The EU Nature Restoration Law:

Avoiding legal pitfalls in further negotiations

SERE Legal Working Group[1]

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The SERE Legal Working Group analysed the amendments of the European Parliament on the Nature Restoration Law (NRL) proposal from the European Commission. We identified four ways in which many of these amendments undermine the NRL: (i) reducing ambition, (ii) inflating the margin of appreciation of the Member States, (iii) reversing the priorities of the proposal and (iv) slowing down the required transition to a sustainable society. As a result, the NRL becomes legally pointless, undermining the European and international obligations and commitments on restoration. The far-going flexibility and contradictions in the amendments undermine the level-playing field within the EU and undermine legal certainty. The amendments contradict existing legislation such as the Habitats Directive. They undermine the credibility of the European Union, as a frontrunner in environmental law. Using such a mechanisms in any kind of legislation would only lead to bad law-making.

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1. Introduction

The European Commission's proposal for an EU Nature Restoration Law (NRL) from 22 June 2022,[2] is a potentially groundbreaking law, aimed at tackling both the biodiversity and the climate crisis. A strong EU restoration law is indispensable for reaching the EU commitments under the EU Green Deal, the EU Biodiversity Strategy to 2030, the Kunming-Montreal Global Biodiversity Framework and the UN Decade on Ecosystem Restoration.

Overall, the Commission's proposal is scientifically justified and legally sound and will provide more legal certainty for EU Member States and stakeholders.[3]

After months of misinformation on the proposal,[4] and attempts from the European People's Party to delete the Commission's proposal, the plenary session of the European Parliament, on 12 July 2023, rejected the proposal to delete the NRL. However, where the amendments upheld in the General Approach of the Council[5] already meant a significant decrease in ambitions, the Parliament took things a step further. Many of the adopted amendments[6] not only go against the object and purpose of the proposal, but also of the EU's environmental policy as a whole. It turns the NRL mostly into an empty box, thereby defying science and good law-making. Some amendments have been made that can be considered an added value compared to the Commission's proposal, such as an reference to light pollution in consideration 44a.

This note addresses several ways in which the Parliament's amendments undermine the NRL and contradict existing EU legislation. This note is not a comprehensive article-by-article assessment of the European Parliament's amendments. Through examples it shows the mechanisms that are used to weaken the NRL, as well as the legal reasons why this is to be avoided in the ongoing and future negotiations on the NRL.

2. Four categories of pitfalls

The Parliament's amendments that are pitfalls for a sound restoration law can roughly be divided into four categories: amendments that (i) reduce ambition, (ii) inflate the margin of appreciation of the

[2] European Commission, Proposal for a Regulation of the European Parliament and of the Council on nature restoration, COM(2022) 304 final, 2022/0195 (COD), Brussels, 22 June 2022, available at https://environment.ec.europa.eu/publications/nature-restoration-law_en

[3] For a more thorough analysis, see: SERE Legal Working Group, Legal assessment of the Proposal for an EU Nature Restoration Law, April 2023; SERE Legal Working Group, The EU Nature Restoration Law: Providing legal certainty in tackling the biodiversity and climate crisis, May 2023; all documents available at: https://chapter.ser.org/europe/

[4] See: SERE Legal Working Group, EU Nature Restoration Law: myths and misconceptions debunked by the SER Legal Working Group, May 2023, available at: https://chapter.ser.org/europe/ ; K Decleer & A Cliquet, 'Science denial and disinformation threaten EU Nature Restoration Law (NRL)', Correspondence Nature, 2023, available at: https://www.nature.com/articles/d41586-023-02228-x

[5] Council, Proposal for a Regulation of the European Parliament and of the Council on nature restoration - General approach', 20 June 2023, available at: https://www.consilium.europa.eu/media/65128/st10867-en23.pdf

[6] European Parliament, Amendments adopted by the European Parliament on 12 July 2023 on the proposal for a regulation of the European Parliament and of the Council on nature restoration, COM(2022)0304 – C9-0208/2022 – 2022/0195(COD), available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0277_EN.pdf

Member States, (iii) reverse the priorities of the proposal and (iv) slow down the required transition to a sustainable society. This section will give one or more examples of each of these typologies, without being comprehensive.

(i) Downgrading: amendments that reduce ambition

ARTICLE 4, § 1 – RESTORATION OF TERRESTRIAL, COASTAL AND FRESHWATER ECOSYSTEMS	
Commission proposal (June 2022)	**Provision as amended by the EP (July 2023)**
Member States shall put in place the restoration measures that are necessary to improve to good condition areas of habitat types listed in Annex I which are not in good condition. Such measures shall be in place on at least 30% of the area of each group of habitat types listed in Annex I that are not in good condition, as quantified in the national restoration plan referred to in Article 12, by 2030, on at least 60% by 2040, and on at least 90% by 2050.	Member States shall **aim to** put in place the restoration measures in Natura 2000 sites that are necessary **to move towards reaching favourable conservation status** of habitat types listed in Annex I which are not in good condition. Such measures shall be **put in place on Natura 2000 network area of habitat types** listed in Annex I **that are not in good condition, as quantified in the national restoration plan** referred to in Article 12.

