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Atmospheric Nitrogen Deposition and the Habitats Directive: Tinkering with the Law in the Face of the Precautionary Principle?

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Abstract

The implementation of the EU Habitats Directives has urged the permit issuing instances to apply more scrutiny when assessing the local impacts of nitrogen deposition. At present, the critical loads for nitrogen deposition are exceeded in many Natura 2000-sites across Europe, making it one of the most important bottlenecks for the achievement of the good conservation status. This article addresses the legal conundrum of how to reconcile continuous economic development with increased attention for the adverse effects of excessive nitrogen deposition on natural habitats. In this respect, the exact implications of the protection scheme tied to Natura 2000 sites for nitrogen-emitting activities are further discussed. In particular, a focus is placed on the novel regulatory approaches that have recently been implemented at Member States' level in order to better align nitrogen-emitting activities with the recovery rationale underpinning the Habitats Directive. The Dutch Programmatic Approach Nitrogen (PAN), which aims to make preservation and restoration of protected habitats possible without impeding room for further economic development, stands out as one of the most notable regulatory tools in this regard. This article reveals that the majority of the recently implemented regulatory solutions, such as the PAN, heavily rely upon the expected benefits linked to additional reduction efforts and restoration measures that will have to be implemented in nitrogen-sensitive Natura 2000-sites. Given the current doubts surrounding the effectiveness of ecological restoration efforts in offsetting impairments to natural habitats, it remains debatable whether such rationale is appropriate and fully in line with the precautionary principle. A more cautious strategy would be to only allow for new economic development once further reductions of nitrogen deposition levels have been established and the effectiveness of the restoration measures on the ground is guaranteed. If it turns out the PAN is not capable of reversing the ongoing deterioration in nitrogen-sensitive Natura 2000-sites, the additional room for economic development might quickly evaporate.

1. Introduction

Nitrogen deposition describes the input of reactive nitrogen from the atmosphere to the biosphere both as gas, dry deposition and in precipitation as wet deposition.[1] Since the start of the 20th century, the skyrocketing human-induced nitrogen emissions have significantly disrupted the natural nitrogen cycle.[2] Recent research unveils that human activities currently contribute twice as much terrestrial nitrogen fix-

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[1] N. Dise, 'Nitrogen as a threat to European terrestrial biodiversity' In M. Sutton et al. (eds.), *The European Nitrogen Assessment* (Cambridge, Cambridge University Press: 2011), pp. 463–494; R. Bobbink et al., 'Global Assessment of Nitrogen Deposition Effects on Terrestrial Plant Diversity: a synthesis', (2010) *Ecological Applications* 20, pp. 30–59.

[2] See also: Live Science Staff, 'Nitrogen Fingered As Latest Ecosystem Evildoer' (2010), http://www.livescience.com/8720-nitrogen-fingered-latest-ecosystem-evildoer.html (Accessed 20 June 2015).

ation as natural resources, and provide around 45 percent of the total biological useful nitrogen of the total biological useful nitrogen produced annually on earth.[3] Nitrous oxide levels are currently higher than at any other time during the last 800,000 years.[4] Ecosystems are overloaded with nitrogen. Among the primary causes of this sharp rise of the atmospheric concentration of nitrous oxide are processes such as the industrialization of agriculture, fossil fuel combustion and other industrial processes.[5] Since the eutrophying and acidifying effects of atmospheric nitrogen deposition are seen as part of the long-range transboundary air pollution, they have been subject to international and EU air pollution abatement rules for several decades.[6]

Even when, generally speaking, nitrogen emissions are expected to further decline until 2030, they are still far too high to re-establish the so-called '*favourable conservation status*' of many endangered natural habitats across Europe. Currently, the critical loads of nutrient nitrogen are exceeded on 62 % of the ecosystem area in the EU-27 countries.[7] Among the most vulnerable habitats in Europe to elevated levels of nitrogen deposition are many of the semi-natural grassland communities, heather and peatlands in Europe, which are dominated by species with low nutrient requirements.[8] According to the recent findings of the European Environmental Agency (EEA), approximately 50 % of the vulnerable natural or semi-natural habitats in the EU are expected to be at risk of excessive nitrogen deposition in 2020. Across Europe, and particularly in the Atlantic Biogeographic Region, high background concentrations of nitrogen and ammonia continue to stand in the way of the much-needed recovery of many nitrogen-sensitive terrestrial habitats.[9] Accordingly, nitrogen deposition has become one of the major challenges for the management and conservation of many natural habitats in the Atlantic Region. For instance, in the United Kingdom 68 % of the area of sensitive habitats is at risk due to exceedance of the critical loads[10], whereas the bulk of the Dutch EU protected sites are severely impacted by excessive nitrogen deposition levels.[11] In its 2015 Report on the State of Nature of the EU, the EEA stressed that the overwhelming majority of the protected natural habitats have an unfavorable

[3] D.E. Canfield et al., 'The Evolution and Future of Earth's Nitrogen Cycle', (2010) Science, pp. 192–196.

[4] A. Schilt et al., 'Glacial–interglacial and millennial-scale variations in the atmospheric nitrous oxide concentration during the last 800,000 years', (2010) *Quaternary Science Reviews* 29, pp. 182–192.

[5] European Environment Agency, *Effects of air pollution on European ecosystems. Past and future exposure of European freshwater and terrestrial habitats to acidifying and eutrophying air pollutans* (Copenhagen: 2014), http://www.eea.europa.eu/publications/effects-of-air-pollution-on (Accessed 20 June 2015).

[6] Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants, OJ L 309, 27 November 2001.

[7] M. Posch et al., *Modelling and mapping of atmospherically-induced ecosystem impacts in Europe. CCE Status report 2012* (The Netherlands: Coordination Centre for Effects, RIVM: 2012).

[8] C. Nelleman and M.G. Thomsen, 'Long-term changes in forest growth: potential effects of nitrogen deposition and acidification', (2001) *Water, Air and Soil Pollution* 128, pp. 197–205.

[9] A. Nordin et al., 'New science on the effects of nitrogen deposition and concentrations of Natura 2000-sites', In W.K. Hicks et al. (eds.) *Nitrogen Deposition and Natura 2000: Science and practice in determining environmental impacts* (COST729/Nine/ESF/CCW/JNCC/SEI Workshop proceedings, COST: 2011) http://cost729.ceh.ac.uk/n2k-workshop (Accessed 20 June 2015), pp. 114–128.

[10] Joint Nature Conservation Committee, The UK's approach to assessing N impacts in relation to Article 17 reporting (UK, Workshop proceedings: 2013) http://ec.europa.eu/environment/nature/natura2000/platform/documents/whitfield_wg1_presentation_uk_approach_eng.pdf (Accessed 20 June 2015).

[11] Secretary of State for Economic Affairs and the Minister of Infrastructure and the Environment, *Programmatic Approach Nitrogen (PAN) –Version to be submitted to the Advisory Division of the Dutch Council of State* (The Netherlands: 2012) https://zoek.officielebekendmakingen.nl/blg-206138.pdf (Accessed 20 June 2015), pp. 8–10.

status, with a staggering 47 % of the national assessments being unfavorable-inadequate and 30 % being unfavorable-bad.[12] What makes the nitrogen deposition threat for the EU's biodiversity even more palpable is that the recovery of over-burdened ecosystems from excessive nitrogen deposition constitutes a slow process.

In recent years, however, the issue of nitrogen deposition has not stayed confined to the domain of ecological management and restoration. It also has become a major obstacle for economic development in some Member States, such as the Netherlands, Germany and Denmark. The application of the protection rules set out in the 1992 Habitats Directive to nitrogen-emitting activities and projects, such as dairy farming and industrial operations, has resulted in an increasing number of rejections of planning applications.[13] In sharp contrast to the more generic air pollution rules, the Habitats Directive sets forth a more localized approach to major environmental threats, such as nitrogen deposition, through its so-called '*habitats assessment-test*' (Article 6(3) of the Habitats Directive) for new plans and projects.

This is particularly important for agricultural emissions since the deposition of ammonia from cattle farms is relatively high in the vicinity of that source in comparison with the deposition at a greater distance from that source. The increasingly stringent – some submit rigid[14] – interpretation of the habitats assessment-procedures linked to EU protected sites has tightened up the terms and conditions for the issuance of permits to plans and projects likely to impact Natura 2000-sites through their nitrogen emissions. As a result of that, the construction of a new road bypass or the expansion of an existing cattle farm is no longer to be presented as a given whenever it is located in the immediate vicinity of nitrogen-sensitive natural habitats.

In order to avoid a complete economic paralysis for nitrogen-emitting activities in the vicinity of Natura 2000-sites, some Member States, among which the Netherlands, have come forward novel regulatory solutions aimed at better aligning the achievement of the conservation objectives for Natura 2000 with allowing additional room for economic development.[15] Certain of these regulatory approaches are grounded on a more liberal reading of the second sentence of Article 6(3) of the Habitats Directive. For example, the recently promulgated Dutch *Programmatic Approach to Nitrogen* (PAN) is based on the assumption that the implementation of additional reduction efforts by the agricultural sector, when taken together with the implementation of robust restoration measures in the already affected Natura 2000-sites, will create room for economic development without leading to further environmental degradation due to excessive levels of nitrogen deposition.

This analysis presents a critical overview of the recently emerged regulatory approaches to the issue of nitrogen deposition. In particular, it will be investigated to what extent the incrementing reliance on restoration measures in the context of permit policies is in line with the precautionary principle, as upheld by the Court of Justice of the EU (ECJ/CJEU) in its recent case-law regarding the Habitats Directive. The present analysis mainly focuses on the

[12] European Environmental Agency, *State of Nature in the EU* (Technical report No 2/2015, Copenhagen: 2015) http://www.eea.europa.eu/publications/state-of-nature-in-the-eu (Accessed 20 June 2015).

[13] Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and Wild Fauna and Flora, OJ L 206, 22 July 1992 (Habitats Directive).

[14] F.H. Kistenkas, 'Rethinking European nature conservation legislation: toward sustainable development?', (2013) *Journal for European & Planning Law* 10, pp. 69–81.

[15] J. Zijlmans and H. Woldendorp, Compensation and mitigation: Tinkering with Natura 2000 Protection Law, (2014) *Utrecht Law Review* 10, pp. 172–193.

current legislative and administrative trends in the Netherlands, a Member State renowned for its relatively high number of law suits by which the EU nature directives are enforced before courts, also in nitrogen-related cases. Seeing that the Netherlands are currently a frontrunner in their dealing with the environmental impacts of nitrogen deposition, it can be expected that the below presented analysis will also serve as a useful jumping-off point for future research in other EU Member States.

This article is structured as follows. In order to set the legal context for the subsequent discussion, *section 2* elaborates on the generic features of the protection scheme applicable for the Natura 2000 Network and, subsequently, its application in the specific context of decision-making procedures for industrial and agricultural activities liable to emit nitrogen compounds in the vicinity of a Natura 2000-site. *Section 3* sheds light on the distinct flexible techniques that have been promulgated at national level in order to provide permit issuing authorities with more leeway in the context of nitrogen-related cases. The purpose of *section 4* is to discuss the much-anticipated ruling of the CJEU in the Dutch *Briels*-case, which touches upon the margin for flexibility when authorizing nitrogen-emitting projects adjacent to Natura 2000-sites. Thereafter, *Section 5* reflects on the wider implications of the latter ruling and discusses how it might affect the margin of manoeuvre for national authorities in the context of economic development nearby nitrogen-sensitive Natura 2000-sites. More specifically, it is examined to what extent the Dutch Programmatic Approach to Nitrogen (PAN), which is regarded by some as an exemplary approach in this context, is deemed compatible with the strict requirements set out the Habitats Directive.

2. The Habitats Directive and nitrogen deposition: Toward more scrutiny?

2.1 A paradigm shift from status-quo to restoration?

The Habitats Directive is, together with the earlier enacted Birds Directive[16], considered to be one of hallmarks of EU environmental law.[17] By requiring Member States to take measures to maintain or restore natural habitats and wild species listed on the annexes to the Habitats Directive at a favorable conservation status, the Habitats Directive lays down a set of robust protection and restoration duties for those habitats and species of European importance.

Due to the explicit reference to the concept of '*restoration*' in the Habitats Directive, Member States cannot confine their conservation efforts to merely maintaining a status quo of the conservation status of the degraded natural habitats that are currently present on their territory. Whenever protected natural habitats are at an unfavorable conservation status, Member States will have to consider measures aimed at the restoration of these habitats.[18]

In view of the high number of critical load exceedances for nitrogen, the nitrogen deposition threat persists as one of the most prominent

[16] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (Birds Directive), OJ L 103, 25.4.1979, p. 1, replaced by Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (hereafter 'Birds Directive'), OJ L 20, 26.1.2010, p. 7.

