

VI.1. *In dubio pro natura*: turning the screw in the light of the wording and objective of the Habitats Directive

ECJ (Gr. Ch.), judgment *Landelijke Vereniging tot Behoud van de Waddenzee & Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij* of 7 September 2004, C-127/02

Birds Directive – Habitats Directive (Art. 6, § 2, § 3) – Natura 2000 site – Appropriate assessment – Significant effect – Integrity – High level of protection (importance of objectives) – Precautionary principle (no reasonable scientific doubts/*in dubio pro natura*) – Judicial control of permits (legality)

Summary

In this landmark case, the Court of Justice awakens a till then largely dormant tiger. The Court of Justice gives sharp teeth to Article 6 Habitats Directive and therefore provides a high level of environmental protection, partly in the light of the wording of the text of the Habitats Directive, and partly in the light of the objective of the Habitats Directive which is far from being achieved. Therefore, it gives a large interpretation of the scope of plans and projects that have a significant effect on a protected site and for which a thorough appropriate assessment must be established in the light of the best scientific knowledge in the field, and a strict interpretation of the conditions under which competent national authorities can agree to a plan or project: i.e. that it has been made certain that it will not adversely affect the integrity of the site. Therefore, in case scientific uncertainty remains, priority should be given to the objective of protecting the site's integrity over the development of a plan or project (in dubio pro natura).

Extracts

28. Le fait que ladite activité est pratiquée périodiquement depuis de nombreuses années sur le site concerné et que son exercice nécessite l'obtention d'une licence chaque année, dont la délivrance exige à chaque fois une nouvelle évaluation tant de la possibilité d'exercer cette activité que du site où elle peut être exercée, ne constitue pas, en lui-même, un obstacle à ce qu'elle puisse être considérée, lors de chaque demande, comme un plan ou un projet distinct au sens de la directive habitats.

36. En effet, l'autorisation d'un plan ou d'un projet, accordée en vertu de l'article 6, paragraphe 3, de la directive habitats, suppose nécessairement qu'il a été considéré comme n'étant pas de nature à porter atteinte à l'intégrité du site concerné et, par voie de conséquence, comme n'étant pas non plus propre à entraîner des détériorations ou des perturbations significatives au sens du paragraphe 2 dudit article.

37. Néanmoins, il ne saurait être exclu que, par la suite, un tel plan ou projet se révèle, même en l'absence de toute erreur imputable aux autorités nationales compétentes, de nature à entraîner de telles détériorations ou perturbations. Dans ces conditions, l'application de l'article 6, paragraphe 2, de la directive habitats permet de répondre à l'objectif essentiel de la préservation et de la protection de la qualité de l'environnement, y compris de la conservation des habitats naturels ainsi que de la faune et de la flore sauvages, tel qu'énoncé au premier considérant de cette même directive.

38. Par conséquent, il y a lieu de répondre à la deuxième question que l'article 6, paragraphe 3, de la directive habitats instaure une procédure visant à garantir, à l'aide d'un contrôle préalable, qu'un plan ou un projet non directement lié ou nécessaire à la gestion du site concerné, mais susceptible d'affecter ce dernier de manière significative, n'est autorisé que pour autant qu'il ne porte pas atteinte à l'intégrité de ce site, alors que l'article 6, paragraphe 2, de ladite directive, fixe une obligation de protection générale, consistant à éviter des détériorations ainsi que des perturbations qui pourraient avoir des effets significatifs au regard des objectifs de la directive, et ne peut s'appliquer concomitamment au paragraphe 3 du même article.

45. [...] l'article 6, paragraphe 3, première phrase, de la directive habitats doit être interprété en ce sens que tout plan ou projet non directement lié ou nécessaire à la gestion du site fait l'objet d'une évaluation appropriée de ses incidences sur celui-ci au regard des objectifs de conservation de ce site, lorsqu'il ne peut être exclu, sur la base d'éléments objectifs, qu'il affecte ledit site de manière significative, individuellement ou en conjugaison avec d'autres plans ou projets.

46. Ainsi qu'il ressort de l'article 6, paragraphe 3, première phrase, de la directive habitats, lu en combinaison avec le dixième considérant de celle-ci, le caractère significatif de l'incidence sur un site d'un plan ou d'un projet non directement lié ou nécessaire à la gestion de ce site est mis en relation avec les objectifs de conservation de ce dernier.

47. Aussi, lorsqu'un tel plan ou projet, tout en ayant une incidence sur ledit site, ne risque pas de compromettre les objectifs de conservation de celui-ci, il ne saurait être regardé comme étant susceptible d'affecter de manière significative le site en question.

49. [...] en vertu de l'article 6, paragraphe 3, première phrase, de la directive habitats, lorsqu'un plan ou un projet non directement lié ou nécessaire à la gestion d'un site risque de compromettre les objectifs de conservation de celui-ci, il doit être considéré comme susceptible d'affecter ce site de manière significative. L'appréciation dudit risque doit être effectuée notamment à la lumière des caractéristiques et des conditions environnementales spécifiques du site concerné par un tel plan ou projet.

