assess the suitability of the current legislation will depend on the previous evaluation of the monitoring outcomes. Following a suitability assessment, a proposal will be prepared to amend the above-mentioned decree, regarding to the way of protection, change of prohibited activities or delimitation of boundaries of the territory.

8.4 Conclusion

The program document of the government of the Slovak Republic, which was adopted for the period 2016–2020, is a reference document for further legal and political development of nature and landscape conservation. Under this program, the government is committed to completing a national and international network of protected areas, including Natura 2000 Network, implementing conservation programs and continuing the zoning of protected areas, while promoting an integrated approach to landscape management, nature conservation and the rational and efficient use of natural resources.[322] We consider that the elaboration of 34 large-scale care programs and their gradual authorization is a positive step in the field of bird protection in the Slovak Republic. However, it is clear that implementation of care programs as well as the subsequent optimization of protection of rare bird species will depend on the sufficient amount of funds allocated within the budget of the MoE.

321 The Care Program for protected bird area 2017–2046 [cit. 25 August 2017]. Available at: http://www.rokovania.sk/File.aspx/ViewDocumentHtml/Mater-Dokum-208898? prefixFile=m

322 The program document of the Government of the Slovak Republic 2016–2020 [cit. 25 August 2017]. Available at: http://www.rokovania.sk/File.aspx/ViewDocumentHtml/Mater-Dokum-199014?prefixFile=m

9 PROTECTION OF NATURAL SITES AGAINST INVASIVE ALIEN SPECIES FROM THE INDIVIDUALS' PERSPECTIVE

9.1 Introduction

Alien species are plants, animals, fungi and microorganisms that have been transported as a result of human intervention across ecological barriers such as mountain ranges, or oceans, and have become established in an area outside their natural range. Some of them were introduced accidentally, some were brought into a new area intentionally. Currently, due to a changing climate many species migrate into new geographical sites in their struggle to survive changed living conditions. Nevertheless, species migrating in response to climate changes are not considered alien species, as they do not cross ecological barriers and they do not enter a completely different environment. This is a natural process of adaptation.[323]

Alien species of plants and animals represent a major threat to native species and ecosystems and to biodiversity in general. Some of them were introduced accidentally; however, many of these species were brought into Europe purposefuly, for their beauty, usefulness or commercial value. In their new environment, species may lack competition with other species and therefore they spread rapidly and become invasive alien species, causing significant damage to biodiversity, human health or economy. Portugal eucalyptus forests may serve as a sad example.[324] In the EU Biodiversity Strategy,

323 European Commission: Adoption of the first list of invasive alien species of Union concern. Available at http:// ec.europa.eu/environment/natura/invasivealien/index_en.htm [14 August 2017].

324 Eucalyptus had been introduced to Portugal as an ornamental tree from Australia already in 18th century. Today it covers a quarter of all forest land. In Portugal, similarly to the Czech Republic, eucalyptus tree has formally been planted purposefully with the aim to protect soil against erosion. As a plant with low water demand and fast growth, eucalyptus was used for industrial production of paper and cellulose since the second half of the 20th century. Portugal became the biggest producer of cellulose in Europe. However, eucalyptus trees draw the ground water and dry up the soil, which leads to the extinction of local plants. Moreover, they pose a significant risk for people. On 17 June 2017, an eucalyptus forest started to burn. The consequences were tragic – 47 people died because they did not succeed to escape, since eucalyptuses are much more flammable than other local trees. See more in LÉBR, T. Jak si Portugalsko vyrobilo lesy smrti, *Mladá fronta Dnes*, sobota 1 July 2017, p. 7.

adopted in 2011, invasive alien species were identified as a significant and growing threat to biodiversity in the EU and estimated to cause 12,5 billion worth of damage in the Union each year. The Commission was therefore tasked with developing a legislative instrument to address the problems posed by invasive alien species. This resulted in the adoption of Regulation 1143/2014 on the prevention and management of the introduction and spread of invasive alien species.[325]

Certain aspects mentioned above were dealt with by Regulation 708/2007 concerning the use of alien and locally absent species in aquaculture, which came into effect on 18. 7. 2007. This Regulation aims to create a framework governing aqua-cultural practices in order to ensure adequate protection of aquatic environment from the risks associated with the use of non-native species and locally absent species in aquaculture.[326] As some of alien invasive species belong to pests, we can mention Regulation 2016/2031 on protective measures against pests of plants[327] which establishes rules to determine the phytosanitary risks posed by any pests and measures to reduce those risks to an acceptable level.

Regulation 1143/2014 laid down rules for preventing, minimizing and mitigating the adverse impact of the introduction and spread, both intentional and unintentional, of invasive alien species on biodiversity within the Union (Art. 1). An invasive alien species is defined in Art. 3(2) as "*an alien species whose introduction or spread has been found to threaten or adversely impact upon biodiversity and related ecosystem services*".

The Regulation applies in principle to all invasive alien species (Art. 2) except for species, organisms and micro-organisms specified in Art. 2(2)

325 LANGLET, D., MAHMOUDI, S. *EU Environmental Law and Policy*. Oxford, United Kingdom: Oxford University Press, 2016, pp. 364–369. ISBN 978-0-19-875393-3.

326 Proposal for a Regulation of the European Parliament of the Council on the prevention and management of the introduction and spread of invasive alien species / COM/2013/0620 final – 2013/0307(COD). Available at: http://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32007R0708 & qid=1503048593998 [cit. 31 July 2017].

327 Regulation (EU) 2016/2031 of the European Parliament of the Council of 26 October 2016 on protective measures against pests of plants, amending Regulations (EU) No. 228/2013, (EU) No. 652/2014 and (EU) No. 1143/2014 of the European Parliament and of the Council and repealing Council Directives 69/464/EEC, 74/647/EEC, 93/85/EEC, 98/57/EC, 2000/29/EC, 2006/91/EC and 2007/33/EC.

that have already been regulated by other legal instruments.[328] Concerned action at the EU level is required to prevent introduction, establishment or spread in respect to species that are included on the List of Invasive Alien Species of Union concern, which was adopted by the Commission on 13 July 2016 in the form of implementing Regulation 2016/1141. The list contains mainly species that are already present in the EU, even though they are established only in some Member States. The list is supposed to be updated and future updates are expected to include more species that have not been present in the EU. The first update of the list entered into force on 2. 8. 2017. 37 species were listed on the former list, the updated list encompasses 49 species (23 species of plants and 26 species of animals). Currently, a draft of the second update of the list is under preparation proposing other 11 species to be included on the list.

Beside the List of species of Union Concern, the Member States are anticipated to establish a national list of invasive alien species of a Member State concern. For those invasive alien species, the Member States may apply, in their territory, measures such as those provided for in Articles 7, 8, 13 to 17, 19 and 20, as appropriate. Those measures must be compatible with the TFEU and must be notified to the Commission in accordance with the Union law. The Member States may also identify, from their national list of invasive alien species of Member State concern established in accordance with Article 12, species native or non-native to the Union that require enhanced regional cooperation (the so-called List of Invasive Alien Species of Regional Concern).

9.2 Regulation Directly Applicable to Individuals?

The EU Regulations are usually directly binding on individuals. Regulation 1143/2014 contains many rules which are characteristic for Directives.

328 For example, regulations (EC) No. 1107/2009 (11) and (EU) No. 528/2012 (12) of the European Parliament and of the Council and Council Regulation (EC) No. 708/2007 (13) provide for rules concerning the authorization for the use of certain alien species for particular purposes. The use of certain species has already been authorized under those regimes at the time of entry into force of this Regulation. To ensure a coherent legal framework, species used for those purposes should thus be excluded from the scope of this Regulation. (Regulation (EC) No. 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ L 309, 24. November 2009, p. 1).

Rules directly applicable on individuals are to be found in Art. 7. Preventive restrictions are addressed to everybody who would intend to bring invasive alien species of Union concern into the territory of the Union, including transit and transporting them to, from or within the Union, except for the transportation of species to facilities in the context of eradication. It is also prohibited to keep and breed them, including in contained holding, to place them on the market, use or exchange them, or to permit their reproduction. No one is allowed to grow or cultivate them, including in contained holding, or to release them into the environment. Derogations may be granted through the permit system established by individual Member States. Non-commercial owners of companion animals not kept for commercial purposes that belong to the invasive alien species included on the Union list do not have to dispose of them due to transitional rules in Art. 31. Transitional rules also apply, under certain conditions, to commercial stocks of listed species pursuant to Art. 32.

It must be pointed out that individuals are responsible just for intentional realization of activities mentioned above. The prevention of unintentional introduction or spread is vested in individual EU MS, since they are obligated to take all necessary steps to prevent any unintentional introduction or spread of invasive alien species, including, where applicable, by gross negligence. No direct duties are imposed on individuals regarding detection, surveillance, emergency measures, eradication or restoration of damaged ecosystems. As far as these activities are concerned, the EU Member States are in charge. Thus, implementing legislation at national levels can be expected to meet the EU requirements.

9.3 Individuals and Czech National Legislation

9.3.1 Introduction and Release to the Environment

Since not all alien species[329] are invasive, many of these enjoy important place in domestic economy and hobby activities. They are introduced into

[329] Alien species means "any live specimen of a species, subspecies or lower taxon of animals, plants, fungi or micro-organisms introduced outside its natural range; it includes any part, gametes, seeds, eggs or propagules of such species, as well as any hybrids, varieties or breeds that might survive and subsequently reproduce". (Regulation 1143/2014).

the environment usually because of their beauty or economic profit their exploitation can bring. Moreover, the introduction of some of these species is supported by the government because of their role as a renewable source of energy. On the other hand, these species might easily become invasive in non-native environment lacking their natural competitors and thus their introduction should be regulated.

The EU legislation tolerates possible introduction of these species to their non-native environment. For example, Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (Habitat Directive) does not preclude the introduction of alien species in general since Art. 22(b) requires the Member States to "*ensure that the deliberate introduction into the wild of any species which is not native to their territory is regulated so as not to prejudice natural habitats within their natural range or the wild native fauna and flora and, if they consider it necessary, prohibit such introduction*".

Intentional introduction of alien species of birds is also possible according to Directive 2009/147/EC on the conservation of wild birds on condition "*Member States shall see that any introduction of species of bird which do not occur naturally in the wild state in the European territory of the Member States does not prejudice the local flora and fauna. In this connection they shall consult the Commission.*"

It can be concluded that the introduction of alien species is not prohibited in general, on the other hand, the EU legislation laid down conditions that must be met. Provisions of both Directives are implemented in the Czech Nature and Landscape Protection Act[330] by restrictions laid down in § 5. Pursuant to § 5(4), intentional introduction of alien species to the landscape must be permitted by the NPA (so-called Municipal Authorities with Enlarged Competences). Derogation from this rule relates to species used in forestry in compliance with authorized forest management plans, since these plans must be authorized based on a binding opinion of NPA. Alien species are defined in this provision as "*animal and plant species that are not a part of natural communities of specific regions*" wording of which is different from the definitions provided for in the Invasive Alien Species Directive, however, the meaning seems to be similar. The provision of § 5(4) is also applicable to the introduction of alien species of fish and water organisms

330 Act No. 114/1992 Coll., as amended.

which are otherwise regulated by Act No. 99/2004 Coll., on Fishery. This law, however, provides for a different definition of alien species since invasive species are explicitly included. The ban on intentional introduction of alien species is difficult to enforce since the provision of § 5(4) is not secured by adequate sanction.[331] Fines may be imposed on a wrongdoer only in relation to consequent damage caused to specially protected parts of the nature. On the other hand, the duty to adopt corrective measures pursuant to § 86 may be imposed generally for illegal changes or damage to the nature.

Habitat Directive further requires the Member States to take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated. This rule may be applied to the introduction of alien species as well. In Czechia, it is implemented by the Nature and Landscape Protection Act in § 45 which sets out the general ban to destroy Natura 2000 areas. Should certain activity have a negative impact on Natura 2000 area, the NPAs must grant an approval to carry out such an activity. The intentional introduction of alien species of plants and animals in specially protected areas (national parks, protected landscape areas, natural reserves and national natural reserves) is explicitly banned by the law. This ban, however, is not absolute, since the NPA is entitled to decide on exemptions on a case – by-case basis pursuant to § 43 of the Nature and Landscape Protection Act.

Rivers and other water areas are part of nature, thus general nature protection rules can be applied in respect to the introduction of alien water animals and plants. Moreover, the Act No. 254/2001 Coll., on Waters contains a specific provision (§ 35.3) prohibiting the release of alien fish and other water animals to rivers and all water bodies. Competent Water Protection Authorities are entitled to decide on exemptions from this rule. The question is if the introduction of an alien species into water bodies needs to be permitted by the Water Protection Authority and by the NPA at the same time. The conclusion depends on the interpretation of the term "*landscape*", since the permit under the Nature and Landscape Protection Act is not required for the introduction

331 DOLEŽALOVÁ, H. Právní úprava regulace šíření invazních nepůvodních druhů rostlin a živočichů (Legal Regulation Related to Spread of Invasive Alien Species). *České právo životního prostředí*, 2/2013, p. 72. ISSN 1213-5542.

into the environment in general, but for the introduction to the *landscape*, which is defined as "*a part of the Earth's surface with characteristic relief, made of system of interrelated ecosystems with civilization elements*". Should water bodies be considered part of the landscape, then the permit of the NPAs is required along with the permit under the Water Act because there is no subordinate relation between these two laws. On the other hand, if water bodies do not form a part of the landscape, then the NPAs would be in position of so-called "*authority concerned*" by the decision of Water Protection Authority (§ 90.15). It is obvious that the regulation contained in the Water Act is not related to the Act on Fishery and to the Nature and Landscape Protection Act, which are interconnected. In this regard, the provision establishing the duty to observe obligations laid down by other laws aimed at nature protection similar to § 12(2) of the Act on Fishery, is missing. On the other hand, the public interest in nature protection in aquatic environment is to be secured by declaring rivers, ponds and lakes as significant landscape components with adequate protection against their damaging provided in § 4(2) of the Nature and Landscape Protection Act.

It should be stressed that the protection of ecosystems including aquatic ecosystems is the objective of all the above mentioned laws. In respect to the introduction of alien species to the aquatic environment, it can be concluded that competent NPAs are empowered either to directly grant exemptions from the general ban or to issue binding opinions as a basis for the final decision on permitting the introduction of alien species which the Water Protection Authority is entitled to adopt pursuant to § 35(3) of the Water Act.

Alien species of animals are also dealt with in the Act No. 449/2001Coll., on game-keeping, as amended. In the regime of this law, the importation and introduction of alien species of game is subject to a prior approval of the NPA and State Administration of Game-keeping (Ministry of Agriculture). Veterinary rules ought to be respected as well. It is prohibited to release animals which were bred and kept in farms, including cross-bred animals as well as game that was kept in captivity. Derogation from the latter is possible on a case-by case basis based on the decision of the NPA pursuant to § 5(1) of the Act on game-keeping.

The Act No. 326/2004 Coll., on Phytosanitary Care as amended is so far the only law in Czechia, which provides specifically for the definition of invasive species. An invasive species means "*a harmful organism in specific territory, which is able, after its introduction, to adversely influence plants or the environment in this territory including the biodiversity*" (§ 10.1). Implementing rules to this law are contained in Regulation No. 215/2008 Coll. Harmful organisms, such as viruses, are listed in Annexes 1-3 of the Regulation. The introduction and release of these organisms is strictly prohibited, however, invasive species are listed in Annex 8 of the Regulation just in connection to monitoring and research.[332]

It can be concluded that both EU and Czech legislations enable the introduction of alien species into non-native environment. It is under the control of NPAs which are competent to consider a possible impact of species that are to be introduced and not to allow the introduction of species which may pose a threat to the native ecosystems, e.g. which may become invasive. One must believe that the discretion of administrative bodies is based on scientific knowledge with the aim to prevent the introduction of species that might become invasive as well as with the aim to protect native natural ecosystems.

9.3.2 Detection and Management of Invasive Alien Species

As mentioned above, Regulation 1143/2014 does not impose duties directly on individuals in respect to the management and control of invasive species. The EU Member States are in charge of establishing a surveillance system, introducing emergency measures, establishing action plans and adopting rapid eradication measures at an early stage of the invasion of invasive alien species of Union concern.

Pursuant to Art. 19 of the Regulation, the Member States are obligated to adopt "*effective management measures for those invasive alien species of Union concern which the Member State found to be widely spread on their territory, so that their impact on biodiversity, the related ecosystem services, and, where applicable, on human health or the economy are minimized.*"

332 DOLEŽALOVÁ, H. Právní úprava regulace šíření invazních nepůvodních druhů rostlin a živočichů (Legal Regulation Related to Spread of Invasive Alien Species). *České právo životního prostředí*, 2/2013, pp. 21–31. ISSN 1213-5542.

It is upon the Member States to select management measures and methods which are to be applied. They may consist of lethal or non-lethal physical, chemical or biological actions aimed at the eradication, population control or containment of the population of invasive alien species. These measures should also be directed to the receiving ecosystem where the objective is to increase its resilience to current and future invasions. When adopting the management measures, the Member States are bound by the conditions laid down in Art. 19 of the Regulation. First of all, these measures should be proportionate to the impact on the environment and appropriate to specific circumstances of each Member State. Their selection should be based on a cost-benefit analysis and they should be prioritized based on the risk evaluation and their cost-effectiveness. When applying the management measures and selecting the methods aimed at the eradication, population control or containment, the Member States have to take due care to human health and the environment. They have to ensure that targeted animals would be spared any avoidable pain, distress or suffering.

As a consequence, it is almost impossible for the Member States to adopt national legislation establishing specific duties for individuals to implement the Regulation. The Member States will probably empower competent authorities to select appropriate measures on a case-by-case basis and establish the duty for individuals to carry out the measures. The most important issue to solve is who will bear the cost of these measures.

The Member States are required to have in place effective management measures for those invasive alien species of Union concern which the Member States have found to be widely spread on their territory. The time period for meeting this requirement is 18 months of an invasive alien species being included on the Union list. The Commission Implementing Regulation 2016/1141 of 13 July 2016 adopting the first list of invasive alien species of Union concern pursuant to Regulation (EU) No. 1143/2014 of the European Parliament and of the Council came into effect 3 August 016.

Since the Czech national law does not encompass specific duties regarding the management and control of invasive alien species and there is no specific law focused on invasive alien species in Czechia, the Czech government is expected to draft a new national law by the end of 2017. The regulation of invasive alien

species is supposed to be included into the Nature and Landscape Protection Act in the form of an amendment to the existing legislation. The new law is about to introduce rules regarding the process in protection against invasive alien species and the List of Invasive Alien Species of European and Member State concern. Even though the current legislation lacks specific provisions, general rules applicable to the control of invasive alien species can be found in many different laws, beside the above mentioned bans on introducing them into the landscape and aquatic environment.

Rules of very general character are part of the **Act No. 17/1992 Coll., on Environment**, as amended. Among these is preventive duty to minimize adverse impact of any activity to the environment and to prevent its damaging at the source (§ 17.1) and the duty to inform competent authorities and the duty to intervene when the environment is in threat. A duty to notify is also established in the **Act No. 324/2004 Coll., on Phytosanitary Care** in respect to revelation of a harmful organism. Should invasive species be considered harmful organism, competent authorities are empowered to impose eradiction measures pursuant to § 76.1. Persons, who carried out these measures, are entitled to apply for financial compensation.

The **Nature and Landscape Protection Act** contains provision § 68 on measures to enhance the natural environment. The owners and tenants of the land are encouraged to enhance the state of existing natural environment for the sake of the preservation of biodiversity and the attainment of ecological stability. They are also encouraged to enter into agreements with NPAs regarding their care of the land and the way it is used and covered. The agreements must be in writing; they have a character of so-called "*public law agreement*" governed by the Code of Aministrative Procedure. Financial contributions may be provided to carry out measures based on the agreement. If the agreement failed to be reached then NPAs themselves are entitled to carry out the measures to enhance natural environment. In this case, the owners and tenants have a duty to let those measures be carried out.

Pursuant to provision § 32(1) of the **Forest Act** the owners of the forests are obligated, directly by the law, to adopt measures to prevent and preclude the influence of harmful agents to the forest. They have a duty

to monitor harmful organisms and in case of their invasion to inform the State Forest Administration without any delay and to adopt adequate measures. Most importantly, they are obligated to prevent harmful organisms. Should invasive alien species belong to these harmful agents, this provision could be applicable to the management of these agents. Moreover, the owner of forest has a general duty to make an effort to preserve all functions of the forest and to preserve the genetic fund of forest timber species. The most strict provision of § 29 sets up requirements focused on forest renewal and restoration, significantly restricting the choice of reproductive materials of forest trees.

The **Act on Fishery,** § 12(9), introduced the duty that everybody must behave in the way so that the fish and other water organisms would not be disturbed and their environment would not be damaged.

The most efficient rules are included in the **Act No. 128/2000 Coll., on Municipalities**, which enables municipal authorities to adopt generally binding ordinances. Pursuant to § 84(2) h) the municipality is entitled to adopt ordinances to protect the environment, beside other objectives formulated in § 10. Based on this, the municipality is entitled to impose measures to restrict the enlargement and/or eradication of alien invasive species for the sake of protecting the environment.[333]

One must keep in mind that beside the above mentioned public law rules, civil law may be applied to regulate invasive alien species. Mainly the nuisance provisions of § 1031 of the **Czech Civil Code**[334] may be efficient in cases when the owner of land does not exercise a proper care about his land and the land becomes a focal point for the expansion of invasive alien species. Nevertheless, the legal action of a neighbor is voluntary, which significantly reduces the chances of coping with the invasive alien species.

9.4 Ecological Damage Liability

Even though Regulation 1143/20014 imposes the duty to adopt invasive alien species management measures and to carry out appropriate restoration

333 Http://invaznidruhy.nature.cz/legislativa/narodni/ [cit. 9 September 2017].
334 Act No. 89/2012 Coll., Civil Code.

measures to assist the recovery of ecosystems that has been degraded, damaged, or destroyed by invasive alien species of Union concern on the EU Member States, it does not solve the problems of either the costs of the measures needed for preventing, minimizing or mitigating the adverse impact of invasive alien species or costs for the restoration of damaged ecosystems. The application of "the polluter pays" principle, as anticipated in Art. 20 of the Regulation, would mean that these costs will have to be borne by landowners, which is opposite to the current approach mentioned above.

Beside fines recovered from the penalties for non-compliance with the requirements set by the law, provisions establishing environmental damage liability pursuant to Directive 2004/35 are applicable to damage to the environment caused by invasive alien species of animals and plants. In Czechia, the Environmental Liability Directive was implemented by the Act No. 167/2008 Coll., on the Ecological Damage Liability. Pursuant to its provisions, the damage caused by invasive alien species may be considered as ecological damage to specially protected species of animals and plants and their habitat and to waters. Since the pollution is defined in the Act on Environment[335] as an introduction of biological agents (beside others) to the environment due to human activity alien to the environment, the adverse change of the soil can have a character of the ecological damage as well. It is very difficult to imagine that some of the activities listed in Annex 1 to the Act on Ecological Damage Liability could cause ecological damage through the introduction and spread of invasive alien species. Should this be the case the operator will have the duty to adopt preventive and corrective measure without regarding illegality of his operational activity. However, if the ecological damage through the introduction and management of invasive alien species was caused by other activities than those listed in the Annex 1 operators may be liable for ecological damage only if they breached their duties and, at the same time, caused damage to specially protected part of nature pursuant to § 5(2) of the Act. In both cases they have to bear the costs of preventive and corrective measures pursuant to § 12 of the Act.

335 Act No. 17/1992 Coll., on the Environment.

Persons outside the scope of the definition of the "*operator*" (e.g. a natural person not involved in business) cannot be held liable for ecological damage in the scope of the Act on Ecological Damage Liability. Nevertheless, such individuals may become liable in the scope of the Act on Environment. Pursuant to § 27 "*everybody, whose illegal behavior caused ecological damage*[336], *has a duty to restore natural functions of the damaged ecosystem or its damaged parts*." This provision has been applied in practice very rarely so far, however, it could serve as a good legal basis for the enforcement of duties related to invasive alien species imposed on landowners and other individuals not operating any enterprise.

9.5 Conclusion

Regulation 1143/2014 addresses serious problems which are caused by both intentional and unintentional introduction and spread of invasive alien species to the environment. The most preferable way how to cope with the invasive alien species is to prevent their introduction and spread. While preventive restrictions (Art. 7) imposed on individuals are aimed at intentional behavior, the EU Member States are in charge in case of unintentional introduction and spread. It was found out that the Regulation laid down only a few provisions directly applicable to individuals. The obligations related to the detection, surveillance, adoption of emergency measures, eradication and restoration of the damaged ecosystems are imposed on the EU Member States. Therefore, this Regulation seems to have rather a character of a directive than a regulation and the EU Member States have to adopt implementing legislation to ensure the fulfilment of the Regulation requirements. It needs to be stressed that the rules contained in the Regulation apply only to species on the List of Union Concern, however, the EU Member States are expected to draw National lists of invasive alien species of Member State concern (respectively Lists of invasive alien species of regional concern) and thus enlarge the scope of regulation.

The Czech Republic is a country where some of the invasive alien species of Union concern occur and where no specific rules have been adopted so far

336 In the scope of the Act on Environment, the ecological damage means "*the loss or weakening of natural functions of ecosystems, caused by damaging of their parts and processes or of internal structures among them*".

in this regard. The aim of this chapter was to map the current legislation to find out if it can satisfy the EU law requirements in respect to the duties imposed on individuals. The conclusion can be drawn that currently the Czech legislation in force does not comply with those requirements. It contains some rules mostly of general character or rules applicable to specific organisms (which might have invasive character) or related to specific activities which could be applied to prevent the introduction and release of invasive alien species and to ensure their management, eradication and restoration measures to a certain extent. Even though the Regulation 1143/20014 imposes the duty to adopt invasive alien species management measures and to carry out appropriate restoration measures to assist the recovery of ecosystems that has been degraded, damaged, or destroyed by invasive alien species of Union concern on the EU Member States, it does not solve the problems of either the costs of the measures needed to prevent, minimize or mitigate the adverse impact of invasive alien species or costs of the restoration of damaged ecosystems. The application of the polluter pays principle, as anticipated in Art. 20 of the Regulation, would mean that these costs will have to be borne by landowners, which is opposite to current approach based on public subsidies.

Nevertheless, these rules substantially differ in respect to their terminology and scope, and relevant provisions are scattered in many different acts focused on various kinds of problems. The biggest gap in the Czech law can be seen in the absence of a clear and unified definition of invasive alien species of plants and animals and in the absence of their lists which would become a part of generally binding legal act, and thus have a binding character.

Beside directly binding rules, such as the prohibition of intentional introduction and other preventive restrictions included in Art. 7 of the Regulation, the law focusing especially on the protection against invasive species of animals and plants is missing in Czechia. The draft of a new act is in preparation, and the Ministry of Environment plans to submit it to the government at the end of 2017. The new law is supposed to have a form of an amendment to the existing Nature and Landscape Protection Act and to other correlative laws.[337]

337 MINISTERSTVO ŽIVOTNÍHO PROSTŘEDÍ. *Evropská komise navrhla další aktualizaci seznamu invazních druhů, které ohrožují evropskou přírodu*. Available at: http://www.mzp.cz/cs/news_invazni_druhy_aktualizace [cit. 9 September 2017].

10 LEGAL INSTRUMENTS OF NATURE PROTECTION AGAINST NEGATIVE INFLUENCE OF AGRICULTURAL ACTIVITY IN POLAND

10.1 Introduction: Characteristics of Natural Values of Rural Areas in Poland

Contemporary agricultural activity causes numerous threats to pure nature. Factors that cause the degradation of natural values and depletion of biodiversity are, in particular, uncontrolled urbanization and fragmentation of rural areas, drainage ditches in wetlands, reduction of water retention, monocultures connected with intensification of agricultural production, soil and water pollution due to excessive agricultural chemistry, biogeographic species to the environment and genetically modified varieties of plants, and the disappearance of breeding of traditional breeds of animals[338]. The damage caused by dehumidification of land for agriculture and uncontrolled chemistry of agriculture took place largely in the 1990s.[339]

As observed by natural sciences[340], in spite of these negative phenomena, the biodiversity of areas in Poland is much richer and the agricultural landscape is more diverse than in other parts of Europe. There are still many unique aquatic and peat ecosystems, unmatched in Europe[341]. The impact on the

338 POSKROBKO, B., POSKROBKO, T., SKIBA, K. *Ochrona biosfery, (Protection of the biosphere)*. Warszawa: Polskie Wydawnictwo Ekonomiczne, 2007, p. 178. ISBN 9788320816778.

339 CHMIELEWSKI, T., WĘGOREK, T. Rolnicza przestrzeń produkcyjna a różnorodność biologiczna (Agricultural production area and biodiversity). In: ANDRZEJEWSKI, R., WEIGLE, A. *Różnorodność biologiczna Polski, Narodowa Fundacja Ochrony Środowiska.* Warszawa: Narodowa Fundacja Ochrony Środowiska, 2003, pp. 203–210. ISBN 8385908757.

340 Ibidem and RADWAN, S., PŁASKA, W., MIECZAN, T. Różnorodność biologiczna środowisk wodnych i podmokłych na obszarach wiejskich (Biodiversity of aquatic and wetland environments in rural areas). *Woda-Środowisko-Obszary Wiejskie,* 2004, Vol. 4, 2a, p. 279. ISSN 1642-8145.