[17] G. Wandesforde-Smith and N.S.J. Watts, 'Wildlife Conservation and Protected Areas: Politics, Procedure, and the Performance of Failure Under the EU Birds and Habitats Directive', (2014) *Journal of International Wildlife Law & Policy* 17, pp. 62–64.

[18] See on the topic of ecological restoration: A. Cliquet, K. Decleer, H. Schoukens, '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?* (Routledge: 2015), pp. 265–283.

obstacles for the much-needed recovery of many Natura 2000-sites across the EU.[19]

As alluded to above, when compared to the higher inputs throughout the sixties and seventies, the projected lower inputs will certainly slow down the rate of further damage to natural habitats. However, they will still compromise the recovery patch which is mandatory for degraded natural habitats. In many instances, the expansion and the ecological improvement of the natural habitats that are adversely affected by excessive levels of historic nitrogen loads remains the only sustainable pathway to the achievement of the good conservation status at site-level.[20]

2.2 Article 6 of the Habitats Directive and nitrogen deposition: increasingly intertwined?

So far, this article mainly focused on the ecological underpinnings of the threat elevated levels of nitrogen deposition are posing for natural habitats. However, In order to understand the full scope of the regulatory challenges Member States are facing in this respect, a further analysis of the protection duties incumbent on the Member States is warranted. Article 6 of the Habitats Directive provides a useful starting point for a further discussion. In particular, the habitats assessment-rules included in Article 6(3) and (4) of the Habitats Directive have, due their major impact on spatial and economic planning policies, risen to the fore in many Member States. In former days, economic interests were capable of easily trumping nature conservation-based arguments. With the implementation of the Habitats Directive more weight needs to be given to the conservation and, as explained above, the restoration of degraded natural habitats and species. Judges no longer refrain from halting projects that have not observed the protection rules linked to Natura 2000-sites. Yet Member States also have to take into account the more generic conservation duties set out in Article 6(1) and 6(2) of the Habitats Directive. Therefore also the latter provisions are further analyzed.

2.2.1 Article 6(1) of the Habitats Directive: implementing restoration measures for overburdened Natura 2000-sites?

Pursuant to Article 6(1) of the Habitats Directive Member States are required to take proactive management measures for the Natura 2000-sites that have been designated on their territory. The latter provision lays down the groundwork for the Member States when implementing the substantive protection requirements for their Natura 2000-sites. It thus provides a first touchstone for their nitrogen-related policies. The positive management measures referred to in Article 6(1) of the Habitats Directive have to enable the Member States to maintain or, as the case may be, restore the natural habitat types and species, listed in Annex I and II of the Habitats Directive, at a favourable conservation.[21]

Although often overlooked, Article 6(1) of the Habitats Directive has an important bearing on the scope of the implementation duties that are resting upon the shoulders of the Member States in the context of excessive nitrogen deposition levels.

For starters, nitrogen impacts will have to be taken into account when establishing the site-specific conservation objectives for many Natura 2000-sites. It is clear that, whenever a Natura

[19] See more extensively: W.K. Hicks et al., *Nitrogen deposition and Natura 2000: Science and practice in determining environmental impacts* (COST729/Nine/ESF/CCW/JNCC/SEI, Workshop proceedings: 2011) http://jncc.defra.gov.uk/pdf/airpol_WG6article63assessments.pdf (accessed 20 June 2015).

[20] Nordin et al., supra n 9.

[21] European Commission, *Establishing conservation measures for Natura 2000-sites* (Brussels: 2014) http://ec.europa.eu/environment/nature/natura2000/management/docs/conservation%20measures.pdf.

2000-site finds itself in a severely degraded state, for instance due to its exposure to elevated nitrogen deposition levels throughout the past decades, restoration objectives will have to be set up. Consequently, the conservation measures, will also have to cover restoration efforts, aimed at reducing the nitrogen burden for the affected natural habitats.[22] For instance, in cases where Natura 2000-sites are not expected to recover in the short run from overexposure to elevated levels of nitrogen deposition, active on-site management measures are to be considered as an appropriate tool to accelerate the natural processes of nitrogen removal. In cases where such measures, such as habitat maintenance or grazing are already implemented, more robust and ambitious restoration measures will have to be contemplated.[23] This could include the implementation of additional measures against acidification by restoring the water cycle, the removal of nutrients by excavation, sod cutting, shopping, measures aimed at restoring wind and water dynamics.[24] It is obvious that the financial and economic burden associated to these measures will considerably affect the political feasibility thereof, especially in times of economic austerity. In the absence of any direct trade-offs with economic development, it remains doubtful whether many Member States will be found ready to take their restoration duties seriously, at least on the short term.

Be that as it may, non-compliance with Article 6(1) of the Habitats Directive, for example in cases of continuous degradation due to excessive nitrogen deposition, might considerably limit the room for further economic development when application is made of Article 6(3) of the Habitats Directive. In cases where the natural habitats are already at an unfavourable conservation status, any additional impact on degraded natural habitats could be qualified as '*significant*' in view of Article 6(3) of the Habitats Directive (cf. *infra*). In this respect, it is important to underline that Article 6(1) of the Habitats Directive does not put forward an explicit deadline for the achievement of the favourable conservation status for the natural habitats. However, the CJEU has recently underlined that the conservation and restoration measures need to be put in place within six years after the inclusion of a Natura 2000-site in the list of Sites of Community Importance.[25]

2.2.2 Article 6(2) of the Habitats Directive: avoiding further deterioration by ongoing and new activities?

Article 6 of the Habitats Directive does not merely focus on the implementation of positive management measures for Natura 2000-sites. For instance, article 6(2) of the Habitats Directive establishes a general obligation to take appropriate protective steps to avoid the deterioration of natural habitats and the disturbance of species, in so far as such disturbance could be significant in relation to the objectives of that directive. Also this protection duty plays an increasingly prominent role in determining the room for manoeuvre conferred upon the Member States when assessing the threat posed by excessive nitrogen deposition to nitrogen-sensitive Natura 2000-sites. In contrast to Article 6(1), which focuses on additional recovery measures, Article 6(2) of the Habitats

[22] Ibid.

[23] C. Stevens et al., *Review of the effectiveness of on-site habitat management to reduce atmospheric nitrogen deposition impacts on terrestrial habitats* (CCW Science Series Report No: 1037 (part A), CCW, Bangor: 2013), p. 83.

[24] See more extensively on recovery strategies: N.A.C. Smits and D. Bal (eds.), *Recovery strategies for nitrogen-sensitive habitats* (The Netherlands: 2012) http://ec.europa.eu/environment/nature/natura2000/platform/documents/part-i-chapter-1_nov-2012_2013-09-10_en.pdf (Accessed 20 June 2015).

[25] CJEU, Case C-90/10, Commission v Spain (2011) ECR I-134, para. 64.

Directive lays emphasis on the duty to take preventative measures in order to avoid further significant deterioration.

At first sight, the standard of protection imposed by Article 6(2) of the Habitats Directive appears to be relatively high. The latter provision, when interpreted literally, seems to explicitly prohibit all forms of deterioration, even those who do not usually produce a significant effect on a Natura 2000-site[26]. Evidently, such interpretation is not without relevance for the issue of nitrogen deposition, since it entails that Member States also have to take into account the impact of small-scale emission sources nearby Natura 2000-sites. Opposite to that interpretation, some Dutch authors have advocated for a more reasonable approach to Article 6(2) of the Habitats Directive, assuming that non-significant deteriorations can be left out of consideration.[27] In a 2009 infringement procedure against France, Advocate General Kokott debunked the latter reasoning when holding that the French implementing rules, according to which human activities could only be restricted if they have significant effects, stand at odds with Article 6(2) of the Habitats Directive.[28] Still, in its final ruling the CJEU did not pronounce itself on the matter, thereby leaving the issue essentially moot.[29]

In terms of economic impact, Article 6(2) of the Habitats Directive has consistently been interpreted by the ECJ/CJEU as an overarching '*catch all-clause*', obliging Member States to scrutinize all harmful activities with adverse consequences on the protected natural habitats for which the site has been designated.[30] By consequence, Member States are barred from exempting certain categories of ongoing activities, such as existing cattle farming activities and the use of nearby roads by vehicle traffic, from Article 6(2) of the Habitats Directive with reference to the economic importance attached thereto.[31] Moreover, the duty to avoid deterioration also clearly applies to ongoing activities that have been authorized and/or initiated before the area at hand had been designated as a Natura 2000-site.[32] Consequently, in cases of excessive nitrogen deposition, also already authorized nitrogen-emitting activities are to be reconsidered whenever they are responsible for a further deterioration of an adjacent Natura 2000-site. This might urge Member States to redraw their permit policies and impose stricter permit conditions to ongoing cattle farming operations. In cases of continuing environmental degradation, Member States will even have to consider the withdrawal of existing permits for major nitrogen polluters in the vicinity of a Natura 2000-site. The stark economic consequences of such actions for the holder of the permit could be mitigated through financial compensation or the availability of subsidy schemes.

As is widely known, Article 6(2) of the Habitats Directives establishes an obligation of result. Most importantly, the latter provision could also force the Member States to contemplate active restoration measures in some instances. This

[26] Article 6(2) of the Habitats Directive does, however, only rule out disturbances to protected species '*in so far as such disturbance could be significant in relation to the objectives of that directive*'.

[27] Backes et al., *Stikstofdepositie en Natura 2000. Een rechtsvergelijkend onderzoek* (Universiteit Maastricht/Alterra: 2011) http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2011/09/13/stikstofdepositie-en-natura-2000.html (Accessed 20 June 2015), pp. 29–31.

[28] Advocate General Kokott, Case C-241/08 Commission v France, Opinion of 25 June 2009, para. 20.

[29] CJEU, Case C-241/08 Commission v France (2010), ECR I-01697, para. 18–24.

[30] See more extensively: H. Schoukens, 'Ongoing Activities and Natura 2000: Biodiversity Protection vs Legitimate Expectations', (2014) *Journal for European Environmental & Planning Law*, pp. 1–30.

[31] Ibid,

[32] CJEU, Case C-404/09 Commission v Spain (2011) ECR I-11853, paras. 144–160.

will, among others, be the case whenever restoration is crucial to halt or reverse an ongoing deterioration due to excessive nitrogen impacts. For instance, in its notable decision on the deterioration of the habitat of the Red Grouse in Ireland, the ECJ ruled that it was necessary for the authorities '*not only to take measures to stabilise the problem of overgrazing, but also to ensure that damaged habitats are allowed to recover*'[33]. A similar reasoning is to be applied in the context of elevated levels of nitrogen deposition. This begs the question to what extent Member States are still obliged to consider robust restoration measures for Natura 2000-sites that have been severely affected by historic levels of nitrogen deposition. In its recent ruling in the *Cascina Tre Pini Ss*-case, the CJEU underscored that a declassification of a Natura 2000-site can only be considered where, despite compliance with Article 6(2) of the Habitats Directive, the site has become irretrievably unsuitable to meet the objectives of the Habitats Directive, so that its classification no longer appears justified.[34] To that end, a mere allegation of environmental degradation will not suffice. Thus, in order to successfully apply the declassification-option for severely degraded Natura 2000-sites, a Member State will have to demonstrate it has taken all the necessary measure to restore the site, thereby avoiding further deterioration.[35] Member States are therefore in principle required to find comprehensive solutions in order to halt the ongoing degradation of Natura 2000-sites caused by current nitrogen deposition impacts, even if the majority of the damage has been incurred before the designation of the area as Natura 2000-site. Only if it can be established that the bulk of the degradation is to be assigned to pre-designation activities, sufficient recovery measures have been implemented in the meantime and have proven to be not successful, a declassification option might possibly still be in line with the protection duties enshrined in Article 6(2) of the Habitats Directive.

2.2.3 Article 6(3) and (4) of the Habitats Directive: assessing the adverse effects of new nitrogen-emitting developments?

Whereas Article 6(2) of the Habitats Directive includes a clear-cut result obligation, it leaves it to the Member States to consider which specific regulatory actions are necessary in order to avoid further deterioration. By contrast, the procedural rules laid down by Article 6(3) and (4) of the Habitats Directive are more straightforward in terms of legal procedures to be applied in the context of permit policies and other decision-making processes. The latter provision explicitly sets out the procedures to be followed in respect of a plan or project which is not directly connected with or necessary to the management of the Natura 2000-site but which is likely to have a significant effect thereon.

