

Non-Regression Clauses in Times of Ecological Restoration Law: Article 6(2) of the EU Habitats Directive as an unusual ally to restore Natura 2000?

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1. Introduction

In the European Union, as in other parts of the world,¹ biodiversity is suffering a major decline, both as to quality and as to numbers. The 2015 State of Nature in the EU report, which represents the most comprehensive European overview of the conservation status and trends of the habitats and species covered by the European Union's Habitats² and Birds Directives³ (EU Nature Directives), revealed that nearly 77% of the protected habitats and 60% of protected species are currently in an unfavourable conservation status.⁴ Even though it has been generally accepted that preservation of the remaining biodiversity is key to halt further biodiversity loss,⁵ the concept of ecological restoration has recently risen to the fore in international and regional biodiversity policies as a newly coined tool aimed at intentionally recovering degraded ecosystems.⁶ The term was defined by the Society for Ecological Restoration in its 2004 Primer as the practice of 'assisting the recovery of an ecosystem that has been degraded, damaged or restored'.⁷ In spite of the lack of a fixed and well-established definition in the existing regulatory framework,⁸ it is generally accepted that ecological restoration entails both *passive* measures, such as restrictions aimed at removing current disturbances or capping existing human pressures (e.g. banning grazing in certain areas in order to allow grassland to recover, or eradicating invasive species) and *active* measures, aimed at deliberately

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1 A 2016 analysis of change in the global terrestrial human footprint between 1993 and 2009 indicated that 75% of the planet's surface is suffering from measurable human pressure. See: O. Venter et al., 'Sixteen years of change in the global terrestrial human footprint and implications for biodiversity conservation', (2016) *Nature Communications*, <http://doi.org/10.1038/ncomms12558>.

2 Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7 (further referred to as 'Habitats Directive').

3 Council Directive 79/409/EEC on the conservation of wild birds, OJ L 103, 25.04.1979, p. 1 (further referred to as 'Birds Directive'). The initial Birds Directive was codified in European Parliament and Council Directive 2009/147/EC on the conservation of wild birds, OJ L 20, 26.1.2010, p. 7.

4 European Environment Agency, *State of nature in the EU. Results from reporting under the nature directives 2007–2012*, EEA Technical Report, No. 2/2015.

5 See for instance: C.L. Gray et al., 'Local biodiversity is higher inside than outside terrestrial protected areas worldwide', (2016) *Nature Communications*, <http://doi.org/10.1038/ncomms12306>.

6 R.J. Hobbs & J.A. Harris, 'Restoration ecology: repairing the Earth's ecosystem in the new millennium', (2001) 9 *Restoration Ecology*, no. 2, pp. 239-246.

7 Society for Ecological Restoration International Science & Policy Working Group, *The SER International Primer on Ecological Restoration* (<<http://www.ser.org>> & Tucson, Society for Ecological Restoration International 2004).

8 D. Jørgensen, 'Ecological restoration in the Convention on Biological Diversity targets', (2013) *Biodiversity and Conservation*, pp. 2977-2982; J.S. Kotiaho et al., *Framework for assessing and reversing ecosystem degradation. Report of the Finnish restoration prioritization working group on the options and costs of meeting the Aichi biodiversity target of restoring at least 15 per cent of degraded ecosystems in Finland* (2016), pp. 16-18. See also: A. Telesetsky et al., *Ecological Restoration in International Environmental Law* (2017), pp. 22-26.

shifting an impacted ecosystem towards improved health and integrity (e.g. reintroducing large carnivores, re-establishing natural hydrology, or recreating native plant communities).⁹

It is true that static preservation efforts have proven effective to stem biodiversity loss, at least when strictly enforced in the field.¹⁰ However, instead of exclusively focusing on the maintenance of a rigid status quo, as is the case with conservation, ecological restoration seeks to return a degraded ecosystem to its so-called historic trajectory.¹¹ It is to be seen as complementing¹² the hands-off approach that often prevailed in the context of earlier nature management policies in protected areas and, in situations of severe impairments or where unaltered habitats are lacking, did not suffice to reverse the trend of ongoing biodiversity loss.¹³ The unparalleled rates of species extinction have led to a trend to include explicit restoration targets in global and regional biodiversity targets.¹⁴ In the framework of the 1992 Convention on Biological Diversity (CBD),¹⁵ the 2010 Aichi Targets set the goal of restoring at least 15% of degraded ecosystems by 2020.¹⁶ Also, the European Commission has embraced ecological restoration in the explicit policy targets that are included in its Biodiversity Strategy to 2020.¹⁷ In line with the EU's international obligations, the European Commission adopted an overarching 15% restoration target, along with its commitment to halt the deterioration in the status of all species and habitats covered by EU nature legislation and to achieve a significant and measurable improvement in their conservation status by 2020.¹⁸

In the available literature it is commonly understood that legal instruments play an important role in inducing ecological restoration in the field.¹⁹ Even so, research has shown that many nature conservation laws and regulations were written mainly from a perspective of and implemented with a focus on conservation rather than restoration and adaptation.²⁰ They often lack explicit standards to be applied in the context of ecological restoration actions and leave too little room for a more interventionist approach to nature management. In light of the degraded status of many habitats and species in the world, however, many of these so-called 'old school' nature conservation laws are increasingly being re-interpreted as catalysts for ambitious restoration and/or recovery programmes. The EU Nature Directives arguably provide one of the most striking examples of this recent shift towards restoration-based policy. Even though they are sometimes framed as legal instruments that are predominantly preoccupied with burdensome restrictions on economic development and 'deathbed conservation',²¹ a closer analysis of the wording of both directives reveals that the conservation efforts of Member States should, especially in situations where protected patches of habitat are currently in a severely degraded status, establish robust restoration programmes

9 See for instance: K.A. Keenleyside et al., *Ecological Restoration for Protected Areas, Principles, Guidelines and Best Practices* (2012), pp. 9-13.

10 See on the effectiveness of the EU Nature Directives: G. Chapron et al., 'Recovery of Large Carnivores in Europe's Modern Human-Dominated Landscapes', (2014) 346 *Science*, <http://doi.org/10.1126/science.1257553>, pp. 1517-1519.

11 Often a distinction is made between 'restoration', which aims at the recovery of an ecosystem to its original natural state, on the one hand, and 'rehabilitation', which refers to activities that may fall short of returning the ecosystem to its pre-degradation state. See more extensively: S.K. Allison, 'What do we mean when we talk about ecological restoration? An inquiry into values', (2004) 22 *Ecological Restoration*, no. 4, pp. 281-286.

12 H. Schoukens, 'Ecological restoration as the 21st century environmental paradigm: Is EU law capable of saving our declining nature?', in J. De Bruyne et al. (eds.), *Policy within and through Law* (2015), p. 66.

13 Jordan III and Lubick actively describe how the National Park Service in the United States was not concerned about ecocentric restoration, or even ecologically based management, until well into the 1970s. See: W.R. Jordan III & G.M. Lubick, *Making Nature Whole. A History of Ecological Restoration* (2011), pp. 97-101.

14 A. Cliquet et al., 'Restoring nature in the EU: The only way is up?', in C.H. Born et al. (eds.), *The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?* (2015), pp. 265-284; Jørgensen, *supra* note 8.

15 Convention on Biological Diversity (CBD), Rio de Janeiro, 5 June 1992.

16 CBD, 2010, COP 10 Decision X/2, Strategic Plan for Biodiversity 2011-2020.

17 European Commission, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Our life insurance, our natural capital: an EU biodiversity strategy to 2020*, COM(2011) 244 final; the Biodiversity Strategy was endorsed by the Council of the European Union in its Decision of 21 June 2011 (EU Biodiversity Strategy to 2020 – Council conclusions, 11978/11).

18 See more extensively: Cliquet et al., *supra* note 14, pp. 268-271.

19 See amongst others: J. Aronson et al., 'What Role Should Government Regulation Play in Ecological Restoration? Ongoing Debate in São Paulo, Brazil', (2011) 19 *Restoration Ecology*, pp. 690-695.

20 A. Cliquet et al., 'Adaptation to Climate Change. Legal Challenges for Protected Areas', (2009) 5 *Utrecht Law Review*, no. 1, <http://doi.org/10.18352/ulr.100>, pp. 158-175.

21 See for instance: F. Kistenkas, 'Rethinking European Nature Conservation Legislation: Towards Sustainable Development', (2013) 10 *Journal for European and Environmental Planning Law*, no. 1, p. 83.

aimed at the recovery of the national habitats and the populations of species of wild fauna and flora to a favourable conservation status.²²

The EU Nature Directives are renowned for having set up an ecological network of protected areas, dubbed ‘Natura 2000’, aimed at the sustainable conservation of the EU’s most endangered habitats and species. Yet, while the EU protection rules linked to Natura 2000 are notorious for the restrictions laid down for unsustainable new developments likely to damage the protected sites, they also provide strong incentives for ecological restoration. For instance, Article 6(1) of the Habitats Directive compels the EU Member States to implement a certain number of restoration actions for Natura 2000 sites with a view to achieving the favourable conservation status for the habitats and species concerned,²³ whereas Article 6(4) of the Habitats Directive urges project developers to offset impairments to Natura 2000 sites in the context of economic development.²⁴ Most interestingly, though, Article 6(2) of the Habitats Directive, which lays down a general obligation to take appropriate protective steps to avoid the deterioration of natural habitats and the disturbance of species within those protected sites, has recently come to the fore as a crucial tool to achieve the EU restoration and conservation targets.²⁵

The position of Article 6(2) of the Habitats Directive as a non-regression or standstill clause in the shift towards a more recovery-based approach to nature conservation is not much discussed. On the surface, combining non-deterioration and restoration seems to create an oxymoron. Still, in spite of its explicit focus on maintaining the status quo, the latest case law developments before the Court of Justice of the EU (CJEU) effectively underline that the protection duty enshrined in Article 6(2) of the Habitats Directive is an indispensable tool for achieving the EU’s ambitious restoration goals in the years to come, especially given the many implementation deficits that have occurred in the past decades. As is demonstrated below, the focus of the said provision is not only on freezing in perpetuity a particular protected site but also on improving the health and integrity of ecosystems in the Natura 2000 Network. After having outlined the relevant policy context regarding ecological restoration within the EU and the specific role Article 6(2) of the Habitats Directive plays in the overarching protection regime that is applicable to Natura 2000 sites, this article addresses the following research questions:

1. What is the material scope of Article 6(2) of the Habitats Directive and to what extent does it allow competent authorities to oversee and tackle ongoing degradation caused by autonomous and ongoing activities (e.g. agriculture, fisheries, ...) and already permitted plans and/or projects in the context of Natura 2000?
2. What baseline or reference point should be used in order to establish deterioration and are so-called ‘interim losses’ taken into consideration?
3. Can both passive and active restoration measures be required in order to comply with Article 6(2) of the Habitats Directive and halt further decline?
4. Does Article 6(2) of the Habitats Directive contain a ‘best-efforts clause’ or does it include a strict obligation of result which can be used to force authorities to restore protected sites that have been subject to insufficient protection during the previous years?

A selection of relevant rulings of the CJEU (previously the European Court of Justice (ECJ)), which is principally tasked with interpreting EU law and ensuring its equal application across all EU Member States, is given a prominent place in this analysis. The opinions of the Advocate General are authoritative as well and are therefore also taken into account where relevant.

22 See more extensively: J. Verschuuren, ‘Climate Change: Rethinking Restoration in the European Union’s Birds and Habitats Directive’, (2010) 28 *Ecological Restoration*, no. 4, pp. 431-439.

23 See more extensively: European Commission, *Establishing conservation measures for Natura 2000 sites* (2014).

24 See more extensively: D. McGillivray, ‘Compensating Biodiversity Loss: The EU Commission’s Approach to Compensation under Article 6 of the Habitats Directive’, (2012) 24 *Journal of Environmental Law*, no. 3, pp. 417-450.

25 See for a general analysis: A. Cliquet, ‘About blanket bogs, brown bears and oak forests: case law of the European Court of Justice on Article 6, §2 of the Habitats Directive’, in C.H. Born & F. Jongen (eds.), *d’Urbanisme et d’Environnement: Liber Amicorum Francis Haumont* (2015), pp. 531-544; H. Schoukens, ‘Ongoing Activities and Natura 2000: Biodiversity Protection vs Legitimate Expectations?’, (2014) 11 *Journal for European and Environmental & Planning Law*, no. 1, pp. 1-30.

2. The wider policy context: EU restoration targets – bridging the gap between theory and reality?

2.1. Different targets for ecological restoration

In line with the Aichi Biodiversity Targets, the European Commission integrated ecological restoration as a progressive policy target in the EU Biodiversity Strategy to 2020.²⁶ In general, the strategy is aimed at halting and reversing biodiversity loss in and outside the EU. As is well known, Target 2 is the most explicit on restoration. It stipulates that ‘by 2020, ecosystems and their services are maintained and enhanced by establishing green infrastructure and restoring at least 15% of degraded ecosystems’, thereby incorporating the target set at the international level, at the Biodiversity Convention in 2010.²⁷ However, the overarching restoration target is inextricably linked with the more specific target aimed at halting and, ultimately, reversing the further deterioration of EU protected habitats and species. This goal will prove crucial in light of the subsequent analysis. More in particular, Target 1 urges Member States to halt the deterioration of the status of all species and habitats covered by EU nature legislation and to achieve a significant and measurable improvement in their status. The two targets are entwined and, to a certain extent, mutually dependent. Evidently, Target-1 measures will contribute to the achievement of the overarching 15% restoration target. Yet the focus on restoration measures in the wider environment, beyond the EU’s protected areas, will evidently be important for maintaining or restoring the Natura 2000 Network and connectivity measures.²⁸

2.2. Lack of precise definitions and a well-established baseline

Even though the setting of explicit biodiversity targets at EU level is to be applauded in itself, the excessive focus on the ambitious 15% restoration target has been criticised as impractical by some in recent literature.²⁹ In addition, the absence of clear-cut definitions of key concepts, such as ‘ecological restoration’ and ‘degradation’, can further compound the effective implementation of the ambitious restoration targets.³⁰ Some authors have argued that there is a clear need for more concrete data on biodiversity, ecosystem services and restoration, if restoration as a tool is to be successful.³¹

The EU Biodiversity Strategy in itself lacks a well-defined *baseline* scenario or reference point against which progress is to be measured. Even so, it is accepted that the progress of the ecological restoration actions should be measured against the 2010 EU Biodiversity Baseline report.³² Furthermore, efforts have been put into mapping the pressure on ecosystems and assessing the current condition of ecosystems, for instance in the context of the so-called European Environment Agency’s Mapping and Assessment of Ecosystem and their Services (MAES) initiative.³³

In the Report *Priorities for the Restoration of Ecosystem and their Services in the EU* (hereafter: 2013 Report) which was commissioned by the European Commission to assist Member States in the development of prioritisation frameworks for restoration of ecosystems, ecological restoration is primarily seen as a process and not necessarily as a final destination. A so-called *four-level model for ecosystem*

26 European Commission, supra note 17.

27 EU Biodiversity Strategy to 2020 – Council conclusions, 11978/11, 5.

28 Cliquet et al., supra note 14, p. 272

29 J.S. Kotiaho, ‘Target for ecosystem repair is impractical’, (2015) 519 *Nature*, <http://doi.org/10.1038/519033a>, p. 33.