341 For example on Polesie Lubelskie, Pojezierze Pomorskie, in the vicinity of Chełmno, in Dolina Biebrzy. More on the topic: RADWAN, S., PŁASKA, W., MIECZAN, T. Różnorodność biologiczna środowisk wodnych i podmokłych na obszarach wiejskich (Biodiversity of aquatic and wetland environments in rural areas). *Woda-Środowisko-Obszary Wiejskie,* 2004, Vol. 4, 2a, p. 279. ISSN 1642-8145.

richness of species of living organisms in Poland is the area of preservation of natural spaces in rural areas, which occupy 290.8 thousand square kilometres in Poland, which represents 93.2% of the country's area[342].

As E. Symonides points out[343] that from the point of view of preserving specific agrocenosis of species and landscape elements eliminated in other parts of Europe, the most important components of the agricultural model in the last decades are: 1) spatial structure of land, with small surface mosaic of fields, meadows, orchards and the presence of copper, trees and bushes, ponds, etc.; 2) the use of low doses of mineral fertilizers and chemical plant protection products[344]; 3) cultivation of old indigenous cultivars and breeding traditional farm animals, despite its low profitability; 4) relatively low degree of physical degradation of soils, mainly due to the cultivation technology and low use of heavy equipment.

The aim of this article is to present legal instruments relating to the protection of nature in agricultural activities, and to undertake efforts to assess the degree of implementation of legal regulations introduced in this regard.

10.2 Genesis of Legal Regulation of Environmental Protection in Agricultural Activity

In Poland, both in the interwar period, and throughout the communist period, the government policy relating to agriculture marked as the primary goal ensuring the public food security in terms of quantity. Thus, regulations relating to the effectiveness of agricultural production in agricultural legislation were dominant, which among others included: 1) an obligation to carry out certain agro technical operations (e.g. irrigation drainage[345] and

342 Data from *Rocznik Statystyczny Rolnictwa 2015 r.* Główny Urząd Statystyczny, Warszawa, 2016, p. 119. ISSN 2080-8798.

343 SYMONIDES, E. *Ochrona przyrody (Nature protection)*. Warszawa: Wydawnictwa Uniwersytetu Warszawskiego, 2008, pp. 316–317. ISBN 9788323503101.

344 However, statistics show that sales of plant protection products have increased significantly over the past ten years: in 2005 – 41,1 thousand tones, and in 2015 – 67,3 thousand tones (in bulk goods). *Rocznik Statystyczny Rolnictwo*, 2016, p. 140. ISSN 2080-8798.

345 Act of 22 May 1958 on Promoting Land Reclamation for Agricultural Purposes, cons. text Journal of Law of 1963 No. 42, item 237 with amendments. The first Polish regulation in this respect was the law of the same title from 13 July 1939, Journal of Laws No. 64, item 428 with amendments.

land consolidation[346]); 2) the order to use pesticides[347], and 3) the order to apply fertilizers (aka agrominimum)[348]. In these regulations there was no reference even to the minimal extent to any requirements of environmental protection (especially water and soil) from excessive chemigation from agricultural sources, or protection of biodiversity. What is more, the intensification and specialization of agricultural activity, while marginalization and underutilization of land, led to damage to the environment, including contamination of soil, water pollution by nitrates from agricultural sources and a significant loss of biodiversity.

The first legislation relating to environmental protection in agricultural activities appeared in the seventies[349] and addressed the problem of prevention of changing agricultural land for non-agricultural purposes, preventing of lowering their fertility and restoring value in use to agricultural land, degraded as a result of non-agricultural activities. Only the first Polish Environmental Protection Law of 1980[350], relating to the overall environmental concerns in art. 13-15 lay down an obligation of rational management of the soil, to protect the value of production, and other conditions necessary to maintain the balance of nature. These provisions remain in the realm of postulative due to lack of regulations precising those obligations, due to the normative regulation, failure or issues relating to the use of fertilizers or pesticides[351].

346 Act of 24 March 1968 on Merging and Exchange of Land, Journal of Laws No. 3, item 13 with amendments. It replaced Act of 31 July 1923 on Land Consolidation, Journal of Laws No. 92, item 718 with amendments.

347 Act of 19 November 1956 on the Protection of Crop Plants Against Diseases, Pests and Weeds, Journal of Laws No. 55, item 253. Act replaced President Decree of 19 November 1927 on the Control of Plant Diseases and Extermination of Weeds and Pest Plants, Journal of Laws No. 108, item 922.

348 Council of Ministers resolution No. 347 of 22 October 1963 on the Agrominimum, M.P. No. 85, item 408, and then Act of 13 July 1967 on the Obligation of Mineral Fertilizers in Agriculture, Journal of Laws No. 23, item 109 with amendments, valid until 1982, more on this subject: KRÓL, M. A. Wpływ regulacji prawno-rolnej na zakres korzystania z gruntu rolnego (Impact of legal agricultural range of agricultural land). *Studies in Law and Economics*, Łódź, 2005, Vol. 72, p. 111. ISSN 0081-6841.

349 Council of Ministers Resolution No. 198 of 12 July 1966 on the Protection of Agricultural Land, M.P. No. 40, item 200, followed by Act of 26 October 1971 on the Protection of Agricultural Land and Forest Land Reclamation, Journal of Laws No. 27, item 249 with amendments.

350 Act of 31 January 1980 on the Protection and Management of the Environment, cons. text 1994, Journal of Laws No. 49, item 196, with amendments.

351 Pointed out by RADECKI, W. *Prawna ochrona środowiska w rolnictwie (Legal protection of the environment in agriculture)*. Zielona Góra: wyd. Agencja Rozwoju Regionalnego, 1996, pp. 179–180. ISBN 83-86326-14-X.

Under the Europe Agreement[352], changes in legislation started appearing gradually in this field. For the first time, in the Act of 1995 on the Protection of Crops[353], the legislator introduced rules relating to the manner, scope and conditions of using pesticides in agriculture and forestry land use. Then, for the first time in the Act of 1995 on the Protection of Farm and Forest Land[354], faulty agricultural activity (e.g. caused by the improper use of pesticides) was identified as one of the causes of land degradation and devastation. Another new legal solution was the introduction of the regulation of fertilizer use[355], which was subjected to many restrictions, both because of the risks it posed to health and life of humans, as well as the need to protect the environment. The first Polish Act of 2001 on Organic Farming[356], introducing the first legal regulation on organic production method comes from this period as well.

After accession to the EU the following documents served to promote environmentally friendly farming practices: 1) The Code of Good Agricultural Practice (2004)[357] and 2) the rules of the Common Good Agricultural Practice (ZDPR) introduced due to the dependence of financial support in the framework of several measures covered by the Rural Development Plan for 2004–2006[358] for the fulfillment of environmental requirements.

352 Europe Agreement establishing an association between the Polish Republic on the one hand, and the European Communities and their Member States, on the other hand, Journal of Laws No. 11, item 38 with amendments.

353 The Act of 12 July 1995 on the Protection of Crops, cons. text Journal of Laws 2002, No. 171, item 1398 with amendments, derogated.

354 Cf. Art. 4 sec. 16 and 17 in conjunction with Art. 15 § 1 and 5 of the Act of 3 February 1995 on the Protection of Farm and Forest Land, the original text Journal of Laws No. 16, item 78 with subsequent amendments. More information: KRÓL, M. A. Przejawy europeizacji w prawie rolnym (Manifestations of Europeanization in agricultural law). *Studia Iuridica Agraria*, Białystok, 2009, Vol. 7, p. 82. ISSN 1642-0438.

355 The Act of 26 July 2000 on Fertilizers and Fertilization, Journal of Laws No. 89, item 991 with amendments, Ministry of Agriculture and Regulation of 1 June 2001 on the Detailed Method of Application of Fertilizers and Conduct Training on their Use, Journal of Laws No. 60, item 616, acts derogated.

356 The Act of 16 March 2001 on Organic Farming, Journal of Laws No. 38, item 452 with amendments, act derogated.

357 KRÓL, M. A. Dobre praktyki w rolnictwie jako przejaw realizacji zasady zrównoważonego rozwoju (Best practices in agriculture as a manifestation of the principle of sustainable development). *Environmental Law Review*, Toruń, 2010, No. 1, p. 54. ISSN 2080-9506.

358 Rural Development Plan for 2004-2006, announced M.P. of 2004, No. 56, item 958, designed to flexibly Act of 28 November 2003 on Support for Rural Development from the Guarantee Section of the European Agricultural Guidance and Guarantee Agricultural, Journal of Laws No. 229, item 2273 with amendments, act derogated.

These standards related primarily to the requirements of the rational management of fertilizers, plant protection products, management of grasslands, water and soil conservation, rational use of wastewater and sewage sludge, conservation of valuable habitats and species found in agricultural areas, as well as maintaining cleanliness and order on the farm[359].

10.3 Legal Basis for Biodiversity Protection in Agricultural Activities

Requirements for Poland's accession to the EU required the adaptation of many normative acts to Community legislation. One of these acts was the NCA passed in 2004[360]. This Act, being another Polish legal act in the discussed subject, represents the continuation of the existing concepts of protection of the natural environment[361], but with a strong emphasis on the concept of biodiversity conservation[362]. This is confirmed by the content of art. 2 par. 1 of NCA, which defines the scope of this protection as:

359 The scope of the obligations arising from ZDPR specified in Annex F to the Plan, and in the form of normative in Appendix 1 of Regulation of 14 April 2004 on Detailed Conditions and Procedures for Granting Financial Aid to Support Agricultural Activities in Areas Favored Covered by the Rural Development Plan, Journal of Laws No. 73, item 657.

360 Regulation of 16 April 2004 Nature Conservation, i.e. from 2016 Journal Pos. 2134, as amended. This law has implemented several EC Directives including Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, WE L 103, 25. April 1979, p. as ammended (valid until 2009), Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, WE L 206, 22. July 1992, p. as ammended (Hereinafter referred to as the "Habitats Directive").

361 The doctrine strongly emphasizes the conservative aspect of nature conservation: PACZUSKI, R. *Prawo ochrony środowiska (Environmental protection law)*. Bydgoszcz: Branta, 2000, p. 438. ISBN 8386605650; or BAR, M., JENDROŚKA, J. *Prawo ochrony środowiska (Environmental protection law)*. Wrocław: Centrum Prawa Ekologicznego, 2005, p. 859. ISBN 83-917518-3-X. The more contemporary, planning direction of nature protection emphasize: RADECKI, W., SOMMER, J. *Prawne formy ochrony przyrody (Legal forms of nature conservation)*. Warszawa: Wydaw. SGGW-AR, 1990, p. 8; or RADECKI, W. *Prawna ochrona środowiska w rolnictwie (Legal protection of the environment in agriculture)*. Zielona Góra: wyd. Agencja Rozwoju Regionalnego, 1996, pp. 39. ISBN 83-86326-14-X.

362 As shown by HABUDA, A. Koncepcje ochrony przyrody w prawie polskim i wspólnotowym (Concepts of nature conservation in Polish and Community law). In: JENDROŚKA, J., BAR, M. (eds.). *Wspólnotowe prawo ochrony środowiska i jego implementacja w Polsce trzy lata po akcesji*. Wrocław: Centrum Prawa Ekologicznego, 2008, p. 128. ISBN 83-917518-4-8. W. Radecki recognizes that the concept of biodiversity protection is a new understanding of conservation nature. RADECKI, W. *Ustawa o ochronie przyrody. Komentarz (NCA. Commentary)*. Warszawa: Centrum Doradztwa i Informacji Difin, 2008, p. 49. ISBN 978-83-7251-852-1.

preservation, sustainable use and renewal of resources, compositions and components of nature and art. 2 pt. 2 of NCA indicating biodiversity conservation as one of the goals of the Act.

In this concept, the natural environment of human being in which the human activity takes place remains the object of legal conservation. Referring to the content of the provision of art. 2 of NCA, this activity must not violate the principle of sustainable use of natural resources. Hence, consequently, art. 3 pt. 1 of NCA specified the obligation to take into account nature protection requirements in business and investment. The manifestation of sustainable socio-economic development, as written in art. 5 of the Constitution of the Republic of Poland[363] with regard to nature conservation, is the assumption of sustainable use of natural resources and components (Article 2 par.1 of NCA), sustainable use of biological diversity (Article 3 par. 4 of NCA) and sustainable use of agricultural and forestry land (Article 24 par. 1 pt. 6 of NCA).[364]

As M. Górski points out[365], as regards the protection of nature in the Polish legislation, two protective regimes can be clearly distinguished. The first, traditionally referred to as the "Nature Conservation Law", is the preservation of natural resources in terms of preservation, ideal. This ideal protection of nature means protection of resources, creatures and components of nature, motivated by conservation and biocenotic considerations, irrespective of their economic value. The second, referred to as "consumer protection", is the provision relating to the economic use of natural resources in agricultural, fishing, forestry and hunting[366].

363 Constitution of the Republic of Poland of 2 April 1997, Journal No. 78, pos. 43 as ammended.

364 More: RADECKI, W. *Ustawa o ochronie przyrody. Komentarz (NCA. Commentary)*. Warszawa: Centrum Doradztwa i Informacji Difin, 2008, p. 48. ISBN 978-83-7251-852-1; CIECHANOWICZ-McLEAN, J. *Polskie prawo ochrony przyrody (Polish law of nature protection)*. Warszawa: Centrum Doradztwa i Informacji Difin, 2006, pp. 33–34. ISBN 8372516235; SOMMER, J. In: RADECKI, W. (ed.). *Teoretyczne podstany prawa ochrony przyrody (Theoretical bases of nature conservation law)*. Wrocław : Biuro Doradztwa Ekologicznego, 2006, p. 100. ISBN 8360644012; or BUKOWSKI, Z. *Zrównoważony rozwój w systemie prawa (Sustainable development in the legal system)*. Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa "Dom Organizatora", 2009, pp. 482–483. ISBN 978-83-7285-463-6.

365 GÓRSKI, M. In: GÓRSKI, M., KIERZKOWSKA, J. *Prawo ochrony środowiska (Environemntal protection law)*. Bydgoszcz: Wyższa Szkoła Informatyki i Nauk Społeczno Prawnych, 2006, p. 509. ISBN 83-923256-1-3.

366 KRÓL, M. A. In: GÓRSKI, M. *Prawo ochrony środowiska (Environmental protection law)*. Warszawa: Wolters Kluwer, 2014, pp. 520–524. ISBN 978-83-264-4556-9.

When referring to legal instruments for the protection of natural resources against negative impact of agricultural activity, it should be pointed out that the initial analysis of the normative material allows to state that the legal regulation in this area is dispersed. The basic legal act establishing restrictions on the conduct of this activity are the provisions of the NCA of 2004:

1. indicating the legal regime in areas covered by one of nature conservation areas;
2. regulating resources management and nature components (par. 9 of NCA). In addition, it must be stated that legal solutions for the preservation of biodiversity in agricultural activities, irrespective of the location of the area where this activity is conducted, are found in many other legal acts. The provisions of the Act on the Protection of Agricultural and Forest Land are of paramount importance[367], Forest Act[368], Law on fertilizers and fertilization[369], Law on plant protection products[370], Act on payments under direct support schemes[371] along with their respective executive acts[372]. An important instrument for nature conservation in agricultural activities is financial support for afforestation of the most vulnerable forest classes and agri-environmental-climatic measures (the provisions of the Rural Development Act, together with implementing acts[373]) and support for the ecological method of agricultural activity, (the provisions

367 Act of 3 February 1995 about the protection of agricultural and forest land, i.e. from 2017, Journal, pos. 1161.

368 Act of 28 September 1991 about forests, i.e. from 2017, Journal Pos. 788 as ammended.

369 Act of 10 July 2007 about fertilizers and fertilization, i.e. from 2017, Journal Pos. 668.

370 Act of 8 March 2013 About plant protection products, i.e. from 2017, Journal Pos. 50 as ammended, later: "plant protection products act".

371 Act of 5 February 2015 on payments under direct support schemes, i.e. Journal from 2017 pos. 278 as ammended.

372 MARD Regulation of 9 March 2015 on standards of good agricultural and environmental condition, Journal pos. 344 as ammended.

373 The Act of 20 February 2015 on Support for Rural Development, with funding from the European Agricultural Fund for Rural Development under the Rural Development Program 2014–2020, i.e. Journal z 2017 r., pos. 562 as ammended and MARD Regulation of 19 March 2009 on the detailed terms and conditions for the granting of financial assistance under the "Afforestation of agricultural land and afforestation of non-agricultural land" covered by the Rural Development Program 2007–2013, i.e. z 2016 r. Journal pos. 153 and the MARD Regulation of 18 March 2015 on the detailed terms and conditions for the granting of financial assistance under the Agri-environment and Climate Action program covered by the Rural Development Program 2014–2020, Journal pos. 415 as ammended.

of the Organic Agriculture Act[374]), or restrictions on genetically modified organisms[375].

In view of the framework of this paper, the present discussion does not serve to fully discuss legal aspect of nature of the abovementioned acts, but merely to answer the question whether the legal protection of natural assets during agricultural activities is sufficient and meets the requirements of "sustainable use" as well as whether the coherence of the identified nature protection instruments with the rural development instruments is maintained.

10.4 Conservation of Natural Resources against Excessive Chemigation in Agriculture

The use of chemical compounds in pest protection has already occurred in ancient Greece and Rome. The first chemicals to protect plants began to be produced in the nineteenth century.[376] In literature,[377] it is emphasized that modern, effective farming is not possible nowadays without the use of soil improvers in nutrients and plant protection agents against harmful organisms. High efficiency in regulating growth and other biological processes in crop plants must be achieved while maintaining the safety of human health and life and the protection of the environment.

Admission to use or marketing of plant protection products, fertilizers or plant-growth aids is strictly regulated. The first Polish legal regulation introducing a plant protection product registration system was introduced on the basis of art. 11 par. 1 Act of 1961 on the protection of crops against diseases, pests and weeds[378]. However, it was only in 1965 on the basis

374 Act of 25 June 2009 on organic farming, i.e. from 2017 Journal pos. 1054.

375 Act of 22 June 2001 on microorganisms and genetically modified organisms, i.e. from 2015, Journal pos. 806 as ammended.

376 MATYJASZCZYK, E. Rejestracja środków ochrony roślin w Polsce – historia, stan obecny i przyszłość (Registration of plant protection products in Poland – history, present condition and future). *Progress in Plant Protection*, Poznań: Instytut Ochrony Roślin – Państwowy Instytut Badawczy, 2011, Vol. 51, No. 1, pp. 77–87. ISSN 1427-4337.

377 MYSTKOWSKA, I., ZARZECKA, K. Zasady i bezpieczeństwo stosowania środków ochrony roślin w rolnictwie (Principles and safety of use of plant protection products in agriculture). In: ZARZYCKA, K., KONDRACKI, S., SKRZYCZYŃSKA, J. *Współczesne dylematy polskiego rolnictwa, część II*. Biała Podlaska, 2012, p. 249. ISBN 9788361044024.

378 Act of 16 February 1961 on the protection of crops against diseases, pests and weeds, Journal No. 10, pos. 55 as ammended.

of the order of the Minister of Agriculture[379], issued on the basis of art. 11 par. 2 of the Act, when the registration of these measures began.

It present, only those agents which do not pose a risk to human health, animals or the environment when used properly and for their intended purpose are allowed to be used[380]. In particular, plant protection products must not contain active substances presenting such hazard, for which the European Commission has issued a decision on non-application. The authorization of a plant protection product to the market requires the authorization of the minister responsible for agriculture. Fertilizers and plant growth aids authorized by the Minister competent for agriculture or marketed in another EU Member State, the Republic of Turkey or a Member State of the European Free Trade Association (EFTA) may be placed on the market if the national rules on the basis of which they were produced and marketed, provide protection for human and animal health and the protection of the environment.

The Plant Protection Act of 1995 introduced several principles to prevent environmental contamination from the use of plant protection products for the first time. These rules do not lose their relevance, appearing in subsequent legislation on this issue: the 2003 Plant Protection Act[381], and in law on plant protection products of 2013 which is currently in force. These rules are the following: 1) the principle of taking into account first the agrotechnical, physical, mechanical or biological methods of protection allowing to minimize the use of chemicals; 2) the obligation to strictly apply the recommendations of the use of measures to prevent contamination of the environment; 3) the establishment of a number of control instruments, which were entrusted to the State Inspectorate for Plant Protection and Seed Production, above all land entry, sampling, plant and protection measures, document control.

379 Ordinance of the Minister of Agriculture of 22 April 1965 on the conditions and procedure of granting permits for commercialization of chemical plant protection products, M.P., No. 28, pos. 156.

380 A list of fertilizers and plant improvement agents that can be marketed under the authorizations of the Minister for Agriculture is available on the website of the office of the minister responsible for agriculture and rural development. Available at: http://www.bip.minrol.gov.pl

381 Act of 18 December 2003 on the protection of crops, i.e. from 2008 r., Journal No. 133, pos. 849 as amended.

The concept of "integrated production of plants", i.e. production using integrated plant protection and the use of technical and biological advances in cultivation and fertilization, with particular reference to human and animal health and the protection of the environment was implemented (article 2, point 17, Plant Protection Products Act). Furthermore, "integrated plant protection" means, pursuant to article 2 point 16 of Plant Protection Products Act, the method of protection of plants against harmful organisms, using all available methods of plant protection, especially non-chemical methods, in a way that minimizes risks to human health, animals and the environment. The manufacturer using this method can apply for an IP certificate, which confirms that the permitted levels of plant protection chemicals, heavy metals, nitrates are not exceeded in manufactured crops.

The use of fertilizers in modern agriculture is necessary in view of the need to ensure that the agriculture of the EU is increasingly competitive on world markets and hence the requirement to improve its efficiency. However, excessive or inadequate use of fertilizers leads to serious contamination of soils, surface and groundwater, and thus poses a threat to human health and life. According to W. Radecki, the task of the system of law is to counteract such threats[382]. The Fertilizer and Fertilizing Act regulates the conditions and mode of placement of fertilizers and plant health aidson the market, the rules governing the use of these substances in agriculture and the rules for the prevention of risks to human and animal health and to the environment which may arise as a result of their transport, storage and use.

The Act introduces several rules regarding the use of fertilizers and plant-growth aids, including: 1) the order to use fertilizers and agents in a way that does not endanger the health of humans, animals or the environment; 2) the exclusive use of fertilizers and measures that have been authorized; 3) the determination of maximum dose of fertilizer that can be used during the year; 4) the order to use soil improvers and growth promoters in accordance with instructions for use and storage.

382 RADECKI, W. *Prawna ochrona środowiska w rolnictwie (Legal protection of the environment in agriculture)*. Zielona Góra: wyd. Agencja Rozwoju Regionalnego, 1996, pp. 179. ISBN 83-86326-14-X; more: RADECKI, W. *Ustawa o nawozach i nawożeniu z komentarzem*. Wrocław: Prawo Ochrony Środowiska, 2002, passim. ISBN 8391555534.

Implementing provisions of the Act on Fertilizers and Fertilizing[383] have laid down the detailed rules for the application of fertilizers, preventing risks to human, animal and environmental health, including use of appropriate equipment, prohibition of use at a distance of at least 20 meters from the protection zone of water sources, water intakes, reservoir shores and watercourses, surface waters and coastal waters, and restrictions applied at low levels of groundwater.

To control the proper implementation of the provisions of the Act, among others marketing of fertilizers and plant aids, the Agricultural Trade Quality Inspectorates are authorized to enter the land, make an inventory of these resources, carry out inspections of compliance with the provisions of the Act, have access to facilities where these resources are stored, are netitled to free of charge sampling for testing. These are instruments to enhance the effectiveness of observance of established regulations, and on their practical application depends the actual state of human and environmental safety.

10.5 Protecting Natural Resources by Limiting the Use of Genetically Modified Organisms

With regard to agricultural activities, the protection of biodiversity is also concerned with reducing the use of genetically modified organisms. The benefits of genetic modification in agriculture have been known for decades (e.g. plant crosses) and the development of genetic engineering could contribute to a significant increase in the efficiency of agricultural production. Application of this method is also possible in forest production. However, the need to ensure the biological safety of present and future generations, in the absence of clear view of the natural sciences as to the effects of the release of genetically modified organisms (so-called transgenic organisms) on the environment, and the ethical objections raised[384], caused the issue to be addressed within the the 6th framework of EU Environment Action

383 MARD Regulation of 18 June 2008 on implementation of certain provisions of the Act on fertilizers and fertilizers, Journal No. 119, pos. 765 as ammended.

384 More: CHEDA, J. Korzystanie z zasobów genowych (The use of genetic resources). In: KORZENIOWSKI, P. (ed.). *Prawa i obowiązki przedsiębiorców w ochronie środowiska. Zarys encyklopedyczny*. Warszawa: Difin, 2010, p. 470. ISBN 978-83-7641-298-6. and the literature indicated there.

Program.[385] Legal regulation in this regard was the role of regulating the treatment of genetically modified organisms and protecting the environment from uncontrolled use and release of GMOs. Emphasis is needed to be put on the lack of clear position of Member States in this area.

The doctrine emphasized[386], that in the Netherlands, Denmark and Spain, the legislator opted for widespread use of GMOs in agriculture and the food industry. On the other hand, in Poland, Austria and France, the axiological views of legislator are dominated by a negative view on the issue. Yet another solution was adopted in Hungary where, in art. XX par. 2 of the Hungarian Constitution of 25 April 2011 introduced the principle of GMO-free farming[387].

In Polish law this issue is governed by the 2001 Act on Microorganisms and Genetically Modified Organisms. The Act in art. 10a authorizes the Minister responsible for the environment to develop a National Strategy for Biosafety[388], which is to define the biosecurity principles and the resulting action program for each sector of the economy. The Act regulates the issue of the contained use of GMOs, the deliberate release of GMOs into the environment and the marketing of these products.

The basic legal instrument regulating the use of gene resources is a permit that needs to be obtained from the Minister of the Environment following the conduct of the assessment of risks to human health and the environment and the fulfillment of a number of requirements specified in the Act and specified in the implementing regulations[389], adherence to the principles

385 See: art. 6 par. 2 pt i) decision No. 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Program, Journal WE L 241 from 10 September 2002, p. 1.

386 KEMPA, A. GMO – szansa dla bezpieczeństwa żywnościowego czy zagrożenie dla zrównoważonego rozwoju (GMO – a chance for food security or a threat to sustainable development). *Studia Iuridica Agraria*, Białystok, 2013, Vol. 11, p. 260. ISSN 1642-0438.

387 CSAK, C., RAISZ, A. *Legal framework of environmental law for agricultural production. Rapport national for Hungary*. Available at: http://www.cedr.org/congresses/luzern/pdf/Commission_II_Hongrie.pdf, p. 4.

388 The project of National Strategy for Biosafety in Poland was developed by the Institute of Plant Breeding and Acclimatization in 2005 as part of a study funded by UNEP/GEF. The document has not yet been adopted by the Council of Ministers.

389 Ordinance of the Minister of the Environment of 11 April 2016 on detailed types of security measures used in genetic engineering plants, Journal pos. 600.

of good laboratory practice and general safety rules, the use of the appropriate degree of hermeticity, additional safety measures required for activities in greenhouses or in animal houses, among others.

According to the article 104 par. 9 of the Seed Act of 2012[390] the Council of Ministers may, by way of regulation, prohibit the use of seed of certain varieties, guided by their inadequacy for growing under climatic and soil conditions of Poland or the need to avoid risks to human health, animals, plants and the environment. The Cabinet issued two regulations based on this provision: the regulation on the prohibition of the use of seed of MON 810 maize varieties[391] and the ban on the use of Amflora potato seed[392].

To sum up, despite the absence of a general ban on GMO cultivation, all GMO maize varieties registered in the list (281 variants of maize) were accepted in the EU, while Poland introduced actual and complete ban on genetically modified plants.

In addition, in art. 15 of the 2006 Law on Feed[393] ban on the manufacture, placement on the market and use in animal nutrition has been introduced for: 1) "prohibited substances" as defined in Annex III to regulation of EC No 767/2009 of the European Parliament and of the Council on the placing on the market and the use of feedingstuffs[394]; 2) "undesirable substances" – feedingstuffs containing a substance or product that pose a potential risk to human or animal health or the environment and which may adversely affect animal production in excess of their permitted content; 3) feeding materials and compound feed containing pesticide residues in excess of their permitted levels; 4) genetically modified feed and GMO

390 The Seed Act of 9 November 2012, i.e. from 2017 r., Journal, pos. 633.

391 Regulation of the Council of Ministers of 2 January 2013 on the prohibition of the use of seed of maize variety MON 810, i.e. from 2014, Journal pos. 1085 as ammended.

392 Regulation of the Council of Ministers of 2 January 2013 banning the use of potato seed Amflora, Journal of 2013, pos. 27.

393 Act of 22 July 2006 on Feed, i.e. from 2017, Journal pos. 453.

394 Regulation (EC) No. 767/2009 of the European Parliament and of the Council of 13 July 2009 on the placing on the market and use of feedingstuffs amending Regulation (EC) No. 1831/2003 of the European Parliament and of the Council and repealing Council Directive 79/373, Comission Directive 80/511/EEC, Council Directive 82/471/EEC, 83/228/EEC, 93/74/EEC, 93/113/EC and 96/25/EC and Counsil Decission 2004/217/EC, Journal EU L 229 from 1 September 2009, p. 1 as ammended.

for feed use[395]. Implementing regulations[396] determine the acceptable content of undesirable substances in feedingstuffs with a view to the protection of human and animal health and the protection of the environment and to ensure the quality of products of animal origin.

10.6 Conservation of Natural Resources under the Direct Payments Scheme for Agricultural Land

10.6.1 Cross Compliance Requirements

An important legal instrument for the protection of biodiversity is the instrument of law introduced successively into our legal system and referred to as "cross compliance requirements". As emphasized by B. Jeżyńska, this principle has been incorporated into the direct payments system for agricultural land in response to the adoption of the Sustainable Agriculture Model and the emerging health food safety risks associated with the globalization of trade and the related expectations and demands set out by EU consumers, conditions of agricultural production, which is financed through this subsidy from the resources of EU citizens[397].

