

# PRZEGLĄD PRAWA ADMINISTRACYJNEGO

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## The Legal Issues of Appropriate Assessment Procedure for the Proposed Activities, Installations, Plans and Programmes for the Types of Activities That Have or Are Likely to Have an Adverse Impact on the Emerald Sites

*Problemy wdrażania przepisów prawa UE dotyczących ochrony obiektów  
w ramach Sieci Szmaragdowej (Sieci Natura 2000) na Ukrainie*

### 1.

The Ukraine–European Union Association Agreement is a European Union Association Agreement between the European Union (EU), Euratom, Ukraine and the EU’s 28 Member States<sup>1</sup> (hereinafter referred to as the Association Agree-

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<sup>1</sup> Association Agreement between the European Union and Ukraine dated 27 June 2014, <https://www.kmu.gov.ua/en/yevropejska-integraciya/ugoda-pro-asociacyu> [access: 2.11.2018].

ment) which stipulates that Ukraine shall approximate its legislation to that of the EU law requirements. Annex XXX to the Association Agreement, among EU legal acts that shall be implemented in Ukraine, lists the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora<sup>2</sup> (hereinafter referred to as Directive 92/43/EEC).

Development of legal acts aimed at Ukrainian legislation approximation of the EU law requirements set forth theoretical goals. The author tries to solve some theoretical problems related to Directive 92/43/EEC provisions implementation. This directive aimed at the natural habitats and the habitats of species protection. There are the notions of the natural habitat and the habitat of species in this directive. In Art. 1 of the Directive 92/43/EEC the natural habitat is defined as “(...) terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural” (paragraph “b”), the habitat of a species, under this directive, means “(...) an environment defined by specific abiotic and biotic factors, in which the species lives at any stage of its biological cycle” (paragraph “f”).

In Resolution No. 1 (1989) of the Standing Committee on the provisions relating to the conservation of habitats, adopted by the Standing Committee of 9 June 1989<sup>3</sup> the habitat of a species is defined as “(...) the abiotic and biotic factors of the environment, whether natural or modified, which are essential to the life and reproduction of members of that species (or population of that species) and which occur within the natural geographical range of the species (or population of that species)”.

The Emerald Network is defined in the literature as a “(...) set of the territories of nature protection that is of the special interests for preserving of the natural habitats listed in Resolution No. 4 and the habitats of the species of flora and fauna listed in Resolution No. 6 of the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention, 1979)”<sup>4</sup>. The Directive 92/43/EEC is directed to the Emerald Network and Emerald sites protection.

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<sup>2</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, Official Journal L 206, 22 July 1992, pp. 7–50.

<sup>3</sup> Resolution No. 1 (1989) of the standing committee on the provisions relating to the conservation of habitats. Adopted by the Standing Committee of 9 June 1989, [https://search.coe.int/bern-convention/Pages/result\\_details.aspx?ObjectId=0900001680746be2](https://search.coe.int/bern-convention/Pages/result_details.aspx?ObjectId=0900001680746be2) [access: 2.11.2018].

<sup>4</sup> V.O. Vasyliuk, *About the Necessity of Inclusion of Some Territories of Natural Reserve Fund of Donetsk Region to the Emerald Network* (V.O. Vasyliuk, H.O. Kolomytsev, Yu.O. Spinova), [https://www.academia.edu/31070003/ПРО\\_НЕОБХІДНІСТЬ\\_ВКЛЮЧЕННЯ\\_ДО\\_СМАРАГДОВОЇ\\_МЕРЕЖІ\\_ДЕЯКИХ\\_ТЕРИТОРІЙ\\_ПЗФ\\_ДОНЕЧЧИНИ>About\\_the\\_necessity\\_of\\_inclusion\\_some\\_NRF\\_areas\\_of\\_Donetsk\\_region\\_to\\_the\\_Emerald\\_Network](https://www.academia.edu/31070003/ПРО_НЕОБХІДНІСТЬ_ВКЛЮЧЕННЯ_ДО_СМАРАГДОВОЇ_МЕРЕЖІ_ДЕЯКИХ_ТЕРИТОРІЙ_ПЗФ_ДОНЕЧЧИНИ>About_the_necessity_of_inclusion_some_NRF_areas_of_Donetsk_region_to_the_Emerald_Network) [access: 2.11.2018].