30 Jørgensen, supra note 8. See more recently: D. Jørgensen, ‘Ecological restoration as objective, target, and tool in international biodiversity policy’, (2016) 20 *Ecology and Society*, no. 4, p. 43.

31 B.N. Egoh et al., ‘Exploring restoration options for habitats, species and ecosystem services in the European Union’, (2014) 51 *Journal of Applied Ecology*, pp. 899-908.

32 See amongst others: Kotiaho et al., supra note 8, p. 27. Kotiaho, Ten Brink and Harris rightly criticised the use of arbitrarily chosen baselines, such as 2010, for not fully reflecting the extent of land degradation or recovery. Instead, they propose to use an ecosystem’s natural state, which has no human-caused loss of biodiversity or of ecosystem functions, as a benchmark. This could serve as a more objective reference state in order to measure recovery efforts across countries that are in different stages of economic development. See: J.S. Kotiaho et al., ‘Land use: A global baseline for ecosystem recovery’, (2016) 532 *Nature*, <http://doi.org/doi:10.1038/532037c>, p. 37.

33 This is a collaboration between the European Commission, the EEA and the Member States, which developed an analytical framework for assessment based on the DPSIR framework (Drivers, Pressures, State, Impact and Responses). See most recently: European Environment Agency, *EEA Report No 3/2016 Mapping and assessing the condition of Europe’s ecosystems: progress and challenges* (2016).

restoration is derived from these principles.³⁴ This model describes the continuum of ecosystem condition from poor (e.g. urban areas) to excellent (e.g. wilderness areas and Natura 2000 sites in a favourable conservation status) in four different levels. Any significant improvement that brings an area to a better state or condition should be regarded as a contribution to the 15% restoration target. This approach, which allows Member States to gradually proceed towards their restoration targets, seems to leave more room for pragmatism. It acknowledges that the actions taken to achieve Target 1 of the strategy concerning the full implementation of the Birds and Habitats Directive can be counted as contributions to the more generic 15% target. On a more general level, the strategy presented by the 2013 Report enables Member States to engage in restoration activities and count them as part of the 15% without having to aim for full restoration within 15 years.³⁵ Interestingly, the 2013 Report assumes the whole EU territory to be included in the scope of the 15% restoration target. This is based on the principle that no location should be regarded as non-restorable, except for protected areas which already have a favourable conservation status.³⁶ Moreover, it was suggested that the 15% restoration target should be achieved both in the marine and in the terrestrial environment. For clarity's sake, the 2013 Report proposes to apply the 15% target to each Member State instead of applying it to bio-geographical regions of the ecosystems.³⁷

2.3. Criticism and alternative approaches

In its recent communication to the EU Member States the European Commission did not hesitate to highlight the relevance of the conclusions of the 2013 Report.³⁸ Although describing ecological restoration as a process rather than a purpose appears to be sensible in view of the limited success of ecological restoration efforts so far,³⁹ the 2013 Report has also sparked some criticism.⁴⁰ Some authors point out that the model fails to take into account the degree of ecosystem degradation or improvement and therefore does not allow an assessment of the success of achieving 15% net improvement or any other quantitative target.⁴¹ In recent years, several alternative prioritization approaches towards the achievement of the EU's 15% restoration target have emerged in the available ecological literature. Egoh et al., among others, have proposed that when a restoration target is set at 10% for habitat and species with an inadequate or most threatened conservation status and at 2% for all ecosystem services, about 18% of EU ecosystems should be restored to meet the overarching restoration targets.⁴² Such an approach would give the conservation and restoration of the Natura 2000 Network – which is further addressed below – a strong position on the agenda of future nature restoration policies. Yet this analysis has not remained uncontested either. For instance, Kotiaho et al. consider the latter approach, which focuses on habitats with an unfavourable conservation status, to be flawed because, among other things, it fails to acknowledge that environmental degradation has two components, i.e. the *extent* of the area that has become degraded or restored and the *magnitude* of the degradation, or its counterpart improvement at any location. It is argued that a strategy which fails to take into account both qualitative and quantitative factors risks focusing restoration efforts on areas where the ecological improvement of restoration is the smallest.⁴³ Accepting that restoration policies have only limited financial resources at their disposal, one should focus restoration more on environments where there is a great likelihood for success with low to moderate costs.⁴⁴ Also, criteria are to be used which

34 J. Lammerant et al., *Implementation of 2020 EU Biodiversity Strategy: Priorities for restoration of ecosystems and their services in the EU. Report to the European Commission*, ARCADIS, in cooperation with ECNC and Efec (2013), <<http://ec.europa.eu/environment/nature/biodiversity/comm2006/pdf/2020/RPF.pdf>> (accessed 10 February 2017), p. 16.

35 *Ibid.*, p. 18.

36 *Ibid.*, p. 21.

37 *Ibid.*, p. 19.

38 See for instance: European Commission, *Note to the Nature Directors*, Env B02 PM/oe ARES(2014), 23 April 2014.

39 M. Curran et al., 'Is There Any Empirical Support for Biodiversity Offset Policy?', (2014) 24 *Ecological Applications*, pp. 617-632.

40 See extensively: Kotiaho et al., *supra* note 8, pp. 22-24. On a more general level, Tittensor et al. have argued that there is a consistent lack of previous indicators to measure progress towards the 15% target put forward by the CBD. See: D.P. Tittensor, 'A mid-term analysis of progress toward international biodiversity targets', (2014) 346 *Science*, <http://doi.org/10.1126/science.1257484>, pp. 241-244.

41 *Ibid.*

42 Egoh et al., *supra* note 31.

43 *Ibid.*

44 J.S. Kotiaho & A. Moilanen, Conceptual and operational perspective on ecosystem restoration options in the European Union and elsewhere, (2014) 52 *Journal of Applied Ecology*, pp. 816-819.

avoid that restoration targets are linked to the operational reality in the field.⁴⁵ Likewise, one needs to take into account the exact scope of the degradation in the first place. This implies that in order to achieve a global 15% restoration target, partial restoration is to be considered at sites covering more than 15% of the total landscape area and, additionally, potential further degradation, which has become apparent in recent years, needs to be taken into account.⁴⁶

3. Article 6(2) of the Habitats Directive framed in the wider context of conservation duties for Natura 2000 sites: a simple theory?

This article now shifts its focus from the wider policy context regarding ecological restoration, which leaves much room for interpretation as to the concrete implementation of the restoration rationale, to the non-regression clauses put forward by the Habitats Directive in the context of area protection. Article 6(2) of the Habitats Directive includes the primary obligation for Member States to ‘take appropriate steps to avoid (...) the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the sites have been designated’. The provision was described by the CJEU itself as ‘a provision which makes it possible to satisfy the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and established a general obligation of protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the directive’s objectives’.⁴⁷ This non-regression obligation is firmly rooted in the prevention principle. Since the specific policy context regarding ecological restoration is distinctively patchy and inconsistent, it is not surprising that the specific role of Article 6(2) of the Habitats Directive in the implementation of this policy shift is often misunderstood.

In terms of territorial ambit, Article 6(2) of the Habitats Directive is explicitly linked to Natura 2000, a network of natural or semi-natural sites in the European Union that have significant value in terms of heritage, owing to the exceptional flora and fauna that they contain. As is well known, this network of protected areas was first created in 1992, as laid down in the Habitats Directive, and comprises *Special Protection Areas (SPAs)*,⁴⁸ including the most suitable territories for these species under the Birds Directive, and *Special Areas of Conservation (SACs)*, including the core areas of natural habitat types listed in Annex I and habitats of the species listed in Annex II of the Habitats Directive. The Natura 2000 Network covers approximately 18% of the land area and 6% of the sea area of the EU, which indicates that its contribution to achieving the above-mentioned restoration objectives may be considerable.

In order to better grasp the precise scope of the protection duties enshrined in Article 6(2) of the Habitats Directive, it is to be understood in the wider context of Article 6 of the Habitats Directive. As is well known, this provision contains three distinct conservation duties that are to be considered in the context of Natura 2000 sites and aim at establishing sustainable management in light of the applicable environmental requirements and recovery potential.⁴⁹

Article 6(1) of the Habitats Directive, which is the counterpart of Article 4(1), (2) and (3) of the Birds Directive, obliges Member States to take proactive conservation measures for SACs, which can take at least the form of ‘appropriate statutory, administrative or contractual measures’ and, ‘if need be’, the form of ‘appropriate management plans’.⁵⁰ The other three paragraphs of Article 6 of the Habitats Directive serve a different purpose since they are more concerned with establishing a so-called reactive protection regime.⁵¹

45 Ibid.

46 Kotiaho et al., supra note 8, p. 24.

47 Case C-226/08, *Stadt Papenburg v Bundesrepublik Deutschland*, [2010] ECR I-131, para. 49.

48 Before the entry into force of the Habitats Directive, a similar non-deterioration obligation applied to SPAs by virtue of the first sentence of Art. 4(4) of the Birds Directive.

49 See Schoukens, supra note 25, pp. 7-8.

50 See more extensively in this respect: A. Garcia Ureta & I. Laznako, ‘Instruments for active site management under Natura 2000: Balancing between stakeholders and nature conservation’, in Born et al. (eds.), supra note 14, pp. 71-92.

51 See R. Frins & H. Schoukens, ‘Balancing Wind Energy and Nature Protection: From Policy Conflicts Towards Genuine Sustainable Development’, in L. Squitani et al. (eds.), *Sustainable Energy United in Diversity – Challenges and Approaches in Energy Transition in the European Union* (2014), pp. 84-115.

3.1. Article 6(2) vs Article 6(1): going beyond the *status quo* versus avoiding ongoing loss?

The European Commission itself has clarified the distinction between Article 6(1) and 6(2) of the Habitats Directive in its Guidance document on Article 6. In particular, the Commission stated that '(t)he avoidance and protection measures that are to be implemented according to Article 6(2) of the Habitats Directive go beyond *simple* management measures necessary to ensure conservation'.⁵² It would be wrong to infer from these guidelines that the implications of the non-regression duties enshrined in Article 6(2) are by nature more intrusive than those of the conservation duties defined in Article 6(1). Surely, the distinction between the two provisions is not always that clear-cut. For instance, implementing conservation measures pursuant to Article 6(1) of the Habitats Directive might in some instances encompass the issuance of outright *protective* measures,⁵³ as is principally required by Article 6(2), and vice versa.

However, Article 6(1) of the Habitats Directive equally urges Member States to consider the establishment of restoration actions at Natura 2000 sites that currently have an unfavourable conservation status due to environmental pressures related to activities and projects carried out and completed *before* the site was designated as a Natura 2000 site. This is where another crucial distinction in terms of restoration duties between the two provisions comes to the surface. In contrast to Article 6(2), which allegedly exclusively covers situations of *ongoing* degradation, Article 6(1) of the Habitats Directive also seems to cover situations where *past* degradation that relates to activities carried out and completed before a site was protected continues to compromise the achievement of the site-specific conservation objectives. It is not hard to imagine how activities or projects that were permitted and completed a long time before the areas were included in the Natura 2000 Network, such as unsound forest management, drainage activities and fragmentation that helped to degrade an area throughout the 1970s, can constitute an obstacle for the achievement of the favourable conservation status.⁵⁴ Tackling such prevailing cases of *past* degradation in order to foster restoration may, at least in some instances, require measures that go further than simply maintaining a status quo, which limits its focus to halting the *ongoing* degradation at Natura 2000 sites. Member States might, for instance, consider the re-creation of previously lost wetlands, mud flats and tidal marshes in the context of estuarine habitats. This is far-reaching in itself, especially when compared to other EU environmental directives, such as the Environmental Liability Directive (Directive 2004/35/EC),⁵⁵ which explicitly excludes environmental damage that was caused by or linked to emissions, events or incidents that took place before 30 April 2007 (i.e. the date of its entry into force).⁵⁶

Admittedly, while in theory the distinction between Article 6(1) and (2) is clear, it will sometimes be hard to distinguish situations of *ongoing* and of *past* degradation, especially since ongoing degradation may also have been caused by activities that were completed prior to the designation of a Natura 2000 site. For now, it can be maintained that Article 6(2) of the Habitats Directive is to be used primarily as a tool to solve the first category of cases, while Article 6(1) of the Habitats Directive will be the primary path to tackle the latter scenario. However, it is useful to keep in mind that the focus of Article 6(1) appears to be the gradual realization of the conservation objectives, whereas Article 6(2) primarily aims to avoid further degradation. In the latter context the conservation objectives also play a role, but in a different manner. Contrary to the appraisal of the European Commission, it might therefore be submitted that Article 6(1) may also require more intrusive protection or restoration actions, whereas the standstill premise on which Article 6(2) is based may, at least in some instances, be more easily achieved through the issuance of containment measures.

52 European Commission, *Managing Natura 2000 Sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC* (2000), p. 25 (emphasis added).

53 Such as for instance avoiding disturbance of a species during the breeding season. See for instance: European Commission, *Natura 2000 and Forests, Part I-II* (2015), p. 48.

54 H. Schoukens, 'Atmospheric Nitrogen Deposition and the Habitats Directive: Tinkering with the Law in the Face of the Precautionary Principle?', (2015) *Nordic Environmental Law Journal*, no. 2, pp. 29-31.

55 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30.4.2004, p. 56 (further referred to as 'Environmental Liability Directive').

56 Art. 17, first indent of the Environmental Liability Directive.

3.2. Article 6(2) vs Article 6(3)-(4): tackling future versus ongoing degradation?

To a certain extent, the distinction between the overarching protection duty enshrined in Article 6(2) of the Habitats Directive and the specific assessment rules laid down by Article 6(3) and (4) of the Habitats Directive is more straightforward. Article 6(2) of the Habitats Directive includes a general duty to avoid *ongoing* degradation and leaves the Member States with the task to consider which specific regulatory actions should be taken. Therefore no specific procedural obligations nor specific restoration duties may be derived from it. Conversely, the conservation and assessment duties under Article 6(3) and (4) of the Habitats Directive are inextricably linked to permitting procedures for *new* developments likely to jeopardize the achievement of the conservation objectives of a specific Natura 2000 site.

This means that also in this context there appears to be a clear dichotomy. The standstill obligation enshrined in Article 6(2) of the Habitats Directive principally focuses on *ongoing* degradation, while the procedural duties of Article 6(3) and (4) of the Habitats Directive relate to *future* degradation linked to new development plans. In the context of the latter, the ECJ has held in the *Waddenzee* case that the mere likelihood of 'significant effects' is sufficient to compel a permitting authority to deny a permit for an intended activity pursuant to Article 6(3).⁵⁷ By virtue of Article 6(4) of the Habitats Directive, however, development can still go ahead in spite of a negative assessment, provided that there is no alternative solution, concluding that it is necessary for imperative reasons of overriding public interest and that all compensatory measures necessary to ensure the overall coherence of the Natura 2000 Network are taken.⁵⁸ Whenever the derogation clause is applied, comprehensive restoration measures can be used in order to ensure that the overall coherence of the Natura 2000 Network is guaranteed.⁵⁹

By contrast, Article 6(2) of the Habitats Directive does not lay out specific procedural obligations to be applied in the context of decision-making procedure. Likewise, in the context of Article 6(2) of the Habitats Directive no reference can be found as regards reasons to justify further deterioration of natural habitats or significant disturbance of protected species. Nor is there any mention of the necessity to consider active restoration measures.

