Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 25 July 2018 [1]

Joined Cases C-293/17 and C-294/17

Coöperatie Mobilisation for the Environment UA and Others
v
College van gedeputeerde staten van Limburg and Others

(Requests for a preliminary ruling
from the Raad van State (Council of State, Netherlands))

(References for a preliminary ruling — Environment — Directive 92/43/EEC — Conservation of natural habitats and of wild fauna and flora — Special area of conservation — Appropriate assessment of the effects of a project on a site — Concepts of project and appropriate assessment of the implications for the site — Programme for assessment of nitrogen deposition — Agriculture — Authorisation for a farm — Fertilising — Grazing — Cumulative effects — Irrelevance thresholds — Damage mitigation measures — Compensatory measures)

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1 Original language: German.

I. Introduction

1. Agriculture is not only an absolute necessity for many protected habitat types and species,[2] but it is at the same time one of the main causes of damage to such protected assets. These two requests for a preliminary ruling give the Court an opportunity to consider this situation through the example of nitrogen deposition in protected sites under the Habitats Directive[3] ('Natura 2000 sites') in the Netherlands. This case promises to be of similar importance to the well-known case concerning shellfish fishing in the Waddenzee,[4] also referred to the Court by the Netherlands Raad van State (Council of State, Netherlands).

2. According to the European Environment Agency, in 2010 73% of all Natura 2000 sites in the EU were affected by an overload of nitrogen deposition.[5] Consequently, the findings made in the present case could also be important for other Member States. Furthermore, the question arises whether those findings can be applied to other adverse effects of agriculture, such as those resulting from the use of pesticides.

3. The specific point at issue is that nitrogen deposition by individual farms in the Netherlands is not assessed individually in certain protected sites, but is classified in a programmatic integrated plan, which defines the extent to which nitrogen deposition is permitted on the basis of an assessment of each individual protected site. It must be clarified not only whether such an integrated plan is lawful, but also to what extent it is compatible with the protection of sites to take into account measures to reduce nitrogen deposition from other sources, measures to upgrade protected sites and future developments. It must also be examined how fertilising of agricultural land and grazing are to be classified in the system relating to the appropriate assessment of the implications for the site.

4. I would like to make clear at the outset that, whilst a programmatic integrated planning approach is to be welcomed, there is still room for improvement in its practical implementation.

2 See Halada, L., Evans, D., Romão, C., Petersen, J.E., 'Which habitats of European importance depend on agricultural practices?', *Biodiversity and Conservation* 20 (2011), 2365–2378.

3 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193).

4 Judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482).

5 European Environment Agency, Effects of air pollution on European ecosystems, EEA Technical report No 11/2014, Annex 4 (p. 38).

II. Legal framework

A. EU law

1. Habitats Directive

5. The following rules concerning the protection of sites are laid down in Article 6(1) to (4) of the Habitats Directive:

'1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, 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 disturbance could be significant in relation to the objectives of this Directive.

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.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

2. EIA Directive

6. Reference should also be made to Article 1(2)(a) of the EIA Directive[6], which defines 'project' as 'the execution of construction works or of other installations or schemes' (first indent) and 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources' (second indent).

6 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2011 L 26, p. 1).

B. Netherlands law

7. In Netherlands law, note should be taken of Article 2.4 of the Wet natuurbescherming (Law on nature conservation, Wnb):

'1. Where the management of a Natura 2000 site so requires in view of conservation objectives, the Provincial Government shall require any person who, in its Province, carries out or proposes to carry out an activity:

a. to provide all information regarding that activity;

b. to take all necessary preventive or restoration measures;

c. to carry out that activity in accordance with the provisions laid down in the abovementioned measures, or

d. to refrain from carrying out or to cease that activity.

2. Where the protection of a Natura 2000 site necessitates the immediate execution of a decision as referred to in paragraph 1, the Provincial Government may give notification of its decision orally to the person who carries out or proposes to carry out the activity in question. The Provincial Government shall document the decision in writing as soon as possible and send or deliver it to the interested parties.

3. …

4. It is prohibited to act in contravention of an obligation under paragraphs 1 or 3.'

III. Background to the dispute and requests for a preliminary ruling

8. In 118 of the 162 Natura 2000 sites in the Netherlands there is an overload of nitrogen deposition in nitrogen-sensitive habitat types and habitats of protected species. The most important source of that nitrogen is agriculture.

9. These requests for a preliminary ruling concern two different sets of problems connected with the Netherlands measures to limit nitrogen deposition in such sites. The points at issue are, first, whether fertilising and grazing by existing farms must be restricted [7] and, second, whether new farms may be authorised. [8]

A. The Netherlands measures to reduce nitrogen deposition

10. The nitrogen overload in protected sites affects in particular habitat types whose vegetation is specialised in nitrogen deficiency. The protection of these ecological features is therefore a particular challenge and also capable of hampering economic developments that cause nitrogen deposition.

11. The Netherlands has thus adopted a programmatic approach to nitrogen, the Programma Aanpak Stikstof 2015-2021 (Programmatic approach to nitrogen 2015-2021 (PAS)).

7 Case C-293/17, *Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu*.

8 Case C-294/17, *Stichting Werkgroep Behoud de Peel*.

12. The PAS has a twofold objective: first, the conservation and restoration of the Natura 2000 sites included in the PAS in order to achieve a favourable conservation status at national level and, second, to enable economic developments which cause nitrogen deposition in those sites.

13. In order to bring about a steady reduction of nitrogen deposition, additional source-directed measures have been included in the PAS. Generally, these are measures to reduce the emission of nitrogen at source and consist of measures to reduce emissions from stables, measures for low-emission fertilisers, feed measures and management measures. The effects of those measures have been calculated and the conclusion is that by 2020 ammonia emissions [9] will decrease by about 13.4 kilotonnes per year as a result of the PAS, as compared to the situation if the PAS had not been implemented. However, only 6.4 kilotonnes per year are taken into consideration in the PAS in order to allow a safety margin. [10]

14. In addition to these source-directed measures, the PAS also makes provision for site-specific restoration measures. The restoration measures are aimed at strengthening nitrogen-sensitive habitats. They include hydrological measures and additional vegetation measures which are supplementary to the regular management of the Natura 2000 sites.

15. Lastly, the PAS regulates how much nitrogen may be deposited during a six-year period. This is known as the 'room for deposition', which has been defined for each Natura 2000 site. The calculated decrease in nitrogen deposition is partly used to expand the room for deposition.

16. The PAS includes a system of monitoring and making adjustments. Monitoring allows insights into the development of nitrogen deposition, the available and allocated room for deposition, progress in implementing the PAS and the development of nitrogen-sensitive habitats. On this basis, the competent authorities are able to modify, replace or add source-directed measures and/or restoration measures in the PAS or reduce the room for deposition for a site.

17. An important aim of the PAS is to simplify the official authorisation of nitrogen-producing activities. Since the entry into force of the programme, the PAS and associated legislation can be used when granting authorisation for activities causing nitrogen deposition. They provide an assessment framework for nitrogen-producing activities (projects and other operations). That assessment framework means that:

(a) projects and other operations which cause nitrogen deposition not exceeding a threshold value of 0.05 mol [11] N/ha/yr are allowed without prior authorisation;

(b) projects and other operations which cause nitrogen deposition not exceeding a limit value of between 0.05 and 1 mol N/ha/yr are allowed without prior authorisation; in certain cases there is a duty to report;

(c) projects and other operations which cause nitrogen deposition over the limit value are subject to a permit requirement. The permit may be granted with reference to the appropriate assessment under the PAS where those projects and operations do not result in an increase of nitrogen deposition. If there is an increase in nitrogen deposition, the permit may be granted with reference to the PAS if room for deposition is allocated in respect of the increase in nitrogen deposition. During the first phase of the PAS (three years) a maximum of 60% may be allocated. The increase is to be compared to the deposition for which a permit had previously been granted or to the existing situation in the period 2012-2014.

9 Ammonia is a chemical compound of nitrogen and hydrogen with the formula NH_3. It is produced inter alia in the decomposition of dead plants and animal excrement (https://de.wikipedia.org/wiki/Ammoniak, consulted on 6 February 2018).

10 Point 6.2 of the request for a preliminary ruling in Case C-294/14.

11 According to the Netherlands Government, 1 mol of nitrogen corresponds to 14 g; 0.05 mol thus corresponds to 0.7 g.

B. Case C-293/17

18. The four farms which are the subject of the request for a preliminary ruling in Case C-293/17, *Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu*, have permits for the period from 1989 to 2015, setting out the number and type of livestock per stable, the stable type and the associated emissions factor. The permits granted show that for all the farms only the effects of the stable emissions on nitrogen-sensitive ecological features in Natura 2000 sites were assessed.

19. On the other hand, legislation in the provinces of Gelderland and Limburg exempts grazing of cattle and fertilising from the requirement to obtain a permit.

20. The request for a preliminary ruling stems from a challenge brought by environmental associations against that exemption from the permit requirement. They applied unsuccessfully for enforcement action to be taken against the grazing of cattle and the fertilising of agricultural land by four existing livestock farms in the vicinity of Natura 2000 sites in the provinces of Gelderland and Limburg. The objections raised by the environmental associations against the rejection of those applications were dismissed by the provincial authorities of Gelderland and Limburg. The associations have now appealed against those decisions.

21. The Raad van State (Council of State) therefore addresses the following questions to the Court in Case C-293/17, *Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu*:

‘(1) Can an activity which is not covered by the concept of “project” as referred to in Article 1(2)(a) of the EIA Directive because it is not a physical intervention in the natural surroundings be a project as referred to in Article 6(3) of the Habitats Directive because the activity may have a significant effect on a Natura 2000 site?