Pursuant to the first sentence of Article 6(3) of the Habitats Directive, any plan or project likely to have a significant effect on a Natura 2000-site, either individually or in combination with other plans or projects, shall undergo an appropriate assessment to determine its implications for the site. The competent authorities can only agree to the plan or projects after having ascertained that it will not adversely affect the integrity of the site concerned. Only in exceptional circumstances, a plan or project could still go ahead, in spite of a negative assessment. Evidently, these procedural assessment obligations have major implications for the permit policies pertaining to new and, in some instances, also ongoing nitrogen-emitting activities.

[33] ECJ, Case C-117/00, Commission v Ireland [2002] ECR I-5335, para 31.
[34] CJEU, Case C-301/12, Cascina Tre Pini Ss (2014), para. 32.
[35] Opinion Advocate General Kokott, Case C-301/12 Cascina Tre Pini Ss, 20 June 2013, para.50

Stock-taking of the ECJ's notable ruling in the *Waddenzee*-case, which related to ongoing mechanical cockle fishing activities, one might be inclined to hold that ongoing nitrogen loads emitted by farm holdings fall firmly within the scope of the habitats assessment-rules.[36] Yet, in view of more recent case-law developments at EU level, this conclusion needs to be adjusted. In its jurisprudence pertaining to the Environmental Impact Assessment (EIA) Directive, the CJEU pointed out that the mere renewal of an existing permit to operate an ongoing installation, in the absence of any works or interventions involving alterations to the physical aspects of the site, cannot be classified as a '*project*' which falls within the scope of the rules on EIA.[37] Likewise, the CJEU steadfastly reasserted that ongoing activities 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 of the realm of the assessment rules laid down by Article 6(3) of the Habitats Directive.[38] Therefore, depending on the national policy options, ongoing nitrogen-emitting activities such as the continuing use of a motorway will not necessarily fall within the scope of the habitats assessment-rules.

To be more precise, a permit renewal for the operation of an existing farm nearby a Natura 2000-site will not necessarily qualify as a '*project*' within the meaning of Article 6(3) of the Habitats Directive if it does not entail physical expansion works. The same goes for a governmental decision to rise the speed limit on a highway adjacent to a Natura 2000-site. By contrast, it remains uncontested that new plans and projects that are prone to emit additional nitrogen emissions, such as road development projects or the extension of an existing cattle farm, remain subject to the assessment procedures included Article 6(3) of the Habitats Directive. In other words, also changes in ongoing activities, which include physical interventions in the natural environment (e.g. the construction of a new stable), will trigger the application of Article 6(3) of the Habitats Directive. Evidently, Member States can decide to opt for a more broad understanding of the term '*project*' in their national or regional legislation, thereby rendering also ongoing activities subject to a prior assessment in cases of permit renewal.

Lastly, it is not unimportant to address the specific articulation between Article 6(3) and Article 6(2) of the Habitats Directive. As alluded to above, Member States are required to avoid further deterioration of protected natural habitats pursuant Article 6(2) of the Habitats Directive. That said, whenever an authorisation is granted in accordance with Article 6(3) of the Habitats Directive for a plan or project, this necessarily assumes that it is considered not likely to affect the integrity of the affected Natura 2000-site and, accordingly, not to give rise to deterioration within the meaning of Article 6(2) of the Habitats Directive.[39] Only if the project would, due to unforeseen circumstances, still give rise to significant effects, Member States are forced to avoid additional deterioration through the application of Article 6(2) of the Habitats Directive. Additional monitoring schemes will have to ensure that further deterioration is avoided in such instances.

[36] ECJ, Case C-127/02, Landelijke Vereniging tot Behoud van de Waddenzee en Nederlandse Vereniging tot Bescherming van Vogels (2004) ECR I-7405 (Waddenzee), paras. 23–27.

[37] CJEU, Case C-275/09, Brussels Hoofdstedelijk Gewest [2011] ECR I-01753, para. 24.

[38] CJEU, Case 226/08 Stadt Papenburg v Bundesrepublik Deutschland (2010), ECR I-00131, para. 47; CJEU, Case C-90/10, Commission v Spain (2011) ECR I-134 (Papenburg), para. 124–125.

[39] Waddenzee, supra n 36, para. 36.

2.3 Precautionary approach vs. economic development?

The above-conducted analysis has indicated that Member States are, at least in theory, obliged to adopt and implement ambitious recovery schemes for Natura 2000-sites that are or have been affected by an overload of nitrogen deposition. In addition, the Habitats Directive requires the Member States to tighten up the permit conditions for new nitrogen-emitting activities. The fundamental question now arises to what extent the protection rules leave room for balancing the continuation of economic activities with the conservation objectives for Natura 2000-sites.

2.3.1 In dubio pro natura?

The over-arching protection duty laid down by Article 6(2) of the Habitats Directive is to be regarded as a major touchstone for the decision-making process for ongoing and, to a lesser extent, new detrimental activities. However, for now, it is clear that the habitats assessment-rules included in Article 6(3) of the Habitats Directive are gaining the most traction at national level. By and large, they are more relevant for new economic developments, such a road construction works or the expansion of an existing agricultural holding, which might adversely affect Natura 2000-sites.

In recent years, the environmental issues related to excessive nitrogen deposition particularly rose to the surface in the context of the habitats assessment-rules. This should not come as a surprise since the CJEU has consistently asserted that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle. Hence, competent national authorities are only permitted to allow projects or plans if they have made certain, in the light of the appropriate assessment and the applicable conservation objectives, that they will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.[40] In cases where the Natura 2000-site at issue finds itself already at an unfavourable conservation status due to high levels of nitrogen deposition, putting forward the required degree of certainty as to the absence of adverse effects for new nitrogen-emitting activities could prove to be difficult, if not impossible. Moreover, the CJEU has reaffirmed that the applicable site-linked conservation objectives for the Natura 2000-site, which might reflect restoration options for severely degraded natural habitats, are determinative for the outcome of decision-making procedure under the second sentence of Article 6(3) of the Habitats Directive.[41] For example, in its recent *Sweetman*-decision, which concerned the development of a road leading to the permanent loss of approximately 1.47 hectares of limestone pavement, the CJEU underscored the importance of the obligation to maintain or restore a Natura 2000-site to a favorable conservation status.[42]

Accordingly, plans or projects capable of compromising the attainment of these conservation and/or restoration objectives will in principle not pass the significance-test. Also cumulative effects have to be considered in the appropriate assessment, which even further reduces the room for manoeuvre in cases of excessive nitrogen deposition levels which are the accumulate result of the operation of several cattle farms in the vicinity of a Natura 2000-site. In some instances, also future recovery options will have to be taken into consideration in the context of an appropriate as-

[40] Waddenzee, supra n 36, para. 59.
[41] Ibid, para. 53.
[42] CJEU, Case C-258/11, Sweetman (2013), paras. 39 and 46. See more extensively: H. Schoukens, 'The ruling of the Court of Justice in Sweetman: How to avoid a death by a thousand cuts?', (2014) *ELNI Review*, pp. 2–12

sessment. This might raise the bar even higher for many harmful project developments nearby Natura 2000-sites.

2.3.2 Critical loads as new yardstick?

Over time, the concept of '*critical load*' has emerged as the determining factor to assess the significance of nitrogen emissions in the context of Natura 2000-sites. It is commonly defined as '*a quantitative estimate of an exposure to one or more pollutants below which significant harmful effects on specified sensitive elements of the environment do not occur according to present knowledge*'[43] and also serves as a benchmark against which to measure the significance of permitted nitrogen contributions in the context of a Natura 2000-site.[44] In recent years, site relevant critical loads for acidification and eutrophication have been established in several Member States, such a Germany, the Netherlands and Belgium (Flemish Region).[45] While the use of threshold values could be defendable from a pragmatic point of view, an exclusive focus on critical loads blurs the fact that the ongoing deterioration of a Natura 2000-site is often not exclusively attributable to elevated levels of nitrogen deposition. Depending on the specific factual circumstances of the site at hand, it can also be related to other factors, such as the absence of sound hydrological management. Indeed, when approached from the perspective of EU nature conservation law, the achievement of the '*overall*' good conservation status, which is dependent on many factors, prevails over the observance of critical loads for nitrogen. Even more so, the Habitats Directive does not include a specific reference to the latter concept. As result, the use of critical loads, while highly recommendable in assessing the significance of additional nitrogen emissions on a Natura 2000-site, will not necessarily leads to conclusive results in this regard.

Be that as it may, several national courts, such as the Dutch Council of State, have ruled that any extra nitrogen emission, regardless of its exact size, can be deemed have significant effects to a Natura 2000-site in which the critical loads for nitrogen deposition have already been exceeded.[46] Against the backdrop of the aforementioned case-law developments, it is not hard to understand how the image emerged of the EU nature directives as rigid pieces of legislation, characterized by a '*dogmatic*' and '*strict*' assessment rules. This was particularly the case in the Netherlands, Germany, Denmark and the UK, where the EU nature directives are frequently invoked in lawsuits against new project developments.[47]

2.3.3 The derogation-clause of Article 6(4) of the Habitats Directive: merely a theoretical option in many instances?

The increasingly tight case-law has created a backlash for EU nature conservation law, which is now often regarded as an inflexible set of rigid protection rules by project developers and business people. As has become obvious through-

[43] J. Nilsson and P. Grennfelt (eds.), *Critical loads for Sulphur and Nitrogen* (UNECE/Nordic Council workshop report, Sweden, Nordic Council of Ministers, Copenhagen: 1988).

[44] Hicks et al., supra n 19.

[45] W.J. Bealey et al., 'Approaches to Assessing the Impacts of New Plans and Projects on Natura 2000-sites', In W.K. Hicks et al. (eds.,) *Nitrogen deposition and Natura 2000: Science and practice in determining environmental impact* (COST729/Nine/ESF/CCW/JNCC/SEI Workshop proceedings: 2011) http://jncc.defra.gov.uk/pdf/airpol_WG6article63assessments.pdf (Accessed 20 June 2015), pp. 12–19.

[46] See more extensively: M. Uittenbosch, 'Nederland toch op slot; helaas geen aprilgrap', (2009) *Milieu en Recht*, pp. 482–488.

[47] On the Netherlands, see more extensively: Beunen M. and M. Duineveld, 'Divergence and Convergence in Policy Meanings of European Environmental Policies: The Case of the Birds and Habitats Directive', (2010) *International planning studies* 15, pp. 321–334.

out the past decade, the image of the habitats assessment-rules as an obstacle course is to be nuanced in view of the poor application and lax enforcement of the protection rules on the ground.[48] Moreover, it is often overlooked that the Habitats Directive contains a specific clause allowing planning authorities to derogate from the general system of protection for reasons of overriding public interest.

By virtue of Article 6(4) of the Habitats Directive, plans or projects may be authorized, by way of derogation and in spite of a negative assessment of the implications for the site, where there are imperative reasons of overriding public interest (IROPI), there are no alternative solutions and all compensatory measures necessary to ensure the overall coherence of the Natura 2000 Network have been taken.

Still, a closer analysis of the 2012 Guidance document produced by the European Commission as to Article 6(4) of the Habitats Directive[49] indicates that the derogation conditions are to be interpreted in a restrictive manner and thus not offer a general fall-back option for economic development. This appears to be reaffirmed in the ECJ/CJEU's more recent jurisprudence.[50] In addition, the simple fact that private interests are, as a matter of principle, not up for consideration under Article 6(4) of the Habitats Directive[51], severely restricts its application for private activities, such as cattle farming, in the vicinity of an overburdened Natura 2000-site. The set of stringent conditions that have to be observed in order to apply the derogation clause partly explains the reluctance at national level to apply this derogation clause for detrimental project developments giving rise to additional nitrogen emissions. Even for plans or projects that are eligible as '*imperative reasons of overriding public interest*', such as large-scale road development projects and power stations, the mere prospect of a thorough alternatives assessment, in which the aim of the project needs to be tested against the background of other reasonable alternatives, might scare off many project developers.

In other words, whereas it could be submitted that Article 6(4) poses no insurmountable obstacle to authorisation for large-scale project developments that might lead to additional nitrogen emissions, the scrutiny and time delays associated thereto help to explain its limited application so far. This stands in sharp contrast to the recent administrative practice of the European Commission under the second subparagraph of Article 6(4) which, at least according to some authors, gives too much weight to economic factors and thus insufficiently takes into account the preventative approach upon which the Habitats Directive is grounded.[52]

3. Towards more flexibility: Novel regulatory approaches to avoid additional deadlocks?

The above-portrayed interpretation of the precautionary principle in the context of the EU nature directives poses additional constraints for the issuance of permits for both new and ongoing activities that create additional nitrogen

[48] J. López-Bao et al., 'Toothless wildlife protection laws', (2015) 24 *Biodiversity and Conservation*, pp. 2105–2108.