As indicated by the European Commission in its Guidance document on Article 6 of the Habitats Directive, the scope of Article 6(2) of the Habitats Directive is larger than that of Article 6(3) and (4) of the Habitats Directive.⁶⁰ What distinguishes Article 6(3) from Article 6(2) is its major focus on concrete cases of *future* degradation or *additional* net losses for Natura 2000. And yet it would be a mistake to limit the relevance of Article 6(2) to *ongoing* forms of degradation and that of Article 6(3) and (4) to *future* or *additional* losses. These two provisions are not mutually exclusive and at least partly overlap. The landmark decision of the ECJ in the *Waddenzee* case provides a good illustration in this regard. After having ascertained that the ongoing cockle fishing activities, which were at issue here, fell within the scope of the notion of 'project' within the meaning of Article 6(3) of the Habitats Directive,⁶¹ the ECJ upheld that '(t)he fact that the activity has been carried on periodically for several years on the site concerned and that a licence has to be obtained for it every year, each new issuance of which requires an assessment both of the possibility of carrying on that activity and of the site where it may be carried on, does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive'.⁶² This aptly refutes the often submitted assertion that *ongoing* degradation cannot be tackled by means of the specific assessment rules included in Article 6(3) of the Habitats Directive.

At the same time it would be wrong to assume that Article 6(3) of the Habitats Directive amounts to a *permanent* review obligation for ongoing activities. In its case law in relation to the Natura 2000 protection

57 Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee*, [2004] ECR I-7405, para. 59.

58 See more extensively: R. Clutton & I. Tafur, 'Are Imperative Reasons Imperiling the Habitats Directive? An Assessment of Article 6(4) and the IROPI Exception', in G. Jones QC (ed.), *The Habitats Directive – A Developer's Obstacle Course* (2010), p. 167.

59 See also: Case C-521/12, *Briels*, ECLI:EU:C:2014:330, para. 38. For more guidance, see: European Commission, *Guidance on Article 6(4) of the 'Habitats Directive' 92/43/EEC. Clarification of the Concepts of: Alternative Solutions, Imperative Reasons of Overriding Public Interest, Compensatory measures, Overall Coherence, Opinion of the Commission* (2012).

60 European Commission, *supra* note 52, p. 25.

61 *Waddenzee*, *supra* note 57, para. 23-27.

62 *Ibid.*, para. 28.

regime, the CJEU has steadfastly reasserted that ongoing projects that had been authorized *before* the designation of a site *or before* the entry into force of the Habitats Directive, even when they entail physical interventions, fall *outside* the scope of Article 6(3) of the Habitats Directive.⁶³ In other words, Member States are not required to mitigate or restore the significant damage related to those activities pursuant to Article 6(3) and (4) of the Habitats Directive. For instance, in its 2010 ruling in the *Stadt Papenburg* case, the CJEU acknowledged that, if it could be established that the alleged dredging merely constituted *unchanged* maintenance activities that had been authorized before the entry into force of the Habitats Directive, Article 6(3) of the Habitats Directive would not apply.⁶⁴ In its subsequent case law, the CJEU steadfastly confirmed this viewpoint, yet decided to use the date of inclusion of a site on the list of sites of community interest (SCIs) as the major cut-off point.⁶⁵ Interestingly, the ECJ held that the authorization of a plan or project in accordance with Article 6(3) of the Habitats Directive necessarily assumes that the substantive requirements of Article 6(2) have also been fulfilled, entailing that there is no risk of deterioration or significant disturbance.⁶⁶

4. The unexpected possibilities of Article 6(2) of the Habitats Directive for ecological restoration: practical lessons to be learned from recent case law developments

The literal wording of Article 6(2) of the Habitats Directive does not refer to restoration actions for degraded nature in the context of Natura 2000. Nor does it contain any explicit reference to recovery, which allegedly seems to downplay its relevance in the context of the EU's restoration targets, especially when measured against provisions such as Article 6(1) and 6(4) of the Habitats Directive, which contain more direct links in this respect. However, in light of the recent case law developments before the CJEU, it has become overly clear that Article 6(2) of the Habitats Directive has become an indispensable tool for achieving the EU's restoration targets, especially within the specific context of the Natura 2000 Network. Given the ongoing biodiversity loss caused by previous non-compliance with the conservation duties during the past decades, as was also recently highlighted by the outcome of the REFIT Fitness Check of the EU Nature Directives,⁶⁷ the existence of an enforceable non-regression clause is instrumental not only in halting the cycle of ongoing biodiversity loss but also in accommodating a more progressive recovery rationale towards the EU's most valuable and endangered habitats and species.

4.1. The surprisingly *wide* material scope of Article 6(2) of the Habitats Directive: tackling *all* sources of ongoing degradation?

It is obvious that achieving 15% restoration across the whole of the territory of the EU will require a robust and comprehensive regulatory framework able to encompass *all* potential degrading activities.⁶⁸ Therefore, situations of incremental or creeping environmental degradation, resulting from diffuse pollution, also have to be addressed by nature conservation laws, especially in the context of vulnerable natural sites, such as the Natura 2000 Network. Shifting environmental baselines might indirectly lead public authorities to justify further biodiversity losses and further compromise future restoration options.⁶⁹ This is where Article 6(2) of the Habitats Directive steps in. However, in order to fully understand the incentive presented in Article 6(2) of the Habitats Directive, a thorough understanding of the limits of the material scope of the avoidance and offsetting obligations under Article 6(3) and (4) of the Habitats Directive, as indicated by the recent case law of the CJEU, is instrumental. This case law is highly relevant to the concrete implementation of the management options for Natura 2000 sites.

63 Case C-90/10, *Commission v Spain*, [2011] ECR I-134, para. 124-125.

64 See: *Stadt Papenburg*, supra note 47, para. 47. See more extensively: Schoukens, supra note 25, pp. 21-26.

65 Case C-404/09, *Commission v Spain*, [2011] ECR I-11853, para. 124-125.

66 *Waddenzee*, supra note 57, para. 36.

67 See: European Commission, *Commission Staff Working Document – Fitness Check of the EU Nature Legislation (Birds and Habitats Directive)*, SWD(2016) 4725 final, available at: <http://ec.europa.eu/environment/nature/legislation/fitness_check/index_en.htm> (accessed 10 February 2017).

68 See for instance: Kotiaho et al., supra note 8, p. 23.

69 See also: Case C- 258/11, *Sweetman*, ECLI:EU:C:2013:220, Opinion of AG Sharpston, para. 67.

Pursuant to a line of interpretation in case law of the ECJ/CJEU, which was initiated in 2009, the mere renewal of an existing permit to operate an ongoing installation cannot, in the absence of any works or interventions involving alterations to the physical aspects of the site, be classified as a 'project' that falls within the scope of the rules on Environmental Impact Assessment (EIA), as laid down in the EIA Directive (Directive 2011/92/EU).⁷⁰ This equally implies that the renewal of permits for ongoing activities that do not require alterations of the physical aspects of a Natura 2000 site, such as the continued use of existing motorways or permits for existing cattle farms, does not depend on the implementation of mitigation measures pursuant to Article 6(3) of the Habitats Directive.⁷¹ Moreover, as can be inferred from other case law developments, whenever lawful in view of the existing permits, even *ongoing* operations that require physical interventions and therefore qualify as 'projects', such as dredging, continuing bottom trawling or mining operations, are exempted from Article 6(3) and (4) of the Habitats Directive.⁷² And, whereas the preventative approach set out by Article 6(3) of the Habitats Directive remains applicable to *new* small-scale interventions that still qualify as projects, other case law before the CJEU has illustrated that many Member States, including the United Kingdom,⁷³ Germany,⁷⁴ France⁷⁵ and Belgium,⁷⁶ have failed to deliver in this respect.⁷⁷ Even though the CJEU in its case law has steadfastly shut the door to such defective practices, many Member States remain reluctant to close all loopholes in their legislation in this respect.⁷⁸

The rationale underpinning the above-mentioned case law in relation to Article 6(3) of the Habitats Directive is closely related to the concept of legal certainty. It avoids the retrospective application of the mitigation duties put forward by these assessment rules. As referred to above, the Environmental Liability Directive, which also covers certain scenarios of damage to Natura 2000 sites,⁷⁹ also exempts environmental damage caused by or resulting from emissions, events or incidents that took place before its entry into force.⁸⁰ Yet if the latter approach were to consequentially prevail in the context of a more generic instrument of nature conservation law, such as the Habitats Directive, it may prevent competent authorities from putting an end to persisting degradation in Natura 2000 sites.

4.1.1. Article 6(2) and activities that do not require a prior permit or authorization: addressing degraded baselines?

As is demonstrated below, however, damaging activities that for the above-presented reasons fall outside the scope of Article 6(3) of the Habitats Directive, are still encompassed in the non-regression obligation contained in Article 6(2) of the Habitats Directive. Case law developments demonstrate that Article 6(2) of the Habitats Directive serves as an important fall-back clause for certain categories of damage or degradation that do not necessarily qualify as plans and projects under Article 6(3) of the Habitats Directive but still are prone to lead to further deterioration. Evidently, degrading baselines render the achievement of ambitious recovery targets, such as the ones included in the EU Biodiversity Strategy to 2020, even less realistic and practical.

The 2010 decision of the CJEU in the *Commission v France* case provides an interesting illustration of the great potential that Article 6(2) of the Habitats Directive possesses in this respect.⁸¹ In the context of the infringement proceedings the CJEU was asked to assess whether France could legally assert in its national

70 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, p. 1 (further referred to as 'EIA Directive'). See for example: Case C-275/09, *Brussels Hoofdstedelijk Gewest*, [2011] ECR I-01753, para. 24. See also more recently: Case C-121/11, *Pro-Braine ASBL*, ECLI:EU:C:2012:225.

71 *Waddenzee*, supra note 57, para. 23-25.

72 *Commission v Spain*, supra note 65, para. 122-123.

73 Case C-6/04, *Commission v UK*, [2005] ECR-09017, para. 41-50.

74 Case C-98/03, *Commission v Germany*, [2006] ECR I-00053, para. 39-45.

75 Case C-241/08, *Commission v France*, [2010] ECR I-01697, para. 62.

76 Case C-538/09, *Commission v Belgium*, [2011] ECR I-04687, para. 55-65.

77 See with regard to the EIA Directive Case C392/96, *Commission v Ireland*, [1999] ECR I5901, para. 66.

78 See for instance with respect to the screening rules in the context of EIA Directive: European Commission, *Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions*, COM(2009) 378 final.

79 Art. 2(1) of the Environmental Liability Directive. See more extensively: V. Fogleman, 'The threshold for liability for ecological damage in the EU: Mixing environmental and conservation law', in Born et al. (eds.), supra note 14, pp. 181-241.

80 Art. 17, first indent of the Environmental Liability Directive.

81 *Commission v France*, supra note 75, para. 34-39.

nature protection legislation that certain activities, such as aquaculture, hunting and fishing, do not cause disturbance to Natura 2000 sites and can therefore be exempted from the application of the applicable conservation duties. Rather than opting for a moderate approach, the CJEU held that the general assumption that such potentially disturbing activities would not give rise to further degradation, when not backed up by sound ecological evidence, is incompatible with Article 6(2) of the Habitats Directive. Ultimately, the CJEU concluded that France could not systematically guarantee that the hunting and fishing activities at issue would not cause degradation, as is meant by Article 6(2) of the Habitats Directive.⁸²

The outcome of these proceedings appears legalistic at first sight, especially since it may give rise to the promulgation of additional regulations in the context of ongoing measures that are traditionally left outside the scope of specific permitting schemes. Yet at the same time it underscores that Article 6(2) of the Habitats Directive is to be interpreted as a *catch-all* clause, also covering situations of diffuse or incremental degradation which cannot be tackled through classic assessment rules linked to permit procedures. This viewpoint had already been implicitly asserted by the ECJ's 2002 ruling in the *Commission v Ireland* case, where the EU judges ruled that the Irish failure to avoid the negative effects linked to overgrazing on heath and peatland used as habitat by the red grouse and part of a Natura 2000 site amounted to a violation of its obligations under Article 6(2) of the Habitats Directive.⁸³ Along the same lines, the ECJ ruled against France for having authorized drainage and reclaiming activities in *Marrais Poitevin*, a French protected site that was characterized by the presence of valuable wetlands.⁸⁴ It is therefore clear that the CJEU has always been adamant to demonstrate that Article 6(2) of the Habitats Directive also covers forms of deterioration and/or disturbance that are caused by so-called autonomous activities, which are not always made subject to a prior authorization in the applicable national or regional law. This indirectly underscores the wide material scope of the non-regression clause, which, in my view, turns it into an important and, in some instances, indispensable precursor of more robust recovery-based nature conservation policies.

Obviously, the designation of a site does not necessarily require the competent authorities to bring to an immediate end all types of ongoing degradation or damage, nor does it require the setting up of an all-encompassing permit scheme in this respect. Even so, one might deduce from the latest judicial decisions that, at a very minimum, the applicable regulations need to enable competent authorities to actively intervene and, wherever necessary, implement adaptations or restrictions on public or private activities that are needed in order to avoid further deterioration. To underline the strict provisions of Article 6(2) even further, the ECJ emphasized that merely voluntary measures, such as agri-environmental schemes, do not suffice as protection measures if not supplemented by more robust and binding conservation measures.⁸⁵ If necessary in order to maintain or restore the conservation status of the natural habitats and/or species for which the site was designated, such types of damaging activities should be banned.⁸⁶ To use the exact words of Advocate General Kokott in the *Spanish brown bear* case (*Commission v Spain*), Article 6(2) of the Habitats Directive 'includes the duty to prohibit harmful acts by private individuals or at least to bring such acts to an end as quickly as possible'.⁸⁷ As underpinned by the ECJ's 2007 ruling on the Irish Natura 2000 implementing rules, national or regional Natura 2000 regulations necessarily need to allow the competent authorities to prevent, mitigate and, if necessary, prohibit public and/or private acts that could cause deterioration and/or significant deterioration within the meaning of Article 6(2) of the Habitats Directive.⁸⁸ Also, it must be ensured that the protection rules are not merely of a reactive nature. Article 6(2) of the Habitats Directive has an anticipatory nature, which implies that one cannot wait until deterioration or disturbance has materialized before taking measures.⁸⁹

82 Schoukens, *supra* note 25, pp. 20-22.

83 Case C-117/00, *Commission v Ireland*, [2002] ECR I-05335, para. 33.

84 Case C-96/98, *Commission v France*, [1999] ECR I-8531, para. 29.

85 *Ibid.*, para. 26-27.

86 European Commission, *supra* note 53, p. 55.

87 *Commission v Spain*, *supra* note 65, Opinion of AG Kokott, para. 104.

88 Case C-418/04, *Commission v Ireland* [2007] ECR I-10947, para. 208. See more extensively: Schoukens, *supra* note 25, pp. 27-28.

89 *Ibid.*, para. 208. See also: European Commission, *supra* note 52, p. 25.