## 2.

The legal issues of Emerald sites forming and protection were studied in the literature. The legal regulation of the Emerald sites creation was studied in the papers of O. Bevz<sup>5</sup> or M. Vashchyshyn<sup>6</sup>. M.I. Taranavska studied the legal issues of the Directive 92/43/EEC implementation to Ukrainian legislation and implementing of the habitat conception in Ukrainian legislation<sup>7</sup>. The legal issues of the Ukrainian legislation approximation to the Directive 92/43/EEC requirements are studied in the papers of V. Storozhuk<sup>8</sup>, V.I. Lozo<sup>9</sup>, H.V. Parchuk<sup>10</sup>. The public participation in the designing process of Emerald sites was studied by the authors of the book *The Public and Science Representatives' Participation in Designing the Emerald Network in Ukraine*<sup>11</sup>.

The appropriate assessment of the proposed activities, installations, plans, programmes and their impact on the Emerald sites (hereinafter referred to as the Appropriate Assessment) is not developed in the articles and books mentioned above.

The experts of the Resource & Analysis Centre "Society and Environment" developed the analytical document dedicated to the study of advantages and disadvantages of the Directive 92/43/EEC implementation<sup>12</sup>. The mere subject of analyt-

<sup>5</sup> O. Bevz, *Legal Regulation of the Emerald Network: National and Global Aspects*, "Journal of Vasyl Stefanyk Precarpathian National University" 2018, Vol. 5(2), pp. 91–98, <http://jpnu.pu.if.ua> [access: 2.11.2018]; *eadem*, *Ukrainian Environmental Legislation on Emerald Network Development Trends in the Context of Interstate Integration Processes*, Electronic Library of Belarusian State University, <http://elib.bsu.by/bitstream/123456789/207404/1/88-90.pdf> [access: 2.11.2018].

<sup>6</sup> M. Vashchyshyn, *Legal Aspects of Creation of the Emerald Network in Ukraine*, "Juridical Scientific and Electronic Journal" 2018, No. 3, pp. 115–119.

<sup>7</sup> M. Tarnavska, *Legal Regulation of Flora and Fauna Ukraine Through Adaptation National Legislation to EU Law*, "Vysnyk of National University «Lviv Politekhnik». Series: Legal Sciences: Collection of Scientific Works" 2016, No. 850, pp. 434–441.

<sup>8</sup> V. Storozhuk, *Ukrainian Forest Legislation Adaptation to EU law. Review*, "Enpi East FLEG II, [http://www.enpi-fleg.org/site/assets/files/2121/report\\_storozhuk\\_assessment\\_approximation\\_ukraines\\_forestry\\_legislation\\_to\\_eu.pdf](http://www.enpi-fleg.org/site/assets/files/2121/report_storozhuk_assessment_approximation_ukraines_forestry_legislation_to_eu.pdf) [access: 2.11.2018], pp. 30–32.

<sup>9</sup> V.I. Lozo, *Ecological Network as a Legal Format of Landscapes Protection Regulation*, "The Collection of Scientific Works of Kharkiv H.S. Skovoroda National University. Series: Law" 2014, No. 21, pp. 90–95.

<sup>10</sup> H.V. Parchuk, *Territories of National Reservoir Fund of Ukraine as an Element of Pan-European Ecological Network*, "Scientific Vysnyk of Ukrainian State Forest Engineering University" 2004, Vol. 14(8), pp. 46–51.

<sup>11</sup> *The Public and Science Representatives' Participation in Designing the Emerald Network in Ukraine*, K.V. Polianska, K.A. Borysenko, P. Pawlaczyk, O.V. Vasyliuk, O.Yu. Maruschak, D.V. Shyriayeva, A.A. Kuzemko, O.S. Oskyrko *et al.*, edited by A. Kuzemko, Kyiv 2017, p. 304.