[49] European Commission, *Guidance Document 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* (Brussels: 2012) http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/new_guidance_art6_4_en.pdf (Accessed 20 June 2015).

[50] See ECJ, Case C-239/04, Commission v. Portugal [2006] ECR I-10183.

[51] CJEU, Case C-182/10, Marie-Noëlle Solvay and Others v. Région Wallonne (2012), paras. 75 and 76.

[52] D. McGillivray, 'Compensating Biodiversity Loss: The EU Commission's Approach to Compensation under Art 6 of the Habitats Directive', (2012) *Journal of Environmental Law* 24, pp. 417–450.

emissions. Given the fact that the accumulated nitrogen deposition levels currently exceed nutrient nitrogen critical loads over a substantial area in Europe, neither the mere continuation of cattle farms nor the construction of new road development projects can be presented as a given in a Natura 2000-context.

3.1 Quick fixes for short-term certainty?

In order to alleviate the administrative burden associated to the afore-mentioned protection rules, Member States have tried to further formalize the use of the assessment procedure for project developers. Different approaches have emerged in this regard. Throughout the past years, the use of the afore-mentioned critical loads has enabled the national permit issuing authorities to further rationalize the application of the habitats assessment-rules both in the screening stage (first stage) and, later on, in the decision-making stage (integrity-test). In some Member States, generic *de minimis*-thresholds based on critical loads are being used to further guide the project proponents and permit issuing authorities through the so-called '*screening stage*' of Article 6(3) of the Habitats Directive.

By applying these thresholds, activities whose contribution to the total level of nitrogen deposition in an area is deemed trivial at best, are liberated from the duty to carry out a more laborious and time-consuming appropriate assessment. At the same time other Member States have started to apply critical loads as a reference criterion in the decision-making process under the second sentence of Article 6(3) of the Habitats Directive. In earlier times, relatively generous threshold values were applied by permit issuing instances. For instance, in the Flemish Region a 10 % threshold had been used in relation to cattle farms until some years ago, while in the UK an acceptable process contribution of 20 % of the critical load had been applied in the assessment of nitrogen emissions originating from existing livestock installations.[53]

In recent years, however, the bulk of these thresholds have been tightened up by the national authorities in the light of the poor conservation status of many protected natural habitats. For example, in Germany a 3 % threshold is now used in order to determine whether or not a new activity should be subject to a prior appropriate assessment. The use thereof is, among others, grounded on the assumption that these small project contributions are not detectable in the environment because of natural fluctuations and the lack of sensitivity of measuring instruments.[54] According to the German competent authorities, a causal link between the emission of such negligible amounts of nitrogen and the deterioration of a Natura 2000-site is hard, if not impossible, to establish. This reasoning was reasserted by the German *Bundesverwaltungsgericht* in its recent case-law, in which the validity of the above-mentioned thresholds was explicitly upheld.[55]

That said, if not balanced with an assessment of possible cumulative effects, a wide-spread use of generic *de minimis* thresholds entails the risk that the so-called '*in combination*'-effects linked to the operation of permitted facilities in the vicinity of a Natura 2000-site are left out of consideration. In order to avoid a so-called '*death by a thousand cuts*'-scenario it appears seminal to keep the threshold values as low as possible and to

[53] Bealey et al., supra n 45, pp. 15–16.

[54] R. Uhl, 'Approaches to assessing and permitting plans and projects (where they are sources of air pollution) for Article 6.3 assessments'. In Department for Environment Food and Rural Affairs and Joint Nature Conservation Committee, *Nitrogen Deposition and the Nature Directives. Impacts and Responses: Our shared experiences* (Workshop Proceedings: 2013) http://jncc.defra.gov.uk/pdf/airpol_WG6article63assessments.pdf (Accessed 20 June 2015).

[55] Bundesverwaltungsgericht (2014) BVerwGA25.12.

avoid a too generous application thereof in cases of severe degradation of a Natura 2000-site.

Another regulatory technique to avoid additional deadlock scenarios consists in exempting ongoing use from the assessment rules set out by Article 6(3) of the Habitats Directive. This approach was, among others, implemented in the Dutch 2010 Crisis and Recovery Act and, albeit in a slightly more ambiguous manner, in the Flemish 2014 Nature Conservation Decree[56]. Accordingly, permitted activities that were ongoing at the moment of designation of a Natura 2000-site and have not been intensified or modified since then, are excluded from the obligation to carry out a prior appropriate assessment. The rationale underpinning the Dutch law reform was confirmed in the subsequent national case-law[57], partly because it implemented the reasoning put forward by the CJEU in its ruling in the *Stadt Papenburg*-case.[58] Moreover, as was mentioned above, the mere renewal of an environmental permit of an ongoing installation does not necessarily qualify as a '*project*' under EU environmental law, creating even more leeway for Member States in this regard.

However, critics submit that the inclusion of this exemption clause in the applicable regulatory framework basically comes down to a legalization of the historic nitrogen exceedances that were present at the time of the final designation of a Natura 2000-site.[59] In addition, excluding the majority of the ongoing uses from a prior assessment, and thereby stricter scrutiny, puts even more weight on the shoulders of the developers of new plans and projects giving rise to additional nitrogen emissions. In other words, an overly generous use of this exemption scheme is capable of further compromising the achievement of the restoration targets for Natura 2000-sites that have already been severely affected by excessive nitrogen loads throughout the past decades.

Henceforth, pursuant to Article 6(2) of the Habitats Directive competent authorities are still required to consider adjusting or, as the case may be, revoking the permits of ongoing installations which are a source of continuing deterioration of a Natura 2000-site.[60] In this respect, due regard must be given to the applicable restoration targets for the Natura 2000-sites at hand. Or, differently put, exemption rules should mainly be regarded as a useful '*regulatory trick*' to offer short term relief for ongoing activities, which are given additional time to readjust their operations or, alternatively, phase out. Yet, the use of exemption clauses offers no fundamental breakthrough or long-term solution for the authorization of new plans and projects causing additional nitrogen emissions on adjacent nitrogen-sensitive Natura 2000-sites. Even more so, if overly relied upon, the use of exemption clauses could backfire for nature conservation as it will be invoked by public authorities as additional justification for the absence of more robust restoration policies toward heavily degraded Natura 2000-sites. Admittedly, the additional flexibility could help in relieving the much-feared additional burden associated with the Habitats Directive in cases of existing activities. However, in turn, this might lead competent authorities to believe that coming forward with more comprehensive solutions for the issue of nitrogen deposition is less urgent.

[56] See more extensively: H. Schoukens et al., 'Het vernieuwde Natuurdecreet: a Game Changer', (2014) *Tijdschrift voor Omgevingsrecht en Omgevingsbeleid*, pp. 473–513.

[57] Dutch Council of State (2010), case no. 200903784/1.

[58] Stadt Papenburg, supra n 38, para. 47.

[59] Along similar lines, see: C.J. Bastmeijer, 'Natuurbeschermingsrecht in crisistijd: 'opzij, opzij, opzij… maak plaats, maak plaats, maak plaats… wij hebben ongelofelijke haast', (2009) Milieu en Recht, pp. 628–633; J. Veltman and G. Smits, 'De voorgestelde regeling van stikstofdepositie in de Crisis- en Herstelwet', (2009) *Milieu en Recht*, pp. 638–641.

[60] Backes et al., supra n 27, pp. 45–47.

3.2 '*Banking*' with nitrogen emissions as mid-term solution for new project developments?

In order to provide the permit issuing authorities with more discretionary margin when authorizing *new* or *modified* projects, the Dutch 2010 Crisis and Recovery Act introduced yet another flexible regulatory tool. It provided the opportunity for permit appliers to offset their nitrogen emissions with reductions that are implemented at other operational facilities (in Dutch: '*salderen*'). By doing so, the Dutch legislator codified a rationale that had already been applied in the existing case-law of the Dutch Council of State.[61] By allowing permit issuing authorities to take into account emission reduction efforts, which are the immediate result of permit withdrawals or revocations for other operating facilities, additional room for manoeuvre is created in scenarios where the exceedance of the critical loads would normally lead to a deadlock for economic activities. In some instances, an operator can also offset additional emissions linked to a new installation with the revocation of an environmental permit for another installation on the same site. The offsetting rules, if applied strictly, will not lead to a net-increase of the total amount of nitrogen deposition in the adjacent Natura 2000-site. Hence, the instrument also seems to be compatible with Article 6(3) of the Habitats Directive. In some Dutch provinces, the competent authorities have gone that far to establish '*nitrogen emission banks*', from which permit applicants can withdraw the necessary permit rights needed for their new operations. As a result, formal negotiations were no longer needed with holders of existing permits.

That said, the promulgation of the novel offsetting rules did not pass unnoticed in the Dutch legal literature.[62] While some of the counter-arguments that were raised against it appear well-founded from environmental perspective, they can be, at least partly, refuted on legalistic grounds.[63] As to the risk of in-combination effects linked to the additional nitrogen emissions, it remains indeed hard to see how this risk will exacerbated by the application of the offsetting rules. Provided the offsetting rules are applied in a rigorous and consistent manner, no additional net contribution of nitrogen will be deposed on the adjacent Natura 2000-sites.

However, at least some part of the criticism seems to hold ground when approached from the perspective of the *standstill*-obligation laid down by Article 6(2) of the Habitats Directive. Indeed, whenever additional reduction efforts are merely used to create so-called '*development room*' for new economic project developments that lead to additional nitrogen deposition, the further degradation of Natura 2000-sites will probably not be halted in the long run. As already alluded to above, a clear distinction must be drawn between the habitats assessment-rules laid down by Article 6(3) of the Habitats Directive and the *standstill*-obligation laid down by Article 6(2) of the Habitats Directive. The former merely requires permit issuing instances to ensure that plans or projects will not give rise to adverse effects in a Natura 2000-site. This obligation seems to be complied with whenever the project at hand does not lead to an increase of the nitrogen deposition levels, at least on a net-level. Still, when all additional reductions are immediately '*re-used*' in order to authorize new development projects, the Netherlands could eventually be held accountable for not observing its obligations under Article 6(2) of the Habitats

[61] C.J. Visser, 'Stikstof en saldering; vallen nu ook de depositiebanken om?', (2013*) Tijdschrift voor gezondheidsschade, milieuschade en aansprakelijkheidsrecht*, pp. 155–160.

[62] Bastmeijer, supra n 59.

[63] Backes, supra n 27, pp. 46–47.

Directive if the existing deterioration continues. In other words, a generous use of the offsetting rules might further compromise the attainment of the EU conservation goals in general and thus lead to possible infringement proceedings before the CJEU.

The application of the offsetting rules is also severely restricted as a result of the more recent case-law developments before the Dutch Council of State.[64] For instance, it is not possible re-use the withdrawal of a permit for an activity which has adverse effects on another habitat type or Natura 2000-site as an offset for a new economic development. Also under the banking rules, it must be guaranteed that nowhere in the affected Natura 2000-site a net-increase of nitrogen deposition levels can be detected. In addition, the Dutch Council of State has highlighted that the proposed mitigating measure needs to be inextricably linked to the filed permit application. In order to fulfil this requirement, is has to be ascertained that the permitted activity, which serves as mitigating measure under the second sentence of Article 6(3) of the Habitats Directive, will be effectively withdrawn or revoked in a short time frame.[65] Also a clear-cut link is to be established between the withdrawn permit and the purported nitrogen emissions.[66] Whereas the latter case-law developments at the national should definitely not be read as an outright rejection of the instrument of deposition banks, they do serve as a cautionary tale that also in this respect no quick wins are possible.[67]

3.3 '*Nature inclusive design*' as long-term go-between for project developments in the context of nitrogen-sensitive Natura 2000-sites?

Absent more generic regulatory solutions to defuse the deadlock scenarios that have emerged in certain scenarios, planning authorities continued searching for novel flexible strategies vis-à-vis mitigation. Interestingly, a recent shift toward a more lenient approach to mitigation is detectable in the planning policies of some Member States, such as the Netherlands and Belgium (Flemish Region). It was submitted that, by taking into account the positive effects of restoration measures that are functionally linked to a project development, additional leeway for permit issuing authorities in the context of over-burdened Natura 2000-sites might be created. The latter approach is built on the premise that such restoration measures can be coined as '*mitigating measures*' under the second sentence of Article 6(3) of the Habitats Directive. It was assumed that such approach could trump the overly strict application of the precautionary principle in permit policies for nitrogen impacts.