Behind all this is the undeniable premise that a substantial part of the current biodiversity loss has been caused by autonomous developments or cases of diffuse degradation, such as intensified agricultural activities, unchecked hunting practices and unsustainable forestry. Whether such damaging activities already existed at the time of the designation of the Natura 2000 site or only started after that date is irrelevant for the purpose of Article 6(2) of the Habitats Directive, since this provision applies *permanently* to the Natura 2000 sites whenever evidence of ongoing deterioration is established. The simple fact that the ongoing degradation has been caused by an activity carried out before the designation of a site or results from an activity that was carried out prior to the entry into force of the protection regime is therefore irrelevant in this respect. In contrast to, for instance, the Environmental Liability Directive, which arguably has a more narrow and specific scope than the EU Nature Directives because of its focus on certain incidents or events, Article 6(2) of the Habitats Directive can therefore also have a retrospective effect. It allows competent authorities to tackle ongoing damage caused by or linked to emissions, interventions or accidents that took place before the designation of a Natura 2000 site. And even though prohibitions tackling ongoing degradation are in general of a defensive nature, they evidently can also help to restore or improve habitats to the extent that they allow positive natural developments and natural recovery to take place.⁹⁰

The lack of binding EU rules as to sustainable forestry practices⁹¹ and the relatively modest steps taken towards a *greener* Common Agricultural Policy (CAP) make Article 6(2) of the Habitats Directive for tackling ongoing degradation even more important.⁹² This is a finding which was also highlighted by the recent outcome of the REFIT Fitness Check of the EU Nature Directives, which stressed, among other things, that greater efforts are needed to conserve and enhance biodiversity through the CAP.⁹³ It is undeniable that Article 6(2) requires competent authorities to urge farmers and/or foresters to review their land practices, especially in cases of ongoing damage and where restoration targets at site level need to be achieved. Interestingly, the ECJ has already emphasized in its case law that, even if part of the deterioration at a Natura 2000 site is related to unsound CAP aid measures focusing on intensive agriculture, this fact alone does not authorize a Member State to disregard its obligation to avoid further deterioration.⁹⁴

Along the same lines, Article 6(2) of the Habitats Directive might require Member States to review and, as the case may be, outlaw, destructive fishing activities within or in the vicinity of marine Natura 2000 sites that host vulnerable habitats. This specific situation is giving rise to an increased number of complexities given the ambivalent relationship between the Member States' duties under the EU Nature Directives and the exclusive competences of the EU institutions in the field of the conservation of marine biological resources under the Common Fisheries Policy (CFP).⁹⁵ Interestingly enough, the 2013 Basic Regulation on the CFP now explicitly grants Member States the possibility to adopt conservation measures for the purpose of complying with their obligations under Article 6 of the Habitats Directive, including the non-regression obligation.⁹⁶ Admittedly, the new Regulation does not remedy all reported deficiencies and does not explicitly refer to restoration targets. Even so, in my view, these findings yet again highlight the relevance of, amongst others, Article 6(2) of the Habitats Directive in addressing ongoing losses, arguably an indispensable precondition for achieving restoration targets in degraded environments.

90 Case C-383/09, *Commission v France*, [2011] ECR I-4869, Opinion of AG Kokott, para. 45.

91 However, the European Commission adopted a new Forestry Strategy in 2014 (COM(2013) 659 final, 20.9.2013). For more background information, see: <http://ec.europa.eu/environment/forests/index_en.htm> (accessed 10 February 2017).

92 See more extensively: I. Doussan & H. Schoukens, 'Biodiversity and agriculture, Greening the CAP beyond the status quo?', in Born et al. (eds.), *supra* note 14, pp. 437-451. Very critical in this respect: A. Matthews, *Greening CAP Payments, A Missed Opportunity*, Institute and European Affairs (2013).

93 European Commission, *supra* note 67, p. 7.

94 *Commission v France*, *supra* note 84, para. 40.

95 See more extensively: H. Schoukens & H. Dottinga, 'Natura and fisheries: A question of competence or willingness?', in Born et al. (eds.), *supra* note 14, pp. 375-398.

96 See Art. 11(1) of the Council Regulation (EU) No 1380 of the European Parliament and of the Council of 11 December 2011 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ L 354, 28.12.2013, p. 22.

4.1.2. Article 6(2) of the Habitats Directive and ongoing projects and activities: towards strict adaptive management for cases of ongoing and future degradation?

Now that it has been established that Article 6(2) of the Habitats Directive is of vital importance to control the adverse effects of autonomous activities which generally fall outside the scope of the assessment requirements set out by Article 6(3) of the Habitats Directive or the national/regional permitting policies, we shift our focus to ongoing *plans* and *projects* that have explicitly been permitted or even completed prior to the designation of Natura 2000 sites. As hinted at above, these activities may lead to unacceptable forms of ongoing degradation and, if unchecked, exacerbate the degradation of an already imperilled Natura 2000 site and render total restoration unfeasible. In many instances, the capping of cumulative environmental pressures or damage related to permitted activities and projects constitutes the first logical step towards a more comprehensive recovery strategy for degraded nature. In this context the question arises whether the non-regression clause applies to damage that has already been explicitly allowed through the application of the impact assessment rules, as laid down in Articles 6(3) and 6(4) of the Habitats Directive.

The importance of Article 6(2) of the Habitats Directive for overseeing the adverse effects related to ongoing activities was fleshed out by the ruling of the ECJ in its 2004 ruling in the *Waddenzee* case. Whereas the ECJ, as stated above, accepted that the authorisation of a plan or project granted in accordance with Article 6(3) of the Habitats Directive necessarily assumes that it is not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2) of the Habitats Directive, it underscored that Article 6(2) of the Habitats Directive can require the implementation of *additional* measures in some instances.⁹⁷ The *Stadt Papenburg* case in turn provided the CJEU with the opportunity to clarify that, while existing maintenance dredging activities do not necessarily require a prior appropriate assessment in accordance with the second sentence of Article 6(3) of the Habitats Directive, such ongoing activities are nonetheless still covered by Article 6(2) of the Habitats Directive.⁹⁸ This means that Article 6(2) not only covers ongoing degradation but in some ways also situations that involve additional future losses, especially if such activities appear to have been based on flawed or incomplete assessments. Among other things, Article 6(2) of the Habitats Directive forces competent authorities to rectify earlier mistakes that have occurred in earlier permitting procedures or, in other instances, to adjust permitting conditions in view of recently changed environmental conditions.⁹⁹ Or put differently, they should refrain from consolidating permitted operations that exacerbate ongoing degradation in Natura 200 sites. Yet the relevance of Article 6(2) of the Habitats Directive goes beyond such non-compliance scenarios and might also be of importance for cases where newly established restoration targets for Natura 2000 sites, which put forward a more ambitious environmental quality to be achieved, demand the implementation of stricter permit policies.

In sharp contrast to, for instance, the Environmental Damage Directive, which explicitly exempts damage to protected natural habitats when it concerns previously identified effects resulting from an act explicitly authorized through the application of Article 6(3) and 6(4) of the Habitats Directive,¹⁰⁰ Article 6 of the Habitats Directive does not contain a provision which lays down a specific hierarchy in this respect. In spite of the rigorous rationale used by the CJEU in its early case law in the 1990s and 2000s, legal research has revealed that the application of Article 6(2) of the Habitats Directive at national level is to be judged disparate at best.¹⁰¹ While some national courts are eager to strictly apply the non-deterioration obligation vis-à-vis ongoing detrimental activities, others display significant reluctance in this respect.¹⁰² For instance, a Belgian appeals court held in 2012 that ongoing motocross races that had been held on a yearly basis for

⁹⁷ *Waddenzee*, supra note 57, para. 37-38.

⁹⁸ *Stadt Papenburg*, supra note 47, para. 49.

⁹⁹ See also along the same lines: Case C-304/05, *Commission v Italy*, [2007] ECR I-7595; Case C-388/05, *Commission v Italy*, [2007] ECR I-7555.

¹⁰⁰ See Art. 2(1), second paragraph of the Environmental Liability Directive. Yet it remains to be seen whether the latter exemption also covers situations in which explicitly authorized activities may cause unexpected damage to the environment.

¹⁰¹ A similar conclusion arose in the context of the Fitness Check of the EU Nature Directives (see note 67, supra). See also: European Court of Auditors, *Special Report: More efforts needed to implement the Natura 2000 Network to its full potential* (2017), <<http://www.eurosai.org/en/databases/audits/More-efforts-needed-to-implement-the-Natura-2000-network-to-its-full-potential/>> (accessed 10 February 2017).

¹⁰² For instance, in the Netherlands, the Dutch Council of State was found ready to check whether ongoing nitrogen deposition would not put in danger the much-needed recovery of Dutch Natura 2000 sites containing vulnerable natural habitats. See more extensively: M. Uittenbosch, 'Nederland toch op slot; helaas geen aprilgrap', (2009) *Milieu en Recht*, pp. 482-488.

more than 30 years before the inclusion of a site in the Natura 2000 Network are not likely to jeopardize the conservation objectives of a highly degraded site. To use the exact words of the Belgian Court, '(i)t is unlikely that nature can be threatened by the continuation of an ongoing event that has been organised on this site for more than 45 years'.¹⁰³ No further consideration was given to the restoration rationale underpinning the Habitats Directive, as is evident from Article 2(2) of the same Directive.

However, at EU level a gradual shift towards stronger scrutiny is to be noted. The 2011 ruling of the CJEU in the *Spanish brown bear* case stands out as the most seminal landmark decision in terms of clarifying the relationship between nature conservation interests and legitimate interests. In the context of these proceedings, the European Commission asserted that several existing open-cast mining operations caused barriers for the migration of the capercaillie and the brown bear, for which the Natura 2000 sites in question had been designated. While the CJEU concluded that the ongoing mining operations were exempted from Article 6(3) of the Habitats Directive,¹⁰⁴ it still proceeded to scrutinize the measures taken by the Spanish Government in view of its obligations under Article 6(2) of the Habitats Directive. In particular, the CJEU held that a violation of Article 6(2) of the Habitats Directive was apparent since it had been established that the operations of several – mostly authorized – open-cast mines caused noise and vibrations which, in turn, were seen as capable of affecting the threatened and isolated populations of the capercaillie¹⁰⁵ and the brown bear¹⁰⁶ in the Spanish Natura 2000 sites. This clearly underlined the duty of national authorities to reconsider or at least update the permit conditions for existing activities in light of ongoing degradation.

Following this ruling, however, new legal questions popped up as to the concrete application of Article 6(2) of the Habitats Directive with regard to already completed projects. In its latest ruling in the *Waldschlösschen Bridge* case (*Grüne Liga Sachsen*), which revolved around the compatibility of an already completed bridge over the Elbe Valley, the CJEU added another important layer to the Member States' permanent review duties under Article 6(2) of the Habitats Directive in the context of already constructed projects. The EU judges concluded that, whereas Article 6(2) of the Habitats Directive leaves a certain discretion to the Member States as to the implementation of further 'appropriate steps', a subsequent review of the ongoing effect of completed projects is still required whenever there is a likelihood that the activity could nevertheless cause significant disturbance of a protected species or deterioration of a natural habitat.¹⁰⁷

Several important lessons can be learnt from these recent rulings. First, the examined case law developments showcase the major role of Article 6(2) of the Habitats Directive as regards all *ongoing* degradation likely to further undermine the environmental quality of a Natura 2000 site. Second, the case law cannot be construed as establishing an absolute obligation to review *ongoing* activities and projects in Article 6(2) of the Habitats Directive in view of future recovery options. It therefore leaves a certain discretion to the Member States and allows them to consider the collective interests that are at stake. However, interestingly, the CJEU consistently challenges the preconceived idea that nothing is to be done about ongoing forms of environmental pressure in the context of degraded Natura 2000 sites.¹⁰⁸ Third, it has also become clear that the CJEU's rationale forces competent authorities to question so-called *fait accompli* scenarios, according to which existing situations that threaten the recovery of degraded Natura 2000 sites cannot be challenged. This might be troublesome from a recovery perspective. For instance, the increased deposition of nitrogen related to existing dairy operations may constitute an important impediment for the recovery of nitrogen-sensitive Natura 2000 sites and should therefore be reconsidered in light of the duties incumbent on Member States pursuant to Article 6(2) of the Habitats Directive.¹⁰⁹

103 Translated from Dutch. See Decision of the Brussels Court of Appeal, 14 February 2012. See: Schoukens, *supra* note 25, pp. 14-19; Cliquet, *supra* note 25, pp. 534-535.

104 *Commission v Spain*, *supra* note 65, para. 155.

105 *Ibid.*, para. 144-160.

106 *Ibid.*, para. 163-171 and 185-191.

107 Case C-399/14, *Grüne Liga Sachsen eV*, ECLI:EU:C:2016:10, para. 44. On the same date, the CJEU also issued a second decision in which a similar rationale was used. See: Case C-141/14, *Commission v Bulgaria*, ECLI:EU:C:2016:8.

108 See also: European Commission, *supra* note 52, p. 25.

109 See more extensively: Schoukens, *supra* note 54, pp. 30-32.

As a tentative conclusion, one can therefore submit that Article 6(2) of the Habitats Directive obliges the Member States to come up with an adaptive management approach towards ongoing activities in light of future recovery options. This entails a structured, iterative process of robust decision-making in the face of uncertainty, with an aim to reduce uncertainty over time via system monitoring.¹¹⁰ It is a rationale that is also reflected in the newly amended EIA Directive, which explicitly states that developers will have the obligation to take the necessary steps to avoid, prevent or reduce possible significant effects to the environment caused by their projects.¹¹¹ According to Article 8a(4) of the amended EIA Directive, projects will now need to be monitored using procedures that are determined by the Member States. In spite of the CJEU's recent critical take on adaptive management approaches in the specific context of Article 6(3) of the Habitats Directive, especially when they are used to anticipate the future beneficial effects of habitat restoration measures,¹¹² it is trite to say that adaptive management is mandatory for activities likely to further deteriorate Natura 2000 sites according to Article 6(2) of the Habitats Directive. The Dutch *Programmatic Approach to Nitrogen* (PAN), which aims to reconcile economic operations with more ambitious recovery options for degraded Natura 2000 sites and which entered into force in 2015, can be seen as a recent implementation of this newly emerged rationale.¹¹³ And while it remains questionable whether this Dutch approach, which relies heavily on future restoration actions in nitrogen-affected Natura 2000 sites, is fully in line with Article 6(3) of the Habitats Directive,¹¹⁴ the robust monitoring and review options attached to it can be seen as a good illustration of how Article 6(2) of the Habitats Directive could be used in order to force competent authorities to implement passive restoration actions at site level.