<sup>12</sup> *Birds and Habitats Directives Appropriate Assessment: The Lessons for Ukraine. Analytical Paper. Resource & Analysis Centre "Society and Environment"*, 2018, p. 34.

ical document does not presuppose the study of the Appropriate Assessment and the issue of the compensation for the property rights on land parcels limitations.

D.V. Skrylnikov studied the issue of approximation of the Ukrainian legislation to the Directive 92/43/EEC requirements. In the course of this study, the author developed the Table of Concordance demonstrating the state of concordance of Ukrainian legislation to the Directive 92/43/EEC requirements<sup>13</sup>. This Table also contains the recommendations of which amendments should be done to approximate Ukrainian legislation to the Directive 92/43/EEC requirements. It constitutes the very useful source of information about the way of Ukrainian legislation approximation to the Directive 92/43/EEC requirements. It only tentatively describes the way of the Directive 92/43/EEC requirements implementation to Ukrainian law, and does not contain answers to the questions posed in this article.

### 3.

The Appropriate Assessment procedure is one of the key elements of the Emerald sites protection. Under this procedure, the proponent of the activity, installation, plan, programme that will have or are likely to have an adverse impact on the Emerald sites before starting the construction of the installation, or adopting a plan or programme, shall submit the draft of the plans or programmes or project of the proposed activity or installation to the empowered authority. This authority shall study this project or a draft impact assessment on the Emerald sites and if preservation of the Emerald sites needs additional measures to be taken, the empowered public authority shall oblige the proponent to implement such measures.

If public authority comes to conclusion that any measures are unable to prevent an adverse impact on the Emerald sites, in this case public authority shall have the right to prohibit the proposed activity, or construct the installation, or adopt plans or programmes.

The circumstance that shall be taken into consideration when developing the Appropriate Assessment procedure is the big burden on the business in Ukraine. By the economic freedom index, Ukraine ranks 150<sup>th</sup> out of 180 countries<sup>14</sup>. Having this in mind, it is necessary to take the way of developing the Appropriate Assessment, that leads to the less possible administrative burden on the business. The best way to fulfil this requirement is to use the existing permitting procedure

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<sup>13</sup> D.V. Skrylnikov, *Table of Concordance. Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora dated 21 November 2011*, Ministry of Ecology and Natural Resources of Ukraine (archive as of 2012).

<sup>14</sup> 2018 Economic Freedom Index, <https://www.heritage.org/index/ranking> [access: 2.11.2028].

for the Appropriate Assessment, making the amendments to them if it is necessary for the efficient Appropriate Assessment. The procedures that can fulfil the Appropriate Assessment task or can be improved to enable them to fulfil these tasks are: strategic environmental assessment (established by the Law of Ukraine “On Strategic Environmental Assessment” dated 23 March 2018, No. 2354-VIII<sup>15</sup>); environmental impact assessment procedure (established by the Law of Ukraine “On Environmental Impact Assessment” dated 23 May 2017, No. 2059-VIII<sup>16</sup>); construction permitting procedure (established by the Law of Ukraine “On Urban Development Regulation” dated 17 February 2011, No. 3038-VI<sup>17</sup>).

Paragraph 3 (second sentence) of Art. 6 of the Directive 92/43/EEC demands that “(...) the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned [Emerald sites – T.T.] (...)”. This provision allows to conclude that in case the installation or activity, plan, programme have an adverse impact on the Emerald sites, they may not be allowed or adopted.

The administrative decision-making procedure, environmental impact assessment procedure, and strategic environmental procedure prescribe the mere obligation of the empowered public authorities when taking decision to strike a fair balance between different, sometimes competing, interests.

Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms dated 20 March 1952<sup>18</sup> prescribes that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”. In the practice of the European Court of Human Rights (hereinafter referred to as ECHR), the following approach is established: the country-party to the convention has to strike a fair balance between the public interest and the owner of the land parcel interests. For instance, in paragraph 148 of the ECHR dated 22 May 2018 in case of *Zelenchuk and Tsytsyura v. Ukraine*<sup>19</sup>, the ECHR stated that “(...) the respondent State has overstepped its wide margin of appreciation in this area and has not struck a fair balance between the general

<sup>15</sup> Verkhovna Rada Journal 2018, No, 16, St.138.

<sup>16</sup> Verkhovna Rada Journal 2017, No. 29, St. 315.

<sup>17</sup> Verkhovna Rada Journal 2011, No. 34, St. 343.

<sup>18</sup> European Convention on Human Rights. Strasbourg: European Court of Human Rights Council of Europe, 2010, p. 33.

<sup>19</sup> Judgment of the European Court of Human Rights (fourth section) in the cases of *Zelenchuk and Tsytsyura v. Ukraine*, dated 22 May 2018, [https://hudoc.echr.coe.int/eng#{"fulltext":\["Tsytsyura"\],"documentcollectionid":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-183128"\]}](https://hudoc.echr.coe.int/eng#{) [access: 2.11.2018].

interest of the community and the property rights of the applicants”. On this basis, the ECHR concluded that “[t]here has accordingly been a violation of Art. 1 of Protocol No. 1”.

The obligation to strike a fair balance between different interests was established in the legal acts that regulate the administrative decision-making procedure. For instance, paragraphs 3 and 4 of Art. 2(2) of the Code of Administrative Court Trial Procedure (hereinafter referred to as CATP) dated 6 July 2005, No. 2747-IV<sup>20</sup> establish the obligation of administrative courts when considering the administrative case to take the decisions “reasonably, i.e. taking into consideration all circumstances essential for taking decision (make the action)” (paragraph 3) and “proportionately, in particular striking a fair balance between each of the adverse consequences for the rights, freedoms and interests of the person and the goals, which the decision (action) aimed to” (paragraph 8).

The above CATP procedural requirements mean substantial requirements to the authorised public authority (taking the administrative decisions) to take these decisions reasonably and proportionately. As it can be derived from the above-mentioned meaning of these requirements, they provide for only obligation to strike a fair balance between different interests. Paragraphs 3 and 8 of Art. 2(2) of CATP do not oblige to prioritize one interest over the others.

There are some legal acts in Ukraine aimed at taking into consideration different interests in decision-making process that is likely to have an adverse impact on the environment. One of these legal acts is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter referred to as Aarhus Convention)<sup>21</sup>. Paragraph 8 of Art. 6 of this Convention obliges the Party to this convention to ensure “(...) that in the decision due account is taken of the outcome of the public participation”.

In paragraph 101 of the Findings of the Aarhus Convention Compliance Committee, in case of compliance of the legislation of Spain to the Aarhus Convention provisions, this Committee drew attention that “(...) a system where, as a routine, comments of the public were disregarded or not accepted on their merits, without any explanation, would not comply with the Convention”<sup>22</sup>. On the other hand, Aarhus Convention Compliance Committee stated that “(...) the requirement in

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<sup>20</sup> Verkhovna Rada Journal 2005, No. 35–36, No. 37, St. 446.

<sup>21</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998, <https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> [access: 2.11.2018].

<sup>22</sup> Findings and Recommendations with regard to Communication ACCC/C/2008/24 concerning compliance by Spain (ECE/MP.PP/C.1/2009/8/Add.1), dated 8 February 2011, [https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-26/ece\\_mp.pp\\_c.1\\_2009\\_8\\_add.1\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-26/ece_mp.pp_c.1_2009_8_add.1_e.pdf) [access: 17.09.2017].

Art. 6, paragraph 8, of the Convention that public authorities take due account of the outcome of public participation does not amount to the right of the public to veto the decision, and that this provision should not be read as requiring that the final say about the fate and the design of the project rests with the local community living near the project, or that their acceptance is always needed” (paragraph 98 of Findings and Recommendations with regard to Communication ACCC/C/2008/24 concerning compliance by Spain (ECE/MP.PP/C.1/2009/8/Add.1), dated 8 February 2011)<sup>23</sup>.