(2) If it is assumed that the application of fertilisers on the surface of land or below its surface is a project, and in the event that it was carried out lawfully before Article 6(3) of the Habitats Directive became applicable to a Natura 2000 site, and that it is still being carried out, must it then be assessed to be one and the same project, even if the fertilising did not always take place on the same tracts of land, in the same quantities and using the same techniques?

Is it relevant, for the purposes of the assessment of whether this constitutes one and the same project, that the nitrogen deposition caused by the application of fertilisers on the surface of land or below its surface did not increase after Article 6(3) of the Habitats Directive became applicable to the Natura 2000 site?

(3) Does Article 6(3) of the Habitats Directive preclude legislation which provides that an activity which is inextricably linked to a project and which must therefore also be assessed to be a project, such as the grazing of cattle by a dairy farm, is exempted from the permit requirement, with the result that no individual authorisation is required for that activity, it being assumed that the effects of the activity which has been permitted without authorisation were appropriately assessed before that legislation was adopted?

(3a) Does Article 6(3) of the Habitats Directive preclude legislation which provides that a certain category of projects, such as the application of fertilisers on the surface of land or below its surface, is exempted from the permit requirement and is thus permitted without individual authorisation, it being assumed that the effects of the activity which has been permitted without authorisation were appropriately assessed before that legislation was adopted?

(4) Does the appropriate assessment which formed the basis of the exemption from the permit requirement for the grazing of cattle and the application of fertilisers on the surface of land or below its surface, which was based on the actual and expected extent and intensity of those

activities, and the outcome of which is that on average an increase in nitrogen deposition by those activities can be ruled out, meet the requirements which Article 6(3) of the Habitats Directive lays down in that regard?

(4a) Is it important in this regard that there is a connection between the exemption from the permit requirement and the Programma Aanpak Stikstof 2015-2021 (PAS) which is premised on a decrease in the total nitrogen deposition in respect of nitrogen-sensitive ecological features in the Natura 2000 sites, and that deposition development in the Natura 2000 sites is monitored annually in the context of the PAS, and that, if the decrease is less favourable than had been assumed in the appropriate assessment, any necessary adjustments are made?

(5) May the appropriate assessment as referred to in Article 6(3) of the Habitats Directive, which was made for a programme such as the PAS, take account of the positive effects of conservation measures and appropriate steps for existing areas of habitat types and habitats, which are taken in connection with the obligations arising from Article 6(1) and (2) of that directive?

(5a) If Question 5 is answered in the affirmative: Can the positive effects of conservation measures and appropriate steps be taken into account in an appropriate assessment for a programme if, at the time of the appropriate assessment, those measures have not yet been implemented and their positive effect has not yet been achieved?

Assuming that the appropriate assessment contains definitive findings on the effects of those measures based on the best available scientific knowledge in that regard, is it important that the implementation and the outcomes of those measures be monitored and, if it transpires that the effects are less favourable than had been assumed in the appropriate assessment, that adjustments, if required, be made?

(6) May the positive effects of the autonomous decrease in the nitrogen deposition which might become apparent during the period in which the PAS applies be taken into account in the appropriate assessment as referred to in Article 6(3) of the Habitats Directive?

Assuming that the appropriate assessment contains definitive findings on the effects of those developments based on the best available scientific knowledge in that regard, is it important that the autonomous decrease in the nitrogen deposition be monitored and, if it transpires that the decrease is less favourable than had been assumed in the appropriate assessment, that adjustments, if required, be made?

(7) May restoration measures taken in the context of a programme such as the PAS and aimed at preventing a particular harmful ecological factor, such as nitrogen deposition, from having adverse effects for existing areas of habitat types or habitats be regarded as protective measures as referred to in paragraph 28 of the judgment of the Court of Justice of 15 May 2014, *Briels and Others*, C-521/12, EU:C:2014:330, which may be taken into account in an appropriate assessment as referred to in Article 6(3) of the Habitats Directive?

(7a) If Question 7 is answered in the affirmative: Can the positive effects of protective measures which may be taken into account in the appropriate assessment be taken into account if, at the time of the appropriate assessment, they had not yet been implemented and their positive effect had not yet been achieved?

Is it important in that respect, assuming that the appropriate assessment contains definitive findings on the effects of those measures based on the best scientific knowledge in that regard, that the implementation and the results of the measures be monitored, and, if this indicates that the results are less favourable than assumed in the appropriate assessment, that adjustments take place if necessary?

(8) Is the power to impose obligations referred to in Article 2.4 of the [Wnb], which the competent authority must apply if, having regard to the conservation objectives, a Natura 2000 site so requires, an adequate preventive instrument in order to be able to implement Article 6(2) of the Habitats Directive in respect of the grazing of cattle and the application of fertilisers on the surface of land or below its surface?'

C. Case C-294/17

22. Case C-294/17 concerns the appeals lodged by the environmental protection association Stichting Werkgroep Behoud de Peel against six permits for different farms in the province of North Brabant which cause nitrogen deposition inter alia in the Natura 2000 sites of Groote Peel (NL 3009012) and Deurnsche Peel & Mariapeel (NL 1000026). The conservation objectives of both sites include raised bogs. This natural habitat type is sensitive to nitrogen.

23. The permits relate to the establishment or expansion of dairy farms, pig farms and poultry farms.

24. The College van gedeputeerde staten van Noord-Brabant (College of Deputies of North Brabant) granted those permits under the PAS and associated legislation. The PAS is based on an appropriate assessment pursuant to Article 6(3) of the Habitats Directive, but the individual permits were not assessed individually.

25. The College authorised the expansion of one farm because the nitrogen deposition of the farm concerned did not increase compared with the deposition actually caused previously. Deposition from existing activities was considered reasonable for the purposes of the PAS as part of the background deposition. The permit was granted with reference to the appropriate assessment of the implications for the site conducted for the PAS.

26. In the other cases, the College authorised operational activities which result in an increase in nitrogen deposition compared with the deposition actually caused or authorised prior to the adoption of the PAS. Some farms cause deposition in the range of 0.05 to 1 mol N/ha/yr in the two protected sites, while others exceed these values. The College allocated room for deposition in respect of the latter.

27. In Case C-294/17, *Stichting Werkgroep Behoud de Peel*, the Raad van State (Council of State) now addresses the following questions to the Court:

'(1) Does Article 6(2) and (3) of the Habitats Directive preclude legislation which exempts from the permit requirement projects and other operations causing nitrogen deposition which do not exceed a threshold value or a limit value, and are therefore permitted without individual approval, proceeding on the assumption that the effects of all projects and other operations taken together which could make use of the legislation have been appropriately assessed before the adoption of the legislation?

(2) Does Article 6(2) and (3) of the Habitats Directive preclude an appropriate assessment for a programme in which a certain total amount of nitrogen deposition is assessed, being used as the basis for granting an authorisation (individual approval) for a project or other operation which causes nitrogen deposition which fits within the room for deposition assessed in the context of the programme?

(3) May the appropriate assessment as referred to in Article 6(3) of the Habitats Directive, which is made for a programme such as the Programma Aanpak Stikstof 2015-2021, take into account the positive effects of conservation measures and appropriate steps for existing areas of habitat types and habitats, which are taken in connection with the obligations arising from Article 6(1) and (2) of that directive?

(3a) If Question 3 is answered in the affirmative: can the positive effects of conservation measures and appropriate steps be taken into account in an appropriate assessment if, at the time of the appropriate assessment, those measures have not yet been implemented and their positive effect has not yet been achieved?

Assuming that the appropriate assessment contains definitive findings on the effects of these measures based on the best available scientific knowledge in that regard, is it important that the implementation and the results of those measures be monitored and, if it transpires that the effects are less favourable than had been assumed in the appropriate assessment, that adjustments, if required, be made?

(4) May the positive effects of the autonomous decrease of the nitrogen deposition which might become apparent during the period in which the Programma Aanpak Stikstof 2015-2021 applies be taken into account in the appropriate assessment as referred to in Article 6(3) of the Habitats Directive?

Assuming that the appropriate assessment contains definitive findings on the effects of those developments based on the best available scientific knowledge in that regard, is it important that the autonomous decrease in the nitrogen deposition be monitored and, if it transpires that the decrease is less favourable than had been assumed in the appropriate assessment, that adjustments, if required, be made?

(5) May restoration measures taken in the context of the Programma Aanpak Stikstof 2015-2021 and aimed at preventing a particular harmful ecological factor, such as nitrogen deposition, from having adverse effects for existing areas of habitat types or habitats, be considered protective measures as referred to in paragraph 28 of the judgment of the Court of Justice of 15 May 2014, *Briels and Others*, C-521/12, EU:C:2014:330, which may be taken into account in an appropriate assessment as referred to in Article 6(3) of the Habitats Directive?

(5a) If Question 5 is answered in the affirmative: Can the positive effects of protective measures which may be taken into account in the appropriate assessment be taken into account if, at the time of the appropriate assessment, they have not yet been implemented and their positive effect has not yet been achieved?

Is it important in that respect, assuming that the appropriate assessment contains definitive findings on the effects of those measures based on the best scientific knowledge in that regard, that the implementation and the results of the measures be monitored, and if that indicates that the results are less favourable than assumed in the appropriate assessment, that adjustments take place if necessary?'

D. Procedure before the Court

28. By order of the President of the Court of 19 June 2017, Cases C-293/17 and C-294/17 were joined for the purposes of the written procedure, the oral procedure and the judgment.

29. Written observations were submitted jointly by Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu as parties in Case C-293/17 and Stichting Werkgroep Behoud de Peel as a party in Case C-294/17, the Kingdom of the Netherlands, the Kingdom of Denmark and the European Commission. In addition to them, the College van gedeputeerde staten van Limburg, the College van gedeputeerde staten van Gelderland and the College van gedeputeerde staten van Noord-Brabant, as parties in the main proceedings, took part in the hearing on 3 May 2018.