The European Parliament significantly reduces the target put forward by the Commission in the initial proposal. Indeed, the language used ('aim to', 'move towards') alters the nature of this provision. The Parliament also limits the scope of the law by only referring to Natura 2000 sites. Moreover, in order to be included in the scope of this provision, these Natura 2000 sites have to be quantified in the national restoration plans. Deadlines and quantitative targets are deleted.

The result of the amendment is the shift from an obligation of result to an obligation of means, merely trying to (slightly) enhance the conservation status of some Natura 2000 sites that are currently not in good condition, while such obligation already exists under the Habitats Directive. The Member States are not obliged to increase their efforts over time.

The added value of the initial provision[7] – an obligation of result to have restoration measures in place on an increasingly larger part of the habitat types listed in Annex I, which can be both Natura 2000 and non-Natura 2000 sites, that are not in good condition – has been rendered void. It is unclear how this provision, as amended, will positively impact the state of nature in Europe.

Another striking example of severely reduced ambition is weakening the non-deterioration clause of restored areas (Articles 4 & 5, § 6) and deleting the non-deterioration clause for Annex I & II habitat types under the Nature Restoration Law (Articles 4 & 5, § 7), while a non-deterioration provision already exists in the Habitats Directive.

ARTICLE 4, § 6 – RESTORATION OF TERRESTRIAL, COASTAL AND FRESHWATER ECOSYSTEMS	
Commission proposal (June 2022)	**Provision as amended by the EP (July 2023)**
Member States shall ensure that the areas that are subject to restoration measures in accordance with	Member States shall ***endeavour to*** ensure that the ***total national area in*** good condition ***and***

[7] SERE Legal Working Group, Legal assessment of the Proposal for an EU Nature Restoration Law, April 2023, 8-9.

paragraphs 1, 2 and 3 show a continuous improvement in the condition of the habitat types listed in Annex I until good condition is reached, and a continuous improvement of the quality of the habitats of the species referred to in paragraph 3, until the sufficient quality of those habitats is reached. Member States shall ensure that areas in which good condition has been reached, and in which the sufficient quality of the habitats of the species has been reached, do not deteriorate.	***the total amount of area with a sufficient*** quality of the habitats of the species referred to in ***paragraphs 1, 2 and*** 3 ***does not significantly decrease over time***.

ARTICLE 4, § 7 – RESTORATION OF TERRESTRIAL, COASTAL AND FRESHWATER ECOSYSTEMS	
Commission proposal (June 2022)	**Provision as amended by the EP (July 2023)**
Member States shall ensure that areas where the habitat types listed in Annex I occur do not deteriorate.	**deleted**

These non-deterioration obligations are necessary to make the law effective and efficient: it would be politically incoherent, economically nonsensical and socially irresponsible to invest time and money in nature restoration and allow deterioration afterwards. Non-deterioration of Annex I and II habitat types contributes to the achievement of the favourable conservation status of the species and habitats involved and prevents additional costly restoration measures in the future. The non-deterioration clauses are necessary for coherence of EU policies, which is an obligation under article 7 of the Treaty on the Functioning of the EU.

Another example of downgrading is the deleting of the restoration obligations of agricultural ecosystems (Article 9), which is extremely worrying as it not only undermines the general objectives of the NRL, but also specific objectives, such as healthy pollinator populations or reaching good conservation status of protected species of agricultural ecosystems. The deleting of the peatlands restoration targets undermines the EU's objectives on climate change. Compared to many other ecosystems, the rewetting of drained peatlands has a great cost-benefit value by storing huge amounts of carbon and thus mitigating climate change. Deleting the targets on peatlands is in clear contradiction to another amendment proposed by the Parliament in which it requires that Member States, in the preparation of their national restoration plans take into account the most cost-effective measures (proposed amendment to Article 11, § 1).