4.1.3. Balancing conflicting interests: recovery of ongoing degradation versus economic interests?

Evidently, a rigid application of Article 6(2) of the Habitats Directive in a recovery context will spark great controversy amongst stakeholders and business people. If the standstill imperative underpinning Article 6(2) is applied stringently, this provision will eventually force competent authorities to revoke or at least modify permits for activities that have been permitted for many decades because of recently adopted or reversed recovery policy choices. This fact alone is likely to create important backlash for nature conservationists, which might be accused of overly rigid environmentalism. At the heart of many of the discussions that have arisen in this respect is the delicate balance between property law, vested rights and legitimate expectations on the one hand, and the environmental interests linked to increased scrutiny as to ongoing damaging activities on the other hand. It is clear that revoking, repealing or modifying permits could impinge upon the property rights of the operators and thus give rise to increased opposition.¹¹⁵

Recent case law developments have highlighted that, in contrast to the rationale underpinning other, arguably more tailored tools such as the Environmental Damage Directive, so-called *legitimate interests* and *legal certainty* cannot bar the application of Article 6(3) of the Habitats Directive to existing or established situations.¹¹⁶ And while the CJEU has never explicitly taken a similar stance in the context of Article 6(2) of the Habitats Directive, it remains very likely that a similar rationale applies in the context of this provision.¹¹⁷ This means that there is no such thing as an 'eternal right to degrade nature', even when such rights can be entrenched in existing and legal environmental permits. Or, formulated positively, it should remain possible to review existing rights in order to foster the imperative recovery of Natura 2000 sites. Rather than exempting ongoing activities from the application of Article 6(2) of the Habitats Directive, which could further compromise the attainment of the EU's biodiversity targets, Member States are therefore implicitly

110 C.S. Holling, *Adaptive Environmental Assessment and Management* (1978).

111 Directive 2011/92/EU was amended by Directive 2014/52/EU. See: Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ L 124, 25.4.2014, p. 1.

112 Joined cases nos. C-387/15 and C-388/15, *Orleans*, ECLI:EU:C:2016:583, para. 48-59.

113 See for more information on the Dutch Programmatic Approach to Nitrogen (in Dutch): <<http://pas.natura2000.nl/>> (accessed 10 February 2017).

114 Schoukens, *supra* note 54, pp. 50-54.

115 Schoukens, *supra* note 25, pp. 9-15.

116 *Stadt Papenburg*, *supra* note 47, para. 44-46.

117 *Commission v Spain*, *supra* note 65, Opinion of AG Kokott, para. 71-72.

encouraged to propose financial compensation schemes to lessen the severe economic impact to which the application of Article 6(2) of the Habitats Directive might give rise in some instances.

It is hard not to overstate the importance of this progressive line of interpretation in light of the current underperformance in terms of conservation management at many Natura 2000 sites across the EU. Accordingly, Article 6(2) of the Habitats Directive may take away important obstacles to future recovery. This is not to say that there are no circumstances under which Member States could still justify the continuation of ongoing operations in the context of Natura 2000 sites. For instance, in its 2011 decision in the *Spanish brown bear* case, the CJEU conceded that, whereas Article 6(2) does not provide a ground to justify degradation, Member States could rely on reasons of overriding public interest in order to justify the continuation of existing, even damaging activities at a Natura 2000 site.¹¹⁸ In the *Waldschlösschen Bridge* case, however, the CJEU further clarified that the review of alternatives in the context of Article 6(4) in a case of ongoing deterioration 'requires weighing the environmental consequences of maintaining or restricting the use of the works at issue, including closure or even demolition, on the one hand, against the public interest that led to their construction, on the other hand.'¹¹⁹ By stating that the economic costs resulting from potential alternatives are 'not of equal importance to the objectives of conserving natural habitats and wild fauna and flora pursued by the Habitats Directive',¹²⁰ the CJEU clearly set a high standard for the application of this derogation clause. Other case law has also made it abundantly clear that the imperative reasons of overriding public interest test (IROPI test) embedded in Article 6(4) cannot be accepted merely because there is some prospect that a development will create private economic benefits.¹²¹ This balancing test therefore needs to be carried out within a strict environmental framework, equally taking into account future recovery options.¹²²

From the 2016 ruling in the *Waldschlösschen Bridge* case one may infer that the EU judges contemplated the removal or even destruction of existing infrastructures, if necessary, to avoid further degradation and allow the attainment of the applicable recovery goals. As admitted by Advocate General Sharpston, weighing the various interests and priorities could still lead to the conclusion that an existing infrastructure (here the bridge over the river Elbe) should be left in place.¹²³ Yet such considerations are to be contextualized within a strict environmental framework, which eventually places restoration options on an equal footing with the economic interests related to the continuation of economic operations. This means that the outcome of such decision-making procedures may not consistently be to the detriment of protected nature and, most importantly, future restoration options.

4.2. Tackling degradation through Article 6(2) of the Habitats Directive: going below the *de minimis* threshold and beyond the boundaries of Natura 2000?

A logical next step when reviewing the suitability of current nature conservation laws for achieving the EU's restoration targets and avoiding a degrading baseline due to further degradation, is to examine the degradation threshold that applies in the context of these protection rules. While a relatively high significance threshold is deemed reasonable in order to avoid an unnecessary administrative burden, it also entails the risk that numerous environmental pressures, which impede the achievement of the recovery goals, fall outside the scope of a Member State's regulation. Likewise, the question as to whether the current environmental quality at site level, which might be poor due to bad management, should be used as a reference criterion to assess the acceptability of ongoing degradation or, alternatively, the conservation goal at national or regional level, is highly relevant to the margin of appreciation left for the Member States in this respect.

118 *Commission v Spain*, supra note 65, para. 156.

119 *Grüne Liga Sachsen eV*, supra note 107, para. 74.

120 *Ibid.*, para. 77.

121 Case C-182/10, *Solvay*, ECLI:EU:C:2012:82, para. 75-76.

122 *Commission v Spain*, supra note 65, para. 192-194.

123 *Grüne Liga Sachsen eV*, supra note 107, Opinion of AG Sharpston, para. 69-71.

4.2.1. Merely significant effects or strictly maintaining the status quo?

A textual analysis of Article 6(2) of the Habitats Directive reveals a certain dichotomy as to whether a certain threshold applies when triggering the application of the protection duty in the context of either deterioration of natural habitats or disturbance of species. As to this scenario, Article 6(2) of the Habitats Directive explicitly specifies that appropriate steps have to be taken to avoid it ‘in so far such disturbance could be significant in relation to the objective of this directive’. Remarkably so, the Habitats Directive does not explicitly link the concept of ‘deterioration of natural habitats’ to the objectives of the Habitats Directive. This could lead us to believe that Article 6(2) of the Habitats Directive bans all forms of deterioration, even those that do not usually produce a significant effect on a Natura 2000 site.¹²⁴ In the *Commission v France* case, Advocate General Kokott held that national legislation which stipulates that human activities can only be restricted if they have significant effects runs counter to the literal wording of Article 6(2) of the Habitats Directive.¹²⁵ In her conclusions, however, she stated that the deterioration of habitats within the meaning of Article 6(2) of the Habitats Directive must also be assumed to exist if the conservation objectives of the Natura 2000 site are affected.¹²⁶ Regrettably, in its final ruling, the CJEU declined to express its opinion on the matter, thereby leaving the issue essentially moot.¹²⁷

Be this as it may, the European Commission indicated in its Guidance document on Article 6 of the Habitats Directive that a restrictive interpretation, under which every single deterioration needs to be avoided, would run counter to the proportionality principle, which equally applies in the context of the EU Nature Directives. It may lead to an unnecessary administrative burden and place environmental regulation in a bad light. In the Commission’s view, ‘(t)he deterioration of habitats is (...) also to be assessed against the objectives of the directive. Indeed it seems difficult to assess deterioration in absolute terms without reference to measurable limits. (...) connecting deterioration to the objectives of the directive makes it possible to use Article 1 of the directive to interpret the limits of what one can regard as deterioration’.¹²⁸ This view was implicitly endorsed by the CJEU’s case law, which underscores that Articles 6(2) and 6(3) of the Habitats Directive are designed to ensure the *same* level of protection of habitats.¹²⁹ And since the CJEU made it clear that, in order to establish whether a proposed plan or project might significantly affect the integrity of a site, the site’s conservation objectives serve as the most important legal touchstone,¹³⁰ one can easily submit that a similar, more reasonable approach is to prevail in the context of Article 6(2) of the Habitats Directive.¹³¹ In her Opinion in the *Sweetman* case, Advocate General Sharpston confirmed this rationale by explicitly holding that Article 6(2) of the Habitats Directive does not impose a duty to ensure that no alterations of any kind are made, at any time, to the site in question.¹³²

To further illustrate this more pragmatic approach, reference can again be made to the Environmental Liability Directive, whose Annex I provides further criteria for the assessment of the significance of any damage that has adverse effects on reaching or maintaining the favourable conservation status. This Annex also explicitly uses a *de minimis* approach by excluding certain scenarios from the notion of environmental damage, such as negative variations that are smaller than natural fluctuations regarded as normal for the species or habitat in question, negative variations due to natural causes or resulting from interventions relating to the normal management of sites and damage to species or habitats for which it has been established that they will recover to the baseline condition within a short time and without human intervention.¹³³

124 See also Schoukens, *supra* note 54, p. 31.

125 *Commission v France*, *supra* note 75, Opinion of AG Kokott, para. 20.

126 *Ibid.*, para. 28.

127 *Commission v France*, *supra* note 75, para. 18-24.

128 European Commission, *supra* note 52, p. 26.

129 See for instance: *Waddenzee*, *supra* note 57, para. 36; *Grüne Liga Sachsen*, *supra* note 107, para. 52.

130 See for instance: *Waddenzee*, *supra* note 57, para. 59; *Sweetman*, *supra* note 69, para. 40.

131 For example, in a 2010 ruling, the CJEU held that Italian legislation which explicitly prohibits the construction of new wind turbines not intended for selfconsumption at Natura 2000 sites is more stringent than the protection rules established by the Birds and Habitats Directives. See: Case C-2/10, *Azienda Agro-Zootecnica Franchini Sarl*, [2011] ECR I-06561, para. 46.

132 *Sweetman*, *supra* note 69, Opinion AG Sharpston, para. 44.

133 See also more extensively: Fogleman, *supra* note 79, pp. 207-209.

Evidently, from a pragmatic point of view, this approach is to be qualified as the more workable and sensible option. Applying a *de minimis* threshold allows the competent authorities to perform a balancing exercise when overseeing ongoing degradation. It gives Member States more freedom, allowing them to come up with more comprehensive solutions to obstacles to the recovery of degraded Natura 2000 sites instead of focusing on specific activities and proposing ad-hoc solutions.¹³⁴ In her noteworthy Opinion in the *Sweetman* case, Advocate General Sharpston referred to a situation in which plans or projects may involve some, strictly temporary, loss of amenity which is capable of being fully undone within a short period of time, as an apt example where one would not need to conclude that there is an adverse effect on the integrity of the site, as meant by Article 6(3) of the Habitats Directive.¹³⁵

Even so, the mere fact that deterioration and disturbance are to be weighed against the Directive's objectives does not necessarily grant more leeway to all Member States, especially those in which the majority of the natural habitats and species already have an unfavourable conservation status. This is because this threshold is not merely linked to simply maintaining the favourable conservation status, but also needs to review whether the significant adverse effects might hinder the achievement of the favourable conservation status.¹³⁶ Most notably, in the above-mentioned *Sweetman* case this led the CJEU to rule that the mere loss of 0.5% of the total amount of limestone at an Irish Natura 2000 site should be interpreted as constituting an adverse effect on the integrity of the site.¹³⁷ In this case, Advocate General Sharpston explicitly referred to the *death by a thousand cuts* phenomenon, which may lead to the gradual degradation of nature as a result of numerous small-scale projects being allowed on the same site. The cumulative effects of such interventions could eventually compromise the achievement of the conservation objectives, especially when they interfere with the natural habitats and species which originally led to the designation of the site and therefore need to be addressed through Article 6(2) and 6(3) of the Habitats Directive.¹³⁸ Against the backdrop of an unfavourable conservation status, such incremental biodiversity loss may urge the competent authorities to also scrutinize small-scale activities that may, if cumulatively assessed, render the long-term attainment of the conservation objectives impossible.

This view is further reinforced by the European Commission in its Guidance document on Article 6 of the Habitats Directive. Given the fact that the purpose of the Natura 2000 Network includes restoring species and habitats that currently have an unfavourable conservation status, the Commission explicitly indicates that more ambitious restoration objectives are to be used as a reference standard here.¹³⁹ In addition, taking into account the definition of the concept of 'favourable conservation status' of natural habitats in Article 1(e) of the Habitats Directive – which stresses the natural range of natural habitats, its specific structure and functions necessary for its long-term maintenance as well as the conservation status of its specific species – even a small-scale reduction of natural habitat within a degraded Natura 2000 site must be deemed significant if the conservation status of the natural habitats is currently unfavourable.¹⁴⁰ The same goes for impairments which adversely affect the factors for long-term maintenance or recovery of vulnerable habitats. In other words, when measured against a degrading baseline, supposedly minor impacts, which normally would be left unaddressed in cases of resilient nature, might also be deemed unacceptable in view of Article 6(2) of the Habitats Directive.¹⁴¹

To some extent, this more rigid understanding was reiterated in the CJEU's 2015 ruling on the meaning that is to be given to the concept of '*deterioration of the status*'¹⁴² of a body of surface water in the context

134 See also along these lines: C. Backes et al, *Stikstofdepositie en Natura 2000. Een rechtsvergelijkend onderzoek* (2011), <<http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2011/09/13/stikstofdepositie-en-natura-2000.html>> (accessed 10 February 2017), pp. 29-31.

135 *Sweetman*, supra note 69, Opinion AG Sharpston, para. 59.

136 See along similar lines: Fogleman, supra note 79, p. 205.

137 *Sweetman*, supra note 69, para. 46-57.

138 *Sweetman*, supra note 69, Opinion AG Sharpston, para. 67.

139 European Commission, supra note 52, p. 27.

140 *Ibid.*, pp. 27-28.

141 *Ibid.*, pp. 33-35.

142 In particular, Art. 4(1)(a)(i) of the Water Framework Directive provides that 'In making operational the programmes of measures specified in the river basin management plans for surface waters, Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water (...)'.

of Article 4(1)(a)(i) of the Water Framework Directive. In this specific context, the CJEU upheld a rather restrictive line of interpretation, which entailed that this concept must be construed in such a manner that there is a deterioration as soon as the status of at least one of the quality elements, within the meaning of Annex V of the 2000 Water Framework Directive, falls by one class, even if this does not result in a fall in the overall declassification of the body of surface water.¹⁴³ Interestingly enough, the CJEU added that, if the quality element is already in the lowest class, ‘any deterioration of that element constitutes a “deterioration of the status” of a body of surface water, within the meaning of Article 4(1)(a)(i)’.¹⁴⁴ And while, admittedly, the wording of Article 4(1) of the Water Framework Directive, which defines the environmental objectives to be achieved for the waterbodies present in the EU, is distinguishable from that of Article 6 of the Habitats Directive,¹⁴⁵ the inextricable logic on which the ruling is based appears to be similar to what the European Commission states in its Guidance document on Article 6 of the Habitats Directive as to Article 6(2). Given the fact that the Habitats Directive also includes an imperative to improve degraded environments, the threshold beyond which a breach of the obligation to prevent deterioration of Natura 2000 is established must be low. Applying the same rationale of the CJEU to the specific context of Natura 2000, one could therefore argue that as soon as a damaging activity affects one of the three specific criteria mentioned in the definition of favourable conservation status in Article 1(e) of the Habitats Directive, it would have to be prohibited according to Article 6(2) of the Habitats Directive. For instance, even if an activity merely affects the structure and function of a protected habitat and does not lead to a reduction of its range, it could still be construed as an unlawful deterioration in light of Article 6(2) of the Habitats Directive. As a result, one may conclude that Article 6(2) of the Habitats Directive does not necessarily force Member States to prohibit any situation of further degradation, especially not when it is of a temporary nature. Even so, heightened stringency needs to be applied in cases of ongoing degradation, especially if the mere continuation of activities might jeopardize the achievement of the recovery targets both at site and at national level.