Whereas, as a matter of principle, plans and projects prone to create residual significant effects cannot be authorized under the second sentence of Article 6(3) of the Habitats Directive, this more liberal approach seems to offer more flexibility. Accordingly, a permit application leading to additional nitrogen deposition would not have to be rejected if restoration measures in other parts of the affected Natura 2000-sites are capable of offsetting this damage by, for instance, setting forth the restoration of resilient habitats in the coming years. Evidently, such approach will create more flexibility within the decision-making process for harmful activities.

The sudden rise of such novel techniques should therefore not come as a surprise. Increasingly, ecological restoration and management

[64] See also: Zijlmans and Woldendorp, supra n 15.
[65] Dutch Council of State (2011), case no. 200908730/1.
[66] Dutch Council of State (2013), case no. 201303243/1, 201303324/1, 201303514/1 and 201303816/1.
[67] See also more recently: Dutch Council of State (2015), case no. 201402973/1/R3 and 201308952/1/R3.

measures are presented as a key mechanism to combat the adverse effects of nitrogen deposition on protected natural habitats. The incorporation of such measures into spatial developments was seen as the ultimate gateway to a more streamlined permit approach in regions which are already characterized by high background levels of nitrogen deposition. Its success lies in the fact that it allows permit issuing authorities to negate the current unfavourable conservation status of natural habitats by anticipating on the beneficial effects of future restoration measures.[68]

By accepting this more progressive approach to the habitats assessment, the EU nature directives would no longer be perceived as an obnoxious brake on economic development. At the same time nature would also benefit from the additional restoration measures. Depending on the context, this more facilitative approach to the habitats assessment is referred to in Dutch legal literature as '*nature inclusive design*' or '*integral planning*'[69]. Regardless of the specific name tag, all these approaches clearly depart from a more legalistic interpretation of the habitats assessment-procedure and give way to a more flexible reading of Article 6(3) of the Habitats Directive.[70] In spite of the promising results in terms of flexibility at permit level, the legal qualification of measures aimed at creating, restoring or enhancing an area of to-be-affected protected habitat remained unclear at best.

Initially, the Dutch Council of State displayed a remarkable openness to the more liberal reading of the habitats assessment. One of the first notable cases in which the above-mentioned progressive approaches toward mitigation had been successfully applied, was the so-called Dutch '*IJburg-case*'. In these proceedings, a large-scale building project implied the destruction of mussel beds serving as a foraging site for different protected bird species which nested in a nearby Natura 2000-site. However, by having integrated the creation of 132 hectares of new mussel beds in the project design, the project developers were able to submit that the integrity of the Natura 2000-site would not adversely affected by the purported works. When faced with legal challenges, the Dutch Council of State qualified these measures as '*mitigation*', which could be taken into account in the appropriate assessment for the construction of the housing zone in the IJmeer.[71] Interestingly, the Dutch Council of State seemed poised to apply a similar reasoning in nitrogen-related cases.

In a more recent ruling concerning the extension of the Port of Eemshaven, the Dutch Council of State accepted a so-called '*system-based approach*'. Under this interpretation, the integrity of the affected Natura 2000-sites, which were already at an unfavourable conservation status, would not be significantly impaired by the limited increase of nitrogen deposition levels. The additional nature conservation measures that had been attached to the contested nature permits would ensure the resilience of the affected sites. It was assumed that the envisaged nature conservation and restoration measures, which included the removal of nitrogen by stripping off the upper layer of the soil as well as excluding the ongoing shrimp fishers in one of the affected Natura 2000-sites, would render the nitrogen-sensitive habitats in the site more resilient and thus enable them to absorb the additional nitro-

[68] See more extensively: H. Schoukens and A. Cliquet, 'Mitigation and compensation under EU nature conservation law in the Flemish region: beyond the deadlock for development projects?', (2014) *Utrecht Law Review* 2, pp. 194–215.

[69] Zijlmans and Woldendorp, supra n 15.

[70] Kistenkas, supra n 14.

[71] Dutch Council of State (2010), case no. 200901224/1.

gen deposition without any risk for further deterioration.[72]

Be that as it may, not all national courts were swayed by this more progressive interpretation of the habitats assessment. In seemingly sharp contrast with the allegedly '*liberal*' Dutch case-law, the Belgian Council of State displayed more reluctance vis-à-vis the use of restoration measures in an appropriate assessment.[73] This was strikingly illustrated by its 2013 ruling in the legal proceedings concerning the construction of a road bypass ('*Noordzuidverbinding*') in the province of Limburg. In this case, the appropriate assessment had taken into the beneficial effects of a to be created nature corridor zone, located several kilometres away from the affected Natura 2000-site. The Belgian Council of State, however, reasserted the counter-claims raised by the opponents of the project. It took the line that such measures are to be ruled out as mitigation. Instead they are to be tagged as compensatory measures and application should have been made of the derogation clause included in Article 6(4) of the Habitats Directive. This led the Council to conclude that the requirements of the derogation clause had been violated in the present case.[74]

The latter case was not a stand-alone ruling. In a more recent decision the Belgian Council of State again had to shed light on the function of autonomous restoration measures for Natura 2000-sites in an appropriate assessment for a harbour development project. Instead of replicating its earlier rationale vis-à-vis mitigation, the Council confined itself to pointing out that the integral planning-approach had not been adequately strict translated in the conditions attached to the planning permit. No clear-cut guarantees for the attainment of the conservation objectives had been included in the planning permit and thus Article 6(3) of the Habitats Directive had not been complied with. Consequently, the planning permit was suspended.[75]

4. The Briels-ruling of the CJEU: One step back for the flexible approaches toward the habitats assessment?

4.1 Persisting legal uncertainty?

The above-portrayed integrative approaches to the habitats assessment might lead to additional '*win-win scenarios*'. Indeed, given the limited political weight that is attached to nature conservation, many harmful projects will eventually go through, regardless of environmental objections. Thus, from a pragmatic viewpoint, it would be better to implement these project developments while at least having the explicit assurance that the necessary robust restoration measures are attached to it. Some environmentalists, however, counter the latter assumptions by pointing out that a wide-spread application of the latter approach could well undermine the preventative approach that is underpinning the Habitats Directive.

Translated in legal terms, this debate basically revolves around the question whether restoration measures can serve as a general means to outweigh and/or balance the detrimental impact of a purported project in the assessment stage under Article 6 (3) of the Habitats Directive, or, alternatively, can only be taken into account as '*compensation*' when application is made of the restrictive derogation clause under Article 6 (4) of the Habitats Directive.

The CJEU was offered the opportunity to shed light on this matter when the Dutch Coun-

[72] Dutch Council of State (2014), case no. 201304768/1.
[73] See more extensively: Schoukens and Cliquet, supra n 68.
[74] Belgian Council of State (2013), case no. 223.083 Vzw Natuurpunt Limburg.
[75] Belgian Council of State (2013), case no. 225.676 Hilde Orleans.

cil of State decided to refer the so-called '*Briels*'-case to Luxemburg. The proceedings revolved around the broadening of a section of the A2 motorway between the cities of Eindhoven and Den Bosch. According to the appropriate assessment the further increase of motorway traffic would give rise to adverse effects on the nitrogen-sensitive blue marshes in the neighboring Natura 2000-site, which were already at an unfavorable conservation status. The CJEU was asked by the Dutch Council of State to indicate to what extent measures with a view to ensure the creation of new blue marshes elsewhere in the same time, to replace and augment the natural habitats affected by the increase of nitrogen deposition levels linked to the extension of the motorway, could be qualified as '*mitigating measures*' in the context of an appropriate assessment under the second sentence of Article 6(3) of the Habitats Directive or, alternatively, could merely be taken into account when application is made of the derogation clause. In the case at hand, the purported restoration measures allowed the appropriate assessment to conclude that the integrity of the nearby Natura 2000-site would not be adversely affected by the purported project development.

4.2 The CJEU rejects the broad interpretation of the second sentence of Article 6(3) of the Habitats Directive

In its highly readable Opinion of 27 February 2014, Advocate General Sharpston was not swayed by the arguments raised by the proponents of the newly emerged mitigation strategy.[76] While accepting that measures incorporated in project which effectively minimize its impact may be taken into account when assessing whether that project adversely affects the integrity of a site[77], she refused to qualify the creation of new meadows as mitigating measures. In any event, according to the Advocate General '*the new habitat will be, to some extent, artificially created and cannot become a true natural habitat for some, possibly quite considerable time*'[78]. In addition, the Advocate General pointed to the importance of the applicable conservation objectives for the site at hand, which indicated that an expansion of the area of blue marshes and improvement of its quality was needed in order to attain a favorable conservation status.[79]

The CJEU basically reasserted the viewpoints raised by the Advocate General in its ruling of 15 May 2014. The progressive reading of the second sentence of Article 6(3) of the Habitats Directive, which underpinned the appropriate assessment for the Dutch road development project, was ultimately dismissed.[80] In the light of the subsequent analysis, it is interesting to take a closer look at the exact steps of the reasoning used by the CJEU in its ruling.

In a first section, the CJEU further elaborated on the semantic difference between mitigation and compensation. The EU judges firmly rejected the more liberal interpretation approach that had been applied in the appropriate assessment for the extension of the Dutch motorway. In the CJEU's view, the application of the precautionary principle requires the competent national authority to assess the implications of the project for the Natura 2000-site concerned in view of the site's conservation objectives and taking into account the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity

[76] Advocate General Sharpston, TC Briels and Others v. Minister van Infrastructuur en Milieu, Opinion of 27 February 2014.

[77] Ibid, para. 32.
[78] Ibid, para. 42.
[79] Ibid, para. 41.
[80] CJEU, Case C-521/12 TC Briels and Others v. Minister van Infrastructuur en Milieu (2012).

of the site.[81] This entails that protective measures provided for in a project which are aimed at compensating for the negative effects of the project on a Natura 2000-site cannot be included in an appropriate assessment.[82]

As a result of that, the future creation of an area equal or greater size of the affected habitat type in another part of the site which will not be directly affected by the project, cannot be qualified as avoidance measures under Article 6(3) of the Habitats Directive.[83] Instead such measures basically seek to counterbalance the unavoidable negative impacts that go along with the project and therefore should be tagged as compensatory measures within the meaning of Article 6(4) of the Habitats Directive.[84] Since none of the restoration measures tied to the road development project were aimed at avoiding nor reducing the effect on the affected patches of habitat, they were not eligible as mitigation.

However, given the absence of an explicit referral to mitigation in the Habitats Directive, the CJEU needed to come forward with additional arguments in order to refute the claims for a more lenient interpretation of the habitats assessment-procedure. Also in this regard, the CJEU followed in the footsteps of the Advocate General. In its decision, it heavily relied upon the precautionary principle which is underpinning Article 6(3) of the Habitats Directive. In particular, the CJEU noted that any positive effect of a future creation of a new habitat which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, even where the new area will be bigger and of higher quality, are highly difficult to forecast with a degree of certainty and, in any event, will be visible only several years into the future.[85] In the light of the continuing uncertainty on the effectiveness of habitat management techniques to mitigate nitrogen deposition impacts, this statement is not without relevance for the remainder of this analysis.

Interestingly, the CJEU also rebuked the criticism which pointed to the alleged rigidity to which such an interpretation might lead. It did so by underlining that the restoration and enhancement measures, if inextricably linked to the road development project, could still be taken into account as compensatory measures in the context of the derogation clause of Article 6(4) of the Habitats Directive. Under the CJEU's approach, the fact that the measures are to be implemented in the affected Natura 2000-site has no bearing on it being principally eligible as a compensatory measure under Article 6(4) of the Habitats Directive.[86]

4.3 A first assessment of the *Briels*-decision

The *Briels*-ruling is to be seen as a landmark-decision in the field of EU nature conservation law, especially given its major implications for permit policies at national level in relation to Natura 2000-sites. Compared to the lenient approach to mitigation put forward in some national or regional planning policies, the rationale of the *Briels*-ruling seems to restrict the conditions under which new projects can be authorized in the context of over-burdened Natura 2000-sites. Still, before addressing the wider consequences of the *Briels*-ruling for the Natura 2000 permit policies at national level, it is appropriate to assess the decision from a wider perspective.

First, when assessed from a legalistic perspective, the reasoning applied by the CJEU does appear justified. In the light of the well-

[81] Ibid, para. 28.
[82] Ibid, para. 29.
[83] Ibid, para. 30.
[84] Ibid, para. 31.
[85] Ibid, para. 32.
[86] Ibid, paras. 35–37.

vested mitigation hierarchy, which is implicitly underpinning Article 6(3) of the Habitats Directive, the outcome of the *Briels*-proceedings before the CJEU can hardly be called surprising. In the case at hand, no genuine steps were taken to further reduce the risk of the increased nitrogen deposition levels linked to the extension of the motorway. While it is true that, for instance in the United States, restoration measures are often dubbed '*mitigation*' in the context of offsetting schemes, the basic semantic distinction between mitigation (or minimization or reduction) and compensation (or offsetting) is not controversial, especially not in the view of the prevention principle.