Compliance requirements are the legal requirements currently imposed on agricultural producers to fulfill their environmental, public health and animal welfare obligations. As a result of the 2013 reform, the scope of cross compliance requirements have changed only a little. As in 2007–2013, cross compliance requirements will consist of good agricultural and environmental standards and basic management requirements (article 93 and Annex II of EU Regulation No. 1306/2013 of the European Parliament and of the Council on the financing of the common agricultural policy)[398].

395 Art. 1 point 4 will come into force on 1 January 2019 in accordance with Art. 65 ff the Act.

396 MARD Regulation of 6 II 2012 on the content of undesirable substances in animal feed, Journal pos. 203 as ammended.

397 JEŻYŃSKA, B. Znaczenie i funkcje zasady cross-compliance w systemie rolniczych dopłat bezpośrednich (Importance and function of the cross-compliance principle in the system of agricultural direct payments). *Studia Iuridica Lublinensia*, Lublin, 2010, Vol. 13, p. 41. ISSN 1731-6375.

398 Regulation (EU) No. 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulation (EEC) No. 352/78, (EC) No. 165/94, (EC) No. 2799/98, (EC) No. 814/2000, (EC) No. 1290/2005 and (EC) No. 485/2008, Journal L 347, from 20. 12. 2013, p. 549.

By implementing the postulate of simplification of EU legislation[399] a number of standards have fallen out of the scope of cross-compliance (for example, sewage sludge or several animal diseases have been removed), some have changed. Biodiversity conservation requirements for the maintenance of permanent pasture, which have previously been one of the requirements, are now linked to the conditions for granting green fees. The requirements of a good agricultural culture for the maintenance of agricultural land have been strengthened. In spite of these few changes, the instrument and the resulting control and sanction system are, in essence, in the present regulation. It should also be noted that although the scope of the cross compliance standards has changed a little, they remain a fundamental instrument for the protection of biodiversity, the condition of soils in agricultural land, and the state of water in agricultural activities.

10.6.2 Payment for Environmental Activities

One of the manifestations of greening is a mandatory environmental element included in direct payments, supporting agricultural practices beneficial to the climate and the environment. According to Regulation No. 1307/2013, the payment system after 2013 was greener. "Greening" refers to a new financial instrument, the so-called payment for environmental actions, in principle granted in addition to the basic area payment for farmers, and dependent on their fulfillment of additional environmental requirements to stop the loss of biodiversity and prevent climate change.

The obligation to strictly comply with the above mentioned practices does not apply to all farmers, in accordance with the provisions in force it is dependent on: 1) arable land on the farm; 2) access to small farm system; 3) owning permanent grassland; 4) running organic production.

Payments for environmental actions are awarded for compulsory agricultural practices undertaken on farms. They involve simple, general, non-contractual nature conservation activities in agriculture, but go beyond

399 The simplification of the CAPY has appeared in many program documents since the mid-1990 s. in the Report on Agricultural Strategy presented by the European Commission to the European Council in December 1995 in Madrid.

the requirements of cross compliance. Among the actions in art. 43 par. 2 Regulation No. 1307/2013 the following were indicated:

1. requirement to diversify crops – pursuant to art. 44 Regulation No. 1307/2013 it consists of the necessity of carrying out several different crops in a number dependent on the farm's surface;
2. the requirement to maintain the existing grassland pasture area, which relates to naturally grown meadows and pastures, often in wetlands. This instrument is primarily intended to be used in Natura 2000 sites designated in accordance with the provisions of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora[400] and Directive 2009/147 EC on the conservation of wild birds[401], but it can also be based on art. 45 par. 1 sentence 2 of Regulation No. 1307/2013 used beside them. Permanent pastureland is characterized by considerable species diversity of plants and animals, existing through the natural process of their long-term expansion on the land. In addition, they also play a significant role in preserving the landscape that exists in these areas;
3. the requirement to maintain green areas – on the area of not less than 5% of the farm area[402]. Ecological areas include terraces, buffer zones, bushes and shrubs, ponds, i.e. all elements of landscape which in the natural sciences are referred to as environmental islands surrounded by agro-ecosystems[403]. Their presence is crucial not only for biodiversity, but also an indispensable element of rural landscape structure, helping to maintain its diversity.

The Polish legislature noted the difficulty in fulfilling these requirements by small family farms, exempting them from the obligation to diversify the farm to 10 hectares. Considering the area of arable land covered by this requirement, it is important to note the significant potential effectiveness of this instrument in Poland, but at the same time, a small share of family

400 Directive 92/43/EEC on the conservation of natural habitats and wild fauna and flora, Journal L 206, 22. July 1992, p. 7.

401 Directive 2009/147/EC on the conservation of wild birds, Journal WE L 20, 26. January 2010, p. 7.

402 This percentage may be increased by the European Commission after 2017 to 7%.

403 SYMONIDES, E. Znaczenie powiązań ekologicznych w krajobrazie rolniczym (The importance of ecological links in the agricultural landscape). *Woda-Środowisko-Obszary Wiejskie*, Warszawa, 2010, Vol. 10, No. 4, p. 250. ISSN 1642-8145.

farms with area equaling national average[404]. Due to the agrarian structure of Poland and average area of farms[405], overwhelming majority (approximately 83 %) will be released from this obligation. However, 66 % of the total area of arable land in Poland will be subject to the obligation to diversify crops.[406] In addition, maintenance of ecological areas will concern farms with more than 15 ha of arable land, about 91 % of farms will be exempted from the obligation to implement this practice[407]. On the other hand, the area of arable land subject to the maintenance of ecological areas will account for about 54 % of the total area of arable land, and thus, as in the case of crop diversification, only a few large farms will be obliged to do so. In addition, the provisions of the regulation contain a list of areas on the farm that may be considered to be ecologically friendly (e.g. fallow land, landscape elements such as ponds, natural monuments, ditches or hedges) which reduces the need for active pro-ecological activities in this area.

Another exception to the set rules is the establishment of the possibility of recognizing the performance of equivalent practices. Based on article 43 par. 3 letter a in connection with annex IX, the Regulation No. 1307/2013 sets out the scope of the implementation of commitments that are equivalent to the triad of environmental actions. Equal practices include similar practices that result in an equivalent or greater level of benefit to the environment and climate compared to one or more practices. Member States may, on the basis of national legislation, recognize the fulfillment of certain requirements for the obligation to diversify crops, maintain permanent pasture, maintain ecological areas.

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404 More: KRÓL, M. A. Rola gospodarstw rodzinnych w prawnej ochronie zasobów środowiska i różnorodności biologicznej (The role of family farms in the legal protection of environmental resources and biodiversity). In: LITWINIUK, P. (ed.). *Prawne mechanizmy wspierania i ochrony rolnictwa rodzinnego w Polsce i innych państwach Unii Europejskiej*. Warszawa: Fundacja Programów Pomocy dla Rolnictwa FAPA, 2015, p. 164. ISBN 978-83-63503-66-6.

405 According to GUS data, the average farm acreage in Poland in 2013 was 11.37 ha and the average farm acreage in the farm was 10.08 ha. Taking into account the land in good agricultural culture this average falls to 9.97 hectares. Data: *Land use and area for sowing in 2013*. Warsaw: Central Statistical Office, 2014, pp. 39, 43, 44, 52.

406 *Biuletyn Informacyjny*, MRiRW, ARiMR, 2014, No. 6.

407 Data: *Informacja na temat wybranych elementów nowego systemu płatności bezpośrednich po 2014 r.* Warszawa: MRiRW, May 2014, p. 5.

In Poland, pursuant to the provisions of MARD Regulation of 20 March 2015 on implementation of equivalent practices[408], only practices equivalent to those specified in the second indent of Section I pt. 2 of Annex IX to Regulation No. 1307/2013 have been adopted, as regards the rotation requirement that is "using at least 4 crops" in the main crop of the farm. On the basis of the resolution adopted in Poland, the implementation of this obligation will be recognized if the requirement set out in Annex 2 to the MARD Regulation of 18 March 2015 on the detailed conditions and procedures for granting financial assistance under the "Agri-environment and climate action" (the development program on rural areas for 2014–2020[409]), where paragraph 1 in Part I of Package I "sustainable farming" specifies the possibility of crop diversification through equivalent practice, i.e. the requirement of 4 main crops per year on arable land on the farm and 1) the share of the main crop and the aggregate crop in the sowing structure cannot be over 65 % and 2) the share of each crop cannot be less than 10 %.

However, it should be noted that the European legislator provided for a substantial deviation from the greening obligations indicated above. Article 61 par. 3 of Regulation No. 1307/2013 exempts farmers participating in the small farm system from agricultural practices that are beneficial to the environment, or equivalent practices, and are exempted from controlling the standards and cross compliance requirements.

10.7 Conservation of Natural Resources in Agri-environmental Programs

Agri-environmental programs are actions for the environment that contribute to the full protection and preservation of the diversity of natural habitats and landscape values of rural areas. In the legislation of the European Communities, agri-environment programs first appeared in the 1985 Green

408 Official Journal from 2015, pos. 433.
409 Official Journal from 2015, pos. 415.

Book[410] – a document containing a collection of draft legal instruments that articulate the Common Agricultural Policy (CAPY).

Article 28 of Regulation No. 2013/1305 introduces the basic principles for the implementation of agri-environmental measures. Their inclusion in rural development programs is mandatory at national or regional level. They aim at preserving and promoting the necessary changes in agricultural practices that make a positive contribution to the environment and the climate. Agri-environmental payments will only be granted for commitments beyond the "greening" regulations provided for in Regulation No. 2013/1307. This means that farmers who would like to benefit from this kind of support will commit themselves to additional environmental measures on their farms. In addition to meeting the core requirements, which are much more stringent since 2015, agri-environmental commitments are made for five to seven years. At the time of existence of the commitment made, pursuant to Article 28 par. 6 of Regulation (EC) No. 2013/1305, payments shall be made annually and shall compensate the beneficiaries for all or part of the additional costs and income foregone. When necessary, these payments may also cover transaction costs up to a maximum of 20 % of the premium paid for agri-environmental commitments. By implementing provisions of this Act and adopting economic and legal conditions in the Polish Program for Development of Rural Areas 2014–2020 a number of sub-measures for environmental protection have been programmed. One of them was defined as a sub-measure: *Payments under agri-environmental commitments*. Polish legislator in this regard chose a shorter, five-year commitment period. Under this sub-measure, five packages have been distinguished: 1) sustainable agriculture, 2) protection of soils and waters, 3) conservation of orchards of traditional fruit varieties, 4) valuable habitats and endangered species in Natura 2000 5) valuable areas beyond Natura 2000. Programmed solutions will be an important instrument to support agricultural producers in family farms located in areas with special natural conditions, and those who, in the new approach to environmental protection, see opportunities

410 Prospects for Common Agricultural Policy – Green Paper, an official Community document adopted by the EEC Council of 15 July1985, KOM (85) 333, final version. The paper outlines the political assumptions for the new phase of structural policy in agriculture that takes into account environmental aspects.

for improving production quality. The new agri-environment and climate change commitments, as in the previous agri-environment, are part of their coexistence with Natura 2000 regulations[411]. In order to compensate the beneficiaries for additional costs and lost revenue, activities in these areas have been strengthened in art. 30 of Regulation No. 1305/2013, by indicating that the support under this measure is granted annually per acre of agricultural land or per hectare of forest.

According to the provisions of the RDP 2014–2020 the purpose of the package *Valuable habitats and endangered bird species in Natura 2000 sites* is: 1) improving the living conditions of endangered bird species whose breeding habitats are associated with permanent grasslands occurring in special bird protection areas by adapting the use to bird species in pasture and pasture and extending their management in these areas; 2) maintaining or restoring proper condition or preventing the deterioration of valuable natural habitats through the use of traditional and extensive ways of using particular habitats. This aid is intended to limit fertilization, the use of appropriate quantities and dates of swaths or grazing intensity on valuable natural habitats or sites of endangered bird species located in Natura 2000 sites. These selected solutions for the new agri-environment climate action are reminiscent of the requirements previously laid down before agri-environmental commitments. The protection plan, which is an act of local law, contains in its essential part the requirements that coincide with the content of the new RDP.

Payments are compensatory by nature. In addition to the undisputed function of supporting the profitability of agricultural producers operating in areas with reduced production potential, in poorly paid classes, in regions with difficult climatic conditions, payments for agri-environment and climatic activities play an important ecological role for example for agricultural activities in areas of high natural value. However, it has many limitations.

411 KRÓL, M. A. Sytuacja prawna prowadzącego działalność rolniczą na obszarach Natura 2000 (Legal status of farmer operating in Natura 2000 areas). In: KAŹMIERSKA-PATRZYCZNA, A., KRÓL M. A. (eds.). *Problemy wdrażania systemu Natura 2000 w Polsce*. Szczecin-Poznań-Łódź: Polskie Zrzeszenie Inżynierów i Techników Sanitarnych O/ Wielkopolski, 2013, pp. 685–708. ISBN 8389696665, 9788389696663; NIEWIADOMSKI. A. Ausgewählte rechtliche Probleme in der Funktionsweise des Europäischen Ökologischen Netzes Natura 2000. In: *Studia Iuridica*, Warszawa, 2014, Vol. 59, pp. 231–246. ISSN 0137-4346.

10.8 Conclusion

The period of harmonization of Polish legislation with EU law and the first years of Poland's membership in the Community have brought about a very dynamic development of only a limited scope of legal regulations relating to the conservation of natural resources in agricultural activity. Increasing use of agri-environmental programs, codes of good farming practice, organic farming principles and financial support for management in disadvantaged areas have had a positive effect on the biodiversity of agricultural land, and agricultural activity in Poland is contributing to the conservation of genetic resources, species and habitats.

The reflections provided indicate that, despite the undisputed importance of natural resource protection legislation in the field of agriculture, the postulates of de lege ferenda are addressed to both the European legislature and the legislature in each Member State. It is hoped that the new legislative solutions currently under development in the next programming period after 2020 will allow for even more effective consideration of the environmental, conservation and rational use of natural resources and landscapes in the agricultural manufacturing process.

11 NATURE PROTECTION AND CONFLICT OF INTERESTS RESOLUTION UNDER THE MINING ACT

11.1 Introduction

The exploitation of mineral resources affects a wide range of interests in the area on which, respectively, under which, the deposits of reserved minerals are located. These interests may be both of private and public nature. The protection of nature and the landscape is the typical public interest usually affected by this development activity. In dealing with the conflict of interests between the use of mineral resources (on the one hand) and the protection of nature and the landscape (on the other hand), it is necessary to proceed in accordance with the relevant provisions of the mining regulations [Act No. 44/1988 Coll., on Protection and Use of Mineral Resources, as amended (hereinafter referred to as the "Mining Act"), and Act No. 61/1988 Coll., regulating mining activities, explosives and the state mining administration, as amended (hereinafter referred to as the Mining Activities Act)][412], as well as Act No. 114/1992 Coll., on Nature and Landscape Protection, as amended (hereinafter the "Nature and Landscape Protection Act" or "NLPA").[413] The process of environmental impact assessment (EIA) according to Act No. 100/2001 Coll., on Environmental Impact Assessment[414], as well as the assessment of the consequences of mining plans on European important locations and bird areas of the European Natura 2000 network[415] is not the subject of this chapter.

412 To these regulations, VÍCHA, Ondřej. *Horní zákon. Zákon o hornické činnosti, výbušninách a o státní báňské správě. Komentář.* Praha: Wolters Kluwer Česká republika, 2017, 992 p. ISBN 978-80-7552-557-4.

413 To this law, STEJSKAL, V. *Zákon o ochraně přírody a krajiny. Komentář.*. Praha: Wolters Kluwer Česká republika, 2016, 576 p. ISBN 978-80-7552-229-0.

414 Closer comp. VÍCHA, Ondřej. Posuzování vlivů na životní prostředí v hornictví. In: VOMÁČKA, Vojtěch, ŽIDEK, Dominik a kol. *Posuzování vlivů záměrů a koncepcí na životní prostředí.* Brno: Masarykova univerzita, 2016, s. 199–219. Spisy Právnické fakulty Masarykovy univerzity, řada teoretická, Edice Scientia, svazek č. 561. ISBN 978-80-210-8343-1.

415 Closer comp. EUROPEAN COMMISSION. *EC Guidelines on the implementation of new non-energy extractive activities in accordance with Natura 2000 requirements*. Luxembourg: Publications Office of the European Union, 2011 [cit. 2 September 2017]. ISBN 978-92-79-18646-2. Available at: http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm

The issue of the resolution of the so called "conflict of interests" that conflict with the mining of mineral wealth is primarily regulated by the Mining Act. The Mining Act in section 33 regulates the resolution of the conflict of interests, covering both public interests protected by special regulations (e.g. environmental interests and its individual parts, including protection of nature and the landscape) as well as private interests, i.e. interests of physical or legal persons that generally derive from the ownership or similar rights to property. It is thus marked by the fact that the amendment to the Mining Act in 1991 (Act No. 541/1991 Coll.) unsystematically incorporated the regulation of the settlement of private claims of landowners and other real estate into the original content-consistency public law regulation of conflict of interests concerning the use of a deposit with public interests protected under special laws. However, there are two different types of legal relationships, in the first case public-law relations, in the second, private-law. This inadequate distinction of the legal nature of relationships in dealing with the conflict of interests (protected by special laws) and in dealing with private claims of property owners is then reflected in the application practice not only of the administrative bodies but also of the courts.[416]

The legal entities dealing with the conflict of interests in the context of the protection of nature and the landscape are on the one hand mining organizations, on the other hand nature protection authorities, as affected public administration bodies, under whose jurisdiction according to the Nature and Landscape Protection Act, the protection of parts of nature and the landscape threatened by mining of minerals belongs.[417]

It should also be remembered that the Nature and Landscape Protection Act directly prohibits[418] mining minerals in the most valuable areas of specially protected areas (in these cases the mining activity is subject to the

416 This chapter leaves aside the issue of solving private conflicts of interest with the exploitation of mineral resources and focuses only on solving public conflicts of interest (specifically interests protected by the Nature and Landscape Protection Act).

417 Section 58 (1) of the Nature and Landscape Protection Act.

418 It is forbidden to exploit minerals, peat or moor in the entire territory of national parks, except excavation of building stone and sand for construction on the territory of the national park [Section 16 (1) (D) of the NLPA]. Mining and minerals are forbidden in the territory of the first zone of the protected landscape area [Section 26 (2) (E) of the NLPA], as well as on the whole territory of national nature reserves [Section 29 (C) of the NLPA].

granting of an exemption), otherwise it is bound by various administrative acts of the nature protection bodies, which are then the subject of procedures in the resolution of the conflicts of interests.

11.2 Procedure under § 33 of the Mining Act

The Mining Act stipulates in section 33, paragraph 1, the duty to cooperate when solving the conflicts of public and private interests to use the exclusive deposit and to propose a procedure which will enable the use of the exclusive deposit to ensure the necessary protection of the above mentioned objects and interests. This obligation is laid down for mining organizations, public administration bodies (state mining authorities and nature protection bodies), as well as natural or legal persons which are competent to protect these objects and interests.

In addition, the Mining Act imposes the obligation on the mining organizations to agree with the public administration bodies (nature protection authorities), that are responsible for the protection of objects and interests pursuant to the Nature and Landscape Protection Act, whether the endangered object or interest is to be protected, to what extent, or for how long. In this case, the organization is obliged to negotiate with the affected state administration bodies an agreement which is of a public law nature and can be regarded as a public contract according to the fifth part of the Code of Administrative Procedure. When concluding an agreement on the conflict of interests, the Mining Act does not distinguish whether it is a conflict of mining with another public interest protected under special laws or a conflict with the private claims of landowners and other real estate. The agreement is submitted to the regional authority to obtain an opinion that is the consent to the concluded agreement, because in the case of a negative opinion (disagreement) the agreement is not concluded. The subject of this agreement is to protect the objects and interests protected under special regulations. This agreement is considered to be valid if the regional authority does not agree with the agreement within one month of its submission. The obligation to conclude an agreement does not apply to cases where the conflicts of interests have been resolved within the previous stages of the permitting process (e.g. where a protected deposit area is designated,

a mining area is identified, or in case of the project, construction or reconstruction of a mine or a quarry).

If there is no agreement on the resolution of the conflict of interests or if the regional authority has not agreed with the agreement, the Mining Act in section 33 (3) assumes that the Ministry of Industry and Trade decides to resolve the conflict of interests. In this case, the Ministry of Industry and Trade is obliged to discuss the draft decision on the resolution of the conflict of interests with the Ministry of Environment and the Czech Mining Authority. The Ministry of Industry and Trade should also cooperate with the other affected central government authorities when taking decisions on the conflict resolution and should take into account the opinion of the regional authority.

11.3 Procedure under the Nature and Landscape Protection Act

However, section 33 (2) and (3) of the Mining Act does not apply, if the procedure for resolving the conflict of interests is laid down by specific rules. Thus if protected interests and objects are covered by special laws (including the Nature and Landscape Protection Act) these special regulations will be applied. In these cases, the mining organization is not obliged to conclude with the nature protection authorities the agreement mentioned in section 33 (2) of the Mining Act. These agreements are only concluded in those cases where specific provisions do not address the matter. The list of these special laws mentioned in the last sentence of article 33 (2) of the Mining Act can be inferred from the footnote to this provision. These include, in particular, environmental legislation, under which the source of administrative acts are issued, which are a necessary binding document for issuing mining permission.[419] The Nature and Landscape Protection Act

419 An example of such a source administrative acts may be the consent of the body for the protection of the agricultural lands to the exclusion from the agricultural lands [Section 9 (1) of Act No. 334/1992 Coll., providing for the Protection of Agricultural Lands], a binding opinion on the location of the stationary source mentioned in Annex No. 2 to Act No. 201/2012 Coll., to provide an Air Protection, to the construction and alteration of the construction of the stationary source [Section 11 (2) B) and C) of Act No. 201/2012 Coll., providing for Air protection], consent of the state forest administration authority [Section 14 (2) of the Forest Act]; consent of the water authority to extract minerals in floodplains [Section 17 (1) C) of the Water Act] or a binding opinion on the protection of interests protected under the Water Act [Section 104 (9) of the Water Act].

expressly stipulates that consents and binding opinions issued under this act as a basis for decision under a special legal regulation (e.g. as a basis for the authorization of mining activities under the Mining Act) are binding opinions according to the Code of Administrative Procedure.[420] It follows from the judgment of the Supreme Administrative Court that binding opinions issued in accordance with section 149 of the Code of Administrative Procedure are not decisions within the meaning of Section 67 of the Code of Administrative Procedure or section 65 of the Code of Administrative Procedure, as they do not in themselves establish, alter, terminate or determine rights and duties. The judicial review of their content in consistence with article 36 (2) of the Charter of Fundamental Rights and Freedoms is allowed only in the framework of final decision pursuant to section 75 (2) of the Code of Administrative Procedure.[421]

From the point of view of the Nature and Landscape Protection Act, the above mentioned administrative acts will be issued by the nature protection authorities and will be required as evidence of conflict of interests in the permitting procedure for mining activity in particular a binding opinion on interventions that could lead to damage to an important landscape element,[422] the consent to activities that could reduce or change the landscape character,[423] the consent to placement, permission or construction of a building, change of land use, landscaping, changes in the water regime of land or water management, use of chemicals and changes in the

420 Section 90 (1) of the Nature and Landscape Protection Act.

421 Judgement of the Supreme Administrative Court of 23 August 2011, No. 2 As 75/2009-113.

422 Section 4 (2) of the Nature and Landscape Protection Act.

423 Section 12 (2) of the Nature and Landscape Protection Act. The Supreme Administrative Court, in its judgment of 18 August 2006, No. 7 A 166/2002-71, concluded that the potential for the reduction or alteration of the landscape exists (and therefore is necessitated by the consent of the nature conservation authority according to § 12 (2), if it appears from the opening, preparing and conversion plan that the mining of the multistorey quarry, for which the method of industrial surface mining is generally applied, will take place in the mining activities. Given that the expansion of the existing quarry was the case, it was completely irrelevant, according to the Supreme Administrative Court, whether or not there had been an open-cast quarry for 80 years. The Supreme Administrative Court in the case for procedural defects and unlawfulness annulled the decision of the Czech Mining Authority, which failed to issue a permit for mining activity without previously having been approved to do so by the competent nature conservation authority under section 12 (2) of the NLPA.

type of land in the protection zone of specially protected areas[424] as well as the prior consent to the activities and interventions specified in the more detailed protective conditions of specially protected areas[425] or of specially protected plant or animal species.[426]

An example of another procedure for resolving conflicts of interest which takes precedence over the procedure in the Mining Act is also the procedure for issuing exemptions from prohibitions in specially protected areas (pursuant to section 43 of the Nature and Landscape Protection Act[427]), memorial trees and specially protected plant species, (according to § 56 of the Nature and Landscape Protection Act[428]), as well as the procedure for negotiating agreements with nature protection authorities under section 65 of the same act.[429]

In proceedings under other legislation (including mining permit procedures) in which interests protected by the Nature and Landscape Protection Act may be affected, nature protection authorities are the authorities concerned.[430]

424 Section 37 (2) of the Nature and Landscape Protection Act.

425 Section 44 (3) of the Nature and Landscape Protection Act.

426 Section 57 of the Nature and Landscape Protection Act.

427 Exemptions from prohibitions in specially protected areas pursuant to section 16, section 16a (1), section 16a (2), sections 17 (2), 26, 29, 34, 35 (2) and 36 (2) the nature conservation authority may authorize in the case where another public interest outweighs the interest of nature conservation or in the interest of nature conservation or if the licensed activity does not significantly affect the conservation of the subject matter of the protection of the specially protected area. The nature conservation authority may also authorize this exception, which concerns an indeterminate range of persons, by a measure of a general nature.

428 The nature conservation body may authorize exemptions from prohibitions on memorial trees and specially protected plant and animal species pursuant to section 46 (2) of the NLPA, section 49 and article 50 of the NLPA, in cases where other public interests outweigh the interest of nature conservation. For specially protected plant and animal species protected under EU law, this exemption may only be granted if one of the reasons listed in section 56 (2) of the NLPA is given (e.g. for other overriding reasons of overriding public interest, including reasons of social and economic nature), there is no other satisfactory solution and the licensed activity does not affect the achievement or maintenance of a favourable conservation status of the species.

429 The state administration body issuing decisions pursuant to special regulations (i.e. the mining authority which issues mining permit pursuant to the Mining Act), which may affect the interests protected by the Nature and Landscape Protection Act, does so only in agreement with the nature conservation authority unless a different procedure is prescribed in the Nature and Landscape Protection Act. Closer comp. STEJSKAL, V. *Zákon o ochraně přírody a krajiny. Komentář.* Praha: Wolters Kluwer Česká republika, 2016, pp. 348–350. ISBN 978-80-7552-229-0.

430 Section 90 (15) of the Nature and Landscape Protection Act.

The position of the authorities concerned in the procedure for the authorization of mining activities is regulated by the Act on Mining Activities, especially in section 18 (3) and, subsidiarily, by the Code of Aministrative Procedure (especially in section 136). In resolving the discrepancies between the body of state mining administration that conducts the mining permit procedure and the affected bodies of nature protection as well as between the affected bodies, the procedure pursuant to section 133 of the Code of Administrative procedure is applied. These bodies are therefore obliged to notify the unsuccessful resolution of the conflict without delay to the superior authorities (i.e. the Czech Mining Authority or the Ministry of Environment) which are obliged to discuss the dispute in the conciliation procedure starting on the day when the first motion of them is the last one. In the case of ineffectiveness, the report on its course together with the proposals of the individual central administrative bodies and the central administrative authority that initiated the conciliation procedure, must be submitted to the government without undue delay.

11.4 Licensing of Mining Activities

According to the mining regulations, conflicts of interests with exploitation of mineral resources are resolved continuously in the individual phases of the licensing procedure. The conflicts of interests with the protection of nature and the landscape are therefore solved in the context of the determination of the protected deposit area[431], the mining area,[432] or also in the case of the design, construction or reconstruction of mines and quarries[433]. At the latest, however, the conflict of interests should be resolved in the mining licensing procedure.

If the objects and interests protected by law are endangered by mining activity, documents of resolving conflicts of interests must be submitted

431 The Ministry of Environment in the procedure for the determination of the protected deposit area provides opinions of the relevant state administration bodies, territorial planning authorities and the building authority (section 17, paragraph 4, of the Mining Act).

432 Section 27 (5) and section 28 (3), (4), (6), (7) and (8) of the Mining Act.

433 Section 23 of the Mining Act.

together with the application for license to mine.[434] These documents are the contract of the mining organization with the relevant state administration bodies and the persons to whom the protection of the threatened public interests belongs, the decision of the Ministry of Industry and Trade on conflict of interests pursuant to section 33 (3) of the Mining Act or the above mentioned binding opinions issued by the nature protection authorities under the Nature and Landscape Protection Act. All these documents form the basis for the licensing procedure.[435] If the application for the license does not contain all documents to resolve conflicts of interest, the district mining office will ask the organization to complete the documents within the specific time limit. If this does not happen, the district mining authority will discontinue the licensing procedure.[436] It can be inferred from the above-mentioned provisions that the failure to resolve conflicts of interest or the failure to solve the conflicts of interest of mining activities with other legitimate public interests, results in the discontinuance of the license procedure, which in substantive terms means that the license for mining activities will not be granted.

The Decree of the Czech Mining Office No. 104/1988 Coll., on the economical mining of exclusive deposits, on the licensing and reporting of mining activities and on the reporting activities performed in such a way as to constitute mining, in § 6 par. a) states that the organization shall attach to the application for license the documents for resolving a conflict of interests if mining activities threaten the objects and interests protected under the special legal regulations. Section 8 (1), further stipulates that the Mining Authority shall examine, inter alia, the completeness of the application as well as the resolution of conflicts of interest protected under special legislation.