IV. Legal assessment

30. The two requests for a preliminary ruling raise a number of questions on how to handle nitrogen emissions from agricultural activities which may have adverse effects on Natura 2000 sites. It is preferable that they should not be answered in the order following from the requests for a preliminary ruling and the case numbers.

31. Instead, consideration should be given first to the 'typical case', that is to say the grant of a permit to a farm whose nitrogen deposition in protected sites is not assessed individually but based on the Netherlands planning measure, the PAS. The fundamental compatibility of this approach with Article 6(3) of the Habitats Directive is the subject of the second question in Case C-294/17 (see under A).

32. It will then be discussed to what extent, in the context of the PAS, the expected decrease in nitrogen emissions, specific measures to reduce nitrogen emissions from other sources and measures to restore protected sites may be taken into account, in particular where these do not occur until the future (see under B). Only then will I examine whether the proposed limit values and threshold values for nitrogen deposition are compatible with Article 6(3) of the Habitats Directive (see under C).

33. The specific questions in Case C-293/17 concerning grazing and fertilising are the subject of the subsequent section (see under D).

34. Lastly, I will explain in some final considerations to what extent, in the light of the other statements, Article 6 of the Habitats Directive permits a measure such as the PAS (see under E).

A. Question 2 in Case C-294/17 — Authorisation of projects under the PAS

35. By Question 2 in Case C-294/17, the Raad van State (Council of State) would like to ascertain whether it is compatible with Article 6(2) and (3) of the Habitats Directive not to carry out an individual review of a measure which results in nitrogen deposition in a protected site in order to ascertain whether it is compatible with the conservation objectives of the site, but to base approval on an appropriate assessment for a programme according to which a certain total amount of additional nitrogen deposition in the site is compatible with the conservation objectives.

36. I will first show below that Article 6(3) of the Habitats Directive does not make an individual assessment of plans and projects mandatory and then turn to the requirements to which a programmatic overall assessment is subject.

1. Individual assessment or programmatic overall assessment?

37. Article 6 of the Habitats Directive imposes a series of specific obligations and procedures designed, as is clear from Article 2(2) of the directive, to maintain, or as the case may be restore, at a favourable conservation status natural habitats and species of wild fauna and flora of interest for the European Union. [12]

38. For that purpose, Article 6(3) of the Habitats Directive establishes an assessment procedure intended to ensure, by means of an *ex ante* examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not (in fact) adversely affect the integrity of that site. [13]

39. Under the first sentence of Article 6(3) of the Habitats Directive, such a plan or project is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it is likely to have a significant effect on that site, either individually or in combination with other plans or projects. [14] The assessment requires that all the aspects of the plan or project which can affect the conservation objectives of that site must be identified in the light of the best scientific knowledge in the field. [15] The assessment must be made in the light, in particular, of the characteristics and specific environmental conditions of the site concerned by such a plan or project. [16]

40. The guiding principle presented in the first sentence of Article 6(3) of the Habitats Directive is thus the individual assessment of plans and projects.

41. The main proceedings concern the possibility of protected sites being adversely affected by nitrogen deposition. In general, pollutants from many different sources occur together on these sites. [17] Consequently, in the assessment provided for in Article 6(3) of the Habitats Directive, account must be taken in principle of all the different sources of nitrogen which contribute to nitrogen deposition in a certain protected site. The assessment must identify all the aspects of the plan or project which could, either individually or *in combination with other plans or projects*, affect the conservation objectives of that site. [18]

42. Without an overall analysis like that conducted in the PAS, this assessment of cumulative effects would be highly susceptible to error. There would always be a risk that certain sources would not be taken into account or contradict the assessment of other projects. This risk would be particularly high in the case of separate assessments conducted in parallel.

43. Accordingly, an overall evaluation of all deposition of nitrogen in the protected site concerned is not only appropriate, but even necessary, to assess the implications of certain nitrogen sources in view of the site's conservation objectives.

12 Judgments of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 31), and of 17 April 2018, *Commission* v *Poland* (*Białowieża Forest*) (C-441/17, EU:C:2018:255, paragraph 106).

13 Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 34), and of 17 April 2018, *Commission* v *Poland* (*Białowieża Forest*) (C-441/17, EU:C:2018:255, paragraph 108).

14 Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 45); of 13 December 2007, *Commission* v *Ireland* (C-418/04, EU:C:2007:780, paragraph 238); of 26 May 2011, *Commission* v *Belgium* (C-538/09, EU:C:2011:349, paragraph 53); and of 12 April 2018, *People Over Wind and Sweetman* (C-323/17, EU:C:2018:244, paragraph 34).

15 Judgments of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 51); of 26 April 2017, *Commission* v *Germany* (*Moorburg*) (C-142/16, EU:C:2017:301, paragraph 57); and of 17 April 2018, *Commission* v *Poland* (*Białowieża Forest*) (C-441/17, EU:C:2018:255, paragraph 113).

16 Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 49), and of 17 April 2018, *Commission* v *Poland* (*Białowieża Forest*) (C-441/17, EU:C:2018:255, paragraph 112).

17 Balla, Müller-Pfannenstiel, Lüttmann & Uhl, 'Eutrophierende Stickstoffeinträge als aktuelles Problem der FFH-Verträglichkeitsprüfung', *Natur und Recht* 2010, 616 (617).

18 Judgment of 26 April 2017, *Commission* v *Germany* (*Moorburg*) (C-142/16, EU:C:2017:301, paragraph 57).

44. The coordination of the appropriate assessment of potential nitrogen deposition in protected sites by means of a central planning instrument which defines the amount of nitrogen that may be deposited in the individual protected sites must therefore be welcomed in principle.

2. The requirements for a programmatic overall assessment with a view to the coordination of nitrogen deposition

45. However, the fact that a comprehensive coordination instrument is preferable to many isolated individual assessments does not mean that the PAS meets all the requirements for an appropriate assessment under Article 6(3) of the Habitats Directive.

46. As has already been stated, in the appropriate assessment of the implications of a plan or project for the site concerned to be conducted pursuant to the first sentence of Article 6(3) of the Habitats Directive, all the aspects of the plan or project which can, either by themselves or in combination with other plans or projects, affect the conservation objectives of that site must be identified in the light of the best scientific knowledge in the field. [19]

47. The assessment carried out under the first sentence of Article 6(3) of the Habitats Directive may not, therefore, 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 proposed works on the protected site concerned. [20]

48. This must also apply to initiatives outside protected sites which are likely to have a significant effect on them. [21]

(a) The relevant factors in the assessment

49. The requirements which these criteria impose on a programmatic overall assessment are considerable, in particular because all reasonable scientific doubt as to the findings and conclusions is to be excluded.

50. First of all, it must be accurately determined how much nitrogen is released by the individual projects to be coordinated and what proportion of it reaches the nitrogen-sensitive habitats in each of the protected sites.

51. In particular, it is necessary to determine for any land in protected sites on which protected habitats are located the *maximum* amount of nitrogen deposited by the individual project under examination. The necessary degree of refinement of the spatial framework for analysis, that is to say, which tracts of land must be assessed individually, depends on how much deposition may vary from one tract of land to the next.

52. At the same time, the total nitrogen load on that land from existing activities must be accurately determined. It is not therefore sufficient to limit the examination to certain sectors, such as agriculture. Instead, all nitrogen sources, such as transport, industry or private households, must be taken into account.

19 See above, point 39.

20 Judgments of 11 April 2013, *Sweetman and Others* (C-258/11, EU:C:2013:220, paragraph 44); of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 50); and of 17 April 2018, *Commission* v *Poland* (*Białowieża Forest*) (C-441/17, EU:C:2018:255, paragraph 114).

21 Judgments of 10 January 2006, *Commission* v *Germany* (C-98/03, EU:C:2006:3, paragraph 45), and of 26 April 2017, *Commission* v *Germany* (*Moorburg*) (C-142/16, EU:C:2017:301, paragraphs 29 to 31).

53. Lastly, consideration must also be given to any other factors which can have adverse effects on the protected sites in combination with nitrogen deposition.

54. As Denmark rightly made clear at the hearing, it is possible to rely on estimates, as an appropriate assessment of the implications for the site is necessarily a forecast of future effects of the activities in question.

55. Such estimates must nevertheless be consistent with the sensitivity of the habitats and species concerned and the actual risk of adverse effects from the deposition of nitrogen. It would not be sufficient merely to show rough averages and to ignore local or temporary peak load values where those peak values are likely adversely to affect the conservation objectives of the site.

(b) The total amount of permitted nitrogen deposition

56. However, it is particularly important for an overall coordination instrument to determine the total amount of permitted nitrogen deposition in each of the protected habitats.

57. Where a plan or project is likely to undermine a protected site's conservation objectives, it must be considered likely to have a significant effect on that site.[22] In order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive, the site needs to remain at a favourable conservation status. This entails the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive.[23] The same must apply correspondingly to the protected species.

58. Where Article 6(2) and (3) of the Habitats Directive is applied to nitrogen deposition, it cannot therefore be the aim to maintain or fall below the present load level. Rather, regard must be had to the conservation objectives of the protected site, that is, at least to the conservation of the habitat types and species protected in the site in their status at the time when Article 6(2) and (3) became applicable.

59. If those protected assets are not in a favourable conservation status, the conservation obligation applies at least to the available potential for establishing such conservation status in future as, according to the definition of 'favourable conservation status' in Article 1(e) and (i) of the Habitats Directive, only such conservation status can ensure the long-term maintenance of the habitat types and species in question. A load level which prevents a favourable conservation status from being achieved in the long term creates the risk that that presence will be lost. It would therefore be likely adversely to affect the integrity of the site.