57. [...] lorsque subsiste une incertitude quant à l'absence d'effets préjudiciables pour l'intégrité dudit site liés au plan ou au projet considéré, l'autorité compétente devra refuser l'autorisation de celui-ci.

61. [...] Les autorités nationales compétentes, compte tenu de l'évaluation appropriée des incidences de la pêche mécanique à la coque sur le site concerné au regard des objectifs de conservation de ce dernier, n'autorisent cette activité qu'à la condition qu'elles aient acquis la certitude qu'elle est dépourvue d'effets préjudiciables pour l'intégrité dudit site. Il en est ainsi lorsqu'il ne subsiste aucun doute raisonnable d'un point de vue scientifique quant à l'absence de tels effets.

70. [...] lorsqu'une juridiction nationale est appelée à vérifier la légalité d'une autorisation relative à un plan ou à un projet au sens de l'article 6, paragraphe 3, de la directive habitats, elle peut contrôler si les limites fixées à la marge d'appréciation des autorités nationales compétentes par cette disposition ont été respectées, alors même que celle-ci n'a pas été transposée dans l'ordre juridique de l'État membre concerné malgré l'expiration du délai prévu à cet effet.

Observations

A. Context and issues

1. The Waddenzee (Wadden Sea) is an intertidal zone between de Waddeneilanden (the Frisian islands) and the coast of the Netherlands, Germany and Denmark. It has a rich fauna and flora and most of it is designated as a protected site under the Birds Directive¹ and the Habitats Directive.² Two non-governmental nature conservation organisations had brought an action for annulment before the Dutch Council of State against two decisions of the Dutch Secretary of State for agriculture, nature conservation and fisheries to issue short term temporary licences³ to engage in mechanical cockle fishing in the Waddenzee special protection area.⁴ Under mechanical cockle fishing a ship drags metal cages over the seabed to scrape the upper 4 to 5 cm of the surface.⁵ The applicants have claimed in essence that the cockle fishing would cause permanent damage to the geomorphology, flora and fauna of the Waddenzee's seabed; that the fishing would cause a decline of bird species that feed on shellfish as it would reduce their available food stocks, and that the decisions were contrary to the Birds and Habitats Directives.⁶ The Dutch Council of State stayed the proceedings and referred several questions on the interpretation of the scope and the conditions of Article 6, § 3 of the Habitats Directive to the European Court of Justice for a preliminary ruling.

1 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

2 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

3 From 16 August to 25 November 1999 and from 14 August to 30 November 2000 respectively.

4 Hereinafter we'll rather talk about a "Natura 2000 site", which can either be a special protection area (SPA) under the Birds Directive or a special area of conservation (SAC) under the Habitats Directive.

5 §§ 9-10 of the Opinion of AG Kokott of 29 January 2004 in the case C-127/02, ECLI:EU:C:2004:60 (hereinafter: the Opinion of AG Kokott or the Opinion).

6 §§ 11-13 of the judgement and §§ 9-16 of the Opinion.

2. Whereas §§ 1 and 2 of Article 6 of the Habitats Directive provide for positive obligations for Member States to establish for Natura 2000 sites the necessary conservation measures and to take steps to avoid deterioration of habitats and disturbance of species, §§ 3-4 provide for the procedure and the conditions under which a plan or project not directly connected with or necessary to the management of the site,⁷ but likely to have a significant effect thereon must be evaluated and can be authorised.

According to Article 6, § 3: "Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

3. The Dutch Council of State enquired *inter alia* on the interpretation of several essential elements of the scope and application of Article 6, § 3, of the Habitats Directive.

As to the scope:

- a) What is a "plan or project"? Does an activity which has already been carried on for many years and for which authorisations are in principle granted each year for a limited period, with at each time a fresh assessment as to whether and if so in which sections of the area the activity can be carried on, qualify as a "plan or permit"? In other words, would the already for many years ongoing mechanical cockle fishing in the Waddenzee qualify as a plan or permit? (question 1(a))
- b) When should one consider that a plan or project is "likely to have a significant effect" on a Natura 2000 site? (question 3(a) & (b))

As to the conditions applicable to the activity:

- c) Does Article 6(2) of the Habitats Directive apply cumulatively or separately from the obligations under Article 6(3)? In other words, in the case of a plan or permit do Member States have to take appropriate steps to avoid, in the Natura 2000 site, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbances could be significant in relationship to the objectives of the Directive? (question 2)

⁷ On the scope of this exception, see e.g.: ECJ, 4 March 2010, *Commission v. France*, C-241/08, ECLI:EU:C:2010:114, §§ 44-56; ECJ, 17 April 2018, *Commission v. Poland*, C-441/17, ECLI:EU:C:2018:255, §§ 122-127. AG Sharpston talks about the "day-to-day operation of the site" (Opinion of AG Sharpston of 22 November 2012 in case C-258/11, *Sweetman*, ECLI:EU:C:2012:743, § 45).