In the case of an application for permission to open, prepare and mine an exclusive deposit or to secure and dispose of mines and quarries, the organization is obliged to prove that conflicts of interests have been

434 Section 17 (2) of the Mining Act in conjunction with Section 6 (3) A) Decree No. 104/1988 Coll.

435 Within the meaning of section 50 (1) of the Administrative Procedure Code.

436 Section 17 (3) and (5) of the Mining Act.

resolved.[437] Therefore, the conflict of interests should be resolved before the opening, preparation and mining, or disposal of main mines and quarries. It follows that it should be done before the commencement of the administrative procedure for a license to mine (i.e. before filing an application for a license to mine).

11.5 Threatening or Affecting the Interests of Nature Protection

It follows from the case law of the Supreme Administrative Court referred to below that resolving conflicts of interests does not only deal with the land and property on which mining activities will be carried out but also with those which may be threatened or affected by such activity.[438] The purpose of resolving conflicts of interests is to eliminate the legal barriers to the execution of mining activities so that they can be applied without any doubt in terms of legal relations.[439] A reliable finding which land is threatened by the mine of an exclusive deposit (in this case, it was threatened by small-scale blasting works) is a prerequisite for resolving the conflict of interests under the Mining Act.[440]

The bodies of state mining administration consider the intensity of the intervention which must reach the degree of threat, which is determined by experts in mine measurement and undermining effects, a criterion for making or not making a conflict of interests contract. The application practice uses the terms "affected" and "threatened" as technical criteria in relation to the degree of influence of the object and the land by the intended mining activity. For this purpose, the technical standard ČSN 73 0039 (Designing of the undermined areas), which distinguishes five degrees of protection according to the extent of the impact of mining activities on land

437 Section 33 (4) of the Mining Act.

438 Closer comp. CZAJKOWSKI, J. Řešení střetů zájmů v horním zákoně.. *Právní rádce*, 2006, No. 6, pp. 42–43.

439 Judgement of the Supreme Administrative Court of 27 October 2004, No. 7 A 133/2002-33. Published in the Collection of Decisions of the Supreme Administrative Court, vol. III, 2005, No. 9.

440 Judgement of the Supreme Administrative Court of 30 January 2004, No. A 5/2003-83. Published in the Collection of the Supreme Administrative Court decision, 2005, Vol. III, No. 6.

and buildings, is used. The objects classified in the 5th degree of protection are classified as objects "affected", the objects classified from I. to IV. degrees of protection are rated as "threatened". "Threatened" is considered to be an object which may be destroyed, damaged or any of its useful parameters may be reduced by mining activities. The term "affected" is then applied by the state mining bodies, both as a procedural attribute to identify the parties to the licensing procedure for mining activities and as a substantive designation of the protected objects if the intensity of the threat is not reached.

11.6 Conclusion

The resolution of all conflicts of interests (public and private) is a prerequisite for the realization of mining minerals in a particular area. One of the most important public interests that may be threatened by mining minerals is the interest in nature and the landscape protection. The need to protect the public interest, including the interest in nature and landscape protection, is capable of influencing the final decision of the state mining administration bodies (the license for mining activities or the activities performed in such a way as to constitute mining) or the scope and the conditions of the licensed activity. The Mining Act in section 33 regulates the resolution of the conflicts of interests. Mining organizations and the affected authorities (nature protection authorities) have a general duty to deal with the conflicts of interests in mutual cooperation, if the objects and interests protected by special regulations are threatened by mining the exclusive deposit. Both the organization and the authorities affected, have a duty to propose a procedure that will allow the use of the exclusive deposit and the necessary protection of those objects and interests. However, the obligation to conclude an agreement under the Mining Act does not apply to cases where the procedure for their settlement is laid down by specific regulations. In the view of the Nature and Landscape Protection Act (in connection with the Code of Aministrative Procedure, which regulates in particular the position of the authorities affected, binding opinions and the resolution of disputes), sets out specific procedures (in the form of the so-called natural assessment and the powers of the nature protection authorities to issue the underlying

administrative acts), the legal regulation of conflicts of interests regulated in section 33 (2) and (3) of the Mining Act is practically excluded. The mining organization is therefore not obliged to conclude an agreement with the nature protection authorities on whether to protect the endangered nature and the landscape and to submit it to the regional authority for an opinion. In this context, the competence of the Ministry of Industry and Trade is also ruled out to resolve conflicts of interest. On the basis of this legal relationship, therefore, in dealing with conflicts of interests of mining activities with nature and landscape protection, it proceeds according to the Nature and Landscape Protection Act and not pursuant to Section 33 (2) and (3) of the Mining Act. The final decision on licensing of mining activities falls within the competence of the State Mining Authority pursuant to the Mining Act. However, the mining authorities are bound by the administrative acts (binding opinions) of nature protection authorities when issuing such decisions.

12 CONSERVATION OF NATURE AND LANDSCAPE IN THE PROCESS OF LOCATING, CONSTRUCTING AND OPERATING WIND POWER PLANTS IN THE CZECH REPUBLIC

12.1 Introduction

The use of renewable sources is promoted mainly in order to reduce greenhouse gases and protect the climate, the environment, as well as the health and life of humans, animals and plants[441]. In the field of legal regulation of energy from renewable sources, we are now in the stage of many changes that result especially from the Paris Climate Conference. However, issues hampering renewable energy deployment can be identified today already. Such issues include various administrative hurdles, uncertainty of the investor[442] and weak official support which resulted in termination of the operating forms of promotion of energy from renewable sources, in particular a green bonus and purchase price rates for the new sources after December 2013. This is clearly evident from the development of the wind power plants network in Czechia. After two years of absolute decline, the construction of the last wind power plants is scheduled to be commissioned this autumn in Václavice, a small village close to the Polish borders.[443]

441 Judgement of the Court of Justice of 13 March 2001. PreussenElektra AG versus Schhleswag AG. Case C-379/98. ECLI:EU:C:2001:160, paragraph 73.

442 European Commission. Explanatory Memorandum of the Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast), COM(2016) 767 final, paragraph 1.1.

443 Václavice wind farm is a project of 13 wind power plants having the total rated capacity of 26 MW. It is expected to generate sufficient power to supply over 17,000 households each year. It was approved by the Ministry of Environment in the process of assessing the project's impact on the environment in 2011 already. See CENIA EIA Information System. Statement with respect to the assessment of the project's impact on the environment pursuant to Section 10 of Act No. 100/2001 Sb., of 28 February 2011. File ref. no.: 88539/ENV/10 [online]. 28. 2. 2011 [cit. 1 September 2017]. Available at: https://portal.cenia.cz/eiasea/download/RUlBX01aUDI3NF96YXZlcnlTdGFuRE9DXzEucGRm/MZP274_zaveryStan.pdf

Furthermore, according to the Czech State Energy Policy, requirements of the legal protection of the environment significantly limit the use of the potential of energy from renewable sources.[444] Due to their technical parameters, the wind power plants present the cause of various interferences in their surroundings. In addition to being the source of noise, they can represent a migration and reproduction barrier for flying species, among others. However, their visual aspect (height, warning lights, location on hills or in open plains, etc.) is the most typical aspect disrupting the landscape character. This means that in addition to the current form of state (non-)promotion of renewable sources[445], conflicts with various interests in the conservation of nature and landscape occurring in the process of locating, constructing and operating wind power plants represent probably the biggest issue hindering construction of the new wind power plants.

This paper aims to describe the competing interests of the development of wind power plants occurring in individual stages of land use planning and authorization, analyse the points of conflict and suggest possible solutions.

12.2 Wind Power Plants vs. Land Use Planning

The Land Use Planning phase is rather crucial for any future construction of wind power plants ("WPPs"). Due to their visual significance, their impact is deemed to exceed the boundaries of a single municipality. Therefore, as it was repeatedly concluded by the Supreme Administrative Court[446] ("SAC"), the WPPs must be regulated on the regional level, within the Spatial Development Principles (land use plans for the particular region). The Spatial Development Principles must follow the State Spatial Development Policy, which sets some contradictory requirements regarding the WPPs. It states that one of the State's main priorities is to *"create territorial conditions for development (…) of energy from renewable resources, aiming to eliminate their negative impacts*

444 THE MINISTRY OF INDUSTRY AND TRADE. *State Energy Policy of December 2014 (updated on 18 May 2015)*, p. 1 [online]. 18. 5. 2015 [cit. 1 September 2017]. Available at: https://www.mpo.cz/assets/dokumenty/52841/60959/636207/priloha006.pdf

445 See Section 4(10) of Act No. 165/2012 Sb., on the Promoted Energy Sources and on Amendment to Some Acts, as amended.

446 See Judgement of the SAC of 3 July 2009, ref. No. 5 Ao 1/2009-186, and of 16 June 2011, ref. No. 7 Ao 2/2011-127.

and risks."[447] On the other hand, however, the WPPs are explicitly mentioned in connection with the need of *"efficient territorial regulation of a danger of uncoordinated construction of wind power plants, especially in the Ústí Region."*[448] For this reason, the Spatial Development Principles in several regions opted for very strong regulation of the WPPs, in some cases expressively or effectively restricting any possibility to place the WPPs in the region.

This limitation of the construction of the WPPs within the Spatial Development Principles has been reviewed by the SAC in several cases. In its Judgement of 15 September 2010, ref. No. 4 Ao 5/2010-48, the Court did not exclude the possibility of a partial prohibition of the WPPs. Nevertheless, it declared the mere *"reference to the protection of the landscape character (…) of the territory of the Plzeň Region"* was insufficient reasoning. Later on, in 2011, it called unconvincing a regulation which employed a set of criteria of the landscape protection which, combined, did not allow construction of the WPPs in a major part of the Moravian-Silesian Region, in particular in the areas most suitable for this purpose. The Court stated that such regulation presented as an inappropriate limitation of the landowners without leaving any room for *ad hoc* consideration.[449] In the review of the Principles of Spatial Development of the Ústí Region, the Court was in a similar situation. It ascertained the general legitimacy of stricter means of protection than those laid down in the Nature and Lanscape Protection Act, however, it emphasised the need of sufficient justification of such higher level of protection, especially by providing specific reasons as to how the relevant areas would be affected by the location of the WPPs.

On the lower level of the planning regulation, the municipality plans have to follow the Spatial Development Principles. They delimit the developable areas and built-up territory, hence affecting the construction of the WPPs. Moreover, provided there are no Spatial Development Principles or a particular region delays the adoption of updates after the Spatial Development

447 THE MINISTRY OF REGIONAL DEVELOPMENT. *Spatial Development Policy of the Czech Republic, as amended by Update No. 1* [online]. Prague, Brno 2015, p. 18 [cit. 1 September 2017]. Available at: http://www.uur.cz/images/1-uzemni-planovani-a-stavebni-rad/politika-uzemniho-rozvoje-aktualizace-1-2015/publikace-apur-cr-2015-cz.pdf

448 Ibid., p. 37.

449 See Judgement of the SAC of 16 June 2011, ref. No. 7 Ao 2/2011-127.

Principles have been quashed in the court proceedings, the municipalities may even regulate construction of large projects including the WPPs.[450]

12.3 Wind Power Plants vs. EIA

In Czechia, the EIA procedure presents the very first step in a long chain of permitting procedures. The outcome of the EIA process is either a negative result of the screening procedure in the form of administrative decision, or a binding EIA statement. The EIA procedure is not a standard, full proceeding with participants. It is a process of preparation and adoption of a binding statement which is used in the subsequent permitting proceedings, as required by the Act No. 100/2001 Sb., the Environmental Impact Assessment Act, as amended (EIAA). It applies in particular[451] to the WPPs with the total rated capacity exceeding 500kWe or the stand height exceeding 35 meters, if determined in the screening process.

The last affirmative binding statements for the WPP projects considered the impact of the projects on the landscape character, especially protected species and Natura 2000 sites. As regards the WPP Bor construction project in the cadastral territory of Damnov, the affirmative statement identifies the impact of the project implementation on the landscape character as the most significant interference in the environment. Despite that, it accepts the implementation of the project, referring to *"its benefit in connection with the orientation of the state energy policy towards renewable energy sources."*[452] For construction of the WPP Kozmice, the EIA statement required an exception from the protection of specially protected species pursuant to Section 56 of the NLPA in case of any interference with their protection conditions.[453] The exception was

450 See Judgement of the SAC of 31 August 2016, ref. No. 4 As 88/2016-35.

451 Pursuant to Section 4/1, d), e) of the EIAA Act, the WPPs not reaching the threshold values will be screened, if the competent authority determines that they are subject to screening, or if a nature conservation authority states that they could themselves or in combination with other units have a significant impact on the territory of a Site of Community Importance or a Special Protection Area.

452 See CENIA EIA Information System. EIA statement pursuant to Section 10 of EIAA of 26 March 2012. File no.: ZN/434D/ŽP/10 [online]. 26. 3. 2012 [cit. 1 September 2017]. Available at: https://portal.cenia.cz/eiasea/detail/EIA_PLK1540

453 See CENIA EIA Information System. EIA statement pursuant to Section 10 of EIAA of 23 March 2012. File no.: 169096/2011/KUSK/39 [online]. 23 March 2012 [cit. 1 September 2017]. Available at: https://portal.cenia.cz/eiasea/detail/EIA_STC1243

required also in the case of a WPP project in the Kamenec locality, when partial impact of the operation on protected species of Eurasian sparrowhawk, Eurasian pygmy owl, boreal owl and Eurasian woodcock was expected[454]. In this case, the impact on the Natura 2000 sites was assessed as insignificant and one of the conditions laid in the EIA merely asked for an updated biological survey. Protection of Natura 2000 site was also considered, this time with a slightly different outcome, in the EIA concerning the project of the wind farm in Hora sv. Šebestiána. An expert opinion of the authorised person stated that the project had a significant negative impact on protected species in the Special Protection Area Novodomské rašeliniště – Kovářská (black grouse)[455], and it also disrupted the integrity of the locality.[456] In the end, the project obtained an affirmative EIA statement. For eight WPPs, it was conditioned by a negative result of at least two-year research of the occurrence of the black grouse in their proposed location.

12.4 Wind Power Plants vs. the NLPA

12.4.1 Wind Power Plants vs. Landscape Character

Besides the EIA statement, and even if no EIA is required, the project must comply with the NLPA Act requirements which are often considered in a separate proceedings. The NLPA does not protect only nature, but presents the most important piece of legislation in the field of landscape protection which certainly plays major role in the authorization of the WWPs.

Interference in the landscape character is defined in Section 12 of the NLPA Act and refers to *"any activity diminishing the esthetical and natural value of the*

454 See CENIA EIA Information System. EIA statement pursuant to Section 10 of EIAA of 30 December 2014. File no.: 66698/ENV/14 [online]. 30 December 2014 [cit. 1 September 2017]. Available at: https://portal.cenia.cz/eiasea/download/RUlBX01aUDQxMl96YXZlcnlTdGFuRE9DXzgwNTkyNjY0NzIwNzQwOTYzMTAucGRm/MZP412_zaveryStan.pdf

455 Immediately afterwards, the author of the expert opinion relativizes the suitability of the methodology of the assessment of impacts of the project on the black grouse, and states that the mathematical calculation cannot be deemed an appropriate method of assessing the impact on such sensitive protected species as the black grouse.

456 See CENIA EIA Information System. Expert Opinion of an authorised person, RNDr. Ondřej Bílek, concerning the project of the construction of the wind farm in Hora sv. Šebestiána and wind farm in Křimov [online]. 22 February 2016 [cit. 1 September 2017]. Available at: https://portal.cenia.cz/eiasea/detail/EIA_ULK658

landscape character."[457] Pursuant to paragraph 3 of the same section, construction of the WPPs can be limited by the establishment of a nature park; otherwise, as a general rule, interference in the landscape character is possible (subject to approval of a NPA (NLPA)). The SAC explained the meaning of this regulation as follows: "*New development thus cannot be rejected and may interfere in the landscape character of the relevant locality in various ways. It may either improve the landscape character of the locality, (…) or diminish its value."*[458] However, the value of the landscape character may be diminished only to acceptable degree corresponding to the character of the interference. For the assessment of the degree of the interference, e.g. the axial symmetry with the landscape element[459] or a height of the WWP or its location[460] are relevant. It means that the degree of the interference in the landscape character is always assessed first; only then the economic benefit of the WPP construction is considered.[461] According to the SAC, the interest in the power security and generation of energy from renewable sources are factors of a subordinate relevance.[462]

12.4.2 Wind Power Plants vs. Protection of Specially Protected Species

The fundamental conditions of the protection of specially protected species pursuant to Sections 49 and 50 of the NLPA exclude almost any interference in the territory of their occurrence. However, the ban can be broken by granting an exception. According to the SAC *"an acceptable degree of interferences may (in the case of the existence of a public interest that is more important than the interest in the nature conservation) be determined by a NPA in its decision to grant an exception pursuant to Section 56".*[463] Since the exception may only be granted

457 Section 12(1) of Act No. 114/1992 Sb., the Conservation of Nature and Landscape Act, as amended.

458 Judgement of the SAC of 10 September 2009, ref. No. 7 As 52/2009-227.

459 Which means that the preference of the accumulation of negative dominants in a territory is not a matter of course. See Judgement of the Supreme Administrative Court of the Czech Republic of 10 September 2009, ref. No. 7 As 52/2009-227.

460 The height of a wind power plant is the basic parameter for the purposes of the protection of the landscape character with regard to the location of that wind power plant. See the Judgement of the SAC of 14 May 2009, ref. No. 1 As 20/2009-70.

461 See the Judgement of the SAC of 9 November 2007, ref. No. 2 As 35/2007-75.

462 See the Judgement of the SAC of 17 September 2009, ref. No. 5 As 63/2008-78.

463 Judgement of the SAC of 23 September 2014, ref. No. 1 As 100/2014-36.

after the existence of an overriding public interest has been proven, it is necessary to determine the existence of a public interest and specify it in the procedure: *"In granting exceptions, nature protection authorities need to identify within the context of each individual case if there is a public interest, which differs from the interest in the nature conservation, and, in case of European protected species, to specify the public interest generally formulated in Section 56".*[464]

If the existence of a public interest is established, it must be determined in what way this public interest in the particular case is more important than the protection of endangered species, which is the primary public interest to be measured with. According to the SAC, production of energy from renewable sources generally presents such overriding public interest: *"In practice, public interests can be identified especially from political and legislative acts of legitimate authorities, from political discourse, public discourse on various expert issues etc. (…) Currently, there is a general majority political consensus expressed by various political and legislative acts on the global, European and national level, that the production of energy from renewable sources leads to a higher degree of the protection of the environment, so it is therefore in the interest of the whole society to implement projects contributing to this goal under reasonable conditions."*[465] Nevertheless, the conclusions of the Court cannot be interpreted in absolute terms. In fact, each particular case needs to be examined in regards to public interests at stake. Moreover, even if the condition of an overriding public interest is met, the official authorities must decide in compliance with the principle of proportionality and take into account possible alternatives and the outcomes of the complex[466] assessment of impacts of the WPP, i.e. negative interferences connected with the construction or with development of related infrastructure or the risk of killing of flying animals with rotating rotors.

12.4.3 Wind Power Plants vs. Natura 2000 Network

On the Czech territory, the Natura 2000 network consists of delimited Special Protection Areas and declared Sites of Community Importance.

464 Judgement of the SAC of 10 May 2013, ref. No. 6 As 65/2012-161.

465 Judgement of the SAC of 13 January 2017, ref. No. 2 As 207/2016-46.

466 In addition to the impacts of the construction of wind power plants, an administrative authority has to take into account also any petitions signed by inhabitants affected by the project, proposed local map amendments under discussion, etc.

Pursuant to Section 45h of the NLPA, if a NPA does not exclude a significant negative impact of the project in its statement, the applicant must submit alternative solutions for any project, which can, by itself or in combination with other projects, have a significant impact on the favourable condition of the subject of protection or the integrity of a Site of Community Importance or Special Protection Area. The goal is to exclude any significant negative impact or at least mitigate it, if the exclusion is not possible.[467] Upon submission of such alternative solutions, the project can be approved despite the significant negative impact on the protected locality. Provided no solution without a significant negative impact is available, a variant with the smallest possible significant negative impact can be carried out for imperative reasons of overriding public interest. In case of a significant negative impact on the locality with priority types of habitats or priority species, a project can be approved only for reasons related to public health, public security or favourable consequences of the indisputable significance for the environment. In this respect, the regulation follows the requirements of Art. 6 of the Habitats Directive and relies on the rule that if the project stretches into the Special Protection Areas, a precautionary principle must be upheld, respecting various general recommendations for the assessment of impact of the WPPs on birds[468] which agree that the WPP projects should be primarily situated beyond the borders of Special Protection Areas (especially the Natura 2000 sites).

12.5 Conclusion

Although the promotion of the use of renewable sources leads to reduction of greenhouse gases, protection of the climate as well as the environment, many conflicts with the colliding interests in the protection of the

467 See Judgement of the SAC of 8 September 2011, ref. No. 9 Ao 4/2011-78.

468 LANGSTON, R. H. W., PULLAN, J. D. Windfarms and Birds: An analysis of the effect of windfarms on birds, and guidance on environmental assessment criteria and site selection issues [online]. *Bird-Life Report, 23rd meeting of Standing Commitee of the Bern Convention*. Strasbourg 2003 [cit. 1 September 2017]. Available at: http://migratorysoaringbirds.undp.birdlife.org/sites/default/files/BirdLife_Bern_windfarms.pdf; PERCIVAL S. M. Predicting the Effects of Wind Farms on Birds in the UK: The Development of an objective assessment method. In: de LUCAS, M., JANSS, F. E. G., FERRER M. (eds.). *Birds and Wind Farms. Risk Assessment and Mitigation*. Madrid: SIA, Quercus, 2007, 275 pp.

environment occur in locating, constructing and operating WPPs. Due to technical parameters of the WPPs, these plants can, for example, interfere in the landscape character, endanger specially protected species or have a significant impact on the favourable condition of the subject of protection or the integrity of a Site of Community Importance or Special Protection Area. The colliding interests must be considered in all those cases. One can encounter strict regulation of the WPP construction already on the level of the Spatial Development Principles, which, however, will not stand a judicial review if it is not justified properly, if it limits inappropriately the landowners, or if it groundlessly excludes the room for exceptions and the *ad hoc* assessment of a particular project. If the land use documents allow the construction of the WPPs, it is essential to submit statements and permissions pursuant to the Environmental Impact Assessment Act and the NLPA, since the WPPs present a significant interferences in the nature and landscape character. The case law of the SAC puts emphasis on several aspects the authorities should take into account, for example the height of the particular WPP, its location and the axial symmetry with the landscape elements. In the conflict with other interests, production of energy from renewable sources is generally considered an overriding public interest which outweighs environmental protection. However, alternative solutions must be taken into account and if plausible, given preference.

13 LEGAL REGULATION OF PERFORMANCE OF OUTDOOR ACTIVITIES WITHIN SPECIALLY PROTECTED AREAS

Everyone can do what is not forbidden by law. The development of outdoor activities shows the need for legal regulation with regard to sustainable development and environmental protection. The use of nature to perform outdoor activities brings varying degrees of extra pressure (ranging from minimal to significant) on the natural environment and resources depending on the characteristics of outdoor activities. However, it can be generally stated that outdoor physical activities of people can result in increased use of water resources, soil erosion, damage to vegetation, disturbance of animals, increased waste production, etc. On the other hand, performance of outdoor activities need not always be in conflict with nature protection interests, as one way to ensure nature and landscape protection is to protect the landscape for environmentally friendly forms of tourism and recreation[469].

13.1 Outdoor Activities

The term 'outdoor activities' is not unambiguously defined; it is not a legal term[470]. Outdoor activities, in their traditional concept, take place outdoors, in the open air. This is a popular way of spending leisure time. The range of outdoor activities is wide and is constantly expanding thanks to human imagination and new technologies. Outdoor activities can have both sport and recreational character. From the legal point of view, this is an irrelevant distinguishing aspect. The basic feature of outdoor activity in the context of this chapter is active movement, not staying (on site) in nature. Therefore, the issue of camping, sleeping, shelters, etc. is not discussed. Taking into

469 Compare with the section 2 (2) k) of the NLPA as amended. In *ASPI* [legal information system]. Wolters Kluwer CR [cit. 25 August 2017].

470 The term of outdoor activity and the possibilities of its definition is explained e.g. by GARGULÁK, M. *Právní úprava provozování outdoorových aktivit v Krkonošském národním parku a Národním parku České Švýcarsko* [online]. Brno, 2015 [cit. 31 August 2017]. Diploma thesis. Masaryk University, Law Faculty. Brno, 2015, p. 10, 11. Available on https://is.muni.cz/th/375879/pravf_m/DIPLOMKA_final.pdf

account the attribute of movement activity in the strict sense of the word it is also clear that motorized outdoor activities (riding on jet skis or snowmobiles, on quad bikes, etc.) are not the subject of examination. On the contrary, an essential aspect for the definition of outdoor activities is whether it is a mass and organized activity or an activity of an individual or groups of friends. The legal regulation of the organization of public outdoor activities[471] is not the subject of this chapter.

The popularity of outdoor activities and the number of people who perform them, the extent of the impact of outdoor activities on the nature and landscape and the demands of outdoor activities on infrastructure[472] are the aspects that influence the state view on the way of regulating outdoor activities.

The basic groups of outdoor activities include:

- Hiking[473]. This activity has in its genuine form a special status among the mentioned groups. Nature protection authorities consider it to be a *reference activity when comparing the effects of outdoor activities as it represents a tolerated level of disturbance in places where the input is not prohibited*[474].
- Cycling. Nowadays it is a mass activity including cycling and mountain biking. Increasing number of people performing this activity results in rising the infrastructure requirements in the form of bicycle route marking and construction of cycle paths.
- Climbing, involving a wide range of disciplines. In the Czech environment, traditional and sporting climbing on rocks, bouldering, ice climbing, and speleoalpinism are being performed. A significant number of people performing climbing activities are members of the Czech Mountaineering Union, or other U.I.A.A organizations.

471 The organization of public events (competitions, camps, and marches) is legally regulated because of mass character and the associated potential increase of negative effects alone and as a result of diversity on a case-by-case basis.

472 The conditions for placing infrastructure, issues of land use changes, landscaping and other interventions in nature are not the subject of this article since it is not about the regulation of the conditions on performance of outdoor activities but regulation on the conditions of changes of the environment.

473 With the development of mobile technologies, a 'geocaching' has become a special kind of hiking, it's a search for 'caches' using mobile applications (mobile phones) and GPS in terrain.

474 NATURE CONSERVATION AGENCY OF THE CZECH REPUBLIC. *Metodické listy č. 16.2. Usměrňování vybraných sportovních a rekreačních aktivit v ZCHÚ*. Prague, 2015, p. 4.

- Water activities, including a wide range of water sports, bathing, swimming, diving, sailing of watercourses and canoeing.
- Winter sports, especially cross-country skiing, downhill skiing and skialpinism. Cross-country skiing and skialpinism are activities of a tourist nature, while downhill skiing, requiring specific and extensive infrastructure, are an example of a hard form of tourism[475].
- Aviation sports. These are specific activities involving flying sports on flying devices, being subject to the Act No. 49/1997 Coll[476]. Non-motorized devices that simultaneously require the active movement of a person to take off include a hang-glider and paraglider.
- Horse riding, or horse driving i.e. activities that use horses as a driving force.

13.2 Legal Framework for Outdoor Activities Performance

As already mentioned in the introduction everyone can do anything that is not forbidden by the law. Therefore, the limits of the performance of outdoor activities must be set by means of public law tools for general or special territorial and species nature protection. The legal regulation affecting the issue is primarily contained in the Nature and Landscape Protection Act[477], Forest Act[478], or in the Water Act[479].

13.2.1 Freedom of Movement as *Condition sine qua non*

A prerequisite for performance of all outdoor activities, including hiking, is the freedom of movement.[480] This freedom, together with the freedom

475 Compare NATURE CONSERVATION AGENCY OF THE CZECH REPUBLIC. *Metodické listy č. 16.2. Usměrňování vybraných sportovních a rekreačních aktivit v ZCHÚ*. Prague, 2015, p. 67.

476 The Act No. 49/1997 Coll on Civil Aviation and amending Act No. 455/1991 Coll on Trade Licensing as amended. In *ASPI* [legal information system]. Wolters Kluwer ČR.

477 Act No. 114/1992 Coll on Nature and Landscape Protection, as amended. In *ASPI* [legal information system]. Wolters Kluwer CR.

478 Act No. 289/1995 Coll on Forests and Amendment of some Acts (Forest Act), as amended. In *ASPI* [legal information system]. Wolters Kluwer CR.

479 Act No. 254/2001 Coll on Waters and Amendment of some Acts (Water Act) as amended. In *ASPI* [legal information system]. Wolters Kluwer CR.

480 Declared in the Article 14 of the resolution No. 2/1993 Coll, the Charter of Fundamental Rights and Freedoms as a part of constitutional order of the Czech Republic, as amended (hereinafter CHFRF). In *ASPI* [legal information system]. Wolters Kluwer CR.

of residence, may inevitably be limited by the law, inter alia for the protection of the rights and freedoms of others and in defined territories also due to the nature protection reasons.

Free access to the countryside is guaranteed by public law in the section 63 of the NLPA. The explanatory memorandum to this provision states[481] that this right should not only ensure the passableness of the landscape through a network of publicly accessible dedicated roads, trails and footpaths outside the built-up area which can be cancelled only with the consent of the NPA. But, in addition, this provision should also guarantee to the broad "non-motorized" public (walking, biking, skiing or horseback) the right of free passage to the landscape through land in ownership or lease of state, municipalities or other legal entities[482] in compliance with the conditions stipulated by law, in particular respecting the rights of other persons. Such passage must be maintained even in the case of fencing or enclosure of the plot. The right mentioned in the section 63(2) of the NLPA may be restricted or modified by way of derogation from the NLPA itself or other special regulations.

