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SUSTAINABLE ENERGY UNITED IN DIVERSITY

Challenges and approaches
in energy transition in the EU



Editors
L.Squintani and H.H.B.Vedder
with M.Reese and B.Vanheusden



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IN DIVERSITY – CHALLENGES AND
APPROACHES IN ENERGY
TRANSITION IN THE EUROPEAN
UNION

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Sustainable Energy United in Diversity – Challenges and Approaches in Energy Transition in the European Union
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Edited by Lorenzo Squintani, Hans H.B. Vedder with Moritz Reese and Bernard Vanheusden, who would like to thank the anonymous reviewers for their invaluable contribution.

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CHAPTER 5

BALANCING WIND ENERGY AND NATURE PROTECTION: FROM POLICY CONFLICTS TOWARDS GENUINE SUSTAINABLE DEVELOPMENT?

‘Those over there are not giants but windmills. Those things that seem to be their arms are sails which, when they are whirled around by the wind, turn the millstone’.

Miguel de Cervantes, *Don Quixote*

RALPH FRINS

HENDRIK SCHOUKENS

1. INTRODUCTION

Windmills appeared for the first time some 3000 years ago. First demonstrations of producing electricity from windmills took place during the 1880s. Despite these early advances, the enthusiasm remained relatively low up until the end of the 1980s. However, throughout the past decades, the positive impacts that go along with wind energy developments, alongside the increasing query for national energy independence, have pushed many countries around the world to prioritize the construction of wind farms as one of the major targets of their energy policy. For instance, within the European Union (EU) it is assumed that wind energy development will play a pivotal role in achieving the ambitious 20-20-20 target included in the 2008 Climate Change and Energy Package.¹

Yet, whilst at the outset wind energy was believed to be totally ‘clean’, that perception slowly altered. The rapid increase of the number of wind turbines is spurring additional concerns about its adverse environmental impacts. One of the most worrisome disadvantages is related to potential wildlife effects that wind farms are liable to create.² The majority of wind farm proposals have been located in upland areas due to the high wind speeds occurring there and their isolation from centres of human population. Mostly such areas also happen to host avifauna of high conservation importance.³ Although the mortality rates of birds and bats vary considerably depending on the specific location of a wind farm, the specific articulation be-

¹ More information about the Climate Change and Energy Package is available at http://ec.europa.eu/clima/policies/package/index_en.htm.

² See recently Tabassum-Abbasi et al, ‘Wind Energy: Increasing Developments, Rising Environmental Concerns’ (2014) 31 *Renewable and Sustainable Energy Reviews* 270.

³ JW Pearce-Higgins et al, ‘International Importance and Drivers of Change of Upland Bird Populations’ in A Bonn et al (eds), *Drivers of Environmental Change in Uplands* (Routledge 2009) 209.

tween biodiversity law and wind energy development has undeniable come more to the forefront in recent years. It raises questions as to the compatibility of the green energy pledges with nature protection.

Within the European context, the Birds⁴ and Habitats Directives⁵ spell out the specific rules as to nature conservation. Not only is the establishment of an EU-wide Natura 2000 Network envisaged, both directives urge the Member States also to enact strict protection rules for threatened species.⁶ Not surprisingly, EU biodiversity law increasingly clashed with wind energy developments which, in turn, spurred the debate forward on the alleged rigidity of the Birds and Habitats Directive. In recent legal literature, some argue that the *rationale* underpinning both directives comes down to ‘deathbed conservation’ or ‘nature gardening’, not capable of supporting sustainable land uses.⁷ By contrast, others have submitted that the legal issues that accompany the application of EU biodiversity law should not be regarded as insurmountable problems, nor as a trigger for relaxation of the Birds and Habitats Directives.⁸