4.2.2. Ongoing degradation: site level or national level as a reference scenario?

Article 6(2) of the Habitats Directive does not lay down an explicit territorial reference point against which the significance of deterioration or disturbance needs to be measured, and neither does Article 6(1) of the Habitats Directive, which, as stated above, more explicitly urges Member States to implement measures in order to maintain or, as the case may be, restore the conservation status of natural habitats and species. Little explanation is needed to stress the relevance of the geographical baseline to be used when applying Article 6(2) of the Habitats Directive. The applicable baseline is decisive for the leverage in terms of ecological restoration present in Article 6(2) of the Habitats Directive. The wider the geographical scale at which it can be assessed, the more leeway competent authorities have to prioritize restoration actions. In some instances, priority setting might be beneficial to Natura 2000, especially in a context of limited financial means. Yet, in a situation of budgetary restraint priority setting may be abused as a cover-up to implicitly give up parts of Natura 2000 sites that hamper the continuation of important economic activities, such as mining operations or dairy farming, to name but a few examples.

According to some, the favourable conservation status of natural habitats or species needs to be established across its natural range and therefore not at individual site level.¹⁴⁶ The Dutch Council of State, for one, has already reaffirmed that neither the Habitats Directive, nor the Birds Directive force the Member States to achieve a favourable conservation status at the level of each individual site.¹⁴⁷ If this viewpoint is upheld, more discretion would obviously become available for the competent authorities when assessing the ramifications of damaging activities within Natura 2000 sites. However, other authors are of the opinion that the favourable conservation status also needs to be achieved at individual site level.¹⁴⁸ In its Guidance

143 Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland eV*, ECLI:EU:C:2015:433, para. 67-68.

144 *Ibid.*, para. 69 (emphasis added).

145 For a critical discussion of the ruling of the CJEU: D. Salm, ‘The Case for Smart Governance in European Water Law’, in B. Vanheusden & L. Squitani (eds.), *EU Environmental and Planning Law Aspects of Large-Scale Project* (2015), pp. 215-235.

146 Backes et al., *supra* note 134, pp. 24-25.

147 See for instance: Dutch Council of State, no. 200902380, 16 March 2011.

148 Cliquet et al., *supra* note 14, p. 275.

document on Article 6 of the Habitats Directive, though, the European Commission strengthened the former view by stating that, in accordance with Article 1(e) and 1(i) of the Habitats Directive, the favourable conservation status needs to be measured at biogeographical level.¹⁴⁹ Even so, the Commission stressed the importance of the individual site, since the ecological coherence of the Natura 2000 Network depends on the contribution of each individual State. Indeed, taking into account that the conservation objectives that are established at national or regional level need to be translated into site-specific conservation objectives, the above-featured discussion ends up being a semantic one, at least to some extent. The simple fact that a natural habitat has an unfavourable conservation status at the national level probably implies that it will be in a degraded status in most of the designated Natura 2000 sites. Yet, in some instances, the status at site-level might be different from the national assessment, which can give rise to additional complexities.

Either way, a more recent response to a parliamentary question by the European Commissioner for the environment displayed less reluctance when holding that '(t)he (EU Nature) Directives impose obligations on the Member States as such, which implies that – inter alia – favourable conservation status of species and habitat types of Community interest should be achieved at Member State level. This in turn implies that, where favourable conservation status is achieved at the national level, the Member State does not necessarily have to achieve good conservation status in each individual state'.¹⁵⁰ Although these (non-binding) statements leave a little room for leverage, especially in a situation where most of the habitats and species are already at a favourable conservation status at the national or regional level, it would be wrong to deduce from this excerpt that no localized test is required in the context of Article 6(2) of the Habitats Directive. Such a stricter test appears in order at least in situations where the natural habitats or species at issue have an unfavourable conservation status at national level. Even more so, the European Commissioner added in the response referred to above that '(...) As a general rule in all Natura 2000 sites, Member States must avoid the deterioration of the habitats of Community interest and the habitats of species of Community interest for which a site was designated'.¹⁵¹

Also the Commission's Guidance on Article 6 of the Habitats Directive hints at a site-specific assessment in the context of Article 6(2).¹⁵² Hence, when applying Article 6(2) of the Habitats Directive, the mere fact that the habitat affected is thriving at a nearby Natura 2000 site does not constitute a sufficient argument to allow the degradation of the same habitat type at another site or another habitat within the same site. Or, framed in terms of ecological restoration, Member States remain under the obligation to consider the recovery of partially degraded Natura 2000 sites to avoid further deterioration, even when at national level other sites may grant more favourable options for further restoration. Only if other restoration actions have proven effective and sufficient in view of the national or regional restoration goals, is more discretion permissible. To some extent, this view has been indirectly reasserted by the outcome of the above-mentioned ruling of the CJEU in the *Sweetman* case, where the CJEU held that a minor but irreparable destruction of priority habitats was incompatible with Article 6(3) of the Habitats Directive.¹⁵³ Likewise, in the same ruling the CJEU emphasized that both Article 6(2) and 6(3) of the Habitats Directive are explicitly designed to 'maintain, or as the case may be *restore*, at a favourable conservation status natural habitats and, in particular special areas of conservation'.¹⁵⁴ Thus, only when the site-specific conservation objectives have been achieved, are minor instances of further deterioration in relation to protected natural habitats and species compatible with Article 6(2) of the Habitats Directive.

149 European Commission, *supra* note 52, p. 19.

150 European Commission, *Answer given by Mr. Potocnik on behalf of the European Commission to parliamentary question E-008540/2011*, 9 November 2011.

151 *Ibid.*

152 For instance, when clarifying when measures with regard to disturbance and deterioration should be taken, the Commission states that '(t)he conservation status of a habitat or species in a site will be assessed according to the contribution of this site to the ecological coherence'. See: European Commission, *supra* note 52, p. 27.

153 *Sweetman*, *supra* note 69, para. 32.

154 *Ibid.*, para. 36 (emphasis added).

4.2.3. Going beyond the boundaries of the Natura 2000 Network: conserving and restoring corridors and wider populations?

In terms of substantive implications, additional attention needs to be paid to the territorial scope of Article 6(2) of the Habitats Directive. As evidenced by the above analysis, this standstill clause is strictly related to the designated Natura 2000 sites and therefore cannot be used as a tool to halt biodiversity decline and foster restoration in the wider landscape, beyond protected sites. One would therefore presume that it is of limited importance to spur conservation and recovery outside the context of the Natura 2000 Network. However, this view should be adjusted in light of the latest jurisprudence and regulatory developments.

For starters, Article 6(2) of the Habitats Directive might prompt the Member States to enact protection measures as regards external activities that are likely to impact the species and habitats of Natura 2000 sites. In hypotheses of ongoing degradation, Member States are required to reconsider drainage works carried out in the past that might lead to the drying out of sensitive marshlands that are located inside a Natura 2000 site.¹⁵⁵ This is again exemplified by the Dutch *Programmatic Approach to Nitrogen (PAN)*, which does not limit itself to addressing the sources of additional nitrogen deposits that are located inside nitrogen-sensitive Natura 2000 sites, but has a more ambitious territorial scope. It also includes generic reduction measures that apply to external impacts, which further underpins the external effect of Article 6(2) of the Habitats Directive.¹⁵⁶

The factual circumstances underpinning the above-mentioned CJEU ruling in the *Spanish brown bear* case revealed yet another important factor to be taken into account when applying Article 6(2) of the Habitats Directive.¹⁵⁷ According to an environmental report issued in this case, the bears move 3.5 to 5 kilometres from the areas of impact of the noise and vibrations caused by the mining operations. The report found that the operations will prevent or severely hinder the brown bear's access to the corridor, whereas it is a north-south transit route of critical importance for the western population of this species.¹⁵⁸ The CJEU also refers to another study, which stated that the risk of deterioration and closure of another corridor constitutes one of the main threats for the *re-establishment* of the Cantabrian brown bear.¹⁵⁹ Given the fact that the said population of the brown bear is not limited to the Natura 2000 sites concerned, one might assume that the brown bear populations located outside the Natura 2000 site will evidently benefit from the increased scrutiny as to the adverse effects of several of the open-cast mines. Even more interesting are the CJEU's observations as regards the impact on the capercaillie of the open-cast mines, some of which were located outside the Natura 2000 sites at issue. In this respect, the CJEU ruled that some of the mining operations, including one that was located outside the Natura 2000 site, were also capable of producing a barrier effect likely to contribute to the fragmentation of the habitat of the capercaillie and to the isolation of certain sub-populations of that species.¹⁶⁰ According to some authors, the CJEU took into account the populations located outside the Natura 2000 sites concerned, hinting that this provision also protects the subpopulations located outside the site to which the site's populations are connected.¹⁶¹

It can therefore be upheld that Article 6(2) of the Habitats Directive is sufficiently robust to urge Member States to consider more landscape-wide recovery options, especially in cases where the already designated sites are suffering from continuous quality loss and habitat fragmentation. When combined with other, often less strictly formulated provisions aimed at the development of ecological corridors across the wider landscape, such as Article 10 of the Habitats Directive, Article 6(2) of the Habitats Directive may also underpin such landscape-wide recovery claims that go beyond the strict boundaries of Natura 2000.¹⁶² Among other

155 European Commission, *supra* note 52, p. 25.

156 Schoukens, *supra* note 54, pp. 30-34.

157 *Commission v Spain*, *supra* note 65. See more extensively: J. Verschuuren, 'Connectivity: is Natura 2000 only an ecological network on paper?', in Born et al. (eds.), *supra* note 14, p. 298.

158 *Ibid.*, para. 188.

159 *Ibid.*, para. 189-190.

160 *Ibid.*, para. 148.

161 Verschuuren, *supra* note 157.

162 See along similar lines: A. Trouwborst, 'International nature conservation law and the adaptation of biodiversity to climate change: A mismatch?', (2009) *Journal of Environmental Law*, pp. 439-440. See more critical: L. Squitani, 'The development of ecological corridors: Member States' obligations under the Habitats and Birds Directive', *Journal of European Environmental & Planning Law*, pp. 195-200.

things, it should be noted that the second sentence of Article 4(4) of the Birds Directive stipulates that beyond Natura 2000 sites, 'Member States shall also strive to avoid pollution or deterioration of habitats'. In a noteworthy ruling of 13 December 2007 the ECJ stated that, although this provision does not constitute an obligation of result, it still obliges Member States 'to make a serious attempt at protecting those habitats which lie outside the SPAs'. It therefore held Ireland liable for not having sufficiently translated conservation requirements, especially related to farmland birds, into its national planning legislation.¹⁶³ Whereas this ruling remains somewhat ambivalent, it certainly has the potential to inspire environmental litigation in which authorities are forced, by a combined referral to both Article 6(2) of the Habitats Directive and the second sentence of Article 4(4) of the Birds Directive and/or Article 10 of the Habitats Directive, to take further measures for protecting and restoring corridors deemed vital in the context of two or more isolated Natura 2000 sites.

4.3. Applying a well-defined temporal reference scenario in a remediation context: tackling ongoing and interim losses via Article 6(2) of the Habitats Directive?

It has been determined that Article 6(2) of the Habitats Directive not only has the potential to ensure non-regression of the environmental quality but, as the case may be, also obliges Member States to take measures to bolster recovery opportunities. The applicable conservation objectives are instrumental to determine the relevance of possible ongoing degradation. Even so, if deterioration is indeed deemed relevant, the question remains against which specific temporal baseline the scope of the potential recovery and/or remediation actions under Article 6(2) of the Habitats Directive needs to be assessed. It is interesting to note here that Article 6(2) seems to present, albeit implicitly, a concrete reference state against which any further degradation needs to be measured and, if necessary, restored.

4.3.1. A clear-cut temporal baseline: the date of designation of a Natura 2000 site?

The specific timeframe for the protection rules linked to Natura 2000 sites allows us to introduce a more explicit temporal baseline against which possible ongoing forms of degradation can be measured and the precise scope of potential remediation measures can be framed.

The starting point for sites designated under the umbrella of the Habitats Directive is Article 4(5), which stipulates that Article 6(2) of the Habitats Directive is applicable from the moment of the inclusion of the site concerned in the list of sites of community interest (SCIs). Admittedly, under the *Draggagi*¹⁶⁴ and *Bund Naturschutz*¹⁶⁵-rationale, proposed SCIs also enjoy a certain degree of protection. Accordingly, Member States are for instance prohibited from authorizing impairments which jeopardize the ecological interests of such sites.¹⁶⁶ Yet, from the moment a site is included in the list of SCIs, the more stringent non-regression obligation enshrined in Article 6(2) of the Habitats Directive applies.¹⁶⁷ As regards protected sites under the Birds Directive (SPAs), the non-deterioration obligation applies from the moment the site has been designated as a protected area under national legislation. In the context of the Flemish Region (Belgium), for instance, this means that potential degradation has needed to be considered since 1988 (as far as SPAs are concerned) and 2004 (as far as SACs are concerned).¹⁶⁸ In other Western-European countries similar dates will have to be used as baseline, while more recently joined Member States will have to go back less far in time.

In other words, when applying the non-regression or standstill obligation included in Article 6(2) of the Habitats Directive, one must not only focus on the applicable conservation objectives but also take into

163 *Commission v Ireland*, supra note 88, para. 179-187.

164 Case C-117/03, *Draggagi et al.*, [2005] ECR I-167, para. 26-27.

165 Case C-244/05, *Bund Naturschutz in Bayern et al.*, [2006] ECR I-8445, para. 46.

166 See more extensively: H. Schoukens & H. Woldendorp, 'Site selection and designation under the Habitats and Birds Directive: a Sisyphean task', in Born et al. (eds.), supra note 14, pp. 49-51.

167 For an illustration of the distinction between the provisional protection regime and Art. 6(2) of the Habitats Directive, see: *Commission v Spain*, supra note 65, para. 163-171.

168 H. Schoukens et al., 'The implementation of the Habitats Directive in Belgium (Flanders): back to the origin of species?', (2007) 4 *Journal of European Environmental & Planning Law*, pp. 127-138.

account the reference situation on the date on which the site was protected.¹⁶⁹ This view, which indirectly underlines the clear potential of Article 6(2) of the Habitats Directive in terms of recovery or remediation, has been reinforced by the European Commission in its Guidance document on Article 6 of the Habitats Directive, which explicitly states that ‘the maintenance of the favourable conservation status has to be evaluated against the initial conditions provided in the Natura 2000 standard data forms when the site was proposed for selection or designation, according to the contribution of the site to the ecological coherence of the network’.¹⁷⁰ Accordingly, these dates could be used as a fixed temporal baseline, against which the viability of acts – or failures to act – of Member States is to be assessed in the context of Article 6(2) of the Habitats Directive.¹⁷¹

Interestingly, the Environmental Liability Directive, while having a distinct focus on concrete accidents and events causing ecological damage, seems to lead to a similar conclusion, although it does not explicitly refer to the date of designation of a Natura 2000 site.¹⁷² In view of determining whether the significance threshold is exceeded as to damage to protected natural habitats and species, it defines the baseline condition as ‘the condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred, estimated on the basis of the best information available’. Annex I to the Environmental Damage Directive contains more detailed criteria on how to determine whether significant adverse changes to the baseline condition have occurred. These criteria cover e.g. the number, density and role of individuals in a species, the rarity of a species, its capacity for propagation or natural regeneration, respectively, and the capacity to recover within a short time to a condition equivalent or superior to the baseline condition.¹⁷³ *Mutatis mutandis* similar criteria could also be of use to determine the baseline condition for a Natura 2000 site at the time of its designation, and thus help to establish a reference baseline.