Thus, the provision of Art. 6(8) of Aarhus Convention means the right of the public concerned to submit the comments, which must be followed by the public authority or it must be proved that it is impossible to follow them without unjustified consequences.

The procedure that is able to fulfil the functions of Appropriate Assessment is the environmental impact assessment (hereinafter referred to as EIA) procedure. The Law of Ukraine “On Environmental Impact Assessment” establishing the EIA procedure was adopted in 2017. The authorised public authority taking the final decision has only to take into account the public concerned comments. Under the Law of Ukraine “On Environmental Impact Assessment”, the final decision is composed of two parts. One of these parts is the EIA conclusion, and the second is the decision on the proposed activity implementation (hereinafter referred to as Decision). Having carried out the public participation, the empowered public authority (oblast or Kyiv city state administration or Ministry of Ecology and Natural Resources of Ukraine – hereinafter referred to as MoE) issues the EIA conclusion. Under paragraph 3 of Art. 9 of the Law of Ukraine “On Environmental Impact Assessment”, “[w]hen developing the environmental impact assessment conclusion, the empowered territorial public authority [oblast or Kyiv city state administration – T.T.], in cases mentioned in paragraphs 3 and 4 of Art. 5 of this Law, authorised central public authority [MoE – T.T.] considers and takes into consideration the environmental impact assessment report and the public participation report”. Therefore, empowered public authority has only to take into consideration the information that is contained in the public participation report.

The proponent submits the EIA report, public participation report and EIA conclusion to the empowered public authority to obtain the Decision (paragraph 1 of Art. 11 of the Law of Ukraine “On Environmental Impact Assessment”). Under paragraph 2 of Art. 11 of the Law of Ukraine “On Environmental Impact Assessment”, “executive authority and the authority of self-government units taking the decision on the proposed activity implementation, shall take into consideration the environmental impact assessment conclusions”.

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<sup>23</sup> *Ibidem*.

Thus, when the empowered public authority issue the EIA conclusion, it shall only take into consideration the information of EIA report and public participation report, and when the such authority takes a Decision, the public authority shall take into account the information of EIA conclusion. The obligation of the empowered public authority issuing the EIA conclusion or taking a Decision only to take into consideration the information means that the empowered public authority has only to strike a fair balance between different interests. If the balance leads to destruction of some part of the Emerald sites, the empowered public authority has no reason to refuse the decision causing such consequences provided that the decision strikes a fair balance between different competing interests.

The other procedure that may fulfil the Appropriate Assessment functions is the SEA procedure. This procedure is established by the Law of Ukraine “On Strategic Environmental Assessment”. Under paragraph 5 of Art. 13 of this Law, “[e]ach comment or proposal that have come during the period of time designated by this article, shall be considered by the proponent [public authority empowered to adopt plans or programmes – T.T.] .The proponent takes into account obtained comments and proposals or reasonably refuses them”. This paragraph provision allows to conclude that the public authority empowered to adopt the plan or programme has only to take into consideration obtained comments or proposals (submitted by the public as well as by the others public authorities) and it has the right to reasonably refuse these comments or proposals. In other words, in the same way as in case of EIA final decision, in the decision adopting a plan or a programme, the empowered public authority has only to strike a fair balance between different interests.

The idea enshrined in the text of the draft Law of Ukraine “On Emerald Sites”<sup>24</sup> is the following. Taking into consideration the comments or proposals of public and public authorities and striking a fair balance in the decision approving the proposed activity, construction of installation or decision on adopting the plan or the programme may mean the destruction of the Emeralds sites. At the same time, paragraph 3 (second sentence) of Art. 6 of the Directive 92/43/EEC requires that the activity may be allowed and a plan or a programme may be adopted only provided that “(...) it will not adversely affect the integrity of the site concerned [Emerald sites – T.T.]”. Keeping this in mind, it was suggested to oblige the empowered public authority to refuse to take a decision allowing the activity or adopting the plan or the programme which have or are likely to have an essentially adverse impact on the Emerald sites, even if this refuse causes damage to the balance between different interests. In other words, the drafters