60. The fact presented by the Raad van State (Council of State) that nitrogen deposition is declining overall is thus to be welcomed but is inevitably insufficient in itself. Rather, Article 6(2) and (3) of the Habitats Directive requires that the load level be reduced such that a favourable conservation status can be achieved in the long term.

61. For that purpose, it is necessary, at least for each habitat type and possibly also for specific habitats that are subject to particular conditions, to determine a limit value for the permitted total load.

22 Judgments of 11 April 2013, *Sweetman and Others* (C-258/11, EU:C:2013:220, paragraph 30), and of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330, paragraph 20).

23 Judgments of 11 April 2013, *Sweetman and Others* (C-258/11, EU:C:2013:220, paragraph 39); of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330, paragraph 21); of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 47); and of 17 April 2018, *Commission* v *Poland* (*Białowieża Forest*) (C-441/17, EU:C:2018:255, paragraph 116).

62. In this regard, it seems difficult, if not impossible, to accept values that are higher than the critical loads. These are intended to define scientifically-based load limits for vegetation types or other protected assets, compliance with which means that pollutant deposition is not expected to have significant harmful effects even in the long term.[24] Scientists have identified such critical loads for nitrogen for the protected habitat types under the Habitats Directive in the Netherlands.[25]

63. Furthermore, it would also appear to be necessary to consider to what extent the individual protected habitats have been exposed to an overload of nitrogen deposition for a considerable time. On the one hand, it would have to be presumed that the status of the habitats has already changed adversely as a result of such deposition, in particular as regards the plant species present. On the other hand, there is probably an initial overload of nitrogen which must be removed or otherwise eliminated before the habitats can be developed in the light of the conservation objectives for the site. It might therefore be necessary, until the removal of existing nitrogen reserves, to permit even less additional nitrogen deposition than envisaged in the critical loads.

64. The competent national court will have to review, in the light of these considerations, whether the critical loads or other values are so scientifically sound that, if they are complied with, all reasonable scientific doubt can be excluded that the integrity of the sites concerned is not adversely affected.

65. As is clear from the request for a preliminary ruling in Case C-294/17, the reference to the overload of many protected sites is based on the critical loads being exceeded,[26] that is, annual nitrogen deposition which is higher than the critical loads. When the PAS was established, however, it was apparently considered not very realistic and politically not feasible to comply with the critical loads.[27] Instead, the aim of the PAS is described as a balance between benefits to nature and burden to society.[28]

66. If this description is correct, the PAS would not be capable of enabling the authorisation of initiatives under Article 6(3) of the Habitats Directive. Rather, a balance would have to be assessed pursuant to Article 6(4). However, the request for a preliminary ruling does not permit the Court to make definitive statements on this point.

3. Interim conclusion

67. The answer to Question 2 in Case C-294/17 is therefore that Article 6(2) and (3) of the Habitats Directive permits an appropriate assessment for a programme in which a certain total amount of nitrogen deposition is assessed to be used as the basis for granting an individual authorisation for a project or other operation which causes nitrogen deposition in protected sites which fits within the room for deposition assessed in the context of the programme. However, that assessment must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the deposition. This requires that it is ensured, for each individual project and any land within protected sites on which protected habitats are located, that the total authorised nitrogen deposition does not, in the long term, jeopardise the conservation of the habitat types and species protected in the site or the potential to establish a good conservation status.

24 According to the Bundesverwaltungsgericht (Federal Administrative Court, 28 March 2013, A44 — crested newt (9 A 22.11, DE:BVerwG:2013:280313U9A22.11.0, paragraph 61). This is consistent with the definition scientifically recognised at international level from Nilsson, J., and Grennfelt, P. (1988), 'Critical loads for sulphur and nitrogen. Report from a workshop held at Skokloster, Sweden 19–24 March 1988', *NORD miljørapport* 1988:15. Copenhagen: NORD: 'a quantitative estimate of 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'.

25 For the Netherlands, van Dobben, H.F., Bobbink, R., Bal, D., and van Hinsberg, A. (2014). *Overview of critical loads for nitrogen deposition for Natura 2000 habitat types occurring in The Netherlands*, Alterra report 2488, Wageningen: Alterra.

26 Point 6.1 of the request for a preliminary ruling in Case C-294/17.

27 De Heer, M., Roozen, F., Maas, R., 'The integrated approach to nitrogen in the Netherlands: A preliminary review from a societal, scientific, juridical and practical perspective', *Journal for Nature Conservation* 35 (2017) 101 (106).

28 Ibid., p. 107.

B. Questions 5 to 7a in Case C-293/17 and 3 to 5a in Case C-294/17 — Consideration of measures unrelated to projects

68. By a series of questions in both cases, the Raad van State (Council of State) is seeking to ascertain whether in the assessment under Article 6(3) of the Habitats Directive account may be taken of certain measures and developments which are not directly related to the respective plan or project to be assessed. In particular, the Raad van State (Council of State) asks whether an expected autonomous decrease of nitrogen emissions may be taken into account (Question 6 in Case C-293/17 and Question 4 in Case C-294/17). In addition, it asks about measures which reduce nitrogen emissions from other sources and restoration measures in sensitive habitats of protected sites which are intended to create room for further nitrogen deposition.

69. In this regard, the Raad van State (Council of State) asks separately whether such measures may be taken into account if they are adopted pursuant to Article 6(1) and (2) of the Habitats Directive (Questions 5 and 5a in Case C-293/17 and Questions 3 and 3a in Case C-294/17) or as protective measures as referred to in paragraph 28 of the judgment in *Briels*[29] (Questions 7 and 7a in Case C-293/17 and Questions 5 and 5a in Case C-294/17). However, I do not consider this distinction to be appropriate. Where an initiative is authorised pursuant to Article 6(3) of the Habitats Directive, it makes no sense to apply Article 6(2) in parallel.[30] In addition, measures under Article 6(1) are directly connected with or necessary to the management of the site and are not therefore included in the assessment under Article 6(3). Irrespective of their legal classification, the crucial factor must be whether the measures in question permit the conclusion that additional nitrogen deposition does not adversely affect the integrity of the site.

70. I will therefore first describe the legal bases for the consideration of measures not related to projects (see under 1) and then examine separately the reduction of nitrogen emissions from other sources (see under 2), the restoration measures in the protected sites (see under 3) and the consideration of future developments, including expected decreases in nitrogen emissions (see under 4).

1. The legal bases

71. The Court has found that in the assessment under Article 6(3) of the Habitats Directive the competent national authority must take 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 of the site.[31]

72. However, 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 taken into account in the assessment of the implications of the project provided for in Article 6(3).[32]

73. Measures which are not aimed either at avoiding or reducing the significant adverse effects for that habitat type caused by a project, but tend to compensate after the fact for those effects are not protective measures which guarantee that the project will not adversely affect the integrity of the site within the meaning of Article 6(3) of the Habitats Directive.[33]

29 Judgment of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330).

30 Judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 35).

31 Judgments of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330, paragraph 28), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 54).

32 Judgment of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330, paragraph 29), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 48).

33 Judgment of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330, paragraph 31).

74. This distinction between measures to mitigate damage, which may be applied in the context of Article 6(3) of the Habitats Directive, and compensatory measures, for which that does not hold, is consistent with the principle laid down in Article 191(2) TFEU that environmental damage should as a priority be rectified at source.[34] This aim, like the precautionary principle, forms the basis for the Union's environment policy and thus also for the Habitats Directive. It is expressed particularly clearly in Article 6(3) of the Habitats Directive, as the appropriate assessment of the implications for the site seeks to identify and prevent damage arising from the plan or project under examination. The initiative is thus examined as a possible source of environmental damage.

75. Article 6(3) of the Habitats Directive, on the other hand, does not provide that the damage caused to protected sites by a plan or project can be compensated.[35] This would also be manifestly incompatible with the principle that environmental damage should as a priority be rectified at source.

76. In addition, the Court rightly underlines the difficulties in assessing the effectiveness of future compensatory measures with the required certainty[36] and the risk of circumvention of Article 6(4) of the Habitats Directive where compensatory measures are expressly provided for in the form of measures to ensure the coherence of Natura 2000, but are combined with other requirements.[37]

77. Denmark rightly states that the appropriate assessment of the implications for the site must be complete. For that reason it must, of course, also take into account all factors not directly associated with the project which can influence the impact of the project within the protected site. It is not without reason that Article 6(3) of the Habitats Directive refers to any plan or project likely to have a significant effect on a protected site either individually or *in combination with other plans or projects*.

78. As regards the application of Article 6(3) of the Habitats Directive, there is, however, a significant difference between measures directed at the investigated source of damage and other measures. If, as a result of damage mitigation, the adverse effects of the project under examination no longer exist or become insignificant, the competent authorities may authorise the initiative pursuant to Article 6(3) of the Habitats Directive. In contrast, other measures which do not act on the investigated source do not affect the damage resulting from the initiative. In particular, the positive effects of those measures may not simply be offset against the adverse effects of the initiative under examination.

79. Such measures can enable an initiative in accordance with Article 6(3) only if they reduce the total load on the protected site or its sensitivity to damage such that the damage resulting from the initiative under examination does not adversely affect the integrity of the site. Where total damage is reduced, but the integrity of the protected site concerned is nevertheless adversely affected, Article 6(3) of the Habitats Directive does not in any case permit any additional damage of this kind.

80. This is clearly illustrated by the example of nitrogen deposition. It is not sufficient to reduce this by a certain amount, such as 1 kg N/ha/yr, in order to permit the same degree of additional deposition if the protected habitat as a whole is still overloaded with nitrogen. Additional deposition can be permitted only if the total load, including this, is sufficiently small that it does not adversely affect the integrity of the site.