- d) Under what conditions must the “appropriate assessment” of the implications of the plan or project for the site in the view of the site’s conservation objectives be carried out? Taking into account the precautionary principle, can an activity be authorised if there is no “obvious” doubt as to the absence of a possible significant effect? (question 4)

Finally, the Dutch Council of State seeks to ascertain whether in the absence of transposition into Dutch law, Article 6, § 3, of the Habitats Directive may be relied upon by individuals in national court? (question 5)

B. Essential content

4. In answer to the first question (*supra* N° 3.a) the European Court of Justice found it immaterial that the activity of mechanical cockle fishing has already been carried out in its present form for many years.⁸ With reference to the definition of “project” in the EIA-Directive⁹ (the activities would qualify as an “other intervention in the natural surroundings and landscape including those involving the extraction of mineral resources”¹⁰) and to the objective “to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment” (i.e. the objective to avoid unintentional damage to Natura 2000 sites) it ruled that each application for a periodic licence¹¹ could qualify as a plan or project within the meaning of Article 6, § 3, of the Habitats Directive.¹²⁻¹³ Hence, the Court gave the term “project” a broad meaning.

8 Verschuuren notices that before the Waddenzee-judgement: “Many people, including the European Commission, always thought that the strict procedure of Article 6(3) did not apply to such activities” (J. VERSCHUUREN, “Effectiveness of the Wild Birds and Habitat Directives in the Wadden Sea area: will the tiger loose its teeth?”, in K. LAURSEN (ed.), *Monitoring and Assessment in the Wadden Sea. Proceedings from the 11th Scientific Wadden Sea Symposium, Esbjerg, Denmark 4. – 8. April 2005*, available at SSRN: <https://ssrn.com/abstract=899552>, p. 3).

9 At the time: Council Directive 85/337/EEC of 27 June 1985 ‘on the assessment of the effects of certain public and private projects on the environment’, currently: Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 ‘on the assessment of the effects of certain public and private projects on the environment’.

10 Art. 1, § 2, second indent, EIA-Directive.

11 Therefore, the Waddenzee-judgement concerns the question whether a re-licensing of an ongoing activity falls under the scope of Article 6, § 3, Habitats Directive. In the Waddenzee-judgement the Court did not rule on the question whether a similar activity that is not subject to a national authorisation scheme, could fall under the scope of Article 6, § 3, Habitats Directive. On the latter question, see ECJ, 20 October 2004, *Commission v. United Kingdom*, C-6/04, ECLI:EU:C:2005:626, §§ 45-47; ECJ, 10 January 2006, *Commission v. Germany*, C-98/03, ECLI:EU:C:2006:3, §§ 39-45; Opinion of AG Tizzano of 24 November 2005 in case C-98/03, ECLI:EU:C:2005:713, §§ 35-39.

12 §§ 21-29 of the judgement. Confirmed in e.g. ECJ, 14 January 2010, *Stadt Papenburg*, C-226/08, ECLI:EU:C:2010:10, §§ 37-39 (ongoing dredging works in respect of a navigable channel); ECJ, 7 November 2018, *Coöperatie Mobilisation for the Environment UA*, joined cases C-293/17 and C-294/17, ECLI:EU:C:2018:882, §§ 74-86 (a recurring activity, such as the application of fertilisers on the surface of land or below its surface). See also: the commentary of H. SCHOUKENS of ECJ C-293/17 and 294/17 (title I.2) in this book; S. MÖCKEL, “Natura 200-sites: Legal requirements for agricultural and forestry land-use”, *Nature Conservation*, 2022, pp. 161-184.

13 In later case-law the Court clarified further that as the term “project” under the EIA-Directive is more restrictive than the one stemming from the Habitats Directive, an activity that is a project under the EIA-Directive must *a fortiori* be covered by the Habitats Directive (ECJ, 7 November 2018, *Coöperatie Mobilisation for the Environment UA*, joined cases C-293/17 and C-294/17, ECLI:EU:C:2018:882, § 65 and ECJ, 29 July 2019, *Inter-Environnement Wallonie ASBL a.o.*, C-411/17, ECLI:EU:C:2019:611, §§ 122-124). See also: the commentary of H. SCHOUKENS of ECJ C-293/17 and 294/17 (title I.2).

5. A second condition for an activity to fall under the scope of Article 6, § 3, of the Habitats Directive – and hence triggering an appropriate assessment according to the first phrase and an authorisation procedure according to the second phrase – is that the implications of a plan or project are “likely to have a significant effect” on the Natura 2000 site. On this question (*supra* N° 3.b), the Court first held that it is not necessary that a plan or project “definitely” has a significant effect, but merely that there is a “probability or risk” to such effects. Secondly, it held that in the light of the precautionary principle, such a risk exists if it “can not be excluded” on the basis of objective information that the plan or project will have significant effects.¹⁴ Therefore, “in case of doubt as to the absence of such effects such an assessment must be carried out”.¹⁵ Thirdly, the Court underlined that the “significant” nature is linked to the site’s conservation objectives. Therefore, if the plan or project is likely to “undermine” the conservation objectives in the light *inter alia* of the characteristics and specific environmental conditions of the site concerned, it must necessarily be considered to have significant effect on that site.¹⁶ In other words, the Court seems in practice to erase the word “significant”.¹⁷