That said, the stark rise in the number of legal challenges against the construction of new wind farms seems to underscore the aforementioned concerns and demonstrates the additional constraints that biodiversity law may pose for wind farm developments.⁹ Although these legal proceedings mostly do not succeed in definitively blocking the construction and operation of wind farms, they create a lot of frustration amongst wind developers because of the increased business risks. In light of the existing lacunae as regards the potential negative impacts of wind farms on wildlife, especially the rigid application of the precautionary principle in the applicable permitting procedures might lead to additional constraints from permit and consultation conditions. In some cases, wind developers will see their proposals rejected. In order to overcome such obstacles, wind energy business is claiming to obtain a ‘green pass’ under the applicable biodiversity rules.¹⁰ Massive wind farm development will, at the end of the day, also help to mitigate the effects of climate change, which is in the interests of all species. So why stick to the biodiversity rules for ‘green projects’ that are helping to reduce the harmful impacts linked to global warming? Are the potential negative effects that go along with wind farm developments not outweighed by the overall environmental benefits of wind power?

⁴ Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [1979] OJ L103/1 (Birds Directive). The initial Birds Directive has been codified in Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L20/7.

⁵ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7 (Habitats Directive).

⁶ Art 12(1) Habitats Directive; Art 5(1) Birds Directive.

⁷ FH Kistenkas, ‘Rethinking European Nature Conservation Legislation: Towards Sustainable Development’ (2013) 10 *Journal for European Environmental and Planning Law* 72.

⁸ ALR Jackson, ‘Renewable Energy vs Biodiversity: Policy Conflicts and the Future of Nature Conservation’ (2011) 21 *Global Environmental Change* 1195.

⁹ See for instance: H Schoukens, A Cliquet and F Maes, ‘Wind Farm Development in the Belgian Part of the North Sea: A Policy Odyssey without Precedent’ (2012) 10 *Zeitschrift für Europäisches Umwelt- und Planungsrecht* 304.

¹⁰ See, more extensively on the articulation between wind farm development and the US Endangered Species Act: JB Ruhl, ‘Harmonizing Commercial Wind Power and the Endangered Species Act Through Administrative Reform’ (2012) 65 *Vanderbilt Law Review* 1769.

This article will address the leeway that EU biodiversity law leaves for wind power development. After having treated the ‘green vs. green’ paradox more in depth (section 2), the articulation between Article 6 of the Habitats Directive, which lays down the basic protection scheme for the sites that are included in the Natura 2000 Network, and wind power development will be explored (section 3). In this paper, it will be argued that, whilst the Court of Justice of the European Union (hereafter: the Court) has definitely opted for a high threshold when applying the protection rules for spatial projects, there still remains sufficient margin to harmonize wind energy developments with the precautionary approach that is present in existing EU biodiversity law. In addition, it will be submitted that mechanisms such as adaptive licensing, possibly combined with additional mitigation or compensatory measures, might allow to better balance the urgent need for addressing climate change with the protection of the EU’s most endangered habitats and species (section 4).

2. THE DILEMMA: COMBATTING GLOBAL WARMING VS. NATURE CONSERVATION?

2.1. Wind energy production on the rise...

It is widely known that the EU has promulgated some ambitious targets in the field of environment and energy policy. Directive 2009/28/EC on the promotion of the use of energy from renewable sources,¹¹ more in particular, has set national targets corresponding to a 20 per cent share of renewable energies in overall EU energy consumption by 2020 and a mandatory 10 per cent minimum target to be achieved by all Member States for the share of renewable energy in transport consumption by 2020. Obviously, wind energy will play a key-role in the achievement of these objectives.

Overall, wind energy, which is widely seen as one of the most environmentally friendly energy resources,¹² has witnessed a rapid growth during the past two decades. At the end of 2008, there were 65 GW of wind power capacity installed within the EU, meeting in total 4.2 per cent of the EU electricity demand.¹³ A 2009 report issued by the European Environmental Agency (EEA) concluded that wind energy could power Europe many times over. It was held that wind power’s potential in 2020 will be three times greater than Europe’s expected electricity demand, rising to a factor of seven by 2030,¹⁴ At present, the EU is a front-runner in wind energy and a lead player on the global market. In 2007 more than half of the global installed wind capacity was located in the EU and European wind turbine manufacturers

¹¹ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16 (RES Directive).

¹² R Saidur et al, ‘Environmental Impact of Wind Energy’ (2011) 15 *Renewable and Sustainable Energy Reviews* 2423, 2424.