81. It should also be pointed out that the Member States are already required, irrespective of the authorisation of a new initiative under Article 6(2) of the Habitats Directive, to take the necessary measures to eliminate existing damage to protected sites, such as an overload of nitrogen deposition.[38]

34 See Opinion of Advocate General Tanchev in *Grace and Sweetman* (C-164/17, EU:C:2018:274, point 76).

35 See judgment of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 57).

36 Judgment of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330, paragraph 32).

37 Judgment of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330, paragraph 33 et seq.).

38 Judgments of 24 November 2011, *Commission* v *Spain* (*Alto Sil*) (C-404/09, EU:C:2011:768, paragraphs 126 and 142), and of 14 January 2016, *Grüne Liga Sachsen and Others* (C-399/14, EU:C:2016:10, paragraphs 41 to 43).

2. The 'source-directed measures' mentioned in the requests for a preliminary ruling

82. It is clear from the requests for a preliminary ruling that Question 5 in Case C-293/17 and Question 3 in Case C-294/17 relate to source-directed measures in so far as they, for example, reduce nitrogen emissions from stables of other farms. Account must be taken of such initiatives as a rule when farms are modified or expanded.

83. However, those sources are not the subject of the assessment under Article 6(3) of the Habitats Directive in the main proceedings, but *other* sources. Reductions of emissions from these other nitrogen sources neither avoid deposition from the farm to be assessed in each case nor reduce such deposition. Consequently, in the context of the authorisation of a farm pursuant to Article 6(3), they cannot readily be offset with its nitrogen emissions, even partially.

84. Only if, as a result of such measures directed at other sources, the nitrogen deposition in the protected site concerned falls so far below the values determined for the habitats in question that there is sufficient room for additional nitrogen deposition, and the total load is consistent with the standard developed above,[39] can that additional deposition be authorised under Article 6(3) of the Habitats Directive.

3. The measures in the protected sites

85. The measures in the protected sites to which the Raad van State (Council of State) refers in Question 7 in Case C-293/17 and Question 5 in Case C-294/17 likewise cannot be recognised as integrated protective measures to mitigate damage.

86. The Raad van State (Council of State) does state that, according to its national case-law, restoration measures in the protected sites which are taken specifically with a view to the implementation of a plan or project and supplementary to existing management are to be regarded as damage-mitigating measures if they seek to avoid or reduce the local impact for protected habitats which would be adversely affected by the plan or the project if the measure was not taken. Here too there is mitigation of direct consequences of the initiative.[40]

87. However, the measures in the protected sites also do not act at the source of nitrogen deposition to be assessed, but where it occurs. In addition, they are not aimed at avoiding deposition from the initiative under examination, but they can at best eliminate it subsequently. In general, they do not specifically cover nitrogen deposition from the initiative in question, but relate indiscriminately to deposition from a variety of sources.

88. Contrary to the view taken by the Raad van State (Council of State), the judgment in *Moorburg* does not lead to a different conclusion. In that case the Court examined whether a fish ladder can be taken into consideration in order to establish that fish kills by the cooling mechanism of a power plant do not adversely affect the integrity of sites.[41] That hypothesis is based on the idea that, on the one hand, fewer fish reach the protected sites to breed because of the fish kills at the power plant while, on the other, this disadvantage is at least compensated by the fish ladder, since more fish are able to reach the sites as a result of the measure.

39 See above, point 56 et seq.

40 Points 10.16 and 10.35 of the request for a preliminary ruling in Case C-294/17.

41 Judgment of 26 April 2017, *Commission* v *Germany* (C-142/16, EU:C:2017:301, paragraph 38).

89. In that case the Court did not state a view on whether such compensation can be recognised as a damage-mitigating measure, but merely held that the advantages offered by the fish ladder did not exist and also could not yet be proven when the power plant was authorised. It was thus able to find that Article 6(3) of the Habitats Directive had been infringed in connection with the authorisation, without the need to make a definitive statement whether such a measure may be taken into account at all in connection with the application of that provision.

90. However, the Netherlands states that as a result of such measures more nitrogen can be deposited in the protected sites without the protected habitats being adversely affected. In fact, there seem to be measures having this effect. Frequent mowing with the removal of clippings, burning of vegetation, rewetting of moorland or removal of soil with a high nitrogen load are mentioned in this regard.[42] Specifically, the measures selected in each case — including any disadvantages[43] — would have to be assessed by the national courts.

91. If in this process it became apparent that as a result of such measures there was actually room for additional nitrogen deposition, the load limit thus being increased to an extent that the total load remains below it, it could be made available for new plans and projects.

4. Future developments

92. A common feature of all the measures not related to projects that have been discussed so far is the fact that their effects have not yet been established but are often expected only in the future. The Raad van State (Council of State) therefore asks, by Questions 5a and 7a in Case C-293/17 and by Questions 3a and 5a in Case C-294/17, to what extent this temporal element is important to the assessment of such measures and whether monitoring with a possibility of adjustment of the measures permits future developments to be taken into account. By Question 6 in Case C-293/17 and Question 4 in Case C-294/14 the same point is raised with regard to taking into account expected general decreases in nitrogen emissions.

93. It must therefore be clarified whether it is possible to authorise projects on the assumption that source-directed measures, measures in sites which are implemented under the PAS and the decrease in nitrogen emissions for other reasons will in future create room for additional nitrogen deposition, even though this has not yet been established with certainty.

94. However, it is at the date of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question.[44] This obstacle is naturally very difficult to overcome in the case of future measures and developments, both as regards the effectiveness of the measures and in terms of the certainty that the measures and developments will actually occur.

95. Partly because of this inevitable uncertainty, the Court has declined to take into account the positive effects of new habitats which are yet to be created in the assessment under Article 6(3) of the Habitats Directive.[45] Monitoring and the possibility of adjustment of the measures were also insufficient for it.[46]

42 Jones, L. et al., 'Can on-site management mitigate nitrogen deposition impacts in non-wooded habitats?', *Biological Conservation*, Volume 212, Part B, 2017, pp. 464 to 475, https://doi.org/10.1016/j.biocon.2016.06.012 (cited by http://eprints.whiterose.ac.uk/102105/).

43 Jones et al., cited in footnote 42.

44 Judgments of 26 October 2006, *Commission* v *Portugal* (*Castro Verde*) (C-239/04, EU:C:2006:665, paragraph 24); of 26 April 2017, *Commission* v *Germany* (*Moorburg*) (C-142/16, EU:C:2017:301, paragraph 42); and of 17 April 2018, *Commission* v *Poland* (*Białowieża Forest*) (C-441/17, EU:C:2018:255, paragraph 120).

45 Judgments of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330, paragraph 32), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 56).

46 Judgment of 26 April 2017, *Commission* v *Germany* (*Moorburg*) (C-142/16, EU:C:2017:301, paragraphs 37 to 45). See also judgment of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 27).

96. The same must hold for the PAS.

97. At first sight, this conclusion could be seen as being in contradiction with the forecast-based nature of the appropriate assessment of the implications for the site under Article 6(3) Habitats Directive.[47] However, the assessment of the future effects of a plan or project can inevitably only ever be a forecast. On the other hand, there is no need to draw on the uncertainty of forecasts if measures are taken independently of the initiative in order to establish conditions such that the detrimental impact of the initiative does not adversely affect the integrity of protected sites.

5. Interim conclusion

98. The answer to Questions 5 to 7a in Case C-293/17 and Questions 3 to 5a in Case C-294/17 is therefore that

– measures to reduce nitrogen deposition from other sources,

– restoration measures to improve nitrogen-sensitive habitat types in the sites concerned, and

– the autonomous decrease in nitrogen emissions

can establish the compatibility of additional nitrogen deposition in protected sites with Article 6(3) of the Habitats Directive only if it is already definitively established at the date of the authorisation that the total load on the site from nitrogen deposition falls below the threshold for the integrity of the site being adversely affected. On the other hand, it is not sufficient, for the purposes of approval of additional nitrogen deposition, if deposition declines overall, but the land in question is still overloaded with nitrogen. Mere forecasts regarding the future effects of those measures and the expected decrease in nitrogen emissions may not be taken into account in the decision on the approval of additional nitrogen deposition.

C. Question 1 in Case C-294/17 — Threshold values and limit values for nitrogen deposition

99. Question 1 in Case C-294/17 is intended to clarify whether Article 6(2) and (3) of the Habitats Directive precludes legislation which exempts from the permit requirement individual projects and other operations causing nitrogen deposition which do not exceed a threshold value or a limit value, and are therefore permitted without individual approval, proceeding on the assumption that the effects of all projects and other operations taken together which could make use of the legislation have been appropriately assessed before the adoption of the legislation.

100. Unlike Article 2(1) of the EIA Directive for example, the Habitats Directive does not contain any express provision regarding a permit requirement for certain activities.

101. In particular, Article 6(2) of the Habitats Directive does not make certain activities subject to a permit requirement. Although a permit requirement does appear appropriate for achieving the objectives of that provision in respect of the effects on protected sites of the activities concerned, the discretion enjoyed by the Member States[48] also allows other methods.

47 See above, point 54.

48 Judgment of 14 January 2016, *Grüne Liga Sachsen and Others* (*Waldschlößchenbrücke*) (C-399/14, EU:C:2016:10, paragraph 40).

102. On the other hand, the *ex ante* assessment procedure under Article 6(3) of the Habitats Directive does require such a permit, as it is to be carried out in the light of the authorities' agreement to the project or plan in question. Failure to conduct the permit procedure is thus compatible with Article 6(3) only if it is clear that the activities in question do not require an assessment.

103. As has already been stated, an appropriate assessment of the implications for the site is not necessary if it can be excluded on the basis of objective information that a plan or project is likely to have a significant effect on protected sites, either individually or in combination with other plans or projects.[49] However, it is not permitted to avoid that assessment in respect of certain categories of projects on the basis of criteria which do not adequately ensure that those projects will not have a significant effect on the protected site.[50] The benchmark for this assessment, as with the agreement to the plans and projects assessed, can only be the absence of reasonable scientific doubt.