The NLPA itself restricts the freedom of movement generally and directly in some specially protected areas. It concerns:

- Prohibition of movement in core zones (currently corresponds to existing first zones) of national parks outside the paths or routes prescribed by the NPA (section 17);
- Prohibition of cycling and horse riding in the territory of national parks outside the built-up areas of municipalities and the developable areas of municipalities and outside the roads, local roads and places prescribed by the NPA (section 16(2) m));
- Prohibition of entry and access into the entire area of national nature reserves outside the routes marked with the consent of the NPA (section 29 d)).

481 GOVERNMENT OF THE CZECH REPUBLIC. The governmental proposal No. 497 of the Nature and Landscape Protection Act. Explanatory Note [online]. *Chamber of Deputies of the Czech Republic. Digital repository* [cit. 1 September 2017]. Available at: http://www.psp.cz/eknih/1990cnr/tisky/t0497_08.htm

482 Regarding practical limits of this provision, see KOCOUREK, T. Omezení vlastnického práva dle zákona o ochraně přírody a krajiny aneb propast mezi veřejným a obecným zájmem. In: NECKÁŘ J. et al. (eds.). *Dny práva – 2008 – Days of Law* [online]. Brno: Masaryk University, 2008, pp. 1841–1851 [cit. 25 August 2017]. Available at: https://www.law.muni.cz/sborniky/dp08/files/pdf/ustavko/kocourek.pdf

In addition, the section 64 of the NLPA lays down the power of the NPA, in particular for reasons of excessive attendance, to restrict or prohibit public access to the territory in national parks, national nature reserves, national natural monuments and in the first zone of protected landscape areas or parts thereof, and also access into the caves[483].

The Forest Act and its institution of public use of forest is another fundamental regulation in relation to the problem. This institution guarantees the right of everyone to enter the forest while respecting the legal restrictions and legally protected interests, on the one hand irrespective of the ownership of the given land (forest) and on the other hand guaranteeing the entrance only to pedestrians, as according to the section 20 (1) j) of the Forest Act, it is forbidden to ride bicycles, horses, skis or sleds outside the forest paths and marked trails[484].

Other restrictions in relation to the freedom of movement for performance of outdoor activities may result from the provisions of the Water Act under which entry of vehicles or persons to the first-degree protection zone is forbidden.

13.2.2 Application Limits of General and Species Nature Protection

Some outdoor activities, such as hiking or cycling, can be performed almost anywhere. Others directly depend on specific natural environment, such as speleology (caves), climbing (rock formations), biking (hilly wooded landscape) or skiing (mountains). A large part of this specific natural environment

483 *The content and scope of the restriction or prohibition of admission must meet the requirement that, from the point of view of territorial, material and personal, it is the least restrictive yet sufficient to achieve the statutory objective, namely to prevent the damage to the territory, which corresponds to the requirement of subsidiarity and minimization of the intervention resulting from the restriction nature, respectively the entry prohibition into the territory of a national park as an interference, inter alia, in the freedom of movement constitutionally guaranteed by the Article 14 of the Charter of Fundamental Rights and Freedoms.* See the Judgement of the Supreme Administrative Court of the Czech Republic of 15 December 2010, No. 7 Ao 6/2010-44. In *ASPI* [legal information system]. Wolters Kluwer ČR [cit. 30 August 2017].

484 Forest means forest stands with their environment and land intended for forest functions. The definition of forest path is included, from the 1 January 2018, in the Decree No. 239/2017 Coll on Technical Requirements for Constructions for Performing the Functions of the Forest; it is access road intended for forest management. For skiers, horse riders, eventually bikers, it can be difficult to recognize in practice whether it is located in a free landscape according to the section 63 of the NLPA or on a plot intended to fulfil forest functions without forest stands.

is located in specially protected areas. The place of performance of outdoor activity is therefore crucial for the way of legal regulation. The NLPA does not include, in the frame of general nature protection[485], a clause which would a priori prohibit or restrict the use of landscape for outdoor activities, especially if they represent a form of activity with minimal interference with the natural environment. General nature protection tools (protection of important landscape features, landscape character, general protection of plans and animals) shall be applied where the outdoor activity requires infrastructure or significant interference with natural environment (e.g. downhill skiing, cycling) as a prerequisite for its performance. Indirect regulation of outdoor activities through the institutes of the Building Code[486] enables the NPAs to direct new significant interventions into the environment already during the planning period and to avoid subsequent conflicts of interest.

The contingency and the heavy predictability of the occurrence of animals and plants means that species protection tools mostly serve to handle the consequences of human activities rather than to prevent primarily negative influences[487]. The application of provisions on general protection of plants and animals is hardly conceivable within the actual performance of outdoor activities by individuals. The provisions of the section 5a or sections 49 and 50 of the NLPA, specifically the restrictions on activities likely to affect the subject of protection are applied as a matter of priority if an application on exemption from the prohibitions on specially protected plants and animals is submitted in accordance with the section 56 of the NLPA or if the conditions of the derogating procedure for the bird protection under § 5 b of the NLPA are being determined. In practice, the application of the sections 5a, 49 and 50 of the NLPA shall be of a predominantly punitive

485 Caves are an exception. *Most of them are of an extraordinary importance because they contain not only remarkable geological, geomorphological and mineralogical phenomena, but also the most valuable documents on the origin and development of life, and about the origin and development of human culture. Therefore, since the very beginnings of the natural sciences, the caves have been the subject of research and, of course, later of also some protection.* See STEJSKAL, V. *Zákon o ochraně přírody a krajiny. Komentář.* Praha: Wolters Kluwer, 2016. Available at: *ASPI* [legal information system]. Wolters Kluwer CR [cit. 1 September 2017].

486 Act No. 183/2006 Coll on Land Planning and Building Code (Building Code), as amended. In: *ASPI* [legal information system]. Wolters Kluwer CR.

487 Compare NATURE CONSERVATION AGENCY OF THE CZECH REPUBLIC. *Metodické listy č. 16.2. Usměrňování vybraných sportovních a rekreačních aktivit v ZCHÚ*. Prague, 2015, p. 8.

nature character. As previously stated in the Methodical sheets[488], protection of specially protected species seems to be more effective through territorial protection of the site of permanent occurrence, protection of known biotopes and restriction of entry or activity. Specially protected areas according to the part 3 of the NLPA and the European significant sites and bird areas according to part 4 of the NLPA[489] are the territories listed below.

13.2.3 Specially Protected Areas

According to the section 14 of the NLPA, the following categories of specially protected areas can be proclaimed in the territory of the Czech Republic: national parks, protected landscape areas, national nature reserves, nature reserves, national natural monuments and natural monuments. Each category is distinguished by the area, significance and degree of protection.

The national parks and national nature reserves receive the strictest protection, as it is evident from the wording of the provisions of the sections 15(2) and 28(2) of the NLPA, according to which all use of these areas shall be subject to the preservation of their natural ecosystems. On the contrary, recreational use is permissible within the protected landscape areas if it does not damage the natural values of the protected landscape areas.[490]

With reference to above mentioned, the basic protective conditions are therefore "graduated". Together with the more detailed protective conditions, they provide the basis for the implementation of individual outdoor activities in specially protected areas.

The basic protective conditions define activities prohibited within the specially protected area. Prohibitions are of a relative nature and there can be permitted an exemption under section 43 of the NLPA. A permit for an exemption shall be decided by the competent NPA on the basis of a request from the

488 NATURE CONSERVATION AGENCY OF THE CZECH REPUBLIC. *Metodické listy č. 16.2. Usměrňování vybraných sportovních a rekreačních aktivit v ZCHÚ*. Prague, 2015, p. 8.

489 It is not a specially protected area according to the Section 14 NPLA, but a specific legal regulation on the protection of a whole European site network – NATURA 2000. Therefore, it will not be further the subject of investigation.

490 It should be stated that the protected landscape areas cover almost 15 % of the state area, and in total they occupy the largest share of all specially protected areas. Protected landscape areas. *The Ministry of Environment* [online]. © 2008–2015 [cit. 2 September 2017]. Available at: https://www.mzp.cz/en/protected_landscape_areas

outdoor activity operator under a separate procedure resulting in (in case of a permit) an administrative decision or a measure of a general nature. There is no legal entitlement to an exemption.

Furthermore, basic protection conditions do not apply to designated areas (roads, trails). Reservation of these designated areas is under the responsibility of the NPAs and is issued in the form of a measure of a general nature. This measure contains not only specific places, but also the conditions relating to the scope, manner and time of activities performed. In practice, the amendment should gradually bring a greater integration of the state administration in the issue of designated areas, especially in the case of the authorized persons, for outdoor activities under the NLPA, as the law abandons the distinction of the regime when reserving the designation areas by the NPA and reserving designation areas with the approval of the NPA and expressly unifies its formal aspect[491]. The NLPA does not set the obligation to indicate the reservation of a place in the field to the NPA, however it could be part of individual administrative acts and therefore, it can be clearly recommended in practice.

More detailed protective conditions include activities whose performance is subject to the prior approval of the NPA[492]. The approval is issued on request and may take the form of a binding opinion if the necessary authorization to the activity is required under other legislation, a separate administrative decision or a measure of a general nature.

A similar regime in the more detailed protective conditions is also applied in the protection zones of specially protected areas[493]. The activities referred in the section 37(2) (*pari passu* in the protection zones of specially protected areas) and in the section 37(3) (in the protection zones of national parks) and as well as activities and interventions determined in the proclamation

491 Compare section 43 (3) of the NLPA. *The nature protection authority shall reserve the designated places and routes pursuant to sections 16a (1) c), 16 (2), 17 (2), 29 and 37 (3) a) and d), by the measure of a general nature.*

492 The wording of more detailed protective conditions of the National Park České Švýcarsko in the section 16 of the NLPA is the exception (see below). In: *ASPI* [legal information system]. Wolters Kluwer CR.

493 Protection zones shall not be declared for protected landscape areas and, in the case of other categories of specially protected areas, the NPA may, when designating them, stipulate that a specially protected area is designated without a protection zone. Compare the section 37 (1) of the NLPA. In: *ASPI* [legal information system]. Wolters Kluwer CR.

of individual protection zones may be performed only with the approval of the NPA. None of the above-mentioned activities are directly connected with the concept of outdoor activities.

National Parks

The Nature and Landscape Protection Act amended by the Act No. 123/2017 Coll (hereinafter the Amendment)[494] has unified the legal regulation of national parks including their basic and more detailed protective conditions.

The following outdoor activities are explicitly and directly regulated in the national parks:

- Flying. Within the territory of national parks, it is forbidden to fly in violation of the conditions laid down in measures of a general nature issued under the Civil Aviation Act.
- Cycling and horse riding. If it is not a municipality's built-up area and a municipality's developable area, it is forbidden to cycle or ride a horse outside the roads, local roads and places reserved by the NPA.
- Climbing and water sports. These sports are forbidden unless performed in a municipality's built-up area and a municipality's developable area, outside the designated areas by the NPA.

Further regulation of outdoor activities in national parks is based on more detailed protective conditions and also on the visitor rules of individual national parks[495].

Regarding more detailed protective conditions stipulated by the Amendment in sections § 16a to 16d of the NLPA, it is a provision prohibiting interference with natural rock formations in the NP České Švýcarsko for reasons other than the imminent threat to human life or health or imminent damage to assets of considerable scale. This relates to the performance of sandstone climbing, namely to the formation of first ascents in which the fixed draws (rings) will be used. The granting of an exemption in the administrative proceedings under the section 43 of the NLPA is a prerequisite for making the first ascents.

494 The Act No. 123/2017 Coll on amendment of the Act No. 114/1992 Coll on Nature and Landscape Protection, as amended. In: *Code: Czech Republic*. Praha: Ministry of Interior Affairs, 2017, figure 44, pp. 1257–1288.

495 However, these visitor rules are only binding till 2020.

The NP Visitor Rules were, before the Amendment came into effect, issued in the form of measures of a general nature pursuant to the section 19 of the NLPA and supplemented the legal regulation of restricted and prohibited activities in national parks, especially in the area of recreational and tourist activities. The consideration of the local protection requirements different in each national park with regard to their natural, social and other specifics and concentration of detailed rules of conduct in a single legal act was supposed to be the advantage of visitor rules in this form. However, it has been found to be unsuitable in practice, especially for the complexity of the procedure for changing the visitor rules, and the risk of cancelling the entire visitor rules in a dispute over one chapter/activity[496].

Visitor rules should newly represent a transparent document in which the visitor of NPs i.e. the operators of outdoor activities, are informed about the current state of regulation (prohibitions resulting from legislation, restrictions, including aggravating or mitigation of restrictions on the basis of individually issued measures of a general nature or decisions) of tourism and sports activities throughout the national park territory.

However, the visitor rules of NPs issued pursuant to the existing legislation shall be valid for the period specified therein but no later than three years after the date of entry into force of the Amendment[497].

Showing NP Šumava as an example, the visitor rules guarantee broad freedom of movement for hikers, skiers and horse riders. The first zone of the NP and some expressly defined parts of marked trails in the defined period of the year (mainly due to the protection of species sensitive to interference) are the exceptions. In accordance with Forest Act, skiing and horseback riding are not allowed in forests. Moreover, there is a code of conduct for operators setting out rules for behaviour towards each other. *"Entering*

496 *There will be no repetition of the situation in NP Šumava when, due to assessment of canoeing of selected of river Teplá Vltava, there was a threat of disapproval of the visitor rules and the impossibility of, for example, cycling the whole territory of NP.* GOVERNMENT OF THE CZECH REPUBLIC. Government Bill amending Act No. 114/1992 Coll on Nature and Landscape Protection, as amended. Document of the Chamber No. 501/0 [online]. *Chamber of Deputies. Parliament of the Czech Republic*, 2015 [cit. 25 August 2017]. Available at: http://www.psp.cz/doc/00/11/46/00114640.pdf

497 Article II of the Act No. 123/2017 Coll clause 9. Selected provisions of the amendments of the NLPA. In *ASPI* [legal information system]. Wolters Kluwer ČR.

a machine-treated strip with cross-country tracks, or for free style, is possible only by persons on skis, not pedestrian tourists, persons on snow-shoes, bicycles or on horse-back. "[498]

Skiing and movement of skiers is not independently addressed in the KRNAP Visitor Rules[499]. It can be inferred from the article 2 of the Visitor Rules that skiing is allowed where pedestrian movement is not prohibited, supplemented by the prohibition under the section 20 of the LZ. Skialpinism is regulated especially in the territory of the first zone of KRNAP. Appropriate natural conditions and increasing interest in this type of outdoor activity led the KRNAP Administration to issue approval for the designation of routes for performing skialpinism also on the territory of the first zone of KRNAP with the following justifications: *"The KRNAP Administration considers more appropriate to allow public access to such parts of the national park (even in the area of the first zone) where these sports activities can be regulated, to set rules of behaviour that reduce the risk of illegal entry and movement of skialpinists in the territory of KRNAP and simultaneously to reduce the risk of unregulated movement for both skialpinists themselves (the possibility of getting lost, avalanches etc.) and for the environment protection (disturbance of specially protected animal species like peregrine falcon or black cock, damaging of young plantations in the framework of forest renewal, increased movement of people and techniques in search for lost skialpinists, and damage to nature by avalanches that would not otherwise be released, etc.).*[500]" The use of designated routes is connected to sufficient snow cover.

KRNAP Administration acted in the public interest in a similar responsive manner, when by the separate decision granted the permission to designate an area for ice climbing, specifically at the rock formation in Labské doly, which is located in the second zone of KRNAP[501].

498 See the Article 3 Measure of General Nature No. 1/2013 Visitor Rules of Šumava National Park, In *ASPI* [legal information system]. Wolters Kluwer ČR.

499 Measure of General Nature No. 2/2010 Visitor Rules of Krkonoše National Park. In *ASPI* [legal information system]. Wolters Kluwer ČR.

500 ADMINISTRATION OF KRNAP. Souhlas s vyhrazením tras pro provozování skialpinismu. Rozhodnutí Správy KRNAP ze dne 7. 11. 2014, č. j. KRNAP 07480/2014 [online]. *Administration of KRNAP* [cit. 1 September 2017]. Available at: http://www.krnap.cz/data/File/turismus/skialpinismus/rozhodnuti_-krnap_07480_2014.pdf

501 Similar inducements to designate climbing areas on icefalls within the first zone of KRNAP were repeatedly rejected by the KRNAP Administration. The legal force of mentioned decision is therefore also bound to the existing zoning of KRNAP. For more details see ADMINISTRATION OF KRNAP. Souhlas s vyhrazením místa pro provozování horolezectví na ledopádech. Rozhodnutí Správy KRNAP ze dne 6. 10. 2014, č. j. KRNAP 06930/2014 [online]. *Administration of KRNAP* [cit. 30 August 2017]. Available at: http://ledopad.krnap.cz/data/rozhodnuti_krnap_06930-2014.pdf

The condition for certain performance of outdoor activities, such as cycling outside roads and local roads, canoeing and climbing, just in daylight (from sunrise to sunset) is a specific provision of the KRNAP Visitor Rules[502].

Specific and controversial provisions limiting or banning climbing are enshrined in the Visitor Rules for NP České Švýcarsko[503]. The Article 6 of the Visitor Rules, in accordance with the NPLA and basic protective conditions, regulates the conditions for climbing. Designated areas and individual rock massifs and towers are listed in Appendix No. 2, including the period during which the climbing is permitted. The Article 6 also limits the number of people (climbers) who can climb in the designated climbing areas, to the members of the Czech Mountaineering Union, the members of the UIAA member organizations and the persons participating in training under the supervision of a climbing instructor, stipulating that these persons are obliged to observe, inter alia, the internal standard of the Czech Mountaineer Union, "Rules of sporting climbing on sandstone rocks in Bohemia". Due to the legal nature of the visitor rules of the national parks and the diction of the provisions of the NPLA on designation, these provisions (Section 6 (1), (2) and (4)) cannot be applied in practice.

Other problematic provisions are included in the Visitor Rules of the NP Podyjí[504]. The Article 4, entitled 'Other Protective Conditions', sets out its own list of prohibited activities that is inconsistent with the law and the basic protective conditions. The practical application of these other protective conditions would be sustainable by using the interpretation that the performance of the listed activities, is possible only with the prior consent of the NPA proceeding from analogical application of the section 90 (15) of the NPLA[505]. Outdoor activities include the entrance to caves and underground areas, swimming in the Dyje River and other watercourses and reservoirs, ice skating on frozen watercourses and areas.

502 See Measure of general nature No. 2/2010 Visitor Rules of the National Park of Krkonoše.

503 Decree No. 1/2001 Visitor Rules of the National Park České Švýcarsko. In: *ASPI* [legal information system]. Wolters Kluwer CR.

504 Decree No. 22/1995 Visitor Rules of the Podyjí National Park. In: *ASPI* [legal information system]. Wolters Kluwer ČR.

505 The activities prohibited or restricted by the more detailed protective conditions laid down in the legislation, by which national parks, protected nature reserves, state nature reserves, protected nature creature, protected nature monuments, protected sites, protected parks and gardens and protected study areas and their protection zones according to the Act No. 40/1956 Coll, on State Protection of Nature are thenceforth considered as activities tied to the approval of the NPA pursuant to the section 44 (3).

National Nature Reserves

National nature reserves as smaller (in comparison to the national parks) territories of extraordinary values are protected by similar provisions as national parks. Climbing, cycling and flying on paragliding and hang gliders[506] are explicitly regulated by the basic protective conditions. These activities cannot be performed outside the areas designated by the NPA, and outside the roads and local roads as regards cycling. Other outdoor activities from the group of water and winter sports are regulated by the basic protective conditions governing entry and access into the NNRs (see above).

Additionally, more detailed protective conditions set in the decrees by which the Ministry of Environment announce the individual NNRs thereafter serve, rather exceptionally, to regulate outdoor activities in the protection zones of the NNRs. As an example, the prior approval of the NPA is required to perform climbing and flying on sports flying devices as well as cycling and riding off-roads and local roads in the protection zone of the NNR Jizerskohorské bučiny. Similarly, cycling or hiking trails can be only marked with the approval of the NPA in the protection zone of the NNR Velký Špičák. The provision of the section 3 (d) and (e) in the Decree No. 200/2013 on the declaration of the NNR of Stará and Nová řeka is an exemption. According to this provision it is possible to designate places and routes intended for navigation on board vessels and to sail on vessels outside existing sites and routes only with the consent of the NPA. The provision appears to be superfluous or even misleading in vision of the applicability of the basic protection condition relating to the prohibition of entry outside the marked paths, and thus reducing the statutory requirement for application of the exemption institute under the section 43 of the NLPA.

Protected Landscape Areas

Apart from the first zones of the PLAs whose protection is ensured by parallel declaration of a small-size protected area, further regulation of outdoor activities in the PLAs is entirely up to the declaration legislative acts. Currently, there are 26 PLAs in the Czech Republic.

506 It would be appropriate to amend the subjected provision when it comes to the definition of flying devices as it does not correspond to the current situation in these sports.

The regulation of outdoor activities in individual PLAs differs according to the date of issue of the declaration legislative act. The "latest" PLAs declared by government regulation have the provisions reflecting also the development of outdoor activities. These PLAs are Český ráj, Český les, Brdy, Kokořínsko – Máchův kraj and Poodří (all declared after 2000). Within the territory of these PLAs the following activities are mostly bound to the prior approval of nature protection authorities:

- Marking of hiking, cycling, horse-riding, running and other similar routes;
- Cycling and horse-riding outside of the roads and designated areas;
- Flying sport on flying devices;
- Climbing activities[507];
- Water sports on watercourses and water areas.

On the contrary, the problematic provisions containing prohibitions beyond the law can be found in the decrees establishing PLAs at the turn of the 1980 s and 1990 s (PLA Železné hory, PLA Broumovsko, PLA Litovelské Pomoraví and PLA Blanský les). However, the problematic provisions of the relevant decrees can be applied in practice in accordance with the section 90 (18) of the NLPA (see above).

The conditions for the performance of outdoor activities are not addressed in the founding documents of the remaining PLAs (ordinances of the Ministry of Culture of the Czechoslovak Republic dated from 1956 to 1981).[508]

507 More detailed protective conditions are formulated in such a way that the marking of climbing terrain and the maintenance of climbing facilities, including permanent fixed draws, and performance of climbing activities outside of these marked climbing terrains are bound to the approval.

508 These ordinances should be gradually replaced by new establishing regulations that would be in compliance with the law. The more detailed protective conditions stipulated by ordinances are products of the time of their issuance, they are difficult to be enforced and should be kept as obsolete. In detail, see NATURE PROTECTION AGENCY OF THE CZECH REPUBLIC. MINISTRY OF THE ENVIRONMENT OF THE CZECH REPUBLIC. Záměr na vyhlášení zvláště chráněného území: Chráněná krajinná oblast Moravský kras [online]. *Ministry of the Environment* ©2008–2015 [cit. 4 September 2017]. Available at: https://www.mzp.cz/C1257458002F0DC7/cz/moravsky_kras_plan_pece_vyhlaseni/$FILE/OZUOPK-Zamer_na_vyhlaseni_CHKO_MK-20170831.pdf

Other Small-size Specially Protected Areas

The provisions of NLPA on basic protection conditions relating to national nature monuments, nature monuments and nature reserves do not directly determine prohibited or regulated outdoor activities. However, it is necessary to distinguish systematically the legal regime of regulation of outdoor activities in natural reserves from the legal regime in national nature monuments and natural monuments.

Regarding the regulation of outdoor activities, the regime of more detailed protective conditions in accordance with the wording of the section 34 (1) of the NLPA shall be applied within the area of NRs. On the contrary, within the territory of the NNMs and NMs, the regime of basic protective conditions and the granting of the exceptions to them under the regime of the section 43 of the NPLA shall be applied, since the provisions of sections 35 (2) and 36 (2) of the NLPA stipulate that it is prohibited to change and damage them. The vague wording of these provisions may lead to different views of the outdoor activities operator and the NPA on the conditions of performance of the outdoor activity. Moreover, it is added in the Methodical sheets that "*the procedure under the section 43 cannot be used when solving the conditions on realization of the intent NNMs and NMs in such a way that there is no change or damage, because then there is no reason either to submit an application or to grant an exemption*"[509].

More detailed protection conditions and their focus on outdoor activities are different in NNMs, NMs and NRs depending on the subject of protection and exposure of the specially protected area. It is possible to encounter the regulation (bindingness to the prior approval of the NPA) of climbing, marking of cycling, horse riding and hiking trails and cycling or horses riding outside marked trails.

The underground areas (caves) are very often the subject of protection of NNMs, NMs or NRs; speleology and speleoalpinism are subsequently regulated under more detailed protective conditions. It involves the entry to underground spaces that are not accessible to the public by which the cave protection guaranteed in the section 10 of NLPA is supplemented and stiffened.

509 NATURE CONSERVATION AGENCY OF THE CZECH REPUBLIC. *Metodické listy č. 16.2. Usměrňování vybraných sportovních a rekreačních aktivit v ZCHÚ*. Prague, 2015, p. 5.

13.3 Conclusion

The subject of the chapter is to analyse the legal framework for the performance of outdoor activities in specially protected areas focusing on direct regulation of outdoor activities, prohibitions or restrictions directly affecting the individual outdoor activities. Moreover, it must not be forgotten that some outdoor activities need necessary infrastructure, which offers an opportunity for further indirect regulation of outdoor activities through application of legal tools such as land categorization changes, landscaping or building permitting that are part of all basic protective conditions, or where relevant, more detailed protective conditions.

Even after the significant amendment of the NLPA, the effort to combine the interests of the special nature protection with the interests of the public is evident from the approach of the NPAs. The basic spectrum of outdoor activities is currently covered by the provisions of the NLPA whose application, together with the application of vindicatory instruments in the event of law infringement and damage to the legally protected interests, allows for the effective protection of specially protected areas. Tools of preventive nature in the form of designation of areas or the issue of permits and opinions appear to be appropriate instruments in this context.

Recently adopted legislation, whether at legal or sub-legal level, reflects in accordance with the proportionality principle the requirements of the public to perform a wide range of outdoor activities and at the same time responds to the development in this area, specifies the diction of the objected provisions and unifies the general conditions for the performance of outdoor activities. In this regard, a change of the legal nature of the National Parks Visitor Rules seems to be a step in the right direction enabling transmission of up-to-date information on the regime of the protection of the area as well as the conditions under which individual outdoor activities can be performed. In addition, the progressive "subsequent re-registration" of specially protected areas can gradually replace inappropriate legislation and reflect new needs in regulating outdoor activities with regard to the subject of protection of the specially protected area in new declared documents. Under the principle of legal certainty, and particularly at a time of wide information sharing, it is widely appropriate to unify the administrative activities of the NPAs in similar cases (although this may be problematic due to nature diversity) in a similar and reasoned manner to the public.