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<sup>24</sup> The draft Law of Ukraine “On Emerald Sites”, Ministry of Ecology and Natural Resources of Ukraine (archive as of 2018).



tried to safeguard the interest in preserving Emerald sites. The drafters tried to achieve that by amending the Law of Ukraine “On Environmental Impact Assessment” and the Law of Ukraine “On Strategic Environmental Assessment”. Under subparagraph 1 of paragraph 3 of Art. 15 of the draft Law of Ukraine “On Emerald Sites”, paragraph 2 of Art. 9 of the Law of Ukraine “On Environmental Impact Assessment” was supplemented by the following paragraphs: “The environmental impact assessment conclusion shall prohibit the proposed activity on the Emerald sites, if this activity causes the essential damage of the natural habitat and to the flora and fauna species listed in the annexes I, II, and III of the Law of Ukraine «On Emerald Sites» and it is impossible to preserve the Emerald sites by establishing conditions to the proposed activity.

In case mentioned in subparagraphs 2 and 3 of paragraph 2 of this article, authorised territorial authority – and in case defined by paragraph 3 and 4 of Article 5 of this Law – authorised central public authority – may issue the positive environmental impact assessment conclusion, only provided that there are no alternatives and this activity shall be allowed for imperative reasons of overriding public interest”.

Keeping in mind that the EIA conclusion is binding (paragraph 2 (first sentence) of Art. 9 of the Law of Ukraine “On Environmental Impact Assessment”), the provision mentioned above makes it impossible, as a general rule, to carry out the proposed activity that has or is likely to have an adverse impact on the Emerald sites, even if the negative EIA conclusion does not strike a fair balance between different interests. The only exception from this rule is overriding public interests.

The similar provision was suggested to be introduced to the SEA procedure by amending the Law of Ukraine “On Strategic Environmental Assessment”.

In my opinion, this provision cannot safeguard the Emerald site protection “at any cost”, even by taking the decision on not striking fair balance between different interests. On the other hand, this provision causes only collisions with the other legal norms.

First of all, in case the draft Law of Ukraine “On Emerald Sites” is adopted, the provision of paragraph 2 of Art. 9 of the Law of Ukraine “On Environmental Impact Assessment”, in the version of the draft Law of Ukraine “On Emerald Sites”, contradicts subparagraphs 3 and 8 of Art. 2(2) of CATP, because paragraph 2 of Art. 9 of the Law of Ukraine “On Environmental Impact Assessment” requires to take a disproportional decision, if it is necessary for Emerald sites protection, and paragraph 8 of Art. 2(2) of CATP does not contain any exception from the obligation to take the administrative decisions proportionately (i.e. the decision shall strike a fair balance between different interests). To solve this collision, the empowered public authority should put itself into the mind of the legislator and take a decision according to the will of an abstract wise contemporary legislator,

forming this will in the way it better addresses social interests<sup>25</sup>. This logical method of collision solving will lead to the obligation of the public authority when taking the decision to strike a fair balance between different contradicting interests, because there are no reasons to prioritize one interest over the others.

This interpretation is also based on the legal provisions. One of these provisions is Art. 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms being interpreted in a view of ECHR practice, that has established and follows the rule under which the state shall ensure a fair balance between the owner's interest and the public interest (obviously, the interest to have the Emerald sites preserved is among the public interest).

As it was demonstrated before, the draft Law of Ukraine "On Emerald Sites" allows the empowered public authority to take a decision allowing proposed activity damaging Emerald sites, provided that there are imperative reasons of overriding public interest. The same provision is contained in paragraph 4 of Art. 6 of the Directive 92/43/EEC, under which "[i]f, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or a project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected".