(ii) Discretion: inflating the margin of appreciation

ARTICLE 11 – PREPARATION OF NATIONAL RESTORATION PLANS	
Commission proposal (June 2022)	**Provision as amended by the EP (July 2023)**

Member states shall quantify the area that needs to be restored to reach the restoration targets […]. The quantification shall be based, amongst others, on the following information: (a) for each habitat type: (i) the total habitat area and a map of its current distribution; (ii) the habitat area not in good condition; (iii) the favourable reference area taking into account the documented losses over at least the last 70 years and the projected changes to environmental conditions due to climate change; (iv) the areas most suitable for the re-establishment of habitat types in view of ongoing and projected changes to environmental conditions due to climate change	Member states shall quantify the area that needs to be restored to reach the restoration targets […]. The quantification shall be based, amongst others, on the following information: (a) for each habitat type: (i) the total habitat area and a map of its current distribution; (ii) the habitat area not in good condition; (iii) the favourable reference area taking into account **records of historical distribution.** (iv) **[deleted]**

Each Member State is required to quantify the areas that need to be restored. The Commission's proposal put forward a couple of scientifically motivated elements that had to be taken into account. The Parliament brings down the effectiveness by introducing two major changes.

First, the 70 years reference period is changed to 'records of historical distribution'. 'Historical distribution' can be interpreted at the Member States' discretion and risks bringing about an absolute lack of consistency between the different Member States as to the applied reference period, as well as a lack of a science-based reference period. Furthermore, by using a more recent reference period, they can reduce ambition. Although regional differences can be justified in some cases, the Parliament's amendment needlessly expands the Member States' manoeuvring space. SERE Legal Working Group proposes to use '…documented losses of at least 70 years or any other science-based reference period',[8] which enables flexibility but is still science-based.

Secondly, by deleting the fourth consideration, the Parliament allows Member States to shift away their attention from the areas with the most restoration potential. As the Commission's proposal already acknowledged the impact of climate change, it is unclear why this provision had to be deleted. It perfectly aligns with the object and purpose of a regulation on nature restoration.

Another example of inflating the margin of appreciation can be found in the amendment of Article 15 on the revision of the national restoration plans through adding the words 'if necessary' for the revision of the national restoration plans.

(iii) Reversing priorities: pushing for bad sustainability

The objective of the NRL is the recovery of nature and achieving the climate mitigation and adaptation objectives. The national restoration plans that implement the restoration targets are science-based (Article 11, § 1). This is in line with existing EU nature legislation, such as the procedures for designating Natura 2000 sites which are also based on scientific grounds. Both the Nature Directives and the NRL however also take into account socio-economic concerns. Article 2, § 3 of the Habitats Directive

[8] See: SERE Legal Working Group, Legal assessment of the Proposal for an EU Nature Restoration Law, April 2023, 11.

mentions: “Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.” The Birds Directive states: “Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements…”. The Commission proposal for the NRL also provides a balance with socio-economic concerns, for instance in article 11, § 9: “Member States shall, when preparing the national restoration plans, aim at optimising the ecological, economic and social functions of ecosystems as well as their contribution to the sustainable development of the relevant regions and communities.”

It is however clear that the objective of nature restoration is the main purpose, other interests are secondary to this. This is in line with case law from the Court of Justice, in which it ruled “… although Article 2 of the Birds Directive calls on Member States to implement it while taking account of ecological, scientific and cultural requirements and economic and recreational requirements, it is clear that the conservation of birds is the principal objective of that directive.”[9]

The Parliament’s amendments however are reversing the priorities.

ARTICLE 11, § 11 – PREPARATION OF THE NATIONAL RESTORATION PLAN	
Commission proposal (June 2022)	**Provision as amended by the EP (July 2023)**
Member States shall ensure that the preparation of the restoration plan is open, inclusive and effective and that the public is given early and effective opportunities to participate in its elaboration. Consultations shall comply with the requirements set out in Articles 4 to 10 of Directive 2001/42/EC.	Member States shall ensure that the preparation of the restoration plan is open, **transparent,** inclusive and effective and that the public **especially landowners, land managers, maritime stakeholders, and other relevant actors, such as advice and extension services, in compliance with the principle of prior and informed consent, are** given early and effective opportunities to **participate in the preparation of the plan. Local and regional authorities, as well as relevant management authorities, shall be properly involved in the preparation of the plan.** Consultations shall comply with the requirements set out in Directive 2001/42/EC

A disproportionate attention in this article is given to owners and economic users. The prior and informed consent principle is used in international law in the context of indigenous communities, which risk degradation of their environment through economic activities. Here, the prior and informed consent is used as a way for economic actors to weaken restoration measures.

Another example can be found in the amendment in Article 11, § 2, bc: the Parliament allows Member States to base the quantification of the areas in need of restoration on conflicting socio-economic interests.

Such inclusions go entirely against the object and purpose of the NRL. By basing restoration efforts on their compatibility with socio-economic interests, the Parliament implicitly chooses economy over biodiversity: a clear reversal in priorities.

[9] CJEU, Case C-900/19, consideration 34.