Thus, at semantic level, it remained uncontested that the restoration and enhancement measures would not be capable of preventing the environmental damage to materialize in the first place. The measures merely comprised of the creation of similar habitats elsewhere in the affected Natura 2000-site. Likewise, the stress that is placed on the precautionary principle should not come as a surprise either, given the ECJ/CJEU's earlier reliance on the precautionary approach in the notable *Waddenzee*-ruling.[87]

However, the CJEU's alleged stringent reasoning also seems reasonable when assessed against the backdrop of the available scientific research on the effectiveness of ecological restoration. Indeed, recent reports consistently point to the relative ineffectiveness of restoration efforts in the context of biodiversity offsetting schemes.[88] Restoration efforts, also when applied in the context of planning permit schemes, only rarely equal those of the reference state, even for '*easy to restore*' natural habitats such as wetlands and grasslands. Replicating ecosystems that have been lost to human development will give rise to considerable uncertainty and time delays, especially when it concerns old growth habitats. All too often current offset practices fail to take into account the uncertainty in restoration and its considerable time lags.[89]

In general, the afore-mentioed conclusions also apply in the specific context of the adverse ecological effects caused by the high levels of nitrogen deposition. There indeed exists an apparent lack of comprehensive studies on the subject of ecological restoration and intensified management as a mechanism to combat the adverse effects of nitrogen deposition on Natura 2000 habitats.[90] Even more so, a recent review of the effectiveness of on-site habitat management to reduce atmospheric nitrogen deposition impacts on terrestrial habitats revealed that, while on-site management techniques might improve habitat suitability, it could also lead to unintended consequences.[91]

Thus, as a preliminary conclusion, it can be submitted that the CJEU had common sense at its side when it decided to limit the room left for implementing habitat creation and restoration measures within the framework of the habitats assessment. Whereas a more widespread integration of restoration measures in spatial and economic developments must be welcomed as

[87] Waddenzee, supra n 36.

[88] D. Moreno-Mateos et al., 'Structural and Functional Loss in Restored Wetland Ecosystems', (2012) *Plos Biol.* 10: e1001247, http://journals.plos.org/plosbiology/article?id=10.1371/journal.pbio.1001247 (Accessed 20 June 2015).

[89] M. Curran, S. Hellweg and J. Beck, 'Is there any empirical support for biodiversity offset policy?', (2014) *Ecological Applications* 24, pp. 617–632.

[90] H. Kros and D. Bal, 'The effectiveness of on-site (intensified) habitat management measures and restoration measures to mitigate impacts and to promote recovery', In Department for Environment Food and Rural Affairs and Joint Nature Conservation Committee, *Nitrogen Deposition and the Nature Directives. Impacts and Responses: Our shared experiences* (Workshop Proceedings: 2013) http://jncc.defra.gov.uk/pdf/airpol_WG7Ecologicalrestorationmeasures.pdf (Accessed 20 June 2015).

[91] Stevens et al., supra n 23.

such, since it at least avoids additional losses for nature, an over-reliance on restoration measures in assessment schemes could effectively put into jeopardy the preventative approach underpinning the habitats assessment scheme. In the CJEU's eyes, the creation of new natural habitats should basically be seen as a last resort-option, in order to offset unavoidable damages linked to projects that are necessary for imperative reasons of overriding public interest. Given the poor compliance with procedural and substantive requirements of the habitats assessment-test on the ground in many Member States, the CJEU's reluctance appears warranted.[92]

4.4 Toward more scrutiny?

While the CJEU's approach might have science and the law on its side, critics could tag the ruling as yet another stark illustration of the inability of the Habitats Directive to support more progressive approaches vis-à-vis biodiversity offsetting and nature conservation. Even more, it could eventually backfire at EU nature conservation law. The stringent interpretation-line might be capable of further jeopardizing the legitimacy of the Habitats Directive among policy-makers and the wider public. For one, it could be portended that the achievement of the conservation objectives will, as such, not be guaranteed by applying strict scrutiny to nitrogen-emitting projects whose contributions have, in themselves, no notable effect on nitrogen-sensitive Natura 2000-sites. Accordingly, it can be argued that, by excluding the use of restoration measures in an appropriate assessment under Article 6(3) of the Habitats Directive, the CJEU clearly narrows down the already limited leeway available to national permit issuing instances for future project developments in a Natura 2000-context. This could be seen as the ultimate proof of the dogmatic and inflexible approach of the CJEU to the EU nature directives and its fundamental unwillingness to accommodate a more pragmatic approach to economic development.[93]

Along the same lines, it could be contended that large-scale project developments offer a unique opportunity for implementing robust restoration efforts for degraded Natura 2000-sites because of the large sums of money that are available in such instances. Therefore, adopting a too restrictive stance could do away with one important trigger for ecological restoration. In the end, the additional rigidity brought about by the *Briels*-ruling might be detrimental for the EU's biodiversity in the long run, especially since the compliance with the autonomous restoration duties under Article 6(1) of the Habitats is far from satisfactory.

By holding that habitat restoration and creation measures are compensation, the CJEU seemingly indicated that such measures can only be taken into account in exceptional cases, *i.e.* when application is made of the derogation clause set out by Article 6(4) of the Habitats Directive. Yet, as alluded to above, the additional constraints and possible delays linked to the application of the derogation clause have rendered it increasingly unpopular among planning authorities. Even in the case of large infrastructure projects, which might still meet the standard of '*imperative reason of overriding public interest*', authorities are often quite reluctant in considering the application of Article 6(4) of the Habitats Directive.

[92] See, among others: Milieu ltd. et al., 'National legislation and practices regarding the implementation of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora, in particular Article 6' (Brussels: 2009) http://www.europarl.europa.eu/document/activities/cont/200910/20091013ATT62399/20091013ATT62399EN.pdf (Accessed 20 June 2015).

[93] Kistenkas, supra n 14.

Having said that, in my view, this weariness on the part of the permit issuing authorities is not completely justified. In most instances, the application of Article 6(4), will not represent an insurmountable obstacle to the authorization of the purported project development, even in the context of increasing levels of nitrogen deposition. This is further evidenced by the fact that the European Commission, when being asked to deliver an opinion on the acceptability of a request for application of the derogation clause, has only in one instance delivered a negative response.[94] *Ergo* it should not *a priori* ruled out as last resort-solution in the context of large-scale infrastructure works.

4.5 Nature inclusive design and nitrogen banking in the *post-Briels*-era?

In *post-Briels*-times a reconsideration of the limited use of Article 6(4) of the Habitats Directive might bring about additional leverage for large infrastructure projects. Yet it will not avoid the predicament that many private projects are facing, for instance in regions with high background values of nitrogen deposition. Private projects, such as the extension of a pig farm, will not meet the standards set out by the derogation clause since they do not relate to '*imperative reasons of overriding public interest*'. It is apparent that the prospects for private project development in the *post-Briels*-era are less promising, at least in the context of the application Natura 2000-rules at permit level. However, it remains to be seen whether all margin for manvoeuvre has indeed completely disappeared with the *Briels*-ruling.

Remarkably so, the final outcome of the *Briels*-proceedings itself before the Dutch Council of State does not display a shift toward more rigidity. Rather ironically, a new appropriate assessment had been drafted up for the contested project, which concluded that, contrary to earlier reports, the blue marshes were still at a favorable conservation status in the affected site and thus no extension of the affected natural habitats was deemed necessary. Therefore, the discussion on the legal qualification of the creation of new natural habitats had become irrelevant in order to assess the validity of the new planning permit that had been issued for the purported road extension works.[95]

Obviously, a newly drafted appropriate assessment will not be able to provide for an alternative escape route in every single case. The more recent jurisprudence of the Dutch Council of State clearly points to more rigidity for the authorization of new project developments in the Natura 2000-context.[96] In several of its recent decisions, the Dutch Council of State rejected the use of restoration measures for projects which led to the outright destruction of protected habitats located inside a Natura 2000-site.[97] It was only found ready to accept the use of restoration measures in cases where project development interfered with foraging areas that were located in the immediate vicinity of a Natura 2000-site (but not

[94] In recent years, several authors have contended that many of the Commission's opinions, which are issued under the second subparagraph of Article 6(4) of the Habitats Directive, do not fulfil the applicable derogation requirements set about by Article 6(4) of the Habitats Directive. All too often mere economic considerations seem to overrule the conservation objectives of the Habitats Directive. See among others: D. McGillivray, 'Compensating Biodiversity Loss: the EU Commission's Approach to Compensation under Art. 6 of the Habitats Directive', (2012) *Journal of Environmental Law*, pp. 417–450.

[95] Dutch Council of State (2014), case no. 201110075/4 and 201201853/3.

[96] See more extensively: R. Frins, 'Het onderscheid tussen mitigatie en compensatie: alea jacta est?', (2015) *Tijdschrift voor Bouwrecht*, pp. 198–205.

[97] Dutch Council of State (2015), case no. 201401736/1; Dutch Council of State (2014), case no. 201202327/1 and 201300125/1.

within its boundaries).[98] By contrast, the Dutch judged adopted a more rigid approach in cases where the authorized project was liable to cause adverse effects to protected natural habitats that are effectively located within the boundaries of a Natura 2000-site. For example, in yet another nitrogen-related case, the Council of State ruled that the increase of nitrogen deposition levels cannot be balanced at site level unless the mitigating measures effectively prevent the occurrence of adverse effects on the protected habitats that will be affected by the project.[99] In line with the allegedly strict stance of the CEU, the Dutch Council of State assumed that habitat creation or restoration measures can only be qualified as mitigation under the second sentence of Article 6(3) of the Habitats Directive whenever they relate to the same affected habitat. Consequently, measures relating to other patches of habitats that will not be impacted by the purported project development can not be taken into account.

Still, it would be erroneous to assume that with the *Briels*-ruling all room for discretion has disappeared. As such, the underlying *Briels*-logic does not preclude the integration of genuine avoidance and minimizing measures in project developments, such as additional nitrogen-capture measures and other means to abate nitrogen and ammonia emissions at facility-level. In other cases, the withdrawal or revocation of one or more permits for other cattle farms that are located in the immediate neighbourhood of the proposed activity might still prevent a net-increase of nitrogen deposition on the protected habitats of an adjacent protected site. Indeed, offsetting nitrogen additional emissions with reduction efforts that are implemented in nearby operational facilities has not been rendered illegal by the *Briels*-decision. That is, provided that they both relate to the same affected patches of natural habitats. In itself, the *Briels*-proceedings did not revolve around the question whether the withdrawal of a permit for an activity which is impacting the same habitat as the one that will be affected by a new plan or project qualifies as mitigation. In contrast to the creation of new natural habitats, the withdrawal of a permit for an activity which is located in the immediate vicinity of the purported plan or project will effectively avoid any additional adverse effects to materialize in the first place. Hence, nitrogen banking, when applied with the necessary caution, would not necessarily go against the precautionary principle. However, as already underlined in the above-conducted analysis, it must be ensured that the withdrawal of an existing permit is not merely an autonomous measure, which would have taken place anyway, regardless of the purported project development. If that were to be the case, it cannot be taken into account as a mitigating measure. Moreover, it needs to be guaranteed that the territorial scope of the permit overlaps with the impact area of the projected new activities.[100]

On a more general note, it might be contended that the CJEU does, as such, not rule out the use of habitat creation and restoration measures as mitigation for excessive nitrogen deposition loads *per se*. While it does certainly limit the possibility for relying on the positive effects of habitat creation and restoration measures in the context of an appropriate assessment not all room for flexibility appears to have vanished. Pursuant to one interpretation-line, restoration measures that are directly related to the same patch of habitat as the one that will be affected

[98] Dutch Council of State (2014), case no. 201309630/1.
[99] Dutch Council of State (2014), case no. 201309655/1.
[100] H. Woldendorp and H. Schoukens, 'De Habitatrichtlijn als Doos van Pandora: het A2-arrest van het Europese Hof van Justitie', (2015) *Milieu en Recht*, pp. 2–15.

by the increased level of nitrogen deposition, remain eligible as a genuine mitigating measure under the second sentence of Article 6(3) of the Habitats Directive. It could be portended that such measures still qualify as mitigation since they immediately relate to the affected habitats. They could yield more resilient natural habitats, which are better equipped to absorb additional nitrogen emissions.