104. The determination of threshold values or limit values for the permit requirement, which would in turn be a condition for carrying out an appropriate assessment of the implications for the site, is thus compatible with Article 6(3) of the Habitats Directive only if it can be excluded on the basis of objective information that nitrogen deposition below those values is likely to have a significant effect on protected sites either individually or in combination with other plans and projects.[51]

105. The PAS exempts from the permit requirement initiatives contributing less than the threshold value of 0.05 mol N/ha/yr or the limit value of between 0.05 and 1 mol N/ha/yr to nitrogen deposition in protected sites. It is conceivable that these values have a sufficient scientific basis to remove all reasonable scientific doubt that additional nitrogen deposition on this scale is not likely to have a significant effect on protected sites.

106. This is suggested, prima facie, by the fact that these values correspond to only very small fractions of the critical loads of particularly nitrogen-sensitive habitat types: 0.017% and 0.23% of the load limit of 6 kg N/ha/yr for oligotrophic waters containing very few minerals of sandy plains (*Littorelletalia uniflorae*) (Natura 2000 Code 3110) and 0.01% and 0.2% of the load limit of 7 kg N/ha/yr for active raised bogs (Natura 2000 Code 7110). For most other habitat types the critical loads are in some cases much higher.[52]

107. Furthermore, Article 2(3) of the Netherlands Decision grenswaarden programmatische aanpak (Decree on limit values for the programmatic approach) even provides for an automatic reduction of the limit value from between 0.05 and 1 mol N/ha/yr to 0.05 mol N/ha/yr if only 5% of the room for deposition is available for affected nitrogen-sensitive land. That provision counters the risk of cumulation of nitrogen deposition from a large number of individually insignificant sources, a 'death by a thousand cuts'.[53]

108. In comparison, the German Bundesverwaltungsgericht (Federal Administrative Court) is much more generous in determining a *de minimis* threshold for nitrogen deposition. According to that court, there is a consensus among specialists that, where the habitats concerned have very high initial loads, additional loads of no more than 3% of the critical load are incapable of bringing about

49 See the references in footnote 14 and judgment of 10 January 2006, *Commission* v *Germany* (C-98/03, EU:C:2006:3, paragraph 40).

50 Judgments of 10 January 2006, *Commission* v *Germany* (C-98/03, EU:C:2006:3, paragraph 41), and of 26 May 2011, *Commission* v *Belgium* (C-538/09, EU:C:2011:349, paragraph 41).

51 Judgments of 4 March 2010, *Commission* v *France* (C-241/08, EU:C:2010:114, paragraph 32), and of 26 May 2011, *Commission* v *Belgium* (C-538/09, EU:C:2011:349, paragraph 52).

52 The values for the 'critical loads' were taken from Dobben et al., cited in footnote 25.

53 Opinion of Advocate General Sharpston in *Sweetman and Others* (C-258/11, EU:C:2012:743, point 67).

significant changes to the current status or of restricting considerably the restoration of a favourable status.[54] There is no need to decide here whether this finding made by the German court is compatible with Article 6(3) of the Habitats Directive. It is nevertheless a further indication that in any case the much lower Netherlands threshold values and limit values can be scientifically justified.

109. Notwithstanding these indications, however, the competent national court must examine whether proof of the insignificance of adverse effects has actually been provided with sufficient certainty in respect of the Netherlands threshold values and limit values.

110. The answer to Question 1 in Case C-294/17 is therefore that legislation which exempts from the permit requirement projects and other operations causing nitrogen deposition which do not exceed a threshold value or a limit value, and are therefore permitted without individual approval, is compatible with Article 6(2) and (3) of the Habitats Directive if, on the basis of objective information, there is no reasonable scientific doubt that there will be no significant effects in the protected site concerned as a result of that nitrogen deposition.

D. Questions 1 to 4a and 8 in Case C-293/17 — Duty to carry out an assessment for grazing and fertilising

111. Case C-293/17 concerns two agricultural activities which result in nitrogen deposition, namely grazing of cattle and fertilising of arable land. Questions 1 to 4a are intended to clarify whether these activities are subject to an appropriate assessment of the implications for the site under Article 6(3) of the Habitats Directive. The Raad van State (Council of State) wishes to know, first, whether they constitute projects within the meaning of the first sentence of Article 6(3) (see under 1) and, second, whether they can form a single overall project together with the farm concerned, which in many cases was subject to a single authorisation before Article 6(3) became applicable (see under 2). For fertilising and grazing activities newly initiated during the application of Article 6(3), the Raad van State (Council of State) asks whether it is permissible not to impose a permit requirement in a specific case if that exemption is based on an assessment showing that on average an increase in nitrogen deposition by those activities can be ruled out (see under 3). With regard to the possible application of Article 6(2) to fertilising or grazing, the Raad van State (Council of State) also asks whether that provision has been adequately transposed in Netherlands law (see under 4).

1. Classification as a project

112. I will first consider Question 1 in Case C-293/17, namely whether fertilising and grazing of dairy cattle are to be regarded as projects.

113. Under the first sentence of Article 6(3) of the Habitats Directive, any project likely to have a significant effect on a protected site, either individually or in combination with other plans or projects, is subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

54 Bundesverwaltungsgericht, judgment of 14 April 2010, Hessisch Lichtenau II (DE:BVerwG:2010:140410U9A5.08.0, paragraph 94).

(a) The definition of 'project'

114. It is true that the Habitats Directive does not define 'project'. The Court has ruled, however, that the definition of 'project' in Article 1(2)(a) of the EIA Directive is relevant to defining the concept of plan or project as provided for in the Habitats Directive, which seeks, as does the EIA Directive, to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment. [55]

115. I understand this statement to mean that in any case projects within the meaning of this definition are also projects for the purposes of the first sentence of Article 6(3) of the Habitats Directive. However, I assume that the concept of project in the Habitats Directive is not thereby exhaustively defined. [56]

116. The Court has thus also held that it is not permitted to exclude from the duty of assessment certain categories of projects on the basis of criteria which do not adequately ensure that those projects will not have a significant effect on the protected sites. [57] In the subsequent examination of the different exclusions, it did not give detailed consideration to whether they relate to projects within the meaning of Article 1(2) of the EIA Directive. Instead, the likelihood of a significant effect on the protected sites was sufficient to reject the exclusions for the activities in question. [58]

117. Contrary to the view of the Raad van State (Council of State), the definition of project in Article 1(2)(a) of the EIA Directive therefore does not definitively delimit the concept of 'project' under the first sentence of Article 6(3) of the Habitats Directive. Rather, the crucial factor is whether the activity concerned is likely to have a significant effect on a protected site. This cannot be ruled out in the case of fertilising and grazing, as the resulting nitrogen deposition can adversely affect many protected habitat types.

118. However, it is not necessary in the present case to go beyond the definition of 'project' in the EIA Directive. Article 1(2)(a) of the EIA Directive defines 'project' as 'the execution of construction works or of other installations or schemes' (first indent) and 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources' (second indent). As the Court has found, this definition of 'project' refers to works or interventions involving alterations to the physical aspect of a site. [59] Both fertilising and grazing meet these requirements.

(b) Fertilising

119. The Raad van State (Council of State) takes the view that the application of fertilisers does not constitute a project at least where it is on the surface of land. Only where fertiliser is worked into the soil is there a physical intervention in the land, as required in the second indent of Article 1(2)(a).

55 Judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 26). See also judgment of 14 January 2010, *Stadt Papenburg* (C-226/08, EU:C:2010:10, paragraphs 38 to 40).

56 See my Opinion in *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:60, point 31).

57 Judgment of 10 January 2006, *Commission* v *Germany* (C-98/03, EU:C:2006:3, paragraph 41). See also judgment of 26 May 2011, *Commission* v *Belgium* (C-538/09, EU:C:2011:349, paragraph 41).

58 Judgment of 10 January 2006, *Commission* v *Germany* (C-98/03, EU:C:2006:3, paragraphs 42 to 44).

59 Judgments of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others* (C-275/09, EU:C:2011:154, paragraphs 20, 24 and 38), and of 19 April 2012, *Pro-Braine and Others* (C-121/11, EU:C:2012:225, paragraph 32).

120. However, the Commission rightly contends that, regardless of the method used, fertilising alters the properties of the soil. By its nature, it is designed to enrich the soil with nutrients. The distinction whether this is done by the farmer working the soil with machinery or by the fertiliser penetrating the soil by seepage, as with manure, cannot justify any difference in treatment. Ultimately, fertilising could be thought of as almost the opposite of the extraction of mineral resources, namely the enrichment of the soil.

121. Such alteration of the soil by fertilising is thus fully comparable with shellfish fishing, where the upper layer of the seabed is sieved, which the Court has already recognised as a project within the meaning of Article 1(2)(a) of the EIA Directive and Article 6(3) of the Habitats Directive.[60]

122. Consequently, fertilising is a project which may be subject to an *ex ante* assessment under Article 6(3) of the Habitats Directive.

(c) Grazing

123. Grazing of cattle is as such more difficult to subsume under the definition of 'project' in the second indent of Article 1(2)(a) of the EIA Directive. If the activity of keeping cattle on certain land were classified under 'other intervention in the natural surroundings and landscape' and were thus placed on a level with the expressly mentioned example of extraction of mineral resources, crop cultivation would also have to be ascribed that quality as both grazing and cultivation are geared to the economic exploitation of the nutrients contained in the soil. This could also be seen as extraction of natural resources.