4.3.2. An enforceable duty to restore to a past reference situation?

Against the background of this case law, however, it still remained unclear whether one could infer an enforceable obligation to restore a Natura 2000 site to the reference state which it was in when it was designated. Given the relatively poor enforcement in many Member States of the protection rules attached to Natura 2000 sites in the early years, it is obvious that a stricter reading of Article 6(2) of the Habitats Directive might pave the way for more ambitious restoration claims, that may be enforced before national courts. The very fact that in its previous case law, the ECJ had already held that a Member State cannot derive an advantage from its failure to adhere to its obligations under the EU Nature Directives, already pointed to more scrutiny in this respect.¹⁷⁴

The Italian *Cascina Tre Pini* case, which dealt with the question of declassification of an existing Natura 2000 site, provided the CJEU with an interesting opportunity to address this issue in a more comprehensive manner. These national court proceedings more specifically revolved around an Italian Natura 2000 site which suffered from significant degradation due to its location close to the Malpensa Airport, among other things. In her Opinion, Advocate General Kokott already held that ‘Article 6(2) of the Habitats Directive requires the Member States to protect SCIs against deterioration. A Member State’s failure to fulfil those obligations to afford protection does not warrant the withdrawal of protected status. (...) Member States should rather take the necessary measures to *restore* the site’.¹⁷⁵

In its final ruling on the matter, the CJEU reached a similar conclusion, although in a slightly more indirect manner in terms of restoration duties. The Court concluded that not every environmental degradation of a

169 *Grüne Liga Sachsen*, supra note 107, para. 58 and 60.

170 European Commission, supra note 52, p. 27.

171 *Commission v Spain*, supra note 65, para. 155.

172 The Environmental Liability Directive does not explicitly refer to the concept of ‘Natura 2000’, which has led some authors to submit that damage to Annex I habitats located outside the designated Natura 2000 sites can also be covered by the system of preventative and remedying duties. See: C. Piroette, ‘La directive 2004/35/CE du 21 avril 2004 sur la responsabilité environnementale: premiers commentaires’, in G. Viney & B. Dubuisson (eds.), *Les responsabilités environnementales dans l’espace Européen* (2006), pp. 661-664.

173 Art. 2(1) and Annex I of the Environmental Damage Directive.

174 Case C-347/98, *Commission v France*, [2000] ECR I-10799, para. 50.

175 Case C-301/12, *Cascina Tre Pini* ss, ECLI:EU:C:2014:214, Opinion of AG Kokott, para. 50 (emphasis added).

site on the list of SCIs justifies its declassification. In its pivotal paragraph 32, however, the CJEU emphasized that Article 6(2) of the Habitats Directive requires the Member States to protect the SCIs by adopting measures to avoid deterioration or disturbance. By doing so, the CJEU clarified that ‘the failure of a Member State to fulfil that obligation of protecting a particular site does not necessarily justify the declassification of that site (...). On the contrary, it is for that State to take the measures necessary to safeguard that site.’¹⁷⁶ This clearly underscores the potential of Article 6(2) of the Habitats Directive as groundwork for recovery claims in the context of degraded Natura 2000 sites. As has become clear, such measures can be qualified as remediation measures or offsets to compensate previous non-compliance situations.

4.3.3. A dynamic temporal baseline, offering more opportunities for restoration claims?

Evidently, the use of a clear-cut reference date will make it easier to specify the exact scope of possible restoration or remediation claims vis-à-vis government actors in the context of Natura 2000 sites that have been poorly managed and conserved over the past decades. However, the question arose whether degradation which has materialized since the reference date needs to be taken into account as well in the context of Article 6(2) of the Habitats Directive. Or, translated in terms of restoration: Should possible recovery efforts mainly focus on restoring a site to its baseline scenario or should such recovery efforts equally take into account the additional degradation that has occurred in the meantime, including the so-called ‘interim losses’?

In its ruling in the *Waldschlösschen Bridge* case, the CJEU reaffirmed that any step taken on the basis of Article 6(2) cannot relate to a date going back to a period in which the site was not protected. Even so, it held that the objective of this provision would be ignored if one were to disregard factors that have caused or that are likely to continue to cause deterioration or disturbance after the date on which the site was protected.¹⁷⁷ Therefore, when assessing potential recovery actions in order to halt ongoing degradation, one should focus both on factors existing on the date of the designation of a site and on all effects that have arisen after that date.¹⁷⁸ This seems to suggest that also interim losses, which result from the fact that the damaged nature was not able to perform its duties until remediation measures took effect, need to be considered. This again underlines the relevance of Article 6(2) of the Habitats Directive in implementing the EU’s restoration targets. The CJEU’s understanding of Article 6(2) of the Habitats Directive is in line with the approach set forth by the Environmental Liability Directive, which explicitly presents ‘compensatory measures’ in order to compensate for interim loss of natural resources and services pending recovery.¹⁷⁹ However, in view of the polluter-pays principle, the exact repercussions of this interpretation may give rise to complexities when enforced at the individual level, especially in cases of diffuse pollution.

Be that as it may, the Dutch *Programmatic Approach to Nitrogen* provides an apt illustration of using correct reference dates in the context of Article 6(2) of the Habitats Directive. In its 2012 Opinion on the legal foundations of the PAN, the Dutch Council of State repeatedly underlined the need to take into account correct reference points for the Dutch Natura 2000 sites included in the PAN.¹⁸⁰ To be more precise, the Dutch restoration actions aimed at the recovery of affected Natura 2000 sites should not only focus on remedying the ongoing degradation that was present in the summer of 2015, when the PAN entered into force. It should also take into consideration the damage that had arisen since 2004 (in the context of SACs) and 1988 (in the context of SPAs), the additional and possible interim losses.

Accordingly, the recovery actions should equally be aimed at remedying the losses that have been unlawfully allowed since the designation of the Natura 2000 sites. Likewise, the dynamic nature of the baseline is highlighted by the Commission’s Guidance document on Article 6 of the Habitats Directive. Here, it is held that the conservation status to be used in the context of Article 6(2) of the Habitats Directive is, as the case may be, assessed ‘against the aim of improving the conservation status announced at the time of

176 *Cascina Tre Pini*, supra note 175, para. 32.

177 *Grüne Liga Sachsen*, supra note 107, para. 60.

178 *Ibid.*, para. 61.

179 See Annex II, 1.1 to the Environmental Liability Directive.

180 Advisory Opinion of the Dutch Council of State (2012) No.W.15.12.0046/IV.

the setting-up of the network'.¹⁸¹ Consequently, when applying the protection duty contained in Article 6(2) of the Habitats Directive, it is only logical to take restoration targets into consideration. As a result, the focus on a well-defined reference status – i.e. the date of the designation of the Natura 2000 site – should not blur the fact that the scope of a possible recovery duty under Article 6(2) of the Habitats Directive can be expanded in view of changed circumstances and interim losses.

4.4. Obligation of result or of means: Article 6(2) of the Habitats Directive as an enforceable protection and restoration duty?

It is obvious that, if Article 6(2) of the Habitats Directive is to be interpreted as a so-called *obligation of result*, this would pave the way for more progressively tailored restoration-based approaches in the context of degraded Natura 2000 sites. Under such circumstances, an environmental NGO only needs to demonstrate that deterioration or disturbance within the meaning of Article 6(2) of the Habitats Directive has occurred in the field and then base its restoration claims on these findings. However, if Article 6(2) of the Habitats Directive is to be interpreted as a *best efforts obligation*, a Member State can suffice by stating that it has acted with the required due care and diligence and that it has taken all the measures one could reasonably expect from it.¹⁸² In this case, the burden of proof is shifted to the applicant, who must prove not only that the result has not been achieved (i.e. deterioration or disturbance) but additionally that the Member State has not acted diligently. In view of the wording and the multiple vague terms used in Article 6(2) of the Habitats Directive, such as the notion of 'deterioration', it may be tempting to conclude that this non-regression duty cannot be interpreted as an obligation of result.

4.4.1. Obligation of result: towards a recovery-based rationale?

In spite of the relatively vague concepts that are used in Article 6(2) of the Habitats Directive, the legal literature has consistently argued that this provision should be read as an *obligation of result*.¹⁸³ Following earlier strict decisions with respect to the first sentence of Article 4(4) of the Birds Directive,¹⁸⁴ the ECJ issued one of its first landmark rulings in the *Commission v Ireland* case, which concerned the problematic overgrazing in some of the Irish SPAs. And while the ECJ acknowledged that Ireland had taken some measures aimed at stabilizing and redressing the problem of overgrazing, Ireland was still condemned for not taking more measures to avoid the negative impact on the habitats of the red grouse in view of the evidence that was presented.¹⁸⁵ Interestingly enough, the ECJ indirectly pointed to the restoration rationale underpinning Article 6(2) of the Habitats Directive, by holding that the competent Irish Government's measures should not merely focus on stabilizing the problem of overgrazing but should also aim at the recovery of the affected habitats.¹⁸⁶

In the *Spanish brown bear* case a similar approach is noticeable given the focus on safeguarding the re-establishment of the population of brown bears in Cantabria, which are currently not at a favourable conservation status.¹⁸⁷ In its recent case law, the CJEU equally underscored that the precautionary principle applies in the specific context of Article 6(2) of the Habitats Directive. To be more precise, the mere existence of a probability or a risk that economic activity at a protected site might cause significant disturbance for a species may constitute an infringement of Article 6(2) of the Habitats Directive, 'without a cause and effect relationship between that activity and significant disturbance to the species having to be proved'.¹⁸⁸ These case-law developments indirectly facilitate future recovery-based litigation in the context of Article 6(2) of

181 European Commission, *supra* note 52, p. 27.

182 See more extensively on this topic in the context of Article 4 of the European Water Framework Directive: J.J.H. van Kempen, 'Countering the Obscurity of Obligations in European Environmental Law: An Analysis of Article 4 of the European Water Framework Directive', (2012) 24 *Journal of Environmental Law*, pp. 499-533.

183 Cliquet et al., *supra* note 14, p. 276; Cliquet, *supra* note 25, pp. 537-538.

184 See, for instance: *Commission v France*, *supra* note 84, para. 35.

185 *Commission v Ireland*, *supra* note 83, para. 26-30.

186 *Ibid.*, para. 31.

187 *Ibid.*, para. 190.

188 *Grüne Liga Sachsen*, *supra* note 107, para. 42; *Commission v Spain*, *supra* note 65, para. 142.

the Habitats Directive. Accordingly, whenever the Member States have set their conservation objectives, more detailed standards to evaluate the acceptability of ongoing decline will be available which will allow for more objective enforcement of the standstill obligation. Likewise, the fact that the CJEU explicitly allowed the use of exemptions, such as Article 6(4) of the Habitats Directive, indirectly points to the fact that the obligation at issue is an obligation of result.¹⁸⁹

4.4.2. Safeguarding the recovery rationale: limited options to declassify Natura 2000 sites?

The comprehensive nature of the implicit restoration duties incumbent on the Member States by virtue of Article 6(2) of the Habitats Directive is further highlighted by the fact that the scope of this obligation is, as such, not limited to intentional acts, but equally covers any chance events that may occur, such as floods and wildfire. In her Opinion in the *Commission v UK* case, Advocate General Kokott refuted the argument of the United Kingdom that only non-natural deterioration is to be avoided, stating that measures to prevent natural developments that may cause the conservation status of species and habitats to deteriorate may be deemed necessary in order to comply with Article 6(2) of the Habitats Directive.¹⁹⁰ In its final ruling in this case, however, the CJEU reasserted this rationale and indicated that Member States are therefore required to tackle non-intentional acts, and cannot limit their actions to intentional human activities.¹⁹¹ Whereas the CJEU did not expressly express its view on the question whether impacts such as climate change or sea-level rise should be tackled through Article 6(2) of the Habitats Directive, the European Commission still went on to clarify that the provision does not apply if a process cannot be influenced by active management.¹⁹²

This again emphasizes the fact that Article 6(2) of the Habitats Directive is principally to be regarded as an obligation of result. The recent jurisprudential evolutions leave Member States relatively little leeway, since they confine options to declassify already degraded Natura 2000 sites. Instead of trying to get rid of the protected status of a degraded Natura 2000 site, Member States are expected to primarily focus on stopping the ongoing decline and, subsequently, allow its long-term recovery. Evidently, one could argue that such a rigid approach may be at odds with the proportionality principle as it requires Member States to invest in ambitious recovery measures in exchange for uncertain environmental gains. Ultimately, this could lead to relatively ineffective restoration programmes. It would considerably limit the Member States' ability to prioritize restoration actions in a cost-effective manner. Indeed, few Member States will be found willing to dedicate infinite financial resources to the conservation and protection of sites with limited prospects of success, even when this is the result of their own failure to abide by the protection rules during the previous decades.¹⁹³

As indicated above, however, Member States are offered several, albeit limited, justification or excuse clauses in order to solve such a puzzle in the context of the Natura 2000 Network. For instance, a Member State can still try to justify deterioration or significant disturbance within the meaning of Article 6(2) of the Habitats Directive if it manages to successfully apply the derogation clause contained in Article 6(4) of the Habitats Directive. Moreover, in its ruling in the Italian *Cascina Tre Pini* case, which was already partly referred to above, the CJEU confirmed that a Member State is required to declassify a site on the list of SCIs when it is definitively no longer capable of contributing to the achievement of the objectives of the Habitats Directive and, accordingly, it is no longer warranted for the site to remain subject to the provisions of that Directive. Under such circumstances, the Member States are obliged to propose to the European Commission that the site be declassified.¹⁹⁴ However, the CJEU hastened to underline in this ruling that a mere allegation of environmental degradation of a Natura 2000 site, made by the owner of land located on that site, cannot suffice to bring about such an adjustment to designated status of such as Natura 2000 site. It is essential that the degradation makes the site irretrievably unsuitable to ensure the conservation

189 See by analogy: Van Kempen, *supra* note 182, p. 526.

190 Case C-6/04, *Commission v United Kingdom*, [2005] ECR I-9017, Opinion of AG Kokott, para. 18-22.

191 *Commission v United Kingdom*, *supra* note 190, para. 34.

192 European Commission, *supra* note 53, p. 55.

193 Backes et al., *supra* note 134, pp. 25-30.

194 *Cascina Tre Pini*, *supra* note 175, para. 28.

of natural habitats and of the wild fauna and flora or the setting up of the Natura 2000 Network, so that the site can definitively no longer contribute to the achievement of the objectives of the Habitats Directive, as set out in Articles 2 and 3. Therefore, not every single case of degradation of a Natura 2000 sites justifies its declassification.¹⁹⁵ Accordingly, Member States are principally obliged to prevent or, as the case may be, remedy further incremental degradation instead of simply abandoning an existing Natura 2000 site in exchange for the designation of other areas with similar characteristics.