6. On the next question (*supra* N° 3.c), the Court rules that the application of Article 6, § 3, Habitats Directive renders superfluous a concomitant application of the rule of general protection laid down in Article 6, § 2, as the authorisation of a plan or project in accordance with Article 6, § 3, of the Habitats Directive necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6, § 2. In other words, there is no need to apply Article 6, § 2 separately, as the material conditions for agreeing to the plan or project in line with Article 6, § 3, encompass an assessment of the material conditions under Article 6, § 2.¹⁸ Nevertheless, an authorisation of a plan or project according to Article 6, § 3, Habitats Directive does not preclude that a subsequent application of Article 6, § 2, Habitats Directive might be necessary if a plan or project “subsequently proves likely to give rise to such deterioration or disturbance, even where the competent national authority cannot be held responsible for any error”.¹⁹ In other words, an authorisation granted according to Article 6, § 3, is no waiver

14 E. Stokes underlines that the Court of Justice moved away from requiring “tangible scientific evidence [...] in order to prove that a risk is concrete” (E. Stokes, “Liberalising the Threshold of Precaution – Cockle Fishing, the Habitats Directive, and Evidence of a New Understanding of ‘Scientific Uncertainty’”, *Environmental Law Review*, 2015, (206) 212-213).

15 Advocate-general Kokott adds an adverb by specifying that the question is whether there is “reasonable” doubt as to the absence of significant adverse effects (§§ 73-74 of the opinion).

16 §§ 39-49 of the judgement.

17 Compare with §§ 84-86 of the Opinion and see *infra* N° 11.

18 As the Court later mentioned in the Sweetman-judgement: “the provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive. Indeed, Article 6(2) and Article 6(3) are designed to ensure the same level of protection of natural habitats and habitats of species” (ECJ, 11 April 2013, *Peter Sweetman a.o.*, C-258/11, ECLI:EU:C:2013:220, § 36).

19 §§ 31-28 of the judgement.

for a subsequent application of Article 6, § 2. In sum, the conditions of Article 6, § 2, always apply, either directly or indirectly through the assessment under Article 6, § 3, and serve as a safety net.

7. On the subsequent question (*supra* N° 3.d), the Court held that an “appropriate assessment” of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects²⁰ of the plan or project which can by themselves or in combination with other plans or project,²¹ affect the site’s conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity only if they have made certain that it will not adversely affect the integrity of the site.²² That is the case where no reasonable doubts remain as to the absence of such effects. In other words, the Court upholds a strict authorisation criterion. Even though it does not require absolute scientific certainty as to the effects and the risks of the plan or project, it sets the threshold high. The Court’s reasoning for this is that Article 6, § 3, Habitats Directive is an expression of the precautionary principle, and that a less stringent authorisation criterion could not effectively ensure the fulfilment of the objective of site protection.²³

8. On the last question, the Court held that individuals may rely on Article 6, § 3, Habitats Directive in national court, when the provision has not been transposed into national law and after the expiry of the time-limit for its transposition, in order to rule on the lawfulness of a national decision. The Court thus applies its *Kraaijeveld* judgement concerning the invocability by individuals of a directive (in the latter case: the EIA-Directive) in national court.²⁴

20 In later judgements, the Court further clarified: “The assessment [...] cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the plans or the projects proposed on the protected site concerned” (ECJ, 7 November 2018, *Coöperatie Mobilisation for the Environment UA a.o.*, joined cases C-293/17 and C-294/17, ECLI:EU:C:2018:882, § 98; see also: commentary of H. SCHOUKENS of ECJ C-293/17 and 294/17 (title I.2) in this book) and “it cannot be held that an assessment is appropriate where information and reliable and updated data [...] are lacking” (ECJ, 11 September 2012, *Nomarchiaki Aftodioikisi Aitolokarnanias a.o.*, C-43/10, ECLI:EU:C:2012:560, § 115). See also: Commission notice “Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC, Brussels 28 September 2021, C(2021)6913 final, 25-67 (https://ec.europa.eu/environment/nature/natura2000/management/pdf/methodological-guidance_2021-10/EN.pdf).

21 We will not further comment this important aspect of the judgement. On this topic, see also: our commentary of CE, 9 March 2021, *Grondwaterarrest*, N° 5 and 11 (titel VI.5) in this book.

22 Later, in the *Sweetman*-judgement the Court clarified: “a plan or project [...] will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of SCIs, in accordance with the directive” (ECJ, 11 April 2013, *Peter Sweetman a.o.*, C-258/11, ECLI:EU:C:2013:220, § 48). Compare also with the commentary of the *Weser*-judgement on the Water Framework Directive (title VI.2) in this book.

23 §§ 50-61 of the judgement.

24 ECJ, 24 October 1996, *Kraaijeveld a.o.*, C-72/95, ECLI:EU:C:1996:404, §§ 55-56. See also: Opinion of AG Kokott, §§ 127-151 which extensively discusses which strand of the Court’s case-law to apply.