¹³ A Zervos and C Kjaer, *Pure Power. Wind Energy Scenarios up to 2030* (European Wind Energy Association 2008).

¹⁴ European Environmental Agency, *Europe’s Onshore and Offshore Wind Energy Potential, An Assessment of Environmental and Economic Constraints* (Office for Official Publications of the European Communities 2009).

accounted in 2006 for around 75 per cent of the global market.¹⁵ Nevertheless, the EU is still lagging by 1.6 GW (-1.5 per cent) behind its 27 National Renewable Energy Action Plan forecasts.¹⁶ According to European Commission's figures, more than two thirds of total EU wind capacity is installed in the three pioneering countries Germany, Spain and Denmark.¹⁷ As of today, Denmark satisfies more than 20 per cent and Spain more than 10 per cent of its electricity demand by wind energy. The figures are far less impressive for many other Member States, underlining the stark need for additional efforts towards renewable energy. As a consequence, it is clear that many Member States will probably opt for massive investments in wind energy projects in the years to come.

2.2. *Rising biodiversity concerns*

Despite offering concrete environmental benefits, biodiversity concerns place additional constraints on wind farm projects. Whilst wind farms might serve as refuges, at least if no fisheries or hunting are allowed within the wind farm area or, in the specific case of offshore wind farm constructions, as artificial reefs, their possible negative effects gained increased attention throughout the past decade.¹⁸

In 2006, a German study on the impacts on biodiversity of exploitation of renewable energy sources, drafted by the German Nature Conservation Office, concluded that 'the main potential hazards to birds and bats from wind farms are disturbance leading to displacement or exclusion and collision mortality'.¹⁹ At the same time, it was noted that there was no evidence that birds generally became habituated to wind farms in the years after construction.²⁰ Likewise, other research has revealed that, taking into account the sharp rise in the number of turbines in some regions, even low mortality rates per turbine could give rise to significant effects on some bird species, especially those with low reproductive rates.

In 2009 the EEA, whilst acknowledging that the majority of studies of collisions caused by wind turbines revealed relatively low levels of mortality, held that, so far, there only had been conducted one sufficiently comprehensive study as regards the long term effects of wind farms on bird populations.²¹ The study referred to an analysis of the impact of a Californian wind farm project, which began in the 1970s and encompassed more than 7,300 operational windmills in 1993. Here, an estimated 35,000 – 100,000 birds, 1,500 – 2,300 of them being

¹⁵ European Commission, 'Technical Background to Wind Energy' available at http://ec.europa.eu/research/energy/eu/index_en.cfm?pg=research-wind-background.

¹⁶ J Wilkes and J Moccia, *Wind in Power. 2012 European Statistics* (European Wind Energy Association 2013).

¹⁷ European Commission, 'Technical Background'.

¹⁸ For a recent overview, see, amongst others, Tabassum-Abbasi et al, 'Wind Energy'.

¹⁹ H Hötter, K-M Thomsen and H Jeromin, *Impact on Biodiversity of Exploitation of Renewable Energy Sources: The Example of Birds and Bats. Facts, Gaps in Knowledge, Demands for Further Research and Ornithological Guidelines for the Development of Renewable Energy Exploitation* (Michael-Otto-Institut im NABU 2006) 6.

²⁰ Ibid.

²¹ European Environmental Agency, *Europe's Onshore and Offshore Wind Energy Potential*, 73.

golden eagles, had been killed by collision during the past two decades.²² Population modelling demonstrated that the declining trend of the local golden eagle population could, at least partly, be ascribed to wind farm mortality.²³

In recent years, also European studies pointed to similar outcomes. Norwegian surveys recorded reduced breeding success in White-tailed eagle linked to wind farms,²⁴ whilst Spanish studies showed that Spanish wind farms are causing many casualties amongst the Griffon vulture.²⁵

On a general note, we can conclude that the risk of significant effects is greater on or near areas regularly used by large numbers of feeding or roosting birds, or on migratory flyways or local flight paths.²⁶ Especially, when