The provisions of paragraph 4 of Art. 6 of the Directive 92/43/EEC and paragraph 2 of Art. 9 of the Law of Ukraine "On Environmental Impact Assessment", in the version of the draft Law of Ukraine "On Emerald Sites", are not the same when compared to paragraphs 3 and 8 of Art. 2(2) of CATP, because unlikely to Art. 2 of CATP, Art. 6 of the Directive 92/43/EEC and Art. 9 of the Law of Ukraine "On Environmental Impact Assessment", in the version of the draft Law of Ukraine "On Emerald Sites", authorise public authority to allow proposed activity only provided for imperative reasons of overriding public interest. Art. 2 of CATP obliges public authority to strike a fair balance between all interests, including private ones. In addition, paragraph 8 of Art. 2(2) of CATP is first of all aimed at protection the interests of private person. This paragraph prohibits the public authority to reach the public goals by imposing disproportionate or unreasonably burdensome consequences to the person, to whom the administrative decision is addressed. Therefore, the provisions of paragraph 8 of Art. 2(2) of CATP on the one hand, and paragraph 4 of Art. 6 of the Directive 92/43/EEC, and paragraph 2 of Art. 9 of the Law of Ukraine "On Environmental Impact Assessment", in the version of the draft Law of Ukraine "On Emerald Sites", contradict each other and

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<sup>25</sup> Free interpretation of the study by A.M. Miroshnychenko, *The Collisions in the Land Relations Legal Regulation in Ukraine*, Kyiv 2009, p. 218.

in case the draft Law of Ukraine “On Emerald Sites” is adopted, it will contradict paragraph 8 of Art. 2(2) of CATP.

The provisions of paragraph 4 of Art. 6 of the Directive 92/43/EEC and paragraph 2 of Art. 9 of the Law of Ukraine “On Environmental Impact Assessment”, in the version of the draft Law of Ukraine “On Emerald Sites”, prove that the legislator tried to establish rules for the consideration of different interests when the public authority takes the decision. It is necessary, therefore, to analyse these attempts.

To my mind, the public authority should be obliged to take the reasonable and proportional decision and to strike a fair balance between different interests. Apart from these obligations, the legislator should not limit the discrete power of the authorised public authority like it did in paragraph 4 of Art. 6 of the Directive 92/43/EEC and paragraph 2 of Art. 9 of the Law of Ukraine “On Environmental Impact Assessment”, in the version of the draft Law of Ukraine “On Emerald Sites”. The more limits on the discretion power of the decision-maker, the less variants of the decision it has to satisfy all competing interests. Thus, limiting the public authority’s discretionary power, exceeding the obligation to take the reasonable, proportional decision and to strike a fair balance between different interest decrease the effectiveness of the discretionary power.

The third procedure potentially able to fulfil the Appropriate Assessment procedure is the construction permitting procedure. This procedure is established by Art. 37 of the Law of Ukraine “On Urban Development Regulation”. It is necessary to use this procedure to fulfil the Appropriate Assessment procedure functions because not all installations, types of activities, that are likely to have an adverse impact on the Emerald sites are covered by the EIA procedure. It was suggested to amend construction permitting procedure and enable it to fulfil the Appropriate Assessment function. In this case, the Appropriate Assessment procedure covers the installations that cannot be constructed without the construction permit.

Unfortunately, this way of drafting was refused. The reason for this was the MoE viewpoint under which the installations, types of activities, plans, programmes that are not covered by the EIA procedure and SEA procedure, should be covered by the procedure for which the MoE or the local public authority of environmental protection are responsible. According to the MoE, if the Appropriate Assessment procedure is carried out by other public authority, the procedure will not fulfil its functions sufficiently<sup>26</sup>. Keeping this in mind, it was decided to develop a new procedure of Appropriate Assessment for the installation, types of activity that are not covered by the EIA procedure. The regional public authority

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<sup>26</sup> M.O. Shymkus, private message, 2018.

will carry out this procedure. This idea was implemented in Art. 9 of the Law of Ukraine “On Emerald Sites”.