C. Commentary

9. The Waddenzee-judgement is a landmark case on the interpretation of the preventive protection mechanism for Natura 2000 sites in Article 6, § 3, Habitats Directive. Article 6, § 3, Habitats Directive has in some respects a dramatic magical effect: it is relatively short, uses open, technical and vague terminology, but with a potential, incisive legal effect on plans and projects in and around Natura 2000 sites ("...shall agree to the plan or project only after having ascertained..."). Moreover, there are some remarkable shifts in meaning between the different language versions.²⁵

In this commentary we will focus on the remarkable transformative effect of the Waddenzee-judgement and on the way how the judgement has shifted legal thresholds and limits.

10. In this case, the dominant tools for the Court of Justice to elucidate Article 6, § 3, Habitats Directive is by interpreting it in the light of the objective of the legislator to effectively protect Natura 2000 sites,²⁶ and this in applying a precautionary approach. In applying both tools for interpretation the European Court of Justice drastically rephrases the wording of Article 6, § 3.

For example, it is in the light of the objective to effectively prevent adverse effects on the integrity of Natura 2000 sites²⁷ that the Court of Justice has no trouble to qualify a yearslong ongoing activity of mechanical cockle fishing as a plan or project (*supra* N° 4)²⁸ and to reverse the burden of proof in applying the precautionary principle (*supra* N° 7).²⁹ Moreover, the Court came to the conclusion that there is in principle no need to apply Article 6, § 2, concomitantly with Article 6, § 3, after ensuring that the level of protection under Article 6, § 3, – which is intended to ensure that a plan or project does not adversely affect the integrity of a site – encompassed the threshold and level of protection under Article 6, § 2 (*supra* N° 6).³⁰ As such, the Court defused the discussion on the delineation between § 2 and § 3: there is no use to argue that existing activities are subject to § 2, as this provision maintains at least the same level of protection as Article 6, § 3, Habitats Directive.

As to the precautionary principle, the Court of Justice establishes that Article 6, § 3, Habitats Directive is a concrete expression of the precautionary

25 E.g. §§ 30, 69, 96 and 99 Opinion and § 46 and § 53 of the Opinion of AG Sharpston of 22 November 2012 in case C-258/11, *Sweetman*, ECLI:EU:C:2012:743.

26 For which the Court refers *inter alia* to the third and tenth recital of the preamble and Article 2, § 1, Habitats Directive.

27 In the Waddenzee-judgement the Court of Justice did not elaborate on the concept of "integrity of the site", as the preliminary questions of the Dutch Council of State already went under the assumption that the activity concerned was "likely to have an effect on the site concerned" (preliminary question, 3, a). AG Kokott was of the opinion that "in principle any adverse effect on the conservation objectives must be regarded as a significant adverse effect on the integrity of the site concerned" (§ 85). Elsewhere she talks about "all potentially harmful measures" to Natura 2000 sites (§ 30). The Court of Justice later clarified this concept in its *Sweetman*-judgement, *supra* footnote 23.

28 §§ 22 and 26 of the judgement.

29 §§ 44 and 58-59 of the judgement.

30 §§ 34-36 of the judgement.

principle as laid down in Article 191(2) TFEU and must therefore be interpreted accordingly.³¹ In applying the precautionary principle it goes even as far as³² reversing the burden of proof in a twofold way:

- Firstly, an appropriate assessment has to be established in case it cannot be excluded that the plan or project will undermine one of the sites conservation objectives (hence rephrasing the passage “likely to have a significant effect [on the site]”, *supra* N° 5);
- Secondly, a plan or project can only be approved where no reasonable scientific doubt remains as to the absence of effects adversely affecting the integrity of the site (hence rephrasing the words “after having ascertained that it will not adversely affect the integrity of the site”, *supra* N° 7).

In other words, the European Court of Justice fundamentally redrafted the text Article 6, § 3, Habitats Directive in the Waddenzee-judgement with the aim of reaching the objective of the legislator. The judgement is a strong reminder not to take the words of a legal provisions on face value. It underlines the necessity to read and interpret its words in the light of its objective and of its wider context.

11. This can be further illustrated with the threshold for triggering the application of Article 6, § 3, Habitats Directive: i.e. that the plan or project is “likely to have a significant effect” on the site. The Court of Justice almost erases the word “significant”. If the term is still to imply a threshold,³³ it would rather amount to verifying whether a reasonable doubt remains over a “relevant” adverse effect for one of the site’s conservation objectives, rather than implying a numerical *de minimis* threshold.³⁴ It also becomes clear from the judgement that the Court does not approve absolute thresholds (either in the form of excluded categories or numerical *de minimis*-thresholds) for triggering the application of Article 6, § 3, but that the potential effects of a plan or project must be assessed in relative terms: i.e. in the light of the sites conservation objectives, and hence *inter alia* in the light of the characteristics and specific environmental conditions of the site concerned by the plan or project.³⁵

31 § 44 of the judgement.

32 Under general international law a reversal of the burden of proof is not automatically part of the precautionary principle, see e.g. A. JAECKEL, *The International Seabed Authority and the Precautionary Principle*, Boston, Brill, 2017, pp. 54-57 and A. TROUWBORST, *Precautionary Rights and Duties of States*, Leiden, Martinus Nijhoff, 2006, pp. 222-227.