Some might accuse the CJEU of rigidity, since the EU judges severely limit the discretion Member States enjoy in the context of the conservation and protection of Natura 2000 sites, especially when located in areas where important economic interests are at play. As a result of the fact that Member States were not allowed to let economic criteria prevail in the context of their national designation efforts, some Natura 2000 sites are located in the close vicinity of industrial activities or port areas, which can put a heavy burden on the continuation of economic activities that frequently clash with preservation of at least some natural habitats. Even so, a more relaxed stance may lead Member States to believe that no shift towards more ambitious and short-term recovery policies is needed in order to stave off further degradation. It is also important here to point out that Member States are required to take the restoration possibilities of a site into consideration when selecting the ecologically most valuable sites for a particular habitat or species.¹⁹⁶ When evaluating the restoration possibilities of a site, the Member States need to take into account the scientific feasibility of the possible restoration actions.¹⁹⁷ In other words, by designating a site as a Natura 2000 site, a Member State already implicitly suggested that the conservation and restoration thereof is feasible and primordial in view of the achievement of its conservation objectives at national level. Only new, superseding circumstances linked to natural developments which could not have reasonably avoided by applying conservation measures seem acceptable to declassify a Natura 2000 site instead of prioritizing its restoration.

4.5. Beyond maintaining the status quo: *proactive* restoration measures through Article 6(2) of the Habitats Directive?

Now that it has been clearly established that Article 6(2) of the Habitats Directive does not merely focus on maintaining the status quo and, as the case may be, may require the competent authorities to issue prohibitions on activities which might lead to further deterioration of natural habitats or the disturbance of protected species, the question is whether Member States could also be forced to implement *active* restoration measures in order to comply with their obligations under Article 6(2) of the Habitats Directive, such as habitat restoration measures. This question is relevant because when faced with severe degradation, such proactive measures, aimed at the restoration of severely impacted habitats, are key in avoiding further deterioration. Along the same lines, actions aimed at creating new breeding grounds could be crucial for the recovery of species that are threatened by extinction through fragmentation.

4.5.1. From benign neglect to active recovery?

The majority of the above-mentioned rulings of the ECJ/CJEU regarding Article 6(2) of the Habitats Directive related to the failure of Member States to adopt more stringent measures aimed at reducing the negative effects of ongoing activities that could lead to further degradation at Natura 2000 sites. It is therefore not surprising to see the European Commission focus almost exclusively on the prohibitive nature of Article 6(2) of the Habitats Directive while confining the duty to implement more robust restoration measures to Article 6(1) of the Habitats Directive, which more explicitly aims at the implementation of active conservation measures.¹⁹⁸ This point of view seems to be underpinned by the CJEU's ruling in the *Orleans* case, where

195 Ibid., para. 30-31.

196 Annex III, A, c and Annex III, B, b to the Habitats Directive.

197 European Commission, *Commission Implementing Decision of 11 July 2011 2011/484/EU concerning a site information format for Natura 2000 sites*, OJ L 198, 30.7.2011, p. 39.

198 European Commission, *supra* note 52, pp. 23-25.

it clearly makes a distinction between ‘conservation measures’, as meant by Article 6(1) of the Habitats Directive and ‘protective measures’, as intended by Article 6(2) of the Habitats Directive.¹⁹⁹

Admittedly, in some of its rulings the CJEU has already indirectly opened the doors for a more proactive approach towards Article 6(2) of the Habitats Directive. Both in the ECJ’s 2002 ruling in the *Commission v Ireland* case²⁰⁰ and in its decision in the *Spanish brown bear* case,²⁰¹ the EU judges assessed this issue and referred to the potential for recovery of the natural habitats or species concerned. This case law clearly points towards a more proactive interpretation of the non-regression clause, especially when Natura 2000 sites are suffering from continuing degradation. And although the restoration focus of Article 6(2) of the Habitats Directive might not go as far as the robust measures required under Article 6(1) of the Habitats Directive, because the focus is more on avoiding or remedying ongoing and interim losses, it still paves the way for more robust restoration claims in the context of Article 6(2) of the Habitats Directive.

4.5.2. Active restoration measures?

In spite of the clear hints towards the inclusion of a more restoration-oriented approach to the non-regression obligation, the rulings in which the CJEU decisively held that proactive conservation measures are required under Article 6(2) of the Habitats Directive remain relatively scarce. However, stating that there is no room for active restoration measures under Article 6(2) of the Habitats Directive is a foregone conclusion. Back in 2002, Advocate General Léger already concluded in his Opinion in the above-mentioned *Commission v Ireland* case that Article 6(2) of the Habitats Directive had been violated because no measures likely to remedy the damage caused by the overgrazing had been implemented.²⁰² Building on these findings, Advocate General Kokott stated in her Opinion in the 2005 *Commission v UK* case that Article 6(2) of the Habitats Directive ‘in fact points to an obligation to implement certain conservation measures’. This led the Advocate General to conclude that ‘it can be established only from the particular deterioration whether certain conduct must be prohibited or conservation measures adopted in order to avoid deterioration’.²⁰³ Interestingly, the Advocate General referred to the example of scrub growth, which might cause the further degradation of open-land natural habitats. If not prevented by active human intervention, these habitats will therefore degrade further. In other words, human interventions in nature management are often needed in order to stave off further degradation, at least in the short term. Moreover, since the concept ‘conservation’, as defined by Article 1(a) of the Habitats Directive, encompasses ‘a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status’, also restoration actions come into the picture.

While the ECJ did not explicitly elaborate on the duty to establish proactive habitat restoration measures in the above-treated rulings, it did not explicitly reject the rationale used by both Advocate Generals either. The fact that the CJEU opened the door for the application of Article 6(4) of the Habitats Directive – which also contains the obligation to implement compensation measures in order to maintain the coherence of the Natura 2000 Network – its more recent case law indirectly highlights the room available for the implementation of ecological restoration measures in the context of Article 6(2) of the Habitats Directive. Indeed, given the fact that both Article 6(2) and 6(3) of the Habitats Directive aim to ensure the same level of protection, it would be illogical to exclude the use of active restoration actions that go beyond mere passive protection measures in the context of the former provision.

Moreover, it can be indirectly inferred from the 2016 ruling in the *Orleans* case that active restoration measures that do not lead to further deterioration of a site definitely qualify as appropriate measures in the context of Article 6(2) of the Habitats Directive. Yet, since this was not the case for the habitat restoration measures that had been integrated into the spatial development plan for the Antwerp Port Expansion – for they were basically meant to offset future damage – the CJEU repudiated their implementation as Article 6(2)

199 *Orleans*, supra note 112, para. 32.

200 *Commission v Ireland*, supra note 83, para. 31.

201 *Commission v Spain*, supra note 65, para. 190.

202 *Commission v Ireland*, supra note 83, Opinion of AG Léger, para. 77.

203 *Commission v UK*, supra note 73, Opinion of AG Kokott, para. 19.

measures.²⁰⁴ *A contrario*, however, genuine restoration measures aimed at halting ongoing deterioration by restoring degraded habitats or recreating new wetlands might still qualify as genuine protective measures under Article 6(2) of the Habitats Directive. This is especially the case if such actions are needed in order to remedy a failure on the part of the Member State to enforce Article 6(2) of the Habitats Directive since the time of designation of the site.

In this respect, the CJEU's above-mentioned decision in the Italian *Cascina Tre Pini* case needs to be brought back to attention, as it explicitly reasserted the duty that rested on a Member State to take measures to safeguard its Natura 2000 sites from further deterioration. And while the CJEU did not explicitly refer to recovery measures, as did Advocate General Kokott in her Opinion,²⁰⁵ the implicit rationale of this ruling indirectly underscored the need for restoration measures in the context of Article 6(2) of the Habitats Directive, albeit more as corrective actions in order to amend earlier shortcomings.²⁰⁶ Some years earlier, the European Commission also appeared to present a similar rationale when questioned about its actions directed against the Netherlands with regard to the deteriorated conservation status of the Western Scheldt Natura 2000 site as a result of navigation and flood protection projects. In view of the uncertainty at the time as to the concrete implementation of the flooding of the Hedwige polder, which was deemed necessary to avoid further deterioration in light of recent and past dredging works, it held that 'the Netherlands is obliged to take appropriate measures to restore the Western Scheldt estuary to favourable conservation status and to avoid further deterioration'.²⁰⁷ Admittedly, the Commission did refer to both Article 6(1) and 6(2) of the Habitats Directive in this respect, which adds to the existing confusion. Either way, recovery measures can be deemed encompassed under Article 6(2) of the Habitats Directive both as a remedial measure to remedy a past implementation deficit as well as means to halt an ongoing deterioration.

Interestingly, the Netherlands provide yet another interesting example as to the use of restoration measures in the context of Article 6(2) of the Habitats Directive. When implementing the *Programmatic Approach to Nitrogen*, the Dutch Government presented the use of habitat restoration and recovery measures in the context of Article 6(2) of the Habitats Directive. By means of the envisaged restoration strategies, the Dutch Government aims to halt the continuing deterioration of natural habitats due to the adverse atmospheric nitrogen impacts. Such measures include measures against acidification by adding basic substances and/or restoration of the water cycle, the removal of nitrogen by excavation, dredging, moving, burning or litter removal and interventions in the vegetal succession by coppice management, for instance.²⁰⁸

5. Conclusions and outlook

On paper, the EU's ecosystem restoration targets appear impressive and ambitious. Even so, the lack of clear-cut definitions of key concepts, such as degradation, the applicable baseline scenario and restoration, and the lack of a comprehensive legislative framework aimed at implementing this shift towards recovery, has given rise to mounting criticism, with some authors holding that the short-term achievement of these targets is impractical since it would require comprehensive restoration programmes to be implemented over large tracts of lands.²⁰⁹ The critics might be right. The 2015 mid-term review of the EU Biodiversity Strategy to 2020 indicated that the restoration targets are still far from being achieved.²¹⁰ The majority of habitats and species that already had an unfavourable conservation status are maintaining this status, and some have been deteriorating even further. In addition, across the wider landscape, the ongoing deterioration of valuable nature has not been halted since 2010. It is therefore fair to say that the ongoing degradation

204 *Orleans*, supra note 112, para. 39; *Sweetman*, supra note 69, para. 38.

205 Opinion AG Kokott, supra note 174, para. 50.

206 See also: Cliquet, supra note 25, pp. 541-542.

207 European Commission, *Answer given by Mr. Potocnik on behalf of the European Commission to parliamentary questions E-006402/11, E-006507/11, P-006822/11*, 15 September 2011.

208 Schoukens, supra note 54, pp. 30-34.

209 Kotiaho, supra note 29.

210 European Commission, *Report from the Commission to the European Parliament and the Council. The Mid-Term Review of the EU Biodiversity Strategy to 2020*, COM(2015) 478 final.

renders the achievement of the ambitious restoration targets an even less realistic policy target. The simple fact that all Member States failed to honour their pledge to propose a sound national restoration prioritization framework and the many examples of unsound management of Natura 2000 sites over the past decades²¹¹ indicate that no short-term improvement is to be expected in this respect.²¹²

As showcased by the analysis above, the non-regression clause contained in Article 6(2) of the Habitats Directive may serve as a legally enforceable instrument to oblige Member States to make the shift towards more progressive recovery policies, at least for their Natura 2000 sites that are currently in a degraded status. The case law analysis referred to above has indicated a threefold relevance of Article 6(2) of the Habitats Directive in light of the EU's restoration targets.

First, there is the wide material scope of Article 6(2) of the Habitats Directive, which makes it a very promising legal tool to avoid any further degradation, regardless of the origin thereof, at least in the context of Natura 2000 sites. Most importantly, it also covers cases of diffuse damage and pollution, which often fall outside the realm of other EU environmental directives such as the EIA Directive and the Environmental Liability Directive. In an ideal world, Article 6(2) of the Habitats Directive is thus used by Member States to create a more favourable departing point, from which the achievement of the more ambitious recovery actions required by Article 6(1) of the Habitats Directive becomes possible. Past, interim and current losses are to be tackled through Article 6(2) of the Habitats Directive as long as they give rise to ongoing degradation of Natura 2000 sites.

Second, as demonstrated, the relevance of Article 6(2) goes beyond the introduction of mere passive restoration actions and prescriptions. Substantively speaking, the provision also requires Member States to assess possible impairments vis-à-vis the applicable conservation and/or restoration targets, which points to a relatively low applicable *de minimis* threshold given the imperative improvement which is prevalent. Yet, even more interestingly, the use of the designation date of a Natura 2000 site as a well-established reference scenario might render the positive outcome of restoration litigation against Member States, both before EU and national courts, ever more likely and urges Member State to tackle additional interim losses linked to past non-compliance by implementing active recovery measures. As a result, the CJEU modestly opens the door for restoration claims which are based on the poor enforcement of the protection and conservation duties in previous decades.

Since the poor implementation of the conservation duties in Natura 2000 sites has been singled out as one of the major focal points in the REFIT Fitness Check, Article 6(2) of the Habitats Directive is expected to play a crucial role in safeguarding the remediation of these implementation deficits and, as a result thereof, in achieving the ambitious restoration targets.

Third, the available case law indicates that active restoration measures can be required in order to comply with Article 6(2) of the Habitats Directive, especially in instances where such actions are deemed necessary to halt the ongoing degradation. Whereas such actions are not specifically aimed at achieving the applicable conservation actions, they still have to remedy the biodiversity losses caused by non-compliance with the conservation duties since the designation of the Natura 2000 sites.

Conclusively, it is rather ironic to note that a standstill clause that was originally intended to halt ongoing losses might ultimately constitute one of the most important legal instruments to urge Member States to pursue more ambitious restoration and recovery policies. Obviously, progressive case law developments before the CJEU as regards the application of Article 6(2) of the Habitats Directive, even when endorsed by national courts, will be but one step towards the achievement of the EU restoration targets. Given the fact that only a limited selection of cases ever reaches the EU courts in Luxembourg, it would certainly be naïve to think that the case law developments at EU level alone are powerful enough to speed up the restoration of the EU ecosystems in their entirety. Some may even dismiss the rigor reflected in recent case law as an obstacle to smart governance and more cost-effective prioritization of restoration actions, which is evidently crucial in view of the existing budgetary constraints. Indeed, a mere legalist approach to ecological restoration fails

211 S. Leemans, 'Preventing paper parks: How to make the EU Nature Laws work', WWF UK (2017), <<http://www.wwf.eu/?291910/Preventing-Paper-Parks-How-to-make-the-EU-nature-laws-work>> (accessed 10 February 2017).

212 J. Cortina-Segarra et al., 'Biodiversity: Speed restoration of EU ecosystems', (2016) 535 *Nature*, <http://doi.org/doi:10.1038/535231d>, p. 231.

to grasp the more comprehensive nature of the restoration challenges that lie before us, which are best addressed through a participatory and deliberative approach including all relevant stakeholders. However, these more deliberative approaches are to be framed within a progressive restoration logic, as is evident from the CJEU's case law. Moreover, the case law of the CJEU cannot be interpreted as overly rigid given the leeway it leaves to the Member States in implementing concrete measures to address the current degradation. The rationale used by the EU judges may therefore inspire both environmentalists and competent authorities to step up the implementation of the EU's important ecological restoration commitments, at least in the context of Natura 2000. It serves as a clear warning that, rather than losing oneself in eternal standoffs before courts, private landowners, environmentalists and public authorities should focus on forging innovative alliances aimed at the recovery of our most treasured natural sites in the EU. ■