124. There is no need to take this step, however, because establishing grazing land constitutes 'the execution of construction works or of other installations or schemes' within the meaning of the first indent of Article 1(2)(b) of the EIA Directive. As a rule, grazing land is enclosed to prevent cattle leaving. Such enclosure constitutes a project.[61] In assessing the enclosure, account must be taken of its purpose, namely grazing.

125. If the Court nevertheless recognises neither grazing nor the establishment of grazing land as a project for the purposes of the EIA Directive, grazing would at least have to be regarded as an activity likely to have a significant effect on a protected site in accordance with the broader definition of 'project' in the Habitats Directive. It is not only likely to cause nitrogen deposition but also, at any rate, affects vegetation. The question whether this impact is likely to have a significant effect on a protected site, for example in the form of overgrazing, depends both on the scale and location of the grazing and on the specific conservation objectives of the site.

126. It may therefore be necessary under Article 6(3) of the Habitats Directive to examine whether grazing of cattle is compatible with the conservation objectives of the protected sites concerned.

(d) Interim conclusion

127. The answer to Question 1 in Case C-293/17 is therefore that the fertilising of certain land or use of the land for grazing is to be regarded as a project within the meaning of Article 6(3) of the Habitats Directive.

60 Judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraphs 24 to 27).
61 See judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838, paragraph 47).

2. Integration in an overall project

128. By Question 2 in Case C-293/17 it is intended to clarify how regularly recurring fertilising is to be assessed in the event that it was initiated lawfully before Article 6(3) of the Habitats Directive became applicable to a protected site and that it is still being carried out. The Raad van State (Council of State) would like to know in particular whether fertilising can form part of a single overall project, namely a farm, and could thus be covered by the permit for that farm.

(a) The concept of single project

129. Just as the Habitats Directive defines the concept of project, it regulates which measures may be subsumed in a single project. However, this question has no practical relevance to the application of Article 6(3) of the Habitats Directive to given projects, as irrespective of which individual measures have been subsumed in a project, all specific effects of the package of measures must be examined in view of the conservation objectives of the protected sites concerned.

130. The background to this question is instead the temporal applicability of Article 6(3) of the Habitats Directive. If a project was authorised before that provision became applicable, its further execution cannot be assessed on the basis of that provision, but is subject to Article 6(2),[62] which requires an assessment of compatibility with the conservation objectives of protected sites only in certain circumstances.[63] If, however, any fertilising of agricultural land or even merely fertilising carried out over the course of a certain year is an individual project, it must in principle also be reassessed in each case.

131. In *Stadt Papenburg* the Court recognised the possibility of a single operation in a similar situation. That case concerned recurrent dredging of a waterway which was necessary to maintain the navigable channel at a certain depth. Those works can, having regard to their nature or the conditions under which they are carried out, and in particular their common purpose, be regarded as a single operation and as one and the same project.[64] A further indication that it should be classified as a single project, which the Court did not highlight, however, is the fact that the regular works were approved in a single authorisation before Article 6(3) of the Habitats Directive became applicable.[65]

132. The regular fertilising of agricultural land likewise has a single common purpose, namely crop cultivation on a farm. It must also be assumed that fertilising has been permitted at least since the farm in question commenced its activity.

133. Such a farm is thus to be regarded as a single operation and includes the fertilisation of the land associated with it.

134. This conclusion is also supported when fertilising is viewed from the perspective of the temporal application of Article 6(3) of the Habitats Directive. If an assessment under Article 6(3) of the Habitats Directive had to be carried out for each individual fertilisation of agricultural land or even merely for each year, the expenditure would, in all likelihood, be disproportionate to the possible benefits to site protection. In general, it should be sufficient for fertilising of certain land which recurs in a similar form to be assessed appropriately once in view of the conservation objectives of the sites concerned.

62 Judgment of 14 January 2010, *Stadt Papenburg* (C-226/08, EU:C:2010:10, paragraph 49).

63 See judgment of 14 January 2016, *Grüne Liga Sachsen and Others* (*Waldschlößchenbrücke*) (C-399/14, EU:C:2016:10, paragraph 44).

64 Judgment of 14 January 2010, *Stadt Papenburg* (C-226/08, EU:C:2010:10, paragraph 47).

65 Judgment of 14 January 2010, *Stadt Papenburg* (C-226/08, EU:C:2010:10, paragraph 11).

(b) Changes in fertilisation practice

135. Difficulties can arise, however, where fertilising changes. The Raad van State (Council of State) therefore asks whether a single operation should still be taken to exist if the fertilising did not always take place on the same tracts of land, in the same quantities and using the same techniques. It also asks whether it is relevant to this question that the nitrogen deposition caused by the application of fertilisers on the surface of land or below its surface did not increase after Article 6(3) of the Habitats Directive became applicable.

136. As the concept of project in the context of the application of Article 6(3) of the Habitats Directive is at issue, these questions should be answered with reference to the aim of that provision. It integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects envisaged.[66] The crucial factor must therefore be whether an *additional* risk of a significant effect on protected sites is created by the changes in fertilisation practice.

137. If the risk of adverse effects from fertilising remains within the previously existing bounds, it must be considered that the project, the farm, has not changed. If, however, the risk of adverse effects increases, for example because additional nitrogen deposition in protected habitats are to be expected as a result of more intensive fertilisation, different fertilisers, different fertilisation methods or a change in the location of the fertilisation, fertilising cannot be recognised as being part of the originally authorised project.

138. It is therefore important whether nitrogen deposition caused by the application of fertilisers on the surface of land or below its surface did not increase only if it is clear that nitrogen deposition has not increased in the protected habitats concerned. A general development to the effect that fertilising has not resulted in higher nitrogen deposition overall does not, however, rule out the possibility of a higher load on certain protected habitats.

139. It should further be noted that similar considerations apply to grazing as to fertilising of agricultural land.

(c) Interim conclusion

140. The answer to Question 2 in Case C-293/17 is therefore that regularly recurring fertilising which was carried out lawfully before Article 6(3) of the Habitats Directive became applicable to a protected site and is still being carried out can form a single project with a farm. On the other hand, changes in fertilisation practice are to be regarded as a new project if they create an additional risk of significant effects on protected sites.

3. Exemption from the permit requirement

141. Questions 3 and 3a in Case C-293/17 ask whether Article 6(3) of the Habitats Directive permits grazing and fertilising to be exempted by legislation from the need for individual authorisation. Such exemption necessarily means that those activities are also not subject to an individual appropriate assessment of their implications in view of the conservation objectives of protected sites.

66 Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 58), and of 17 April 2018, *Commission* v *Poland* (*Białowieża Forest*) (C-441/17, EU:C:2018:255, paragraph 118).

142. The Netherlands bases that exemption on an abstract appropriate assessment of the effects of fertilising and grazing. The Raad van State (Council of State) wishes to ascertain, by Questions 4 and 4a in Case C-293/17, whether that assessment is compatible with Article 6(3) of the Habitats Directive. According to the request for a preliminary ruling, the assessment was based on the actual and expected extent and intensity of those activities and its outcome is that on average they would not cause an increase in nitrogen deposition. In addition, the exemption is safeguarded by monitoring of deposition development, which, if necessary, results in an adjustment of the authorised deposition.

143. Although at first sight this is similar to the application of the PAS to other activities, which is lawful in principle, and even to be welcomed,[67] there is one crucial difference. For other activities the individual effects on protected sites are still identified. For fertilising and grazing, on the other hand, there is a presumption that significant effects are excluded.

144. Because grazing and fertilising are to be regarded as projects, an exemption from the permit requirement, precluding an individual assessment, would be incompatible with Article 6(3) of the Habitats Directive if those activities were subject to an appropriate assessment of the implications for the site. Such an assessment may be dispensed with only if it can be excluded on the basis of objective information that grazing or fertilising are likely to have a significant effect on protected sites either individually or in combination with other plans and projects.[68]

145. The actual and expected extent and intensity of those activities are objective information. However, according to the Raad van State (Council of State), they only permit the conclusion that *on average* an increase in nitrogen deposition can be ruled out.

146. A mere average value cannot guarantee that there are no significant effects on any single protected site as a result of fertilising or grazing on the basis of specific conditions, in particular interaction with other nitrogen sources. Consequently, this overall assessment does not in itself permit fertilising and grazing to be exempted from the individual appropriate assessment of the implications for the site.

147. Furthermore, it is at the date of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question.[69] There is no such certainty if the exemption from the duty to carry out an assessment is based merely on the conclusion that on average no increase in nitrogen deposition is expected.

148. Lastly, thus far the Court has also not been convinced that possible doubts as to the harmlessness of measures continue to be irrelevant on account of monitoring.[70]

149. Because fertilising and grazing on certain land presumably make only an insignificant contribution to adverse effects on protected sites in each case, a more liberal approach could be considered. However, the assumption of insignificance itself raises doubts whether the monitoring of the effects of those activities and the corrective measures that may be needed will be carried out with the necessary consistency and rigour.

150. In practice, this means that fertilising or grazing on new land or changes to those activities which could result in additional nitrogen deposition in protected habitats must be assessed pursuant to Article 6(3) of the Habitats Directive before they can be authorised by the authorities. It is true that nitrogen deposition caused by fertilising or grazing of certain agricultural land is probably very limited

67 See above, point 37 et seq.

68 See the references in footnote 14 and judgment of 10 January 2006, *Commission* v *Germany* (C-98/03, EU:C:2006:3, paragraph 40).

69 See the references in footnote 44.

70 See the references in footnote 46.

in extent. However, it does not appear impossible that in individual cases there may be significant effects on protected sites. One might think in particular of highly intensified use of land in the immediate vicinity of protected habitats where these are already subject to a significant initial load. In other cases, however, it should be relatively straightforward to rule out significant effects.