33 In Verschuuren’s opinion “the Court, by stressing the importance of the precautionary principle has rendered the discussion on the word ‘significant’ purely academic” (J. VERSCHUUREN, “Effectiveness of the Wild Birds and Habitat Directives in the Wadden Sea area: will the tiger loose its teeth?”, *op. cit.*, p. 3).

34 §§ 44 and 48 of the judgement. Compare with §§ 85-86 of the Opinion.

According to AG Sharpston the requirement that the effect in question be ‘significant’ is a *de minimis* threshold, but “a very low one”. It operates merely as a trigger, in order to determine whether an appropriate assesment must be undertaken, excluding plans or projects “that have no appreciable effect on the site” (Opinion of AG Sharpston of 22 November 2012 in case C-258/11, *Sweetman*, ECLI:EU:C:2012:743, §§ 48-49).

35 § 48 of the judgement. See also: *supra* footnote 23; our commentary of CE, 9 March 2021, *Grondwaterarrest*, N° 6, 8-9 and 11 (title VI.5) in this book; ECJ, 26 May 2011, *Commission v. Belgium*, C-538/09, ECLI:EU:C:2011:349, § 45 (“It is therefore clear from the case-law of the Court that, in principle, pursuant to Article 6(3) of the Habitats Directive, a Member State may not, on the basis of the sphere of activity concerned or by introducing a declaratory scheme, systematically and

12. In other words, the Court of Justice provides a high level of environmental protection, in light of the wording of the text of the Habitats Directive (e.g. "...shall agree to the plan or project only after having ascertained..."), and in the light of the objective of the Habitats Directive (which in practice is far from achieved). Therefore, it gives a large interpretation of the scope of plans and projects for which a thorough impact assessment must be established in the light of the best scientific knowledge in the field (appropriate assessment), and a strict interpretation of the conditions under which competent national authorities can agree to a plan or project: i.e. that it has been made certain that it will not adversely affect the integrity of the site. Therefore, in case scientific uncertainty remains,³⁶ priority should be given to the objective of protecting the site's integrity over the development of a plan or project (*in dubio pro natura*).

One could argue that in the Waddenzee-judgement the Court of Justice woke up a dormant legal tiger, in order to match with the legislator's objective to avoid damaging activities to Nature 2000 sites, many of which have an unfavourable conservation status.

D. Encyclical effect: connection to other jurisprudential decisions and capacity to influence

13. In light of the European Court of Justices preliminary ruling,³⁷ the Dutch Council of State annulled both licences for mechanical cockle fishing as it ruled that there was no certainty that the mechanical cockle fishing will not adversely affect the integrity of the Natura 2000 site.³⁸ Subsequent licences

generally exempt certain categories of plans or projects from the obligation requiring an assessment to be undertaken of their implications for Natura 2000 sites") and § 55 ("It should be borne in mind, however, that even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration"); ECJ, 4 March 2010, *Commission v. France*, C-241/08, ECLI:EU:C:2010:114, § 56 ("Accordingly, by systematically exempting works and developments provided for in Natura 2000 contracts from the procedure of assessment of their implications for the site, the French Republic has failed to fulfil its obligations under Article 6(3) of the Habitats Directive"); ECJ, 6 April 2000, *Commission v. France*, C-256/98, § 39 ("in any event, that provision cannot authorise a Member State to enact national legislation which allows the environmental impact assessment obligation for development plans to be waived because of the low costs entailed or the particular type of work planned") and N. DE SADELEER, "Assessment and Authorisation of Plans and Projects Having a Significant Impact on Natura 2000 Sites", in B. VANHEUSDEN and L. SQUINTANI (eds.), *EU Environmental and Planning Law Aspects of Large-Scale Projects*, Antwerpen, Intersentia, 2016, (279) 286-292. Compare also with the commentary of the Weser-judgement on the Water Framework Directive (title VI.2) in this book.

36 Balias warns that there is a lot of scientific uncertainty in the field of biodiversity and that scientists upon assessing a risk or harm "are influenced by sociopolitical and other value-laden judgements in the same manner that lay people are affected" (G. BALIAS, "Appropriate Assessment under the European Habitats Directive: Interplay Between Science, Law and Policy", *Journal of International Wildlife Law & Policy* 2019, (281) 297, and 298, 303-305, 306).

37 The coöperatieve Productenorganisatie van de Nederlandse Kokkelvisserij U.A. subsequently applied to the European Court of Human Rights (ECHR) complaining that its right to adversarial proceedings had been breached because of the refusal of the European Court of Justice to allow it to respond to the opinion of the Advocate General in the Waddenzee-case. The European Court of Human Rights has declared the application inadmissible in line with its *Bosphorus* case-law (ECHR, 20 January 2009, *Coöperatieve Productenorganisatie van de Nederlandse Kokkelvisserij U.A. v. The Netherlands*, decision N° 13645/05). This judgement is cited in EU-law and ECHR textbooks on the margin of the ECHR to rule on the conformity of proceedings before the European Court of Justice.