14 FORESTS AS OBJECTS OF PROTECTION IN SLOVAKIA

14.1 Introduction

A forest ecosystem is the basic ecological unit in a particular forest that exists as a "home" for a community of both native and introduced classified organisms. A forest ecosystem is named for the primary tree species that form the canopy. It is defined by all the collective living inhabitants of that forest ecosystem that co-exist together in symbiosis to create a unique ecology. In other words, a forest ecosystem is typically associated with land masses covered in trees and those trees are often classified by foresters into forest cover types. The forest ecosystem is just one of a number of unique ecosystems including prairies, deserts, polar regions and great oceans, smaller lakes, and rivers. As for the forest ecology and its biodiversity, the word "ecology" comes from the Greek "oikos", meaning "household" or "place to live". These ecosystems or communities are usually self-sustaining. The word "usually" is used by the expert public because some of these communities can become unbalanced very quickly when detrimental factors occur. Some ecosystems, like tundra, coral reefs, wetlands, and grasslands are very fragile and very small changes can affect their health. Larger ecosystems with wide diversity are much more stable and somewhat resistant to harmful changes. A forest ecosystem community is directly related to species diversity. Generally, we can assume that the more complex the structure, the greater its species diversity. A forest community is much more than just the sum of its trees. A forest is a system that supports interacting units including trees, soil, insects, animals, and man. Forest ecosystems tend to always be moving toward maturity or into what foresters call a climax forest. This maturing, also called forest succession, of the ecosystem increases diversity up to the point of old age where the system slowly collapses. One forestry example of this is the growth of trees and the entire system moving toward an old growth forest. When an ecosystem is exploited and exploitation is maintained or when components of the forest begin to naturally die, then that maturing forest ecosystem goes into declining tree health. Under

some opinions the management of forests for sustainability is desirable when forest diversity is threatened by overuse, resource exploitation, old age, and poor management. Forest ecosystems can be disrupted and harmed when not properly sustained. Forestry holds the position that a sustained forest that is certified by a qualified certification program gives some assurance that the forest is managed to allow maximum diversity while satisfying the manager's environmental and economic demands. Science distinguishes small forest ecosystems, complex forest ecosystems and ecosystems ranging from dry desert shrub land to large temperate rain forests.[510]

Climate change is one of the most significant threats facing the world today, and its mitigation has been recognized as an issue requiring urgent and extensive action on the part of the global community. At the Paris Climate Conference in December 2015, 195 countries adopted the first-ever universal, legally binding global climate agreement. They agreed to take global measures in order to "put the world on track" and to avoid the dangerous effects of the climate change by limiting global warming to well below 2 °C. Among the proposed measures, an important issue is to transform our current fossil fuel-based energy generation systems to sustainable and renewable energy-based systems by using so-called "carbon-neutral" alternatives. More than 80 % of the global energy demand is satisfied by fossil fuels, while the current supply of renewable energy is insufficient to meet that demand. At the same time, there are widespread concerns over the depletion of fossil fuel reserves and thus new sources are being explored. It is necessary to increase the supply of energy produced from various renewable energy sources in order to avoid an energy-scarce world due to the fast depletion of fossil fuels. Biomass is one of the renewable energy options. Currently, using biomass alone is not sufficient to substitute all the fossil energy. Planetary boundaries for food, biodiversity, clean water and fresh air have also become matters of serious concern. Via land-use and land-use change biomass production for materials and energy may compete over planetary boundaries with food production and perhaps negatively impact biodiversity and the availability of clean water and fresh air. Hence,

510 NIX, Steve. *Understanding Forest Ecosystems and Biodiversity*. Available at: https://www.thoughtco.com/what-is-forest-ecosystem-and-biodiversity-1342815 [1 August 2017, 9:58 CET].

it is important to make certain that renewable energy and materials made of biomass will not become a threat for example to food and water availability. Therefore the forests are expected to play an important role in moving towards a fossil fuel-free and low-carbon society, especially in countries rich in these resources. Wood is a renewable biomass, which has a special status in comparison to other types of renewable energy because it is easier to store, can be used as such or converted it into solid, liquid and gaseous products. In addition, wood is used in construction and for producing pulp and paper and manufacturing furniture. It can also be converted into a range of other goods with a variety of uses such as hydrogels, reinforcement polymers and resorcinol-formaldehyde. All these may substitute fossil resources in the future and thus science is searching for new methods to improve the efficiency of using wood for various purposes.[511]

14.2 The Constitutional Legislation Regulating Forests, Forestry and Nature and Landscape Protection in the Slovak Republic

The Constitution of the Slovak Republic does not mention forests explicitly. However it defines the right to environmental protection and cultural heritage. Under the Article 44 of the Constitution of the Slovak Republic "(1) Everyone has the right to a favourable environment… (2) Everyone is required to protect and enhance the environment and cultural heritage… (3) No one is allowed to endanger or harm the environment, natural resources and cultural heritage beyond the law… (4) The State is committed to the careful use of natural resources, the protection of agricultural land and forest land, ecological balance and effective environmental care, and the protection of certain species of wild plants and wildlife… (5) Agricultural land and forest land as non-renewable natural resources use special protection from the State and society… (6) Details of rights and obligations under paragraphs 1 to 5 shall be laid down by law." Under the Article 45 of the Constitution of the Slovak Republic "Everyone has the right to timely and

511 KARVONEN, J., HALDER, P., KANGAS, J., LESKINEN, P. Indicators and tools for assessing sustainability impacts of the forest bioeconomy. In: *Forest ecosystems. Springer Online*. Available at: https://forestecosyst.springeropen.com/articles/10.1186/s40663-017-0089-8 [1 August 2017, 10:15 CET].

complete information about the state of the environment and the causes and consequences of this condition." Therefore the Constitution of the Slovak Republic speaks explicitly about the forest land. The constitutional protection of the forest land has been established by the Constitutional Act No. 137/2017 Coll., which amended the Constitution of the Slovak Republic (hereinafter referred to as the "Constitutional act No. 137/2017 Coll.").

The explanatory memorandum to this act explains the reasons and the motives which have led the Slovak legislator to adopt the mentioned legislation. Nowadays, the Slovak Republic is exposed to threats represented by the speculative purchase of agricultural land. The explanatory memorandum to the mentioned constitutional act states that the legislator of Slovak Republic aimed to enshrine the framework for soil protection before this speculative purchase, which could have far-reaching negative consequences for the Slovak society and economy. The explanatory memorandum considers the speculative purchase a purchase of agricultural land but not for the purposes of the agricultural production and farming. As a result, in the future a threat, which will endanger the food security of the State may arise. There is also another motive, which led to the adoption of the above mentioned constitutional act. The speculative purchase of agricultural land may result in the disqualification of domestic farmers who currently cannot equate and compete with the financially stronger farmers in the common European market. The mentioned legislation was adopted to allow the State, through legislative power (adoption of special acts), to effectively protect agricultural land and forest land. The explanatory memorandum to the mentioned constitutional legislation stressed, that its main goal after the adoption is the possibility to stipulate by the law that certain land and soil (to the extent limited by the food safety of the State) will be eligible to the possession only of certain persons stipulated by the law (e. g. Self-employed farmer).

The legislative motive was to widen the obligation of the State to maintain the protection also of the agricultural land and forest land and the promotion of rural life. Before the adoption of the above mentioned legislation the Slovak Republic had the obligations of the careful use of natural resources, ecological balance and effective environmental care, and the protection of certain species of wild plants and wildlife. The legislator argues that the rural

character of life was historically typical for the territory of the Slovak Republic. Therefore it was the part of the nation's culture as a cultural heritage and it shall deserve special attention. Therefore the legislator saw the opportunity to amend Article 44 of the Constitution of the Slovak Republic with new special objects of environmental protection. There is an argument that the mentioned Article of the Constitution of the Slovak Republic is supplemented with a new separate paragraph containing a certain definition of land (agricultural and forestry) and also establishing the obligation of the State to preserve the land, including its production status for future generations. However, the content of the mentioned provision does not define the concept of agricultural and forest land. It only notes, that such object is considered a non-renewable natural resource and it shall have special constitutional protection.

There is a typical legislative approach towards definitions. Under this approach the legislative terms are defined according to their use in state legislatures.[512] Therefore in my opinion, if the legislator says that agricultural and forest land is a non-renewable natural resource, it means that the Constitution of the Slovak Republic has given a certain attribute to the mentioned objects of environmental protection, however, has not defined them yet.

It would be more accurate to say, that the objects of constitutional amendment are explained in the explanatory memorandum to the mentioned legislative document. The explanatory memorandum defines agricultural land and forest land as a non-renewable natural resource. Therefore it presents the motive of excluding these objects from the scope of the term "goods" in the meaning of the freedoms of the internal market of the European Union. So the explanatory memorandum to the Constitutional Act No. 137/2017 Coll. defines agricultural and forest land as the natural wealth of the State, as an important commodity of strategic importance and also as an irreplaceable component of the environment and all living ecosystems. Therefore the mentioned land works as a limiting factor for the sustainable development of regions and society as a whole.

512 GLOSSARY OF LEGISLATIVE TERMS. *National Conference of State Legislatures*. Washington, D. C., 2017. Available at: http://www.ncsl.org/research/about-state-legislatures/glossary-of-legislative-terms.aspx [1 August 2017, 13:01 CET].

Again – in my opinion it is very unfortunate to use the term "commodity" in connection with agricultural and forest land, if the legislature wanted to exclude the meaning of "goods". Both these terms are used in economics and the doctrine of economics defines them as objects of economic interest. A commodity is a basic good used in commerce that is interchangeable with other commodities of the same type. Commodities are most often used as inputs in the production of other goods or services. The quality of a given commodity may differ slightly, but it is essentially uniform across the producers. When they are traded in an exchange, commodities must also meet specified minimum standards, also known as a basis grade.[513] Therefore if the legislator wanted to balance the economic importance and environmental importance of the agricultural land and forest land, it should have emphasized the environmental usage of the mentioned land and it also should not have denied the meaning of goods in one sentence and not use the term commodity in another.

On the other hand the legislator is right regarding the role that agricultural and forest land plays in the sphere of food security of the State. In the broader context the status of food security can be understood as part of the State sovereignty. Therefore there is undoubtedly a public interest in protecting these objects at a constitutional level and the regulation of the acquisition of property rights may be a legitimate way of restricting this fundamental right.

The legislator explains further that the inclusion of the agricultural and forest land protection into the Article 44 of the Constitution of the Slovak Republic is based on the assumption that land cannot be perceived only through the optics of ownership or means of production but these objects should also be considered as parts of the environment. That means that these objects can be legally understood as components necessary to ensure the ecological balance. The legislator correctly argues that the European Union also recognizes the right to a favourable environment, which includes also the right to natural resources. Therefore these rights are understood as an integral part of the third generation of human rights.

513 *Commodity*. Available at: http://www.investopedia.com/terms/c/commodity.asp [1 August 2017, 10:47 CET].

The legislator also argues that the Constitutional act No. 137/2017 Coll. shall not have an impact on the public administration budget. On the contrary it shall have a positive impact on the environment of the Slovak Republic. The legislator sees this point of view in the increase of the competitiveness of domestic farmers on the common market of the European Union. At the same time, the adopted legislation is expected to have a positive social impact on the whole society, which is currently facing various globalization threats, with reference to the Constitution's guaranteed food security of the State.

14.3 The Statutory Legislation on Forests and Forestry in the Slovak Republic

The basic legislation connected with forests and forestry in the Slovak Republic includes the Act No. 326/2005 Coll. on forests (hereinafter referred to as the "Act No. 326/2005 Coll."), the Act No. 138/2010 Coll. on forest reproductive material (hereinafter referred to as the "Act No. 138/2010 Coll."), the Act No. 274/2009 Coll. on hunting (hereinafter referred to as the "Act No. 274/2009 Coll."), the Act of the National Council of the Slovak Republic No. 259/1993 Coll. on the Slovak Forestry Chamber (hereinafter referred to as the "Act NCSR No. 259/1993 Coll.").

However, the status of the general forest legislation belongs to the Act No. 326/2005 Coll. Act No. 326/2005 Coll. that was adopted by the National Council of the Slovak Republic in the year 2005. This legislation replaced the legislation of the Act No. 61/1977 Coll. on forests, as amended, and the legislation on the Act of the Slovak National Council No. 100/1977 Coll. on management in forests and on the State administration of forest management, as amended. In the explanatory memorandum to the Act No. 326/2005 Coll., the legislator presented the legal opinion that the adopted legislation was based on the social mission of forests as one of the most important components of the environment and also as a producer of the renewable raw material – wood. In the explanatory memorandum the legislator has presented the opinion that the adopted legislation follows the rich past of forestry legislation and at the same time it also aims at ensuring a modern concept of sustainable forest management. The institution of the

sustainable forest management understands the legislator as the forest management and the use of forests in such a way as to preserve their biological diversification, production, the ability to regenerate, vitality and at the same time the ability to fulfill the corresponding functions at a local, regional and national level in the future, thus avoiding damage to other ecosystems.

Like in all of Europe, the forests in the Slovak Republic are significantly marked by human activity as well. The legislator in the explanatory memorandum to the Act No. 326/2005 Coll. admitted that the original forests of Central Europe were virtually destroyed, respectively their liquidation has been taking place since the 13th century. Since that time the forests have gradually disappeared, in particular through their gradual conversion to pastureland. Nowadays forest ecosystems are changed to such an extent that they require constant attention for the fulfilment of all their functions. It is necessary to note, that the legislation on forests itself places an enormous pressure on these ecosystems, because it expects them to fulfil all the mentioned legally relevant functions presented in the explanatory memorandum to the Act No. 326/2005 Coll.

The legislator also claims that the self-regulatory capacity of forest stands has diminished to such an extent that leaving them to develop naturally would mean the onset of catastrophic situations. However, this view cannot be seen uncritically, as there are also opposing expert views representing, for example, the protection of primeval forests in Slovakia, forests with the primeval potential and the primeval forest particles formed on the forest land. However, the legislator also argues with such events as the windstorms of 19 November 2004, which destroyed almost the entire forest monoculture in the High Tatras. The consequences of the mentioned windstorm have persevered till today. Therefore the legislature in the explanatory memorandum to the Act No. 326/2005 Coll. argues that it is the objective of the forest legislation to provide planned and expert management in forests.

On the other hand, the case of the High Tatras provides also a good example of forest conservation without human intervention. The most important conservation principles and methods have been established in the second half of the 19th century, in particular thanks to the efforts of Prince Christopher Hohenlohe (Prince Christian Kraft, Prince Hohenlohe-Öhringen,

the Duke von Ujest). In 1879, he bought a part of the estate DUNAJEC–NEDECA, JAVORINA and LENDAK, together with BIELOVODSKA and JAVOROVÁ valley and part of the BELIANSKE Tatras. The price of the purchase was half a million crowns. The Duke von Ujest bought the estates from the noble family of Salomonov. In the years 1895–1898 he also bought the VYŠNÉ HÁGY with BATIZOVSKÁ, ŠTÔLSKÁ and MENGUSOVSKÁ valley from the noble family of Mariássy. His property here has reached 15,000 hectares of predominantly forest land on which he hunted.[514] Today, these sites form a large part of the State nature reservation JAVORINA, the State nature reservation JAVOROVÁ and the State nature reservation VYŠNÉ HÁGY. In these areas, forests of natural or primeval-like character tend to occur. It means that these forest localities have the potential to form primeval forests.[515]

In addition to being an avid hunter, his activities are attributed to the merits of nature conservation and the countryside of the High Tatras preservation. The memoirs portrayed him as a man aware of his position, but essentially open and righteous. His attempt to relocate the inhabitants of the Ždiar municipality to the climatically and bonitably more favorable regions of Slovakia at his expenses in order to transform the area of the Ždiar municipality into a deserted, hunting ground was also negative. He could not convince all the Ždiarans, and he did not succeed in the mentioned intent. Despite the fact that his current knowledge of nature conservation was not at the present level and his main interest was hunting, territory maintained by his personnel laid down the grounds for the establishment of the TATRA NATIONAL PARK and still represents the most preserved and most valuable parts of the mentioned park. In addition, many of its "natural" conservation measures have gone smoothly into the nature conservation principles of the TATRA NATIONAL PARK itself, but as functional they are also known nowadays from national parks around the world.[516]

514 Christian Hohenlohe. *Wikipedia.com* [online]. Available at: https://sk.wikipedia.org/wiki/Christian_Hohenlohe [13 August 2017, 10:32 CET].

515 *Porovnanie doposiaľ uvádzaných zoznamov pralesov Slovenska s výsledkami získanými na základe mapovania pralesov v rokoch 2009–2014*. Available at: http://pralesy.sk/images/stories/core/lokality/Zoznamy_pralesov_SR_porovnanie.pdf [13 August 2017. 9:10 CET].

516 Christian Hohenlohe. *Wikipedia.com* [online]. Available at: https://sk.wikipedia.org/wiki/Christian_Hohenlohe [13 August 2017, 10:32 CET].

The mentioned legislative act defines the term "forest". Under its Article 2 point a) the forest is an ecosystem consisting of forest land with forest vegetation and factors of its air environment, plant species, animal species and soil with its hydrological and air regime. The point b) of the mentioned Article of the Act No. 326/2005 Coll. defines the forest vesture as a set of a woody-growing plants, spruce plants or their mixtures on the forest land. The term of the ecological stability of the forest is explained in the point c) of the Article 2 of the Act No. 326/2005 Coll. as the ability of the forest to withstand or to cope with external but also with internal influences without permanently disrupting the functional structure of the forest. The legislator considered very important to define also the biological diversity of the forests. Under the Article 2 point d) of the Act No. 326/2005 Coll. it is a diversity of forest ecosystems and diversity within plant and animal species and among species. The legislation of the Act No. 326/2005 Coll. defines also the functions of forests. Under its Article 2 point e) they are understood as the effects and impacts of forests as a component of the natural environment and the object of economic exploitation; they are divided into non-productive functions and production functions.

Compared to the previous legislation, the legislator started to emphasize the non-productive functions of forests much more. The non-productive functions of forests are regulated by the Article 2 point f) of the Act No. 326/2005 Coll. as ecological functions, which are soil-protective function, water management function, climatic functions and social functions, which are in particular health, cultural, educational, recreational, nature conservation and water protection functions. On the other hand the production functions of forests are described by the Article 2 point g) of the Act No. 326/2005 Coll. as functions, which result in benefits from forests of a material nature. The Article 2 point h) of the Act No. 326/2005 Coll. defines also the forest management as a professional activity focused on forest cultivation, forest protection and other activities necessary to ensure the functions of forests. However, the legislation defines also the sustainable forest management. Under the Article 2 point i) of the Act No. 326/2005 Coll. it is a forest management in such a way and to such an extent as to preserve the biological diversity, resilience, production and recovery capacity, lifetime and ability to fulfil the functions of the forests.

Therefore the legislature has sought to reinforce the importance of non-productive functions of forests in the Act No. 326/2005 Coll. The non-productive function of the forests is becoming more and more important these days. According to the statement in the explanatory memorandum to the Act No. 326/2005 Coll. through its existence, the forest is already contributing to the preservation and restoration of natural balance, protection and maintaining biodiversity. Through its existence the forest is also providing additional irreplaceable social, environmental and ecological functions. The mentioned roles of the forest ecosystems are transposed also into the Act No. 326/2005 Coll. The legislator has presented the approach that the purpose of the Act No. 326/2005 Coll. should be balanced between the legitimate interests of forest owners and between the public interest on the forest preservation. According to the environmental ideas the legislation therefore needs to emphasize the meaning of Article 20 sec. 3 of the Constitution of the Slovak Republic. According to this provision "The ownership is binding. It shall not be misused causing damage to others or in contradiction with the public interests protected by the law. The exercise of right in property must not be detrimental to the health of other people, nature, cultural sites or the environment beyond the margin laid down by the law." By applying this assertion, it can therefore be concluded that ownership of forest land is also binding and cannot be misused to the detriment of other entities' rights. In such case, the ownership of forest land may not be misused to the detriment of the right to a favourable environment of other eligible entities.

From my point of view, these assertions can also be supported by the legal obligation arising from the Article 44 sec. 2 of the Constitution of the Slovak Republic. This provision sets out the obligation of "Everyone" and connects it with the requirement "to protect and enhance the environment and cultural heritage." The same argument shall apply in connection to the Article 44 sec. 4 of the Constitution of the Slovak Republic. With this provision the State of Slovakia has anchored its primary constitutional obligation connected with forests, because it declares that "The State is committed to the careful use of natural resources, the protection of agricultural land and forest land, ecological balance and effective environmental care, and

the protection of certain species of wild plants and wildlife. This obligation is also supported by the newly adopted constitutional obligation represented by the Article 44 sec. 5 of the Constitution of the Slovak Republic declaring that "Agricultural land and forest land as non-renewable natural resources use special protection from the State and society." Therefore the Slovak Republic has a legally relevant interest in the friendly use of forests, their ecological balance and the effective care for them. Because the forests as ecosystems also play a social role, the mentioned legally relevant interest can also be called public interest, because the forests serve all of society and they shall be seen as the heritage of the Slovak nation. Therefore according to the explanatory report to the Act No. 326/2005 Coll. the ownership in the field of forestry, cannot even now be understood as an unlimited domain of the owner above the object – above the forest land. Since the forests are a basic component of the environment, private and public interests cannot be separated. However, on the contrary, the legislator has expressed the intention that through the legislation it is necessary to combine these interests appropriately to ensure effective protection and care for forests as part of the natural wealth of the Slovak Republic.

One of the basic prerequisites for achieving this intention is the creation of appropriate economic conditions. The forests, as mentioned above, fulfil in addition to productive functions also the non-productive, in particular environmental functions. The provision of the mentioned functions gives the owners of forests a property rights limitation in the financial extent of more than EUR 33,193,918,874 per year. Therefore the legislator attempted to establish an obligation for the State, legal entities or natural persons in accordance with the Constitution of the Slovak Republic, to provide financial compensation for these restrictions due to the restriction of the management or the implementation of measures in the public or other interest. In order to fulfil all the functions of the forests and the needs of the society, the state shall support activities aimed at the restoration and development of forestry, the creation and preservation of the landscape and forest protection. It shall also support selected activities in the field of forest management, forestry research and development, counselling and education in the non-state forestry sector.

At the same time, the owners and forest managers shall be obliged to manage forests in accordance with the principles of expert management. That means that they shall take timely and effective action against abiotic pests, plant and animal pests and fire. In addition, they shall be obliged to allow (in addition to the statutory exceptions) the public use of forests, to keep relevant records and to provide data on forest property for the information system of the forest management and to take into account the environment not only on own property but also on other land affected by their activities.

14.4 The Exclusion of Forest Land from Fulfilling the Purpose of a Forest

As for the principles of forest protection or of the protection of forest land, the Article 5 sec. 1 of the Act No. 326/2005 Coll. sets out a general rule connected with the usage of forest land. Under this provision the forest land may be used for purposes other than the performance of forest functions if the competent authority of the State Forest Management, following the prior opinion of the relevant public authorities, decides to temporarily exempt or to permanently exempt the forest land from the forest functions (hereinafter referred to as the "exemption"), or if it decides to limit the use of forest functions thereon (hereinafter referred to as "limitation of use"), unless otherwise provided in this Act. Exemption or limitation of use can only take place in inevitable and justified cases, particularly if the role of social and economic development cannot be ensured otherwise. Therefore in my opinion the forest land exclusion from the forest function (hereinafter referred to as the "exclusion") should be an ultima ratio instrument. The case law of the Supreme Court of the Slovak Republic responds to this legislative approach when interpreting the institute of exclusion.

Therefore the exclusion under the Act No. 326/2005 Coll. represents a particular way of using the forests. Exclusion or limitation of use can only take place in an inevitable and justified case, particularly if the role of social and economic development cannot be ensured otherwise. The Act No. 325/2005 Coll. at the same time establishes the obligation that the use of forest land for purposes other than for the performance of forestry functions, particularly in protected forests and forests of special designation, that only

the necessary area of these forests shall be used. There is also an obligation of the reduction of the disturbance of forest integrity, which is followed by the obligation to ensure the functions of the surrounding forest. Also a meaningful and technically feasible way should be found, thanks to which the organomineral surface horizons of the soil should be covered. The measures for the economical use of the forest and the re-cultivation of forest land after the end of its use for other purposes should also be carried out. The intersections in the forests should also be placed in such a way that the forest is least vulnerable to wind.[517]

The Act No. 326/2005 Coll. for such an exclusion of the forest land provides a reason that the role of social and economic development cannot be ensured otherwise. According to the case law the application of the decision to temporarily exempt forest land from performing functions of forests may, for example, be based on the need to provide the drinking water for a recreational site in a particular location. In such a case, the legislation envisages the possibility of imposing an obligation on the applicant to ensure the reclamation of the temporarily excluded land. In this case, the State administration must also address the question of whether it is possible to provide another source of water supply in the given case that would interfere with the forest ecosystem more mildly. If it concludes that other intervention is not possible, it may allow the necessary extent if intervention into the ecosystem. This means that the State administration should first address the issue of the need to cut the trees and decide in a way to ensure the smallest extent of the tree cutting. In addition to these indicators, the exclusion takes into account also socio-economic factors. This means that the State administration is assessing the socio-economic benefit of the exclusion. It is therefore important to address the question of whether the objects to be supplied with drinking water are the part of a sports and recreation area equipment that creates jobs and contributes to the development of tourism. On the one hand, the case-law indicates the benefit of such employment activity. On the other hand, the case-law does not quantify this conclusion by at least with some opinion, expert statement or other evidence supporting the decision

517 Judgement of the Supreme Court of the Slovak Republic of 28 April 2011, case no. 5 Sžo/201/2010.

by the State administration bodies in the employment sector, because the case law itself deals with the possibility of restricting the use of forests for a purpose other than the purpose of the forest functions with the need to develop employment. At the same time, it should be pointed out that the actual provision of the source of drinking water is a question of the use of natural resources owned by the Slovak Republic, under the Article 4 of the Constitution of the Slovak Republic.[518]

Other case of exclusion may include the exclusion of a forest plot for the purpose of extraction of a non-reserved mineral – such as building stone. Obviously, in this case, it is a quantitative but also a more qualitative intervention in the environment than the case of providing a source of drinking water for a sport and recreational object. The conflict is between the property right and the right to a favourable environment of the land-based community (urban co-owners) and the property right and the freedom of business of the operator and applicant wanting to perform an economic plan. The exclusion of the forest land may be carried out temporarily or permanently. The difference lies in the fact that, if the forest land is temporarily excluded from the function of the forest, it will not irretrievably alter its forest character and its potential and ability to subsequently perform forest functions. Thus, the case-law has come to an idea that certain activities can only be carried out on the forest land if it is permanently excluded from the functions of forests. Therefore the temporary exclusion from the functions of forests for a period of 20 years cannot be used for the purposes of exploiting the deposit of non-reserved minerals such as building stone. The reason is that, that the planned mining activity will change the locality of forest land in an irreversible way. The changes to the forest land in question and its integrity will be impaired for good. Even the re-cultivation works will not be able to restore the former production and non-production functions to the extent and the quality in which they were existing prior to the implementation of the mining activity.[519]

518 Judgement of the Supreme Court of the Slovak Republic of 2 December 2014, case no. 3 Sžo 15/2014.

519 Judgement of the Regional Court of Žilina of 12 December 2012, case no. 21S/75/2012-59.

However, on the other hand, there are opposing opinions as well. If the applicant for the realization of a mining project submits an expert statement declaring the possibility of the subsequent reclamation of the forest land, the State administration should deal with this document. The question arises as to how the State administration should deal with such a document? The case-law is of the opinion that the assessment of the issue of the re-cultivation of a temporarily excluded forest plot does not fall within the competence of the State Forestry Authority which decides on the exclusion but it belongs to the competence of another professional organization. Further, the case-law states that the decision on the exclusion of the forest land within the meaning of the Act No. 326/2005 Coll. is carried out in the regime of the administrative proceeding. Therefore, if the administrative authority does not agree with the expert opinion and does not accept the conclusions of the submitted project, it should ask the applicant to supplement the project or ask the applicant to address the problematic issues to which the State authority has a different opinion. Simply said, the State authority may not ignore the conclusions of the expert opinion and replace them with one's own considerations.[520] These case-law assertions sound at certain points very extreme. The State Administration has concluded that the re-cultivation plan only addresses part of the re-cultivation. It does not specify the activity on the terraces and the slopes that will arise due to the extraction of the stone. Also by dividing the originally contiguous forest land into individual terraces and quarry walls, the integrity of the forest land will be impaired, which will significantly change and hinder the possibilities of the forestry management on the mentioned land. Therefore the mining activity will result in irreversible qualitative change of the forest land. The temporary exclusion of the forest land is from my point of view connected with temporary change of the use of the forest. That means that the original use of the forest must be possible even after the 20 years and it must not significantly change the character of the forest and the possibility of its future use as a forest land. On the other hand the permanent exclusion is associated with the consequence that fundamentally modifies the character of the land

520 Judgement of the Supreme Court of the Slovak Republic of 9 April 2014, case No. 10 Sžr 43/2013.

so that it is not possible to return it to the original, mainly qualitative, state. In such case, in my opinion, the State administration responded to the expert opinion on the possibility of land re-cultivation and the applicant still had the opportunity to comment on the conclusions of the state administration. The conclusions of the case-law are, from my point of view, unconvincing in this respect. On the contrary, I am inclined to agree with the conclusion of the Court of First Instance, according to which the decisive criterion for the type of exclusion is, in particular, the qualitative change of the forest land affected by the extraction of the building stone, which predestines its non-livelihoods.

14.5 The Case of Wood Grouse Habitat in the Protected Bird Area the MURÁŇ PLAIN–STOLICA

The media and the professional public have been discussing since the beginning of the year 2017 the issue of natural living surroundings degradation of the wood grouse, which is also known as heather cock (tetrao urogallus). The subspecies of this bird called tetrao urogallus major is native to Central Europe.