Still, the more pressing question remains whether an appropriate assessment can explicitly anticipate on the beneficial ecological effects that will be produced by the purported restoration measures in the context of a harmful project development, regardless of whether they relate to the affected habitats themselves or more distantly located natural habitats. In the light of the limited effectiveness of ecological restoration in general, especially when applied in the context of a biodiversity offsetting scheme, it remains uncertain whether the precautionary principle does not pose a more fundamental additional constraint in this regard. If that were to be the case, also the use of restoration measures that are directly linked to the affected patches of natural habitats is to be ruled out in the context of an appropriate assessment.

For the time being, the Dutch Council of State does not seem to adopt such a strict stance. In one case, it at least implicitly accepted that restoration measures which are legally guaranteed in a planning permit, provided they relate to the to-be-affected protected habitat, can still be of use under Article 6(3) of the Habitats Directive. However, so far, the Dutch Council of State has only touched upon that issue indirectly, which makes it hard to draw general conclusions in this regard.[101]

When approached with the necessary caution, the *Briels*-ruling could be framed as an implicit invitation to project developers to implement restoration measures in a more early stage of the planning process. This would allow permit issuing authorities to take into account the positive effects which have already materialized in the meantime during a subsequent ecological assessment. Yet, understandably, awaiting the final results of restoration measures will not be an appealing prospect for many project developers. It will create additional delays. Therefore, one might ponder whether adaptive management techniques, if attached to a strict monitoring protocol, could not provide for a more elegant go-between for the inherent contradiction that arises in this respect.[102] In itself, adaptive management does not necessarily have to go against the precautionary approach laid down by the CJEU. Interestingly, the European Commission has already pointed to the obvious link between mitigation and monitoring in some of its recent guidance documents[103], whereas Advocate General Kokott herself has already underscored the underlying rationale of adaptive management in the context of Article 6(3) of the Habitats Directive. In cases where scientific uncertainty remains, the Advocate General accepted that it must be possible to gain further knowledge of the adverse effects by means of associated scientific observation and implementation of the plan and project accordingly.[104] Likewise, national

[101] Frins, supra n 96.

[102] P.F.M. Opdam, M.E.A. Broekmeyer and F.H. Kistenkas, 'Identifying Uncertainties in Judging the Significance of Human Impacts on Natura 2000-sites', (2009) *Environmental Science & Policy* 12, pp. 912–921.

[103] European Commission, EU Guidance on Wind Energy Development in Accordance with the EU Nature Legislation (Brussels: 2010) http://ec.europa.eu/environment/nature/natura2000/management/docs/Wind_farms.pdf (Accessed 20 June 2015), pp. 83–84.

[104] Advocate General Kokott, Landelijke Vereniging tot Behoud van de Waddenzee en Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij, Opinion of 29 January 2004.

case-law reasserts, albeit under strict conditions, the use of adaptive management protocol as a means to reconcile a rather stringent precautionary approach with harmful new project developments.[105]

The particularity of adaptive management in the context of elevated levels of nitrogen deposition would be that it allows tracking the effective progress of the restoration measures on the ground. Thus, it might serve as back-up for mitigating measures that have been included at permit level. A gradual approach is thinkable whereby additional nitrogen emissions are only allowed whenever preliminary monitoring results indicate the effectiveness of the restoration measures on the ground. Obviously, the specific monitoring conditions and the legal consequences attached to negative monitoring results need to be precisely circumscribed in the planning permits in order to comply with the precautionary principle.

5. The Dutch Programmatic Approach to Nitrogen (PAN): A panacea for all ills?

5.1 A more integrated approach to excessive nitrogen deposition levels in Natura 2000-sites

In spite of the looming legal uncertainty surrounding the qualification of habitat restoration and creation measures in the context of Article 6(3) of the Habitats Directive, the Dutch government was poised to implement a similar rationale on a more generic level.

The key insights deduced from the inclusion of restoration measures at project-level, are integrated in a national program aimed at comprehensively addressing the excess of nitrogen deposition in all affected Natura 2000-site. Also some of the other above-discussed regulatory tools – such as the *de minimis*-thresholds, the exemption for ongoing use and internal offsetting practices – are partly included in the newly established integrated approach to nitrogen, coined *Programmatic Approach Nitrogen (PAN)*. The PAN entered into force on the 1 of July 2015 after several years of tense political negotiations.[106] With its choice for a programmatic approach to the nitrogen issue, the Dutch government aims to solve the ever-recurring conflict between the strict nature protection rules and economic issues in a more lasting manner.

Given its novelty and its linkages to above-suggested solutions, a closer analysis of the PAN is merited. The core of the PAN, which has a runtime of (at least) 15 years, is to make preservation and restoration of the nature quality possible without jeopardizing economic development. The PAN, which takes into account an expected economic growth of 2,5 %, includes binding agreements that have made about remedial measures in the Natura 2000-sites and additional reductions of the nitrogen load from agriculture, transport and industry. It is an integral program of the Dutch government and the joint provinces, which also relies on the cooperation and involvement of many different actors, such as the Association of Dutch Municipalities, the Association

[105] See more extensively: R. Frins and H. Schoukens (2014) Balancing wind energy and nature protection: from policy conflicts towards genuine sustainable development. In L. Squitani, B. Vanheusen, M. Reeze and B. Vanheusden (eds.), *Sustainable Energy United in Diversity – Challenges and Approaches in Energy Transition in the European Union*, (Groningen, Europa Law Publishing: 2014), pp. 84–110.

[106] Decision of the Secretary of State for Economic Affairs and the Minister of Infrastructure and Environment of 10 June 2015 nr. DGAN-NB/15076652 to adopt the Programmatic Approach Nitrogen, Dutch Official Gazette 29 June 2015. The Programmatic Approach Nitrogen (final version) can be consulted at the following (Dutch) website: http://pas.natura2000.nl/ (Accessed 20 June 2015). See also: H. Woldendorp and H. Schoukens, 'De Programmatische Aanpak Stikstof (PAS) in Nederland als inspiratiebron voor Vlaanderen: pas op de plaats of een stap vooruit?', (2015) *Tijdschrift voor Omgevingsrecht en Omgevingsbeleid*, pp. 320–344.

of Water Boards, the agricultural and horticultural organisations, the employers' organisation VNO-NCW and the various land management organisations. In terms of territorial range, the PAN has a wide range, since it includes generic reduction measures for all relevant nitrogen producing sectors. Most importantly, it specifically focuses on the Natura 2000-sites with over-sensitive natural habitats to which specific recovery goals are linked.

In itself, the PAN has a double purpose. Not only does it aim to ensure compliance with the conservation duties incumbent upon the Netherlands for its nitrogen-sensitive Natura 2000-sites (cf. *infra*), it also re-uses the positive nature effects of the reduction efforts in order to create more so-called '*deposition room*' for economic development, such as the expansion of industrial facilities and dairy farms. The integrated approach rests upon two pillars: (1) reducing point-based emissions from agriculture, transport and industry through on-site measures; (2) reducing the effects of nitrogen deposition in Natura 2000-sites through appropriate restoration and management measures. The additional reduction efforts will create some room for economic development. To be more precise, 50 % of the additional reductions will be returned to economic operators as '*development room*'. The restoration efforts should, in turn, guarantee that the authorized ongoing nitrogen-emitting activities do not further deteriorate the already affected Natura 2000-sites.

While the nature management and restoration measures do not as such create additional room for development, they do ensure that Article 6(2) of the Habitats Directive is complied with and that, on the long run, also the achievement of the conservation goals under Article 6(1) of the Habitats Directive remains a realistic objective. The restoration measures are needed since the reduction efforts alone would not succeeding in stopping the ongoing deterioration in many overburdened Natura 2000-sites.

A significant part of the '*deposition room*' will be turned into '*development room*' for new economic activities and projects, of which the most important are outlined in the PAN itself. The remaining part of the room for development will serve to offset the additional contributions linked to autonomous activities, such as the increase of motorway traffic. The source-related reduction efforts (which are primarily implemented in the agricultural sector) and nature management measures that are set forth will be used as justification for allowing new project developments in the vicinity of Natura 2000-sites.[107]

The PAN goes off the beaten track by opting for a cross-sectoral approach, which tries to reduce nitrogen deposition in all relevant societal sectors (agriculture, industry and transport) by generic source-related measures, that go beyond the existing commitments. This should guarantee a further decrease of the levels of nitrogen deposition. With the purported restoration measures, the Dutch government tries to halt the continuing deterioration of natural habitats in the Natura 2000-sites that are affected by atmospheric nitrogen deposition. Such measures might include measures against acidification by adding basic substances and/or restoration of the water cycle, the removal of nutrients by excavation, dredging, moving, burning or litter removal, … and interventions in the vegetal succession by, among others, coppice management. If a certain effect of nitrogen on this quality can be reduced by measures that are themselves not focused on nitrogen deposition, such a measure can be characterised as a mitigating measure under the integrated PAN-approach. For this reason, measures

[107] G.C.W. Van der Feltz, 'Stikstof, recente ontwikkelingen in wetgeving en rechtspraak', (2014) *Tijdschrift voor Bouwrecht* 2014, p. 53.

aimed at hydrological restoration have, among others, gotten a prominent place within the recently established recovery strategies.

For each separate Natura 2000-site a site-analysis has been produced, in which the specific challenges and possible restoration and management measures are being enumerated and assessed. This site-specific analysis has been subjected to a prior appropriate assessment, while also the PAN in its entirety has been assessed in the light of Article 6(3) of the Habitats Directive. After having outlined the necessary site-related recovery measures, the analysis explicitly lays down the room for economic development that becomes available if these measures are implemented. Within the context of a site-specific analysis the beneficial impacts tied to the additional reductions and management measures are balanced with the room for economic development. Provided the purported project developments can be framed in the room for economic development which has been assigned by the PAN, the analysis will serve as appropriate assessment for these projects. By doing so, it will significantly alleviate the administrative burden for new plans and projects.

The latter permit applications will thus no longer have to be subject to a comprehensive appropriate assessment. Instead the project proponent is merely required to demonstrate that the purported project development can be framed within the applicable PAN-approach and the associated site-analysis. It is assumed that the restoration measures provided for in the area analysis will ensure that no further deterioration of the Natura 2000-site will ensue. The calculation tool AERIUS is crucial in this regard. It calculates nitrogen emissions and deposition levels for Natura 2000-sites, caused by new or expanding economic activity. AERIUS support the process of permits being granted for economic activities involving nitrogen emissions and monitors whether the total nitrogen burden will continue to decline.[108]

Taking into account the measures aimed at reducing point based emissions from agriculture, transport and industry, on the one hand, and the positive effects of the on-site restoration measures, on the other hand, new economic development can be allowed, also in the vicinity of nitrogen-sensitive Natura 2000-sites. In addition, new projects that do not cause a nitrogen deposition of more than 1 mol nitrogen per hectare on a protected habitat are exempted from a prior permit requirement[109], while also the exemption for certain ongoing uses, which has been treated above, in section 3.1, remains applicable.

5.2 The programmatic approach as ultimate go-between?

In itself, the PAN constitutes a prime example of how to reconcile new economic development with nature conservation. In 2014, the foundations for a similar approach have also been implemented in Flemish nature conservation law.[110] Its appeal lies in the fact that it allows economic development in the context of over-burdened Natura 2000-sites at a time when critical levels are still exceeded. The latter sites will be subject to robust restoration measures, which go beyond current management measures. In exchange for further reduction and restoration measures, project developers are offered more flexibility when applying for new project developments. In the absence of this shift to more ambitious reduction and recovery efforts, no room for further economic development would be available, at

[108] See also: https://www.aerius.nl/nl (Accessed 20 June 2015).

[109] Projects and activities that are prone cause an additional nitrogen deposition between 0,05 and 1 mol on a nearby protected habitat will be subject to a prior declaration.

[110] Schoukens et al., supra n 56.

least not at short-term. However, the Dutch approach is also not uncontested, especially in view of the outcome of the *Briels*-proceedings. In 2012, the Advisory Division of the Dutch Council of State issued a very readable Opinion on the PAN, in which some interesting points relating to its compatibility with the EU nature directives were raised.[111]

By accepting that part of the '*nature gains*' will not be primarily used to comply with Article 6(1) of the Habitats Directive – the achievement of the favourable conservation status – the Council explicitly reasserted the main premise upon which the PAN is built. The absence of a concrete time schedule in Article 6(1) of the Habitats Directive (cf. *supra*) seems to leave the Member States a certain discretion in this regard, as long as the achievement of the good conservation status is not definitively compromised.