38 Dutch Council of State, 22 December 2004, judgement N° 200000690/1-A and 200101670/1-A, ECLI:NL:RVS:2004:AR8011, <https://www.raadvanstate.nl/uitspraken/@18726/200000690-1/>.

have been suspended and annulled³⁹ and mechanical cockle fishing has been prohibited altogether shortly afterwards.⁴⁰ The recovery of the habitats affected by the mechanical cockle fisheries were reported to slowly progress afterward.⁴¹ In follow-up to the Waddenzee-judgement the Netherlands has also amended the Nature Conservation Act to ensure that Article 6 Habitats Directive is correctly transposed in national legislation.⁴²

The relevance of the Waddenzee-judgement however transcends the Waddenzee Nature 2000 site and the Netherlands. The judgement sets an important precedent on the interpretation of Article 6, § 3, of the Habitats Directive giving it a large scope and a high level of protection, *inter alia* through a demanding interpretation of the precautionary principle. This interpretation has subsequently been confirmed and further elaborated by the Court of Justice and is now part of the fixed canon that is repeatedly cited by judges all over the EU.⁴³ EEA and BirdLife International assessed that the judgement has a huge practical significance: "because the strict interpretation by the Court of article 6(3) of the Habitats Directive is now applied to all plans and projects. That includes many (existing and new) activities that were previously not subjected to appropriate assessments in accordance with article 6(3)". The study concludes that the Waddenzee-judgement has contributed to preventing significant damage to the species and habitats in Natura 2000 sites in the Netherlands and abroad.⁴⁴

39 Dutch Council of State, 14 September 2004, judgement N° 200407395/1, ECLI:NL:RVS:2004:AR2507, <https://www.raadvanstate.nl/uitspraken/@17925/200407395-1/>; Dutch Council of State, 3 December 2004, case 200409107/2, ECLI:NL:RVS:2004:AR7091, <https://www.raadvanstate.nl/uitspraken/@18535/200409107-2/>; Dutch Council of State, 9 February 2005, judgement N° 200305972/1, ECLI:NL:RVS:2005:AS5513, <https://www.raadvanstate.nl/uitspraken/@19134/200305972-1/>; Dutch Council of State, 9 February 2005, case 200202184/1, ECLI:NL:RVS:2005:AS5471, <https://www.raadvanstate.nl/uitspraken/@19091/200202184-1/>; and Dutch Council of State, 1 June 2005, judgement N° 200409107/1, ECLI:NL:RVS:2005:AT6572, <https://www.raadvanstate.nl/uitspraken/@20156/200409107-1/>.

40 Art. 16 of the Dutch Fisheries Implementation Regulation (Regeling van de Minister van Landbouw, Natuur en Voedselkwaliteit van 19 september 2008, N° TRCJZ/2007/3190, houdende samenvoeging en vereenvoudiging van diverse regelingen op het gebied van de visserij, <https://wetten.overheid.nl/jci1.3:c:BWBR0024539&z=2022-10-01&g=2022-10-01>).

41 EEB and BirdLife International, *Implementation of rulings for nature conservation. Court of Justice of the European Union case studies*, 2020, 37-38, <https://eeb.org/wp-content/uploads/2020/09/Implementation-of-rulings-for-nature-conservation2.pdf>. Verschuuren, however, warns that a static conservation approach is not entirely consistent with the dynamics of an ecosystem. For example, also other factors contributed to the decline of the number of shellfish-eating birds, such as climate change, invasive species and paradoxically, a successful European policy to decrease the level of eutrophication of surface waters. Moreover, the site is not just designed for shellfish-eating birds. Measures to restore the amount of food for shellfish-eating birds diminish the availability of food for worm eating birds and thus causes a decline of these species (J. VERSCHUREN, "Effectiveness of the Wild Birds and Habitat Directives in the Wadden Sea area: will the tiger loose its teeth?", *op. cit.*, p. 4; J. VERSCHUREN, "Shellfish for Fishermen or for Birds? Article 6 Habitats Directive and the Precautionary Principle", *Journal of Environmental Law*, 2005, (265) 277-278).

42 Wet van 29 december 2008, houdende wijziging van de Natuurbeschermingswet 1998 in verband met de regulering van bestaand gebruik en enkele andere zaken, *Staatsblad* (NL) 2009, 18. See also: *Kamerstukken I & II*, 2006/07 – 2009/10, 31038; *Kamerstukken II*, 2005/06, 30192 N° 2.

43 For example, it is cited and referenced in several other judgements that are commented in this book, e.g. ECJ, 17 April 2018, C-441/17, ECLI:EU:C:2018:255 (*infra* title VI.3), § 148; ECJ, 7 November 2018, joined cases C-293/17 and C-294/17, ECLI:EU:C:2018:882 (*supra* title I.2), § 65; ECJ, 8 November 2016, C-243/15, ECLI:EU:C:2016:838, §§ 44 and 66; and ECJ, 29 July 2019, *Inter-Environnement Wallonie ASBL a.o.*, C-411/17, ECLI:EU:C:2019:611, § 122.