(iv) Inertia: supporting slow transition

ARTICLE 18 – REPORTING	
Commission proposal (June 2022)	**Provision as amended by the EP (July 2023)**
§1. Member States shall electronically report to the Commission the area subject to restoration measures referred to in Articles 4 to 10 and the barriers referred to in Article 7 that have been removed, **on an annual basis starting from the date of entry into force of this Regulation**.	§1. Member States shall electronically report to the Commission the area subject to restoration measures referred to in Articles 4 to 10 and the barriers referred to in Article 7 that have been removed, **at least every three years. The first report shall be submitted in June 2028.**

Swift action is crucial.[10] Periodic review of restoration measures undertaken will enable Member States to keep track of the effectiveness of their efforts and quickly adjust policies where needed. The European Parliament altered the initial proposal in a way that completely undermines this mechanism. Instead of spurring the Member States to undertake swift and drastic action and start reporting on restoration measures in place from the very onset, the European Parliament encourages passivity: it gives Member States ample time to prepare their first report, which is only expected in June 2028.

Similar provisions that slow down – and thereby hamper – action can be found in Article 11, § 2 (preparation of the national restoration plans: "(ba) for the purpose of quantifying the area of each habitat type that needs to be restored to reach the restoration targets set out in Article 4(1), point (a), and Article 5(1), point (a), the habitat area not in good condition referred to in point (a)(ii) shall only include such areas for which the condition is known"); Article 15, § 3 (review of the national restoration plans: "On request by the Member State concerned and where duly justified, the Commission may extend that deadline with an additional six months"); new Article 22a (postponement of targets under this Regulation in the event of exceptional socioeconomic consequences) and Article 23 (entry into force: "It shall apply from the date where the Commission has provided robust and scientific data to the European Parliament and to the Council on the necessary conditions to guarantee long term food security, thereby respecting the need of arable land under conventional and ecological agriculture, the impact of nature restoration on food production, food availability and food prices. The Commission shall publish a notice in the Official Journal of the European Union indicating the date from which this Regulation applies").

3. Contradictions with existing legislation

The limitation of the territorial scope of the restoration measures, which Member States are required to undertake by virtue of Article 4 of the Proposal, to areas located in Natura 2000 sites stands at odds with Articles 6, § 1 and 2, § 2 of the EU Habitats Directive. The duty to implement restoration actions, set out by Article 6, § 1 of the EU Habitats Directive, is not territorially limited to sites located inside Natura 2000 sites. If needed, also restorative actions in areas nearby Natura 2000 sites can be required, for instance to address environmental pressures which can, regardless of their location outside the purported sites, hamper the achievement of the favourable conservation status inside Natura 2000 sites. A similar rationale also applies as to the territorial application of the non-deterioration duty, laid

[10] European Commission, Proposal for a Regulation of the European Parliament and of the Council on Nature Restoration, 22 June 2022, COM(2022) 304 final, Explanatory Memorandum, 1; Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services ('IPBES'), 'Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services', 2019, retrieved from https://zenodo.org/record/3553579#.YuD0j4SZM2w

down in Article 6, §2 of the EU Habitats Directive and has already been confirmed in the case-law of the CJEU (Spanish Brown Bears[11] and Dutch Nitrogen case[12]). Limiting the scope of restorative actions to the confines of Natura 2000 sites, as has been proposed by the amendments by the European Parliament, is a breach of the existing restoration mandates in the EU Habitats Directive.

The deletion of the provision on access to justice (Article 16 NRL) constitutes a clear breach of the recent developments towards more environmental democracy at EU level, as well as the recent case law developments. Under the terms of Article 9, §3 of the Aarhus Convention, access to justice in environmental matters should be the default position. A similar rationale applies within the context of EU nature protection law, as illustrated by the CJEU in the two Slovak Brown Bear-cases.[13] Deleting the provision on access to justice seems to negate the international commitments of the EU under the Aarhus Convention regarding access to justice in environmental matters.

4. Conclusion

The European Parliament amendments of the NRL reduce the law to an empty box, with barely added value. It furthermore contradicts existing legislation such as the Habitats Directive. The proposed amendments allow for so much flexibility and contradictory provisions, that the level-playing field is undermined as well as legal certainty. The question arises whether adopting the proposal as amended by the Parliament would bring the achievement of the global and EU biodiversity goals any nearer, or whether indeed it would make matters worse. The far-reaching weakening of the proposal by the European Parliament undermines the credibility of the European Union, as a frontrunner in environmental law. It is contrary to Article 191 of the Treaty on the Functioning of the EU, which imposes a high level of environmental protection. Using these weakening mechanisms leads to bad law-making. In sum, as demonstrated above, there are compelling reasons to return as much as possible to the previous version of the proposal for a NRL, as initially drafted by the Commission.

[11] CJEU, Case C-404/09.
[12] CJEU, Case C-293/17 and C-294/17.
[13] CJEU, Case C-240/09 and Case C-243/15.