Its habitat is usually a diverse native forest. Therefore the most serious threats to the species are habitat degradation, particularly conversion of diverse native forest into often single-species timber plantations. The cases of birds colliding with fences erected to keep deer out of young plantations decrease the population of these birds as well. Increased numbers of small predators that prey on capercaillies (e.g., red fox) due to the loss of large predators who control smaller carnivores (e.g., gray wolf, brown bear) cause problems in some areas too.[521]

The massive logging in STOLICA Hills within the Protected Bird Area STOLICA, has been, threatening the population of the Slovak wood grouse. This bird has been ranked among highly threatened species in Slovakia over the past 40 years. The size of its population has decreased by more than 70 percent over the mentioned period of time. It is already difficult to find

521 Western capercaillie. Distribution and habitat. *Wikipedia.com* [online] Available at: https://en.wikipedia.org/wiki/Western_capercaillie [1 August 2017, 10:32 CET].

the wood grouse in the STRÁŽOV HILLS, the VTÁČNIK, the POVAŽSKÝ INOVEC, the ČERGOV, the BRANISKO and the JAVORNÍČKY where it has lived before. Therefore the concerns about this species have been growing and the environmentalists and especially ornithologists have been asking whether this bird will continue to live in the STOLICA Hills? The appearance of the area of the STOLICA Hills on the border of the districts of the towns Rožňava, Revúca and Brezno displeases not only the nature conservationists, but so to say every nature lover. The forest paths are usually covered by heaps of extracted timber, which is expected to be transported mainly to foreign countries. Other trees in the forests above Rejdová, Čierna Lehota, Slavošovce and other villages are still waiting for logging. Private companies with foreign owners, local urbals, agricultural cooperatives, as well as other (state) owners of forest land are working hard in this locality. The logging is not considered to be illegal, because the so-called calamity wood is being dismantled from the forests within the process of accidental logging. Also the wood infected with the European spruce bark beetle (Ips typographus) is being logged by the companies and other entities and then shipped abroad. The result of these activities is that much more wood glades remain. Local residents, as well as nature conservationists, are already alarmed. If measures are not taken and the logging is not reduced, it will take away nature, animals and people. Forests will cease to function as a sponge for retaining water (hydro-protection of people by the forest) and the storms and heavy rains will easily flood the surrounding area. The professional public represented by the environmentalists and nature conservationists also draw attention to the direct threat the wood grouse as a species face in connection with the logging. The STOLICA protected bird area serves as a habitat for a significant population of wood grouse. From a genetic point of view this population is crucial for the existence of the most eastern population in these birds in the VOLOVSKÉ HILLS. If the logging results into the extinction of the population in the STOLICA protected bird area, other populations of wood grouse in the LOW TATRAS and in the MURÁŇ PLAIN will be endangered. According to the ornithologists, there were 3.697 individuals of wood grouse in the 1972 census in Slovakia. In 2000, there were only 1.612 birds. Their number

was mainly reduced by forest logging. Currently, the number of the wood grouse is estimated at 660 to 880 individuals. In the protected bird area of MURÁŇ PLAIN–STOLICA, there is an estimation that about 80 individuals lived in this locality several years ago and about 30 wood grouse individuals within this population lived on the STOLICA Hill. There is an opinion that currently, this number has still shrunk. The question is, what shall happen to these birds if the logging continues at the current pace. It is not hard to guess the answer in the opinion of the environmentalists. The wood grouse will become extinct from the STOLICKÉ HILLS. It will disappear for good. As for the wood grouse, it is considered to be one of the iconic species of animals. It has been living on the Earth since the ice age. The logging of wood, which has been devastating other localities, seriously disturbs the habitats of these birds even in STOLICA. In the opinion of the State administration it is possible to carry out logging in the protected bird area. The Land and Forestry Department of Rožňava District Office notes that the entities that are working there do nothing illegal. Among the entities that are working in the STOLICA location there is also the Forests of the Slovak Republic, a state company. The position of the company is not to restrict the logging. The company considers the ban on chemical spraying as the restriction promoting nature conservation. In its opinion such a prohibition helps to develop the population of the European spruce bark beetle, which is dangerous to the healthy trees. The environmentalists agree that the Slovak legislation allows to harvest the wood in the forests in the area of STOLICA. However, there is a question of what should be more important in this case. One interest is to continue the logging of the damaged wood. The other issue is the importance of protection of the rare animals living in the protected area. Since the area is located in a protected bird area – part of the NATURA 2000 system, they think it should be more important than logging and therefore the economy should step aside because of the protection of endangered animal species. The environmentalists also point out that the Slovak Republic has declared this area to be protected for the purpose of protecting habitats and animals in order to ensure the conditions for their survival and reproduction. The Protected Bird Area of MURÁŇ PLAIN–STOLICA was declared in 2009 by a decree

of the Ministry of the Environment of the Slovak Republic. The Slovak Republic belongs to the three European Union countries with the largest share of protected bird areas. That's what the protection looks like on paper. But reality is different. Not only STOLICA, but also other areas need more sensitivity in their forest management. The non-governmental organizations try to propose suggestions to protect the habitats of the wood grouse, but yet with no success. So far, they have received no response from the State administration. So how do you protect the wood grouse in the STOLICA? According to the opinion of the environmentalists, the solution would be to create intervention-free or logging-free zones in the woods. These zones could not be exploited. Partial reversal of this situation can also be achieved through financial compensation for non-state owners. The instrument of financial compensation would come into question in the event of the forest habitats protection, because on the natural surroundings of the wood grouse, logging would be excluded. The wood grouse is able to survive at various stages of the natural forest. In Slovakia it is mainly bound to old spruce forests at an altitude of 1.000 to 1.500 meters. Ideally not a dense forest, because as a heavy bird it needs a space to burst(?). Small logging interventions do not interfere with the habitat of this bird in the forest, however, the big ones already do. The nature conservationists say that, in cooperation with the State Conservation of Nature Administration, they are planning to reverse the situation in the STOLICA HILLS. The Ministry of Environment of the Slovak Republic has confirmed that it is currently preparing, in cooperation with conservationists, forest owners and the agriculture sector, programs for the protection of bird areas, which are including also the locality of the MURÁŇ PLAIN–STOLICA. The Ministry of Environment of the Slovak Republic says that it will be a set of concrete measures that would result into the increase of the population of protected animals. For example one of them shall be a special regime of forest management. The Draft Plan for the Caretaking of the protected bird area the MURÁŇ PLAIN–STOLICA is already drawn up and it is currently in the process of pre-negotiation with the affected entities. After the pre-negotiation phase it shall be subject to the adoption process of the Ministry of Environment of the Slovak Republic. The State

Nature Conservation explains why the current situation in the STOLICA HILLS occurred. The calamity at STOLICA was caused by a windstorm in the year 2014. Due to the large area affected by the storm, it was not possible to process the calamity in time. Therefore as a result of this status, the European spruce bark beetle has expanded not only into the STOLICA massif, but also to the KOHÚT locality. As a consequence of the calamity wood logging, the habitats of the wood grouse are indeed threatened and may disappear altogether. On 10 April 2017, the Administration of the National Park Muráň Plain organized an informal meeting with forestry operators, especially in STOLICA and KOHÚT. On this meeting it drew attention to the seriousness of the situation and tried to find common solutions to harmonize forestry activities in the STOLICA and in the KOHÚT areas in order to preserve the survival and reproduction conditions of the wood grouse. However, the restriction or the prohibition of the harvesting of wood in this territory also has the tail side of the coin and the State Conservation of Nature Administration shall face a serious decision. The restriction or the prohibition of the harvesting of wood in the STOLICA massif may give the chance for the survival of the wood grouse, but as a result of this decision there may be an even more pronounced grading of the population of the European spruce bark beetle, which may attack other crops. In the opinion of the State Conservation of Nature Administration the rescue of the wood grouse not only in this area, but on the whole territory of Slovakia, will not be possible without the mutual cooperation of all the participants, which means with all the entities representing the environment, the agriculture and forestry. However, the conservationists and guardians of nature warn that time to make the decision is already here. If the measures are not taken as soon as possible, it is realistic that the logging of the wood, which creates the natural habitat of the wood grouse, will expel the birds from the territory of STOLICA for good. At the current rate of logging, there may not be a single wood grouse in two years. And then it will be too late to take action.[522]

522 *Rúbanie stromov ničí vzácne hluchány*. Available at: https://spravy.pravda.sk/regiony/clanok/432633-rubanie-stromov-nici-vzacne-hluchane/ [15 June 2017, 13.00 CET].

14.6 Conclusion

The wood grouse (tetrao urogallus) belongs to the animal species in the Annex I of the of the Directive No. 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (Hereinafter referred to as the "Birds Directive". Under the Article 4 of this Directive "The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution." Therefore according to the Article 4 sec. 4 of mentioned directive "In respect to the protection areas referred to in paragraphs 1 and 2, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats."

In accordance with the Article 9 of the Birds Directive, a Member State cannot grant exemptions from prohibited activities because the European law grants the wood grouse special protection under the Article 4 of the Birds Directive. According to the Article 13 the application of the provisions of this Directive may not lead to the deterioration of the current bird protection situation. At the same time, a Member State is required, under Article 18 of the Directive, to take adequate administrative measures.

These facts mean that the logging in the protected bird area MURÁŇ PLAIN–STOLICA are contrary to the requirements of the Birds Directive. The Slovak legislation transposed the provisions of the mentioned directive into the Act No. 543/2002 Coll. on Nature and Landscape Protection. According to the Article 26 sec. 5 of the mentioned Act "In protected bird habitats it is forbidden to carry out activities that may have a negative impact on the subject of its protection." Therefore from my point of view the conclusion is that the Slovak Republic has for the time being favored the production function of the forests in the protected bird area MURÁŇ PLAIN–STOLICA and the position of the forestry operators is contrary to the requirements of the Slovak legislation on the nature and landscape protection and also contrary to the requirements of the European legislation.

15 MUNICIPALITIES AND PROTECTION OF TREES AND SHRUBS IN SLOVAK REPUBLIC

Protection of trees and shrubs (hereinafter referred to as "wood species") in Slovak Republic is governed by two legal regimes, depending on where the tree or shrub is located:

a) in case of wood species growing in the forests, we are talking about forest vegetation, where the protection of forest lands, and also of wood species, is regulated by Act No. 326/2005 Coll. on forests as amended,

b) in case of wood species growing outside the forests, the protection of wood species is governed by Act No. 543/2002 Coll. on Nature and Landscape Protection as amended (NLPA).

In order to apply relevant regime of protection, it is essential to define where the tree or shrub is located. In further text, we will focus on wood species protection outside the forest (forest lands), and thus the subject to the legal regime governing protection of wood species by the means regulated by NLPA.

15.1 Protection of Wood Species According to the Nature and Landscape Protection Act

Unlike in Czech legislation, protection of wood species in Slovak NLPA is included in the second part of the NLPA entitled "Special Nature and Landscape Protection", which also includes land protection and protection of special plant species, minerals and skimmelins. *"Special protection is more stringent than general protection of nature and landscape. While general protection is a set of standard rules of protection, special protection is a sum of over-standard rules that apply to exceptional and unrepeatable components of the environment."*[523] It is important to define the relationship between the third chapter of the second part of the NLPA and other provisions of the NLPA. Provisions of the third

523 CEPEK, B. et al. *Environmentálne právo. Všeobecná a osobitná časť*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2015, p. 261. ISBN 978-80-7380-560-9.

chapter apply to the protection of wood species, unless the wood species protection is covered by provisions on protected plants.

NLPA contains definition of wood species growing outside a forest as a tree or shrub including its root system growing alone or in a group outside forest land resources. Other important definitions related to the protection of wood species are regulated by the legislation implementing certain provisions of the NLPA.[524] Protection of wood species is defined as an activity aimed to preserve their ecologic and aesthetic functions in nature and landscape and in urban areas and to prevent their non-reasonable felling. Damaging of wood species is each act or failure to act which may result in immediate or later significant and permanent reduction of ecological and aesthetic functions of wood species or cause their death. Wood species care is an activity aimed to preserve or improve the health status of the wood species or to remove impacts that damage wood species. Maintenance of the wood species ensures conditions for their optimal development.

The NLPA contains general prohibition of wood species damaging and destruction and establishes obligations for the subjects who operate on the lands on which wood species are located. In particular, those subjects are owners of the land on which the wood species are located, but the same legal obligations also apply to the administrator or tenant of such land. These entities are required:

a) to take care of the wood species on land in their possession or administration, in particular to care for them and maintain them,
b) if damage or disease occurs to the wood species, the nature protection body may require the owner, administrator or tenant, to take measures necessary for its recovery or may decide to fell it of.

15.1.1 Felling of Wood Species

Felling of wood species is possible only with the approval of the NPA, which is in the sense of Article 69 par. 1 NLPA municipality. Conditio sine qua non for granting approval for felling is the assessment of ecological and aesthetic functions of the wood species and effects on human health, and

524 Decree of the Ministry of Environment of the Slovak Republic No. 24/2003 Coll. which implements the Act No. 543/2002 Coll. on Nature and Landscape Protection.

in accordance with the Act, the consent to the felling can be issued only in justified cases. Another condition for the approval is the consent of the owner, administrator or the tenant of the land on which the wood species grows, if the applicant is not its owner, administrator or tenant. The felling of wood species can be carried out only following its prior identification by the NPA, i.e. municipality. Required data of the felling application are governed by the Decree to the NLPA. Concerning the assessment needed to grant the approval for the felling of wood species, the Decree to the NLPA states which other important facts should be taken into consideration by the NPA. These are for example: the type and state of health of the wood species, the function and importance of the wood species for the environment or the realization of the felling especially in the period of vegetative peace. A justifiable case for issuing such an approval is the demonstration of a poor state of health of the wood species, in terms of which the wood species has a low probability of survival, inappropriate hygienic conditions in residential and non-residential premises, or a deterioration of the stability of the structure by the root system of the wood species. The Decree also regulates the details of the identification of the wood species intended for felling.

As it is usual in the environmental legislation, the Act exhaustively specifies exceptions when the approval for felling of wood species is not required, for example:

- for trees with a trunk diameter of less than 40 cm measured at the height of 130 cm above the ground,
- for shrubs covering an area of less than 10 m^2 on the lands inside the urban areas of municipalities, or area of less than 20 m^2 on the lands outside the urban areas of municipalities,
- for regeneration of productive fruit trees if planting is realized within 18 months from their felling,
- for trees with trunk diameter of less than 80 cm measured at the height of 130 cm above the ground if they grow in private gardens and garden colonies,
- in case of immediate threat to human health or life or a substantial damage to property,
- for the wood species of invasive types.

15.1.2 Municipality as the Nature Protection Authority

The municipality executes the primary level state administration regarding the protection of the wood species according to the NLPA. Within the wood species protection, municipality may impose the owner, administrator or tenant of the land with a wood species to perform measures necessary for its treatment or decide about its felling.

Municipality, as a NPA, performs other powers in the area of felling of wood species. As hereinbefore mentioned, it gives its approval to the felling of wood species. It is important to state that such approval can be issued only in inevitable cases and only after an assessment of the ecological and aesthetic functions of the wood species and the effects on human health. Municipality identifies wood species intended for felling, and only after such identification, felling can be done.

The NLPA stipulates that in the felling approval the municipality, as a NPA, shall impose the applicant an obligation to provide adequate replacement planting. The municipality shall in advance determine the place of replacement planting and it gives preference mainly to geographically native and traditional species. If the applicant is not the owner of the land on which the replacement planting is made, the NPA may require the applicant to care for the wood species for no longer than a three year period. Costs related to the replacement planting shall be borne by the applicant for the approval of the felling. The municipality is obliged to keep a register of land suitable for replacement planting in its territorial area. Enlistment of the land to the register shall municipality discuss with the land owners.

If replacement planting is not possible, the NPA shall impose a financial compensation for the felling. The amount of financial compensation depends on the societal value of the wood species felled. Societal value of protected plants, protected animals, wood species, natural habitats of European interest and natural habitats of national interest defines mainly their biological, ecological and cultural value that is determined taking into consideration their rareness, threat and performing of non-production functions.[525] Societal value of wood species is defined by the Decree to NLPA where the list of wood species together with their social value is determined in a separate annex.

525 Article 95 of the NLPA.

Municipality shall impose an obligation to pay a financial compensation also to anyone who fells wood species without an approval, up to the societal value of the wood species felled. The financial compensation is an income of a municipality, which is obliged to use it exclusively for settlement of expenses related to care of the wood species growing in its territory. The municipality may issue a generally binding legislation regulating details of the protection of the wood species that form a part of the public green vegetation.

15.1.3 Problems Regarding Wood Species Protection Application

Legal regulation in the field of wood species protection appears to be sufficient and we may come to the conclusion that it adequately ensures the protection of the wood species and the regulation of their felling. However, in further analysis, especially in the area of application of this legislation by municipalities, it is possible to encounter inconsistent application of individual provisions of the Act, or even violation of the provisions of the Act. Violation of the provisions of the Act concerns not only natural persons and legal persons to whom the law imposes obligations, and where the tendency to avoid the fulfilment of obligations imposed by law or nature protection authorities may be expected, for example due to economic difficulty, the Act is also violated by those who should supervise to keep the law. In the next part, we will focus on the municipalities as nature protection authorities on the primary level.

Deficiencies in the application of the wood species protection legislation can be identified within the process of felling of wood species approval granting. Municipalities, when performing state administration duties, often grant a felling approval automatically, without compliance to statutory assumptions, as the NLPA stipulates that approval can be granted only in justified cases after an assessment of the ecological and aesthetic functions of the wood species. Procedure, when the municipality insufficiently assesses, or even does not assess at all the necessity to issue a felling approval, is contrary to the objectives of wood species protection. One of the wood species protection objective is also prevention of their unwarranted exploitation.[526]

526 See KRIŠTOF, M. *Obce a ochrana drevín. Odborno-metodická príručka* [online]. Banská Bystrica: Štátna ochrana prírody Slovenskej republiky, 2014 [cit. 25 September 2017], p. 8. Available at: http://www.sopsr.sk/cinnost/prirucka.pdf

Municipalities often decide to grant approval to the felling of wood species despite the fact that the application for the approval does not contain all the necessary data. Reasoning of the felling approval application, which is essential for the application assessment and approval, resp. disapproval, may be considered as the substantial deficiency of the application.

Relationship between the purpose of the land use by its owner, especially for the construction, and granting the felling approval by the municipality, may be considered interesting. For municipalities, planned construction activity is often sufficient and relevant reason for felling of wood species, irrespective of other factors such as the location of the construction or its use with respect to the existing wood species on the land. At the same time, neither the NLPA nor the Decree to NLPA, states that the planned construction activity or the use of the land in any way represents relevant reason for approval granting. The municipality as a NPA should always take into account only sufficiently justified cases and should assess the ecological and aesthetic functions of the wood species and the effects on human health. Any construction or other use of the land should be allowed only in the context of the objectives of the wood species under the above-mentioned conditions.

Regarding the relation of felling of wood species to the land-use proceedings or building proceedings, there is a question at which the stage of the procedure (land-use or building procedure) should a possible approval to the felling of wood species be submitted. The Supreme Court of the Slovak Republic has stated in its judgment[527]: "The Supreme Court cannot accept the legal situation, knowing that in the affected area, where the growing trees and shrubs are located at the time of decision, the construction authority decides on the location of the building, if it is not possible to exclude the future situation when a in a certain area a construction will be placed, as a result of which trees and shrubs will have to be logically destroyed, respectively eliminated." From the judgment, it can be assumed that prior to the issue of the land-use decision it is necessary to resolve the approval for the wood species felling. If felling of wood species approval shall be bound to the land-use decision, the approval granting procedure

527 Judgement of the Supreme Court of the Slovak Republic, No. 5 Sžp 10/2009.

would only be formal, while the municipality when issuing the approval would have to take into account the existing land-use decision. Prior to land-use decision, the construction authority should resolve whether the NPA may or may not issue felling of wood species approval. In our opinion, only after resolving this question constructing authority is entitled to make decision within the land-use procedure. Such process is consistent with the case-law quoted, as well as with the Article 103 par. 6 of the NLPA, according to which the state administration authority conducting a procedure in the matter by which interests of nature and landscape protection may be affected decides the matter following delivery of a decision at the earliest of the nature protection body on issuing or non-issuing an approval or allowing or non-allowing an exception from prohibition or comments.

Municipalities fail to fulfil the obligation arising from Article 48 par. 3 NLPA, since they do not keep records of land suitable for replacement planting. They also usually determine replacement planting to be carried out on the land of the applicant, and they do not at all or insufficiently control the implementation of replacement planting.

As other deficiencies of municipalities within the state administration performance in the field of protection of wood species, we perceive mainly inconsistent control of natural persons and legal entities obligation fulfilment, obligations imposed on them by the law or by municipalities themselves. This is particularly the case when landowners (administrators or tenants) do not ask for felling permission, because they remove them as part of the "cleaning" of land registered as pastureland and meadows. Furthermore, they do not fulfil the obligation of continuous maintenance during wood species vegetation growth and they only deal with subsequent radical cuts or felling, which could be avoided by control activities.

Many subjects even carry out felling of wood species without the necessary approval, but the more alarming is the fact, that the felling of wood species on their land without approval is carried out by the municipalities themselves.

Insufficiencies in controlling activities are also evident in the area of replacement planting, where the applicants for the felling approval do not fulfill

the established obligation to carry out the replacement planting or other conditions associated with it, but are not in any way sanctioned because the municipality as a NPA does not carry out any control in this area.

15.2 Conclusion

The legislation on the protection of wood species in Slovak Republic is, in our opinion, sufficient. However, the deficiencies are mainly found in the area of its application by the nature protection authorities at the first instance, i.e. by the municipalities. This is also stated by the Slovak Environmental Inspection as the supervisory authority, according to which the most violations of the NLPA detected by the inspections concerned the damage and the felling of wood species[528]. In particular, it concerned the above mentioned deficiencies of compliance with the conditions determined by the NPA for the felling and the replacement planting. The same deficiencies were also found in the previous period. The Slovak Environmental Inspection notes that, in particular, smaller municipalities in the framework of the transferred state administration still do not know their competencies in the issuance of felling approvals and do not correctly apply the provisions of the NLPA. As far as small municipalities are concerned, it should be noted that these municipalities also have problem with the performance of state administration in other areas, for example in performance as the constructing authorities.

The above mentioned deficiencies can be removed by several tools. Firstly, it is necessary for municipalities themselves to comply more rigorously with the provisions of the NLPA and the relevant legislation when granting felling approval. In particular, municipalities should be more careful when it comes to search for the reasoning for the felling and preserving the functions of the wood species. Stricter performance of state supervision by supreme bodies and the subsequent imposition of sanctions, as well as the possible provision of professional assistance to municipalities in the application of NLPA may also help. Municipalities should also be warned

528 *Annual Activity Report published in 2015 by the Slovak Environmental Inspection* [online] [cit. 25 September 2017]. Available at: http://www.sizp.sk/doc/dokumenty/vyrocna-sprava-2015.pdf

of the deficiencies supreme bodies find in their activities within the performance of state environmental management[529]. Transfer of competence to another authority may be considered as a mean of ultima ratio, but it should be carefully determined to which authority it would be appropriate to transfer those competences.

Last but not least, it is necessary to clarify the relationship between the procedure concerning the issuance of felling approval and the procedures concerning the subsequent use of the land. At this point we would refer to the relevant case law which at least partly answers that question.

529 As stated in Article 5 of the Act No. 525/2003 Coll. on state administration care on environment.

16 NEW REGULATIONS CONCERNING TREES AND SHRUBS REMOVAL IN POLAND

16.1 Introduction

The question which has recently caused serious controversies in Poland and is connected with protection of green areas is definitely the public dispute that arose over the phenomena in the Białowieża Forest. Namely public opinion and non-governmental organizations express concerns and protest against logging activity within this last remaining primeval forest in Europe[530]. The activity has become a problem of international character, because the Białowieża Forest was both inscribed on the World Heritage List of United Nations Educational, Scientific and Cultural Organization (UNESCO) and recognized as Nature 2000 site, independently of the fact the part of its area is protected as national park according to Polish law. The World Heritage Committee, during a session held in Cracow, Poland on 2–12 July 2017, did not accept explanations of the State Party of Poland justifying the cutting by the need to combat bark beetle infestation and strongly urged to halt all logging and wood extraction in old-growth forest[531]. Analogous ban was imposed on the Republic of Poland by the Vice-President of the Court of Justice of the European Union on 27 July 2017 in the course of the proceeding for interim measures[532]. In spite of all this, the Polish Minister of Environment, Jan Szyszko, a professor of forestry, does not want to subordinate to these prohibitions, declaring that active nature conservation methods serve the purpose of restoring natural habitats and

530 See for example press information from 30 May 2017 under title: Greenpeace Poland and Wild Poland activists blockade loggers in the Białowieża Forest, available on the website of the Greenpeace Poland at the following web address: http://www.greenpeace.org/poland/pl/wydarzenia/polska/Greenpeace-Poland-and-Wild-Poland-activists-blockade-loggers-in-the-Biaowiea-Forest/ [cit. 5 September 2017]. Activists blocked harvesters (heavy machinery designed for the mass cutting of trees) and displayed banners protesting against logging activity during breeding season of rare spaces of birds. The conflict between activists and cutters supported by authority, especially by the Minister of Environment, has escalated; even some acts of violence were noticed.

531 See Reports on the state of conservation of properties inscribed on the Word Heritage List at the following web address: http://whc.unesco.org/en/soc [cit. 5 September 2017].

532 The case C-441/17R.

slow down their disappearance better than passiveness preferred abroad[533]. As a consequence, his opponents keep accusing him of ignoring European law and of endangering the wild forest by changing this natural forest into regular silviculture[534].

The abovementioned events somehow have cast a shadow on another matter concerning green areas which had been a subject of public debate, i.e. the issue of changes of legal rules referring to tree and shrub removal. The public in Poland seems to have lost interest in that issue and have not appreciated the significance of it. Although prescriptions regulating tree and shrub removal have admittedly mainly domestic, not international, dimension, they may affect green areas within the whole territory of the state, not only one natural object, even of exceptional environmental value. Naturally, it does not exclude special legal regimes covering some categories of trees or shrubs, particularly plants located in forests according to article 3 of the Act of 28 September 1991 on Forests[535] (also Forest Act), which are subject to provisions of this Act determining rules of forest management, defined in relation to particular individual forests, especially the forest management plans.

The general provisions are contained in the Act of 16 April 2004 on Nature Conservation[536], in the chapter entitled "The protection of green areas and woodlots", which was a subject of numerous studies, including

533 See the special tab (section) of the website of the Ministry of Environment (https://www.mos.gov.pl) sacrificed to the Białowieża Forest, including some documents, unfortunately only in Polish, first of all the "Programme for Białowieża Forest as UNESCO cultural and natural heritage site and the Natura 2000 site", signed by the Minister of Environment and the Director General of the State Forests on 25 March of 2016 [cit. 5 September 2017].

534 See for instance press information from 23 May 2017, under title: Białowieża Forest – minister Szyszko crossed the red line, available on the website of the Greenpeace Poland at the following web address http://www.greenpeace.org/poland/pl/wydarzenia/polska/Biaowiea-Forest--minister-Szyszko-crossed-the-red-line/ [cit. 5 September 2017].

535 Official Journal of Laws (Dziennik Ustaw) 2017, item 788 with amendments, consolidated text. According to article 3 of the Act on Forests forest is inter alia a land of compact area of at least 0.10 ha covered with forest plants or temporally deprived of it or land connected with forest management and occupied for needs of forest management, for instance forest roads or forest parking places.

536 Official Journal of Laws 2016, item 2134 with amendments, consolidated text, further also referred to as NCA.

monographs[537] and commentaries[538]. The legal mechanism of the protection is based on four main pillars: obligation of tree (shrub) cultivation, tree or shrub removal permit, fees for tree or shrub removal and financial administrative penalties[539]. Article 83 item 1 of NCA establishes a principle that removal of trees and shrubs from real estates require a prior permit issued in a form of administrative decision on the motion of possessor of real estate[540] by competent administrative organ, i.e. village, town or city mayor, marshal of voivodeship (head of region), starost (district head) and voivodeship conservation officer[541]. The exceptions to the principle are specified by law, at the present by article 83f of NCA. The permit determines a fee for tree or shrub removal, depending on trunk girth or space covered by shrubs, being a public impost, and is calculated according to rates indicated in regulation adopted on the basis of specific authorisation, now contained in article 85 item 4 b of NCA, with exemptions enumerated in article 86 of NCA. The tree or shrub removal may depend on their transplantation or replacement with other trees or shrubs in quantity no smaller than the number of removed trees or shrubs[542]. In such a situation the fee is deferred and after a period of three years remitted on the condition that trees or shrubs

537 GRUSZECKI, K. *Zezwolenia na usunięcie drzew i krzewów*. Wrocław: Presscom, 2011, 813 p. ISBN 9788361188797; HABUDA, A., RADECKI, W. *Ochrona prawna drzew i krzewów poza lasami*. Wrocław: Fundacja Ekorozwoju, 2015, 212 p. ISBN 9788363573133; RAKOCZY, B. *Usuwanie drzew i krzewów*. Warszawa: LexisNexis, 2013, 228 p. ISBN 9788378069775.

538 See inter alia: DANECKA, D., RADECKI, W. *Ochrona terenów zieleni i zadrzewień. Art. 78-90 ustawy o ochronie przyrody. Komentarz*. Warszawa: C. H. Beck, 2016, 263 p. ISBN 978-83-2558-453-5; GRUSZECKI, K. *Ustawa o ochronie przyrody. Komentarz*. Warszawa: Wolters Kluwer, 2017, pp. 480–622. ISBN 9788380928336; RADECKI, W. *Ustawa o ochronie przyrody. Komentarz*. Warszawa: Difin, 2016, pp. 373–452. ISBN 9788380851795.

539 RADECKI, W. *Ustawa o ochronie przyrody. Komentarz*. Warszawa: Difin, 2016, pp. 373–374. ISBN 9788380851795.

540 In case the possessor is not an owner, he is obliged to enclose an owner's consent for tree or shrub removal. The motion can be also submitted by the owner of transferring installations, which serve to supply and to channel liquids, steam, gas, electric energy etc. See also CZECH, M. Objective liability for removal of trees or shrubs without the required permit in the light of recent judicature views. *Polish Yearbook of Environmental Law*, 2014, No. 4, pp. 101–102. ISSN 2084-8595.

541 See more in: KARPUS, K. The notion of "Nature conservation body" in Polish Nature conservation law, its types and competences. *Polish Yearbook of Environmental Law*, 2014, No. 4, pp. 71–98. ISSN 2084-8595.

542 See also ŁUKASZKIEWICZ, J. Replacement tree planting in cities: key problems relating to administrative decisions. *Sustainable Development Applications*, 2013, No. 4, pp. 28–36. ISSN 2081-5727.

retain vitality. The NCA enumerates torts sanctioned by financial administrative penalties, i.e. imposed by administrative authority (village, town or city mayor, marshal of voivodeship or starost) by means of administrative decision. One of the examples of the torts is removal of tree or shrub without required permit.

The rules binding in analysed scope have undergone three significant changes for a period of circa two years. The changes will be reviewed in following sections of the paper. Each of this section is devoted to one of acts amending the NCA.

16.2 The Act of 25 June 2015

The provisions contained in the chapter of the NCA concerning the protection of green areas and woodlots had not been substantially changed since their introduction untill the entrance into force of the Act of 25 June 2015 amending Act on Communal Self-government and some other acts,[543] including the NCA. Considered part of the Act of 25 June 2015, came into force 30 days from the date of publishing the Act – on 28 August 2015.

The changes of legislation serving to protect green areas had been thought as necessary after the Constitutional Tribunal judgement of 1 July 2014, case file ref. SK 6/12[544], in which the Tribunal had recognized article 88 item 1-2 and article 89 item 1 of NCA as unconstitutional[545]. The unconstitutional prescriptions defined the financial administrative penalty as sanction for breach of the prohibition of removing trees or shrubs without prior permit[546]. The Constitutional Tribunal claimed the penalty was imposed in fixed amount, automatically, regardless of individual circumstances of the particular case, for instance harm to the environment, state of necessity,

543 RADECKI, W. *Ustawa o ochronie przyrody. Komentarz*. Warszawa: Difin, 2016, p. 376. ISBN 9788380851795. The Act of 25 June 2015 was published in Official Journal of Laws 2015, item 1045.