44 EEB and BirdLife International, *Implementation of rulings for nature conservation. Court of Justice of the European Union case studies*, *op. cit.*, pp. 6, 37-38 and 50.

Without diminishing the legal relevance of the Waddenzee-judgement, authors differ on the question whether the precautionary principle has percolated into practice of the competent national authorities. Some authors have their doubts, referring to the fact that in practice appropriate assessments are mostly positive (see e.g. G. BALIAS, "Appropriate Assessment under the European Habitats Directive: Interplay Between Science, Law and Policy", *op. cit.*, pp. 291-292 and 306 and H. SCHOUKENS and

In sum, the Waddenzee-judgement enhanced the protection of Natura 2000-sites (and hence one of the goals of the Habitats Directive), a protection that the Nature-2000 areas still remain in good need of⁴⁵ if one intends to achieve the global goals for conserving biodiversity, and hence intends to protect humans that are fully part of and dependent on this extraordinary web of life. But even this stronger European legal framework was not able to prevent that the European and international targets on protected areas have only partially been met and further need to be stepped up.⁴⁶

And just as this is the case today with stronger conservation measures, not all parts of society were thrilled with the Waddenzee-judgement.⁴⁷ For example, the fisherman appealed to the European Court of Human Rights,⁴⁸ other raised their voice to have the Habitats Directive amended or criticized the Court for not having taken into consideration the dynamic nature of ecosystems.⁴⁹

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A. CUQUET, "Mitigation and Compensation under EU Nature Conservation Law in the Flemish Region: Beyond the Deadlock for Development Projects?", *Utrecht Law Review*, 2014, (194) 194 and 198). Others have a more positive reading of this fact and stress that in most cases protection of the integrity of the site and the development of the plan or project can be reconciled through mitigating measures (J. VERSCHUUREN, "Effectiveness of the Wild Birds and Habitat Directives in the Wadden Sea area: will the tiger loose its teeth?", *op. cit.*, p. 5).

45 E.g. in its fitness check of the Birds and Habitats Directive the European Commission concluded that: "The evaluation has shown that the general objectives of the Directives have not yet been met and it is not possible to predict when they will be fully achieved since a very high proportion of species and habitat types protected under the Directive are still in an unfavourable conservation status, some of which are continuing to decline or remain endangered" (Commission staff working document, *Fitness Check of the EU Nature Legislation (Birds and Habitats Directives)*, Brussels, 16 December 2016 COM Doc. SWD(2016) 472 final, https://commission.europa.eu/system/files/2017-01/swd-2016-472-final_en.pdf, p. 87). The EU Ministerial Conference on "30 years of the Natura 2000 network" underlined that there is a need to "significantly strengthen the implementation and enforcement of EU nature protection legislation" in order to live up to the ambition to ensure that all ecosystems in Europe are conserved restored, resilient and sufficiently protected by 2050 (Strasbourg Declaration of the EU Ministerial Conference on "30 years of the Natura 2000 network", 25 February 2022, § 11, https://ec.europa.eu/environment/nature/natura2000/EUnatura2000day/docs/25.02.2022_Declaration_Strasbourg_EN.pdf).

46 At the international and European level, it has been concluded, on the one hand, that the current protected area targets have on the one hand only partially been met (e.g. on Aichi Biodiversity Target 11: "The proportion of the planet's land and oceans designated as protected areas is likely to reach the targets for 2020 and may be exceeded when other effective area-based conservation measures and future national commitments are taken into account. However, progress has been more modest in ensuring that protected areas safeguard the most important areas for biodiversity, are ecologically representative, connected to one another as well as to the wider landscape and seascape and are equitably and effectively managed. The target has been partially achieved": Secretariat of the CBD, *Global Biodiversity Outlook 5 – Summary for Policy Makers*, Montreal, 2020, p. 9, <https://www.cbd.int/gbo/gbo5/publication/gbo-5-spm-en.pdf>), and on the other hand, that they need to be further stepped up (global target 3 for 2030 of the Kunming-Montreal Global Biodiversity Framework, CBD COP decision 15/4, UN Doc. CBD/COP/DEC/15/4, <https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf>; Council conclusions on CBD COP 15, § 3, first indent, *Council Doc.* 13975/22, <https://www.consilium.europa.eu/media/59787/st13975-en22.pdf>; Council conclusions on biodiversity – the need for urgent action, § 9, *Council Doc.* 11829/20, <https://data.consilium.europa.eu/doc/document/ST-11829-2020-INIT/en/pdf>; EU's biodiversity strategy, COM(2020) 380 final, pp. 3-5, https://eur-lex.europa.eu/resource.html?uri=cellar:a3c806a6-9ab3-11ea-9d2d-01aa75ed71a1.0001.02/DOC_1&format=PDF).

47 Compare e.g. with the political opposition to the adoption of a EU nature restoration law.

48 *Supra* footnote 38.

49 *Supra* footnote 42.

50 We want to thank Tim Corthaut and the editors for their valuable input on a draft version of this contribution.

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