The decisions, by which the empowered public authority permits some activity, usually, fulfil a few function (for instance, integrated permit, construction permit, etc.). For example, the main function of the construction permit is to assure the construction safety, to prevent destruction of the building and premises and damage to the property and human health. Simultaneously, this permit is also the tool for the environmental protection, and for ensuring energy efficiency, etc.

The case mentioned above allows one to conclude that if the ministry of other public authority is strong enough to develop and introduce their “own” procedures, those ministries and other public authorities will make it harder or even impossible to carry out the deregulation process.

#### 4.

To sum up, it is necessary to draw readers’ attention to the main conclusions of this article.

Firstly, the draft Law of Ukraine “On Emerald Sites” provisions, obliging the public authority to prohibit the proposed activity or obliging them to refrain from plans and programmes adoption, if they have or are likely to have adverse impact on the Emerald sites, regardless of consequences for the private interests, constitutes a poor way of drafting and will lead to collisions with the other acts of Ukrainian legislation.

Secondly, the public authority should be obliged to take the reasonable and proportional decision and to strike a fair balance between different interests. Apart from these obligations the legislator should not limit the discrete power of the authorised public authority like it did in paragraph 4 of Art. 6 of the Directive 92/43/EEC and paragraph 2 of Art. 9 of the Law of Ukraine “On Environmental Impact Assessment”, in the version of the draft Law of Ukraine “On Emerald Sites”. The more limits on the discretion power of the decision-maker, the less variants of the decision it has to satisfy all competing interests. Thus, limiting the public authority’s discretionary power, acceding the obligation to take reasonable, proportional decision and to strike a fair balance between different interests decrease the effectiveness of the discretionary power.

Thirdly, if the ministry or the other public authority is strong enough to develop and introduce their “own” procedures, those ministries and other public authorities will make it harder or even impossible to carry out the deregulation process.

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**Abstract:** The article is the result of drafting work aimed at Ukrainian legislation approximation to EU law experience in the field of the protection of flora and fauna. The article deals with the issues arisen before the authors of the draft Law of Ukraine "On Emerald Sites", concerning: the kind of procedure for assessing the permissibility for the types of activities, installations, plans and programmes that are likely to have an adverse impact on the Emerald sites (sites that are necessary for the conservation of

natural habitats and of wild fauna and flora); the functions of appropriate assessment procedure for the proposed activities, installations, plans and programmes that are likely to have an adverse impact on the Emerald Sites, etc. The author analyses the ideas enshrined in the draft Law of Ukraine “On Emerald Sites” and suggests his own proposals on this subject. This study may be useful for facilitating the legislative process in the field of decision-making process, property rights protection and Emerald sites preserving.

**Keywords:** decision-making procedure; the property right on land parcel; property right limitations; Emerald Network

**Streszczenie:** W artykule opisano działania legislacyjne mające na celu zbliżenie ustawodawstwa ukraińskiego do wymogów prawa UE w zakresie ochrony zwierząt, w tym m.in. kwestie poruszone przez autorów projektu ukraińskiej ustawy o obiektach Sieci Szmaragdowej, a w szczególności: jaka ma być procedura oceny dopuszczalności działań i obiektów w zakresie ochrony obszarów i obiektów Sieci Szmaragdowej jako niezbędnych warunków dla ochrony zwierząt; jakie są funkcje procedury oceny dopuszczalności działań, urządzeń, planów i programów, które mogą mieć albo już mają negatywny wpływ na obszary i obiekty Sieci Szmaragdowej itd. Autor opisał założenia projektu ukraińskiej ustawy o obiektach Sieci Szmaragdowej i przedstawił własny punkt widzenia odnośnie do tej kwestii. Wnioski mogą być przydatne dla usprawnienia procesu legislacyjnego i ustawodawstwa mającego na celu ochronę prawa własności gruntów oraz obszarów i obiektów Sieci Szmaragdowej.

**Słowa kluczowe:** procedura wydawania decyzji administracyjnej; prawo własności gruntów; ograniczenie prawa własności; obiekty Sieci Szmaragdowej