This being the case, the Council voiced additional concerns as to the observance of the *standstill*-principle which is enshrined in Article 6(2) of the Habitats Directive. In its view, it remained uncertain whether the PAN had taken into account the deterioration that had taken place in between the designation of the Natura 2000-sites and the entry into force of the PAN. Pertaining to Article 6(3) of the Habitats Directive, the Council principally accepted that both the source-related and the area-oriented restoration measure, upon which the room for economic development is based, can serve as a mitigation at project-level. The Council acknowledged that there is a direct and inextricable link between the allocated room for economic development at site level and the additional reduction measures that will be implemented within the agricultural sector. Still, it stipulated some additional conditions which will have to be observed in order to ensure compliance with Article 6(3) of the Habitats Directive. Only if the restoration measures are being implemented according to plan, it is sufficiently ascertained that the allocated room for economic development will not harm the integrity of the Natura 2000-sites. In order to avoid adverse effects, the Dutch Council of State recommended to allocate the room for additional economic development in a gradual manner.

The 2014 *Briels*-ruling seems to have compounded matters even further. At first sight, one of the basic premises upon which the PAN is grounded – *i.e.* safeguarding the necessary room for economic development by, among others, anticipating on the effectiveness of purported restoration measures – remains dubious at best.

On the surface, the CJEU seems to dismiss approaches to the habitats assessment-test which explicitly anticipate on the beneficial effects of future habitat creation and restoration measures. Thus, by indirectly accepting the effectiveness of the restoration measures from beforehand as a means to justify the allocation of development space, the PAN seems to stand at odds with the strict interpretation of the precautionary principle as set out by the CJEU in its *Briels*-ruling. Pursuant to the latter ruling, room for economic development should only become available whenever the effectiveness of the restoration measures has been established. Along the same lines, some authors have pointed to the ambiguity of the exact wording of some of the site-specific analyses that have been carried out for the involved Natura 2000-sites.[112] Moreover, the implementation of additional restoration measures will, in some instances, also give rise to additional ecological impacts. Several natural habitats, such as peatlands, do not require further intensive management and restoration measures. Hence, the implementation of restoration measures in order to offset

[111] Advisory Division of the Dutch Council of State (2012) No.W 15.12.0046/IV.

[112] Frins, supra n 96.

future nitrogen emissions might, in the long run, lead to even more degraded ecosystems. At any rate, whenever the future adequacy of some of the restoration measures that are included in the site-analyses is openly denounced in the PAN-related documents and analyses, the PAN will indeed fall short of the standards set out by the CJEU. In addition, the PAN is also explicitly moving away from the traditional approach to mitigation, in which ad hoc-restoration measures are explicitly linked to a specific project development. Even more so, with its reliance on generic source based efforts and restoration measures, the PAN also no longer provides for an explicit link between a plan or project and a collection of mitigating measures at site-level.

5.3 A silver lining?

In spite of the additional difficulties to which the *Briels*-ruling might lead for the further implementation of the PAN, there could be a silver lining to it.

First, as alluded to above, it could be argued that the CJEU does not rule out the use of restoration measures *per se* in the context of an appropriate assessment. In that regard, it is not unimportant to point out that the PAN has been preceded by comprehensive ecological research which aimed to scientifically evaluate the capabilities for mitigating the adverse effects caused by excessive nitrogen deposition levels in Natura 2000-sites.[113] This research, which is ground-breaking in its own right, led to the conclusion that, on general grounds, the presented management measures are effectively capable of offsetting the adverse effects related to elevated nitrogen deposition levels. This conclusion is further backed up by the site-specific analyses, in which the most appropriate restoration measures are selected and the correlating room for economic developments has been enumerated. Following that line of reasoning, one might indeed contend that the PAN does not allow a scenario to unfold which is similar to the facts that led to the *Briels*-ruling.[114] In itself, the PAN is not about discounting adverse effects in one part of a Natura 2000-site with the positive effects linked to restoration measures in another part of the Natura 2000-site.

The PAN ensures that no deterioration takes place over the whole surface of the Natura 2000-sites that are included in the program. Moreover, the additional room for development is in itself only linked to the additional reduction pledges by the relevant economic sectors. In addition, the final version of the PAN explicitly underlines that every area analysis is based on the best scientific knowledge available and that, for none of them it can be concluded that serious doubts remain as to whether the continuing deterioration will be halted and the applicable conservation objectives will be met.[115]

Second, the monitoring requirements that are linked to the PAN could help in ensuring the compatibility of the programmatic approach with the EU nature directives. The monitoring rules will allow the competent authorities to continuously monitor the progress of the implementation of the PAN but, most importantly, will also check the effectiveness of the restoration measures and the results linked to the additional reduction measures. If the monitoring results would reveal that, in spite of the implemented reduction and restoration measures, the ongoing deterioration of a Natura 2000-site still continues, the competent authorities are required to revise these measures, contemplate additional source-

[113] Smits and Bal, supra n 24.

[114] Secretary of State for Economic Affairs and the Minister of Infrastructure and Environment, *Note of Reply*, 1 July 2015, available at http://pas.natura2000.nl/ (Accessed 20 June 2015), pp. 25–26.

[115] PAN, supra n 106, pp. 24–25.

based or restoration measures or, ultimately, temporarily adjust the development room that has been allocated for future economic activities in the immediate surroundings of the Natura 2000-site. Moreover, as a corollary of this adaptive management-approach, the room for economic activities that are not already explicitly enumerated in the PAN, will be allocated in a gradual manner. Under the final version of the PAN, at maximum 60 % of the economic development room will be allocated in the first three years after the entry into force of the PAN. Only when it can be demonstrated that the restoration measures have indeed yielded the predicted positive effects, a bigger share of the room for economic development can be allocated.

By and large, the above-listed guarantees, if properly implemented, could enable the PAN to generally come forward to at least some of the above-portrayed concerns. Yet the latter safeguards do not take away the risk that some of the restoration measures will not yield the expected positive ecological effects on the ground. Moreover, in terms of timing it remains rather worrisome that further economic development is allowed at a time when the beneficial effects of the ecological restoration measures have not yet materialized. The soundness of the ecological fundamentals upon which the PAN is grounded will therefore be instrumental to ensure the legal underpinnings of the PAN. Awaiting the first results of the effectiveness of the restoration measures, however, new economic activities will already be authorized under the PAN-approach. Taking into account that no significant reduction of nitrogen deposition have taken place at least in some Dutch Natura 2000-sites during the past ten years, this strategy might further undermine the ecological quality of at least some of the Dutch Natura 2000-site. Admittedly, given the allegedly robust ecological underpinnings of the PAN, it can be entertained that such a scenario is not very likely to unfold. Yet nature is unpredictable. Seeing the degraded status of many nitrogen-sensitive Natura 2000-sites it is not unreasonable to think that, at least in some instances, additional restoration measures are required in order to avoid a further decline.

Obviously, if monitoring result were indeed to display a further decline of most Natura 2000-sites, the basic fundamentals of the PAN might quickly evaporate. This will be the case whenever the expected decrease of nitrogen deposition does not see itself translated in the monitoring results on the ground. However, even assuming that the EU and/or national judges would reassert the legality of the Dutch adaptive management approach, it is certainly worth pointing out that a more fundamental concern on the viability of the PAN is still looming around the corner. One of the basic premises of the PAN is to re-use the beneficial effects tied to the purported restoration measures as a counterbalance for the creation of new development space. The measures should avoid additional significant effects to materialize in the first place. Thus, it remains to be seen whether restoration measures in the context of a degraded Natura 2000-sites can be used as leverage for authorizing new economic activities while, at the same time, Member States are also required to implement measures in order to achieve the favorable conservation status for the affected natural habitats. In other words, it could be entertained that Member States should first focus on the implementation of Article 6(1) of the Habitats Directive. Only when this obligation has been complied with, new room for economic development should become available. Under the PAN-approach, the beneficial effects linked to restoration measures are immediately re-used in exchange for further economic expansion.

The PAN tries to solve this last riddle by pointing out that, while the restoration measures are indeed primarily seeking to avoid further

deterioration, they are also ambitious enough to maintain the recovery-path needed to achieve the favorable conservation status according to Article 6(1) of the Habitats Directive.

6. Conclusion and outlook

Excessive atmospheric nitrogen deposition levels represent a major anthropogenic impediment for the recovery of many Natura 2000-sites across the EU. This paper has demonstrated that, in the light of the rigid interpretation of the precautionary principle by the CJEU, national and regional permit issuing authorities in many Member States are facing increasingly tight margins when granting authorizations for plans or projects leading to additional nitrogen emissions. Implementing more scrutiny in relation to unsustainable economic development would be the obvious response to the overload of nitrogen that is present in our ecosystems. However, accepting a so-called '*degrowth-scenario*' merely in function of the much-needed restoration of threatened natural habitats, probably represents a no go-zone for most if not all politicians.

This article sought to address the legal solutions that are capable of better aligning economic developments with a realization of the EU's ambitious recovery targets for its most valuable natural sites.

In a first tier, the analysis has shown that an increasing number of Member States are using threshold values in order to further streamline the habitats assessment-procedures and alleviate the administrative burden for plans and projects whose nitrogen emissions are limited in themselves. A first conclusion is that such approaches might indeed help in objectivizing the application of the habitats assessment in nitrogen-related cases. Still, when applied in a generous manner, the use of thresholds remains debatable in the light of the preventative approach underpinning Article 6(3) of the Habitats Directive. Moreover, exempting ongoing use from a prior assessment does not offer a long-term solution to the environmental issue of nitrogen surpluses in degraded Natura 2000-sites, especially not since Member States also have comply with the autonomous protection and restoration duties set out in Article 6(1) and 6(2) of the Habitats Directive.

A second conclusion is that many of the novel regulatory efforts which aim to further reconcile economic developments with nitrogen mitigation seem to go against the precautionary approach laid down by the EU nature directives. Newly coined concepts such as '*nature inclusive design*', which is grounded on a more lenient interpretation of the concept of '*mitigation*' within the context Article 6(3) of the Habitats Directive, explicitly anticipate on the positive effects of habitat creation and restoration measures. This article sought to demonstrate that that, taking into consideration the outcome of the recent *Briels*-proceedings before the CJEU, a more generous reading of the habitats assessment-rules will be harder to sustain in the coming years. Whereas not all room for leverage has disappeared with the 2014 *Briels*-ruling, the lack of conclusive evidence on the effectiveness of restoration measures for over-burdened natural habitats will probably represent the most formidable obstacle to a more flexible approach to the EU nature directives. At any rate, the CJEU has steadfastly refused to let go its strict interpretation of the precautionary principle in the context of Article 6(3) of the Habitats Directive. At the same time offsetting possible environmental damage with reduction efforts that have been achieved in other permitted operations, while not being ruled out by the *Briels*-ruling, only has limited potential in the context of the habitats assessment-obligation given the additional strict requirements that have to be complied with.

Which bring us to a third and final conclu-

sion. The Dutch programmatic approach (PAN), which entered into force in July 2015, is to be welcomed as a more sensible and long-term solution to the problem of excessive nitrogen deposition for affected Natura 2000-sites. By utilizing comprehensive source-related reductions and site-linked restoration measures as a means to underpin the creation of new room for economic development, it may have struck a right balance between economic development and nature conservation. However, this article has emphasized that, especially taking into account the outcome of the *Briels*-ruling, it will be paramount to safeguard that the room for economic development is not abused to allow further economic expansion in a context where the Natura 2000-sites are facing a continuous decline. Much, if not all, will depend on the soundness of the ecological underpinnings of the PAN. The robust monitoring package, which is included in the PAN, is designed to avert a worst case-scenario. Yet, while the Dutch approach should certainly be credited for having struck a common ground between economic development and nature conservation, its application on the ground will be determinative for its survival in the long run. If monitoring results were to reveal an increase of nitrogen deposition levels, possibly due to a more lenient implementation of the additional source-reduction measures or the limited results of the restoration efforts, the legal underpinnings of the PAN would quickly evaporate. Ultimately, the Dutch PAN-approach could still be criticized for not having implemented the more evident response to excessive nitrogen deposition levels in Natura 2000-sites. Such a solution would consist in maintaining strict permit policies pending the implementation of the reduction and restoration measure. Only if the results on the ground were to indicate a decrease of nitrogen deposition levels and a recovery of the affected habitats, more leniency at permit level should be allowed. Instead the PAN has opted for a more pragmatic approach, by allowing a direct trade-off between future restoration efforts and short-term economic development.

In conclusion, and returning to the paper's title, tinkering with the law might be part of the short-term solution for overcoming economic paralysis due to strict nature protection rules. However, as long as the latter approaches are not backed up by genuine and effective efforts to restore degraded Natura 2000-sites in the first place, they will fail to deliver long-term relief for both the EU's degraded nature and future economic development.