544 Official Journal of Laws 2014, item 926.

545 See for example CHOJNACKA, I. Konieczne zmiany ustawy o ochronie przyrody po wyroku Trybunału Konstytucyjnego o sygn. akt SK 6/12. *Przegląd Legislacyjny,* 2015, No. 2, pp. 41–59. ISSN 1426-6989.

546 The judgment was presented for example by SZALEWSKA, M. Administrative penalties for extortion of trees and bushes without permit – new law regulation. *Polish Yearbook of Environmental Law*, 2015, No. 5, pp. 67–70. ISSN 2084-8595.

guilt or financial situation of the guilty party. Such solutions, recognized as an example of objective liability[547], were in contradiction to article 31 item 3 and article 64 items 1 and 3 of the Constitution of the Republic of Poland of 2 April 1997[548]. The Tribunal did not deny the need of limitation of the right of ownership for the protection of the natural environment as exceptionally important constitutional value: The Constitution refers to the principle of sustainable development (article 5), indicates the reasons of environmental protection as a premise of limitation of constitutional freedoms and rights (article 31 item 4) and imposes an obligation of environmental protection on public authorities (article 74 item 2) and on citizens (article 86). The Constitutional Tribunal accepted both a permit for tree or shrubs removal as requisite instrument preventing uncontrolled destruction of green areas, even conducted by owners of real estates, and administrative penalty as sanction independent and separated from criminal law[549]. However, the Tribunal underlined that controlled legal solutions had excluded discretion of authority and possibility of avoiding liability or diversification of amount of the penalty in a way which would be adequate to the scale of infringement. As a result, the constitutional borders of proportionality in relation to administrative sanctions had been exceeded and the legislator should have introduced minimum standards consistent with constitutional principles

547 CZECH, M. Objective liability for removal of trees or shrubs without the required permit in the light of recent judicature views. *Polish Yearbook of Environmental Law*, 2014, No. 4, pp. 104. ISSN 2084-8595.

548 Official Journal of Laws 1997 No. 78, item 483, with amendments. According to the Article 31 item 3 any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute and when necessary in a democratic state for the protection of its security or public order or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. So the natural environment is regarded as one of the most important constitutional values. The article 64 establishes the right to ownership.

549 However, the administrative penalties have been criticized by part of legal scholars as taking over by the administrative authority the matters reserved for the courts without ensuring rights of accused person observed in criminal procedure – see for example SZUMIŁO-KULCZYCKA, D. *Prawo administracyjno-karne*. Kraków: "Zakamycze", 2004, pp. 238–249. ISBN 8373334076. According to article 175 item 1 of the Constitution the administration of justice in the Republic of Poland shall be implemented by independent courts. The rights of entity in criminal proceeding, particularly the right to defense with support of counsel, even appointed by the court, are defined first of all in article 43 of the Constitution. However, the Constitutional Tribunal expressed an opinion that supervision of administrative courts, hearing complaints against decisions imposing administrative penalties, meets these requirements.

of democratic state ruled by law established in article 2 of the Constitution. Furthermore, the whole legal model of protection of green areas must be changed into less repressive and more flexible regulation.

According to the justification of the draft of the Act of 25 June 2015 the suggestions of the Constitutional Tribunal were taken into consideration and exactly implemented in the amended provisions of the NCA. Legal science generally agreed with this conclusion, describing the legal changes as comprehensive and fulfilling the requirements expressed in the reasons of the judgement of 1 July 2014[550].

The legislator made the provisions more precise, trying to determine the exact meaning of premises which may have influence on the application of law.

The prime examples are definitions of tree and shrub, enabling distinction between these types of plants and as a consequence enabling the choice of legal regime, which is proper in that particular case (article 5 points 26a and 36 b of NCA). In their description shrubs are deprived of two elements which constitute a tree, namely trunk and crown. Obviously, these definitions cannot dissolve all interpretative problems in analyzed sphere[551].

Article 5 points 25c and 26d of NCA define trees and shrubs fallen or broken in a result of natural factors or in state of emergency. Such plants may be removed by competent services, for instance by fire brigade during rescue operation, or by others, but after visual inspection confirming cause of plant's destruction.

The Act of 25 June 2015 has established new, more objective criteria conclusive for an obligation to obtain a tree removal permit, i.e. a girth of trunk, average for 10 year-old trees of given species, instead of age of the tree (new article 83f item 1 point 3 of NCA). The new regulation will certainly benefit by elimination of disputes connecting with ascertainment of exact age of tree, often only with the support of experts appointed by authority.

550 CHOJNACKA, I. Konieczne zmiany ustawy o ochronie przyrody po wyroku Trybunału Konstytucyjnego o sygn. akt SK 6/12. *Przegląd Legislacyjny,* 2015, No. 2, pp. 54. ISSN 1426-6989. See also the review of some changes introduced by the Act of 25 June 2015. SZALEWSKA, M. Administrative penalties for extortion of trees and bushes without permit – new law regulation. *Polish Yearbook of Environmental Law*, 2015, No. 5, pp. 70–77. ISSN 2084-8595.

551 GRUSZECKI, K. *Ustawa o ochronie przyrody. Komentarz*. Warszawa: Wolters Kluwer, 2017, pp. 481–482. ISBN 9788380928336.

It was very difficult, almost impossible to establish the exact point in time when the age of tree had exceeded 10 years and the tree could be removed only with a permit.

Similarly, new article 5 point 27a of NCA defines a notion of plantation as a culture of trees or shrubs of compact area of at least 0.1 ha, established for productive purpose – removal of tree or shrub grown on the terrain of plantation is abolished from obligation of obtaining a permit.

There were also changes of different kind – motivated by the need of improving the effectiveness of protection of green areas.

For instance article 83d item 5 of NCA introduces a rule that trees and shrubs can be removed only at the latest stage of investment process, when a building or demolition permit have been already issued – in order to avoid premature and even unnecessary cutting if the process is not continued[552].

Article 83c item 4 of NCA provides for criteria, which shall be taken into consideration in case of replacement of trees or shrubs, such as environmental, landscape and cultural value of tree or shrub and their location. Also other features of trees and shrubs are decisive for their transplantation, namely their size and condition (article 83c item 5 of NCA).

Article 84 item 4 of NCA states that in situation when only part of transplanted or replaced trees or shrubs remain in vitality, deferred fee shall be paid only in proportion to number of dead trees or shrubs, what had been impossible before[553].

The Act of 25 June 2015 also changed statutory authorisation for the Ministry of Environment to issue a regulation determining rates of fees for tree or shrubs removal. New guidelines concerning the provisions of such regulation implied in fact a modification of method of calculating the fee – according to their provisions the rate shall depend on the trunk girth, rate of growth of the trunk in terms of thickness and tree species as well as location of the tree or shrub and their functions (article 85 item 7 of NCA, which were further amended).

552 See more: ZIEMIAŃSKA, M., SUCHOCKA, M. The planning and principles of tree protection in the investment process. *Sustainable Development Applications*, 2013, No. 4, pp. 11–24. ISSN 2081-5727.

553 The entire fee had to be paid even in case when only one of the replaced or transplanted trees did not remain in vitality.

Last but not least, the Act defines the rules for proper care of tree crowns and for carry out works which may affect roots, trunks and crowns of trees and roots or shoots of shrubs (article 87a item 1 and 2 of NCA). The works must be conducted in the least invasive manner and cannot lead to tree damage in a meaning indicated in article 87a item 4 of NCA. The tree damage takes place in case of removal of branches exceeding 30 % of a tree crown which has developed throughout its lifespan with the aim other than: removal of branches which are dead or broken, maintaining shaped tree crown and executing special operation to restore statics of tree; such a removal exceeding 50 % of a tree crown which has developed throughout its lifespan constitutes tree destruction (article 87a item 4 of NCA).

The changes, which directly reflect the views of the Constitutional Tribunal expressed in reasons of judgment of 1 July 2014, occur in financial administrative penalties.

The penalties have been reduced from the amount of the triple fee for tree or shrub removal to the amount of double fee. Such penalties are sanctions for the removal without required permit or without consent of possessor of real estate[554] and for tree or shrub destruction defined by above mentioned article 87a item 4 of NCA. If the fee is abolished on a removal of tree or shrub, the penalty for lack of required permit shall be equal to the fee (article 89 item 1 of NCA). In this connection it is worth mentioning that natural person removing trees or shrubs on a base of permit for purposes unrelated to pursuit business activity had been exempted from the fee both before the Act of 25 June 2015 came into force and also later (article 86 item 1 point 2 of NCA, further repealed).

The penalty for tree or shrub damage amounts to 0,6 of the fee (article 89 item 2 of NCA).

However, the reduction of the penalties does not mean such a reconstruction of legal model of the penalties that would be in accordance with all the standards set by the Constitutional Tribunal, for instance the question

554 The tree or shrub removal without consent of the possessor of real estate is a tort introduced by the Act of 25 June 2015 in order to enable to impose the penalty on someone who removed the tree or shrub, but could not apply for permit. A motion for permit can be submitted first of all by the possessor, so only the possessor could commit a tort of tree or shrub removal without required permit.

whether the penalties are an adequate measure for infringement of law connected with protection of green areas still remains a matter of discussion[555]. Admittedly diversified amounts of the penalties match a scale of violation of law representative of particular type of torts, but the penalty still can be imposed only on strict amount. New provision does not ensure satisfactory discretion of authorities which are not entitled to take into consideration the circumstances of a given case, for example the guilt of offender, his material situation and so on. The legislator tried to achieve it by more precise and detailed law indicating exact rules for various types of possible cases, but has made provisions too extensive and complicated and the administrative liability for these torts has not lost its objective character.

Nevertheless, in spite of some disadvantages the reviewed changes must be regarded as a step in the right direction. However, the legislator went suddenly and unexpectedly further.

16.3 The Act of 16 December 2016

On 1 January 2017 the next revision of the NCA came into force, introduced by the Act of 15 December 2016 amending Act on Nature Conservation and Act on Forests[556]. The change was described as revolutionary[557], although according to the justification of the draft of the Act of 15 December 2016 the amendments aimed only to: increase the property rights, simplify regulation concerning tree cutting and confer to entities of self-government the power of matching a scale of protection of green areas to their own needs.

The main simplification consisted of liberalization of provisions referring to an obligation of obtaining a tree or shrub removal permit. The justification of the draft of the Act of 15 December 2016 emphasized the need of limitation of the obligation, pointing out that despite restrictive prescriptions almost in every application the permit was granted.

555 CZECH, M. Objective liability for removal of trees or shrubs without the required permit in the light of recent judicature views. *Polish Yearbook of Environmental Law*, 2014, No. 4, pp. 102–103. ISSN 2084-8595.

556 Official Journal of Laws 2016, item 2249.

557 GRUSZECKI, K. *Usuwanie drzew i krzewów. Komentarz do zmian ustawy o ochronie przyrody wprowadzonych ustawami z dnia 16 grudnia 2016 r. oraz z dnia 11 maja 2017 r.* Available at: LEX 2017 – system of legal information [cit. 5 September 2017].

As a result, trees or shrubs can be removed without permit from real estates owned by natural persons, but only for purposes unrelated to pursuit of business activity (article 83f item 1 point 3a of NCA). Such a solution discriminates against entrepreneurs, even more so when it does not affect farmers conducting business on agricultural farms[558]. A tree or shrubs removal aimed to restore agricultural wasteland to agricultural usufruct does not require the permit (article 83f item 1 point 3 b of NCA). The aforementioned abolitions cover all trees and shrubs regardless of their age, species, number, value or function.

The Act of 16 December 2016 authorized communal councils to specify other types of trees or shrubs, which can be removed without permit (article 83f item 1a of NCA, further repealed) by means of resolution (an act of local law[559]). The Act set down criteria, which must be used by the councils: for example species of tree or shrub, their age, purpose of their removal and localisation and purpose of real estate. The same criteria had to be taken into consideration if the council decided to issue a resolution enlarging the statutory catalogue of exemptions from fee for tree or shrub removal with new types of situations, when the fee could not be determined in a permit on the basis of article 86 item 1a of NCA (which was further repealed as well).

The communal councils were also empowered to issue resolutions, acts of local law, specifying the rates of fees applicable to their territorially defined areas of operation. The rates could not exceed the maximum statutory amounts, which were applicable, if a council of particular commune did not issue such a resolution (article 85 items 4a-7 of NCA in a wording introduced by the Act of 16 December 2016).

According to the justification of the draft of the Act of 16 December 2016 this right of communities enables them to have influence on the level of their revenues derived from the fees. However, the scope of discretion left to self-government could lead simultaneously to groundless

558 GRUSZECKI, K. *Usuwanie drzew i krzewów. Komentarz do zmian ustawy o ochronie przyrody wprowadzonych ustawami z dnia 16 grudnia 2016 r. oraz z dnia 11 maja 2017 r.* Available at: LEX 2017 – system of legal information [cit. 5 September 2017].

559 Article 87 item 2 of the Constitution of the Republic of Poland states that enactments of local law issued by the operation of bodies shall be a source of universally binding law of the Republic of Poland in the territory of the body issuing such enactments.

and exaggerated diversification of regulations concerning tree or shrubs removal on the territory of the state. The rules of removal may differ even in neighboring communes, for example in the case of exemption from the requirement to pay a fee or to obtain a permit.

The Act of 16 December 2016 evoked a serious public dispute for a few reasons, not only legal, but also – or rather mainly – political and ideological[560]. The opponents of the Act treated the Minister of Environment as chief adversary and described the Act as "Lex Szyszko" in connection with his surname. However, beside emotional and personal attacks they put forward persuasive rational arguments as well.

The strongest objection was raised in relation to legislative procedure which resulted in an adoption of the Act of 16 December 2016.

The legislative process took only 21 days, which elapsed between the submission of the bill to the Parliament and the signature of the Act by the President[561]. Moreover, the Act came into force only four days after the President had signed it, what prevented citizens and administrative authorities from acquainting with amendments and preparing for them, especially as the draft had been elaborated by the government without public, social and interministerial consultations.

In addition, the Act was adopted during one of the most grievous parliamentary crisis in Poland. The deputies from temporarily united opposition parties, protesting against policy of the ruling party, the Law and Justice, blocked the plenary hall and parliamentary sitting was summoned in another room of the parliamentary building. The session took place without debate and participation of numerous deputies engaged in the protest – doubts

560 See comprehensive analysis of the conflict, taken as a base for further remarks: ORCZYK, M., TATAŁA, M. Ułatwienia w wycince drzew: dobre intencje, patologiczny proces uchwała prawa i manipulacje. *Civil Development Forum*, Analysis No. 2 of 2017. Available at: https://for.org.pl/pl/a/5197,analiza-2/2017-ulatwienia-w-wycince-drzew-dobre-intencje-patologiczny-proces-uchwalania-prawa-i-manipulacje [cit. 5 September 2017].

561 ORCZYK, M., TATAŁA, M. Ułatwienia w wycince drzew: dobre intencje, patologiczny proces uchwała prawa i manipulacje. *Civil Development Forum*, Analysis No. 2 of 2017, pp. 3–7. Available at: https://for.org.pl/pl/a/5197,analiza-2/2017-ulatwienia-w-wycince-drzew-dobre-intencje-patologiczny-proces-uchwalania-prawa-i-manipulacje [cit. 5 September 2017]. The Authors point attention that legislative process took on average 77 days in 2016 and 170 days in 2010.

connected with the presence of deputies lead to an accusation that the required quorum did not exist and therefore the Act is unconstitutional[562]. Consequently, these events are regarded as an example of pathological law-making process[563].

The Act caused profound social and even psychological effect multiplied by an attitude of the leader of the Law and Justice, Jarosław Kaczyński, who fought against the liberalization of provisions and announced another amendment of law. According to the announcement a natural person owning a real estate shall notify an administrative authority of an intention of tree or shrub removal and selling the real estate shall be prohibited for some period after the removal. Thus owners all over the country started uncontrolled massive logging, also without urgent reasons, only in order to avoid expected limitation of their rights[564]. The Act of 16 December 2016 endangered even most valuable trees and led to many irregularities, for instance consisting in removal of trees from real estates only temporarily owed by natural persons and later sold to entrepreneurs[565].

The dispute was fomented by manipulations, which excluded rational debate, seen especially on the Internet[566]. Some fake news appeared, for example fabricated pictures, which allegedly presented the results of the new regulation, but in fact had been taken few years ago. These phenomena deepened the legal chaos.

562 According to article 120 of the Constitution of the Republic of Poland the Sejm (lower chamber of the Polish Parliament) shall pass bills by a simple majority in the presence of at least half of the statutory number of deputies, unless the Constitution provides for another majority.

563 ORCZYK, M., TATAŁA, M. Ułatwienia w wycince drzew: dobre intencje, patologiczny proces uchwała prawa i manipulacje. *Civil Development Forum*, Analysis No. 2 of 2017, pp. 3–7. Available at: https://for.org.pl/pl/a/5197,analiza-2/2017-ulatwienia-w-wycince-drzew-dobre-intencje-patologiczny-proces-uchwalania-prawa-i-manipulacje [cit. 5 September 2017].

564 Ibid., p. 11.

565 GRUSZECKI, K. *Usuwanie drzew i krzewów. Komentarz do zmian ustawy o ochronie przyrody wprowadzonych ustawami z dnia 16 grudnia 2016 r. oraz z dnia 11 maja 2017 r.* Available at: LEX 2017 – system of legal information [cit. 5 September 2017].

566 ORCZYK, M., TATAŁA, M. Ułatwienia w wycince drzew: dobre intencje, patologiczny proces uchwała prawa i manipulacje. *Civil Development Forum*, Analysis No. 2 of 2017, pp. 12–13. Available at: https://for.org.pl/pl/a/5197,analiza-2/2017-ulatwienia-w-wycince-drzew-dobre-intencje-patologiczny-proces-uchwalania-prawa-i-manipulacje [cit. 5 September 2017].

16.4 The Act of 11 May 2017

The anticipated changes have been introduced by the Act of 11 May 2017 amending the NPA[567]. One more time the Act was adopted without consultations or broad debate and with very short vacatio legis, which lasted 14 days from the day of its promulgation[568]. The Act has entered into force on 17 June of 2017. The justification of the draft of the Act amounts only to a half of a page[569] and hardly refers to one of the questions which have been modified in order to verify whether a tree cutting was indeed conducted for purposes unrelated to the pursuit of business activity.

As it had been announced, the new provisions impose an obligation of notification of an intention of tree or shrub removal on natural persons, unless the tree removal does not require a permit for other reasons (article 83f item 1 points 3–10 of NCA). The administrative body, which would be competent to issue a permit, shall conduct an inspection within 21 days from the day of receipt of the notification in order to ascertain, inter alia, species of tree and a girth of its trunk. The administrative body is entitled to lodge a protest by means of administrative decision, which can be posted in a postal office within 14 days from the day of the inspection. A tree can be removed, unless the organ does not lodge the protest within the deadline.

Article 83 item 1 points 14 and 15 of NCA specify conditions of the protest, for example localization of a tree on a real estate recorded in the register of monuments, on a terrain within the borders of forms of nature protection, i.e. national parks, nature reserves, landscape parks, protected landscape areas and Nature 2000 sites and an obligation of obtainment of a permit.

The new provisions must be regarded as more beneficial than earlier provisions enabling natural person tree or shrub removal entirely without preliminary control of administrative authority[570].

567 Official Journal of Laws 2017, item 1074.

568 ORCZYK, M., TATAŁA, M. Ulatwienia w wycince drzew: dobre intencje, patologiczny proces uchwała prawa i manipulacje. *Civil Development Forum*, Analysis No. 2 of 2017, p. 6. Available at: https://for.org.pl/pl/a/5197,analiza-2/2017-ulatwienia-w-wycince-drzew-dobre-intencje-patologiczny-proces-uchwalania-prawa-i-manipulacje [cit. 5 September 2017].

569 Ibid.

570 GRUSZECKI, K. *Usuwanie drzew i krzewów. Komentarz do zmian ustawy o ochronie przyrody wprowadzonych ustawami z dnia 16 grudnia 2016 r. oraz z dnia 11 maja 2017 r.* Available at: LEX 2017 – system of legal information [cit. 5 September 2017].

Fortunately, the legislator has refrained from the prohibition of selling a real estate owned by legal person as a consequence of removal of tree without permit. According to article 83f item 1 point 17 of NCA if within 5 years from a day of inspection a motion for building permit is submitted, the organ, which conducted the inspection, shall, in a form of administrative decision, impose an obligation of paying a fee for tree removal on the owner of real estate, on the condition that an investment is related to the pursuit of business activity and planned on the place the tress were removed.

The aforementioned solutions demand new types of torts and financial administrative penalties, so that infringements in this area could be sanctioned. In this connection the Act of 11 May 2017 has established financial administrative penalties for tree removal without required notification, before an expiry of the term prescribed for lodging the protest and in spite of the protest (article 88 item 1 points 5 and 6 of NCA). The amount of the penalties is the same as sanctions for tree removal without permit or without consent of possessor of real estate: it amounts to double fee for tree removal and in case the removal of tree is abolished from the fee, the penalty shall be equal to the fee (article 89 item 1 of NCA).

The legislator withdrew from an idea of decentralization and conferment of the power of regulating rules of protection of green areas (by means of resolution of communal councils) to communes in their territories. The Act of 11 May 2017 has repealed or amended all the provisions authorising the communal councils in this field, which had been in force only for half a year. The justification of the draft of the Act does not explain reasons for such a radical abandonment of previous conception, although it had been thus emphasized in the justification of the Act of 16 December 2016. However, the NCA in binding wording does not enable the possibility of enlargement of statutory catalogues of exemptions from an obligation of obtainment of tree or shrub removal and from fee for tree or shrub removal. The commune councils have also been deprived of the power of specification of the rates of fee applicable to their territorially defined areas of operation. The Act of 11 May 2017 has restored the rule that it is in the competence of the Minister of Environment, accomplished

by means of regulation, but sustained the solution that the rates cannot extend the maximum statutory amount, which is applicable if the regulation is not issued (article 85 item 4 b and 7 of NCA).

Unfortunately, the legislator did not take into consideration that some communal councils had issued resolutions on the basis of their temporary statutory authorization – the Act of 11 May 2017 does not include transitional provisions concerning the resolutions[571]. It seems to be undisputable that the resolutions lost their legal force with their statutory authorization, although they could cause legal effects during period when they remained acts of binding local law. This fact may evoke many practical problems, for example can cause doubt whether the rates of fee for tree or shrub removal, specified by the resolutions, can be applied, if an administrative procedure was commenced before 17 June 2017[572].

The Act of 11 May 2017 not only reverses obviously negative consequences of earlier amendments, but also returns to previous solutions even when they were replaced by provisions in force not long enough to be checked in practice. The Act was adopted hastily, without consultations and without proper justification pointing out rationale for every new provision.

16.5 Conclusion

The review of Acts amending the NCA, which had been adopted merely for less than two years, leads to critical conclusions.

Changes are introduced frequently without consultations and public debate and that disables proper analysis of consequences of new law. Sometimes these consequences must be eliminated by another amendment, even returning to previous solutions.

The aforementioned fact proves the lack of one consistent and comprehensive vision of legal system concerning protection of green areas, first of all the necessary degree of restriction. The legislator implemented some of the guidelines indicated by the judgement of the Constitutional Tribunal

571 GRUSZECKI, K. *Usuwanie drzew i krzewów. Komentarz do zmian ustawy o ochronie przyrody wprowadzonych ustawami z dnia 16 grudnia 2016 r. oraz z dnia 11 maja 2017 r.* Available at: LEX 2017 – system of legal information [cit. 5 September 2017].

572 Ibid.

of 1 July 2014 and liberalized the most repressive rules, but could not establish a new, more flexible general model of protection, which would not favour one group, for example natural persons. The constitutional standards mentioned by the Tribunal are still not fulfilled, particularly financial administrative penalties are imposed in fixed (although various) amounts, regardless of individual circumstances of given case.

From this point of view, the sole rate and scale of legal changes can be alarming as well, especially as new law often enters into force without suitable vacatio legis, which would be appropriate to get acquaintted with. Such a situation impedes not only application, but even observance of law and must be regarded as contrary to the principle of legal certainty. Unfortunately, the trend which can be currently observed indicates that this legislative practice will continue.

CONCLUSION

From the above mentioned, the conclusion may be drawn that legislation aimed at nature protection is in place in Poland, Slovakia and in the Czech Republic. The impact of EU legislation in the form of Habitat and Bird Directives is recognizable in common legal instruments that were introduced to the legislation on nature protection in all three states.

Even though the legislation in these countries is based on the same principle of sustainable development, its practical application shows, how difficult is to comply with it. Undoubtedly, all three countries recognize the interest in preservation and protection of the nature. On the other hand, it should not preclude to carry out different kind of activities, such as developmental activities, excavation of minerals, logging of the timber, outdoor and other activities.

Authors of this monograph refer to different legislative techniques that can be used to balance contradicting interests. Among these are different kinds of exemptions and approvals enabling to carry out activities in specially protected areas or in habitats of specially protected species and new programmes, plans and other instruments enabling the use of land in protected areas according to public and private needs while preserving objects of nature protection. The legislation aimed at regulation of different activities was also analyzed to find out if it is properly connected to protective regulation.

MAB Reserves belong to the new approaches to solve the conflict of interests in land use and nature protection. MAB programme more than other forms pays attention to the significance of sustainable development of protected areas. UNESCO biosphere reserves have already been introduced into Polish legal system, however, they lack independent legal base so that their current legal state reduces the opportunities to use these areas fully in a way required by the MAB Programme. MAB Programme is not a part of the Czech legislation, where the concept of wilderness has received increasing attention. Comparing to UNESCO biosphere reserves, the concept of wilderness is not focused on possibilities to combine conservation

and development, but on development of wilderness areas aimed at protection of relatively large, undeveloped natural areas with sustainable tourism. Rewilding represent an appeal to legislative and executive bodies in general, even though the Amendment to the Czech Nature and Landscape Protection Act of 2017 introduced "quiet territories" with limited entry which in fact copy the regime of existing 1st zones of large-scale specially protected areas. Similarly to Polish MAB Reserves, the Czech legislator adopted law which is insufficient for effective application, since "wilderness" is declared to be protected in national parks, but the timetable for implementation is missing. Regarding to national parks in Czechia, municipalities participate in nature protection and at the same time, they are involved in economic development. The problem of separate powers leading to the conflict of interests was dealt with to find out that it is necessary to search for a compromise solution. The 2017 Amentment to NLPA aims at assuring stability and sustainable development of municipalities in national parks. The system of national parks and other specially protected areas in Czechia is complemented by another form of site-related protection, such as "natural parks". The core objective of natural parks is to achieve protection of a landscape character. Even in this regard it was found out that nature protection authorities consistently have to deal with the problem of proportionality between protection of the landscape and protection of subjective rights of persons involved. Sometimes the clash of interests is so serious that it results in so called "hard cases", when the law conflicts with values protected by legal or moral norms. Many of these hard cases involve dispute between law and economic developmental interest, specialy in construction of infrastructure in protected areas. Hard cases with environmental background were explained on the example of Rospuda valley case and Vistula Spit cross-cut project in Poland which illustrates the need to adopt specific legislaton in order to enable legal realization of the project. Similarly, development and operation of wind power plants represent one of the most significant interference in the landscape character, endanger specially protected species and have a potential to influence human health. Interest in the production of energy from renewable sources conflicts with protection of nature. Even though effective protective regulation is in place in Czechia

which is encompassing land-use planning, environmental impact assessment and other administrative instruments, in decision-making processes, the interest in nature protection seems to be very often subordinate to interests in development and green energy production.

Besides development, there are other activities which have significant impact on favorable conditions of species and their habitats. In this monograph, the attention was given mainly to agriculture, tourism, mining activities, logging of woods and to problems related to invasive alien species. It was found out that increasing use of EU and national agri-environmental programs, codes of good farming practices, organic farming principles and financial support of management in disadvantaged specially protected areas had positive effect on biodiversity and conservation of species and habitats. The conflict of interests in nature protection and mining activities must be dealt with in permitting procedure. The purpose of resolving conflicts of interests is to eliminate the legal barriers to the execution of mining activities so that they can be carried out without any doubts in term of legal relations.[573] The effort to combine interests in nature protection with the interest of public in tourism is evident from the approach of nature protection authorities in application of legal regulation related to specially protected areas. The authors pointed at problems with timber logging and falling down the trees growing outside the forests. A non-compliance with the EU legislation was identified mainly in respect to logging in Slovak national parks. In all EU MS, the implementing legislation to Regulation 1443/2014 must be adopted, since only few provisions of the Regulation are directly applicable to individuals. In general, recently the legislation in all three countries went to substantial changes.

It can be concluded that legislation aimed at protection of nature was well established in all three Central European states. Deficiencies and obstacles to its effective application rest mainly in problems with proper implementation and enforcement of legislative rules which are conflicting to other interests. Practical implementation of the sustainable development principle

573 Judgement of the Supreme Administrative Court of 27 October 2004, No. 7 A 133/2002-33. Published in the Collection of Decisions of the Supreme Administrative Court, 2005, Vol. III, No. 9.

seems to be the most difficult task. Different ways and legal instruments aimed at achievement of a balance between economic development and nature protection were identified, still the assessment of proportionality is the matter of decision-making authorities. We regret to admit that increased pressure from investors to carry out development project in valuable landscape areas and the interests of the public itself in enjoying the most precious parts of the nature is reflected by the law. Thus in those countries with strict protective rules, the legislation is subject to changes enabling mostly speeding up permitting procedures required for realization of development projects and at the same time its interpretation and enforcement often leads to softening of rules directed to strict protection of the nature.

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SUSTAINABLE DEVELOPMENT AND CONFLICTS OF INTERESTS IN NATURE PROTECTION IN CZECHIA, POLAND AND SLOVAKIA

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