151. The answer to Questions 3 to 4a in Case C-293/17 is therefore that grazing and fertilising may not be exempted by legislation from the need for an individual assessment of their implications in view of the conservation objectives of protected sites on the ground that on average an increase in nitrogen deposition by those activities can be ruled out. In addition, the monitoring of nitrogen deposition and the possibility of taking further measures to counter an overload of deposition cannot justify failure to carry out an individual assessment.

4. The implementation of Article 6(2) of the Habitats Directive

152. Question 8 in Case C-293/17 is intended to clarify whether it constitutes adequate implementation of Article 6(2) of the Habitats Directive where grazing and fertilising are not made subject to a permit requirement, but the power to impose obligations referred to in Article 2.4 of the Wnb is merely applied.

153. The Raad van State (Council of State) rightly notes in this regard that Article 6(2) of the Habitats Directive, unlike Article 6(3), does not require a systematic *ex ante* assessment of activities.[71] A decision not to enforce a permit requirement therefore possibly infringes Article 6(3), but not Article 6(2). As regards the permit requirement for grazing and fertilising, reference should be made to the answer to Questions 3 to 4a in Case C-293/17.[72]

154. If, on the other hand, Article 6(2) of the Habitats Directive requires protective measures irrespective of the matter of authorisation for grazing or fertilising, the request for a preliminary ruling does not contain anything to suggest that Article 2.4 of the Wnb would not be sufficient in this regard.

155. According to the Raad van State (Council of State), that provision permits the necessary obligations to be imposed on farmers. In particular, fertilising and grazing are not excluded from the application of Article 2.4 of the Wnb.[73]

156. The Court objected, in proceedings concerning the implementation of Article 6(2) of the Habitats Directive, that the powers established therein were not preventive, but merely reactive and, furthermore, contained significant obstacles to urgent measures.[74] Nevertheless, the Raad van State (Council of State) is correct that the effects of grazing and fertilising are generally predictable and have also been apparent for a considerable time. In addition, according to the request for a preliminary ruling, Article 2.4 of the Wnb permits urgent measures, unlike the legislation under review on that occasion. Accordingly, the competent authorities may impose additional obligations in good time if there are risks to protected sites.

157. The answer to Question 8 in Case C-293/17 is therefore that a power such as the power to impose obligations referred to in Article 2.4 of the Wnb, which the competent authority must apply if, having regard to the conservation objectives, a Natura 2000 site so requires, is an adequate preventive instrument in order to be able to implement Article 6(2) of the Habitats Directive.

71 See judgment of 14 January 2016, *Grüne Liga Sachsen and Others* (C-399/14, EU:C:2016:10, paragraph 40 et seq.).

72 See above, point 141 et seq.

73 See judgment of 4 March 2010, *Commission* v *France* (C-241/08, EU:C:2010:114, paragraphs 31 and 32).

74 Judgment of 13 December 2007, *Commission* v *Ireland* (C-418/04, EU:C:2007:780, paragraphs 207 and 208).

E. Final considerations

158. In the light of the above statements, it appears that the Netherlands PAS does include promising approaches, but there are significant doubts all in all that it meets the requirements of Article 6(2) and (3) of the Habitats Directive.

159. This does not mean, however, that the directive is irreconcilably opposed to the PAS. Instead, Article 6(4) of the Habitats Directive is the instrument for achieving appropriate results in such a situation. The PAS has been described as a balance between the interests of nature conservation and society[75] and the Raad van State (Council of State) also refers to this when it invokes Article 2(3) of that directive to counter the criticism of a lack of 'ambition' in the PAS.[76] Such a balance is the function of Article 6(4), but not part of Article 6(2) and (3).[77]

160. If we look at the overall picture, it is obvious that a Member State like the Netherlands may not be subject to an unconditional obligation suddenly to place huge restrictions on its agriculture and also to intervene significantly in other economic development in order to reduce the nitrogen load on Natura 2000 sites to an acceptable level. Due regard must be had for imperative reasons of overriding public interest.

161. Such reasons lie in the macrosocial interest in economic development and also, in particular in the context of the ongoing acceptance of previously authorised activities, in the constitutional aim of respecting the fundamental rights of the undertakings concerned. Although it would seem difficult in general to recognise the interests of individual farms as imperative reasons of overriding public interest, an integrated approach like the PAS allows these individual interests to be classified in the public interest in agricultural development and respect for acquired rights.

162. Overall, it is also clear that there is no alternative to permitting certain additional activities and continuing to accept other existing activities. However, an instrument like the PAS is ideally suited to identifying what alternatives are actually available. First, it should impose production methods that minimise nitrogen deposition without causing other disproportionate damage (best practice). Second, it should prevent activities which cause damage that is disproportionate to their benefit.

163. The necessary measures to ensure the coherence of Natura 2000 would seem, at first sight, to be the most difficult obstacle to the application of Article 6(4) of the Habitats Directive. If a comprehensive coordination instrument permits an overload of nitrogen deposition on account of overriding interests in protected sites in the entire national territory, it would seem to be difficult or even impossible to develop the affected habitat types in other sites as compensation.

164. However, the measures in the protected sites provided for in the PAS are intended in particular to ensure the coherence of Natura 2000. If they are effective, they improve the conditions for development of the respective habitats despite an overload of nitrogen deposition.

165. Furthermore, the PAS has the long-term aim of reducing nitrogen deposition to an acceptable level and creating a good conservation status for the habitats concerned. In this long-term perspective, the PAS is likewise a measure to ensure the coherence of Natura 2000.

166. Lastly, the PAS supports this measure with continual monitoring and envisages adjustments if it transpires that the measures provided for are not sufficient.

75 De Heer et al. (cited in footnote 27, p. 107).

76 Point 8.2 of the request for a preliminary ruling in Case C-294/17.

77 My Opinion in *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:60, point 106).

167. Whether the PAS as a whole strikes the correct balance between the protection of Natura 2000 and other societal interests and how this is to be reviewed judicially are questions that have not been referred to the Court. They therefore fall outside the scope of the present case.

168. The application of Article 6(4) of the Habitats Directive could, however, be prevented by at least one obstacle. Where nitrogen deposition affects priority habitat types, such as active raised bogs (Natura 2000 Code 7110), the Netherlands should presumably have consulted the Commission pursuant to the second subparagraph of Article 6(4), as it does not seem possible to base the authorisation of additional nitrogen deposition by the PAS solely on considerations relating to human health or public safety or to beneficial consequences of primary importance for the environment. The Commission has not published an opinion in this regard, however.[78] Nevertheless, this does not prevent such an opinion being obtained subsequently, thereby placing the PAS on a more solid foundation.

V. Conclusion

169. I therefore propose that Court should rule as follows:

(1) The answer to Question 1 in Case C-294/17 is that legislation which exempts from the permit requirement projects and other operations causing nitrogen deposition which do not exceed a threshold value or a limit value, and are therefore permitted without individual approval, is compatible with Article 6(2) and (3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora if, on the basis of objective information, there is no reasonable scientific doubt that there will be no significant effects in the protected site concerned as a result of that nitrogen deposition.

(2) The answer to Question 2 in Case C-294/17 is that Article 6(2) and (3) of Directive 92/43 permits an appropriate assessment for a programme in which a certain total amount of nitrogen deposition is assessed to be used as the basis for granting an individual authorisation for a project or other operation which causes nitrogen deposition in protected sites which fits within the room for deposition assessed in the context of the programme. However, that assessment must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the deposition. This requires that it is ensured, for each individual project and any land within protected sites on which protected habitats are located, that the total authorised nitrogen deposition does not, in the long term, jeopardise the conservation of the habitat types and species protected in the site or the potential to establish a good conservation status.

(3) The answer to Questions 5 to 7a in Case C-293/17 and Questions 3 to 5a in Case C-294/17 is that

– measures to reduce nitrogen deposition from other sources,

– restoration measures to improve nitrogen-sensitive habitat types in the sites concerned, and

– the autonomous decrease in nitrogen emissions

can establish the compatibility of additional nitrogen deposition in protected sites with Article 6(3) of Directive 92/43 only if it is already definitively established at the date of the authorisation that the total load on the site from nitrogen deposition falls below the threshold for the integrity of the site being adversely affected. On the other hand, it is not sufficient, for the purposes of approval of additional nitrogen deposition, if deposition declines overall, but the land in question is still

78 http://ec.europa.eu/environment/nature/natura2000/management/opinion_en.htm.

overloaded with nitrogen. Mere forecasts regarding the future effects of those measures and the expected decrease in nitrogen emissions may not be taken into account in the decision on the approval of additional nitrogen deposition.

(4) The answer to Question 1 in Case C-293/17 is that the fertilising of certain land or use of the land for grazing is to be regarded as a project within the meaning of Article 6(3) of Directive 92/43.

(5) The answer to Question 2 in Case C-293/17 is that regularly recurring fertilising which was carried out lawfully before Article 6(3) of Directive 92/43 became applicable to a protected site and is still being carried out can form a single project with a farm. On the other hand, changes in fertilisation practice are to be regarded as a new project if they create an additional risk of significant effects on protected sites.

(6) The answer to Questions 3 to 4a in Case C-293/17 is that grazing and fertilising may not be exempted by legislation from the need for an individual assessment of their implications in view of the conservation objectives of protected sites on the ground that on average an increase in nitrogen deposition by those activities can be ruled out. In addition, the monitoring of nitrogen deposition and the possibility of taking further measures to counter an overload of deposition cannot justify failure to carry out an individual assessment.

(7) The answer to Question 8 in Case C-293/17 is that a power such as the power to impose obligations referred to in Article 2.4 of the Wet natuurbescherming (Law on nature conservation), which the competent authority must apply if, having regard to the conservation objectives, a Natura 2000 site so requires, is an adequate preventive instrument in order to be able to implement Article 6(2) of Directive 92/43 with regard to the grazing of cattle and the application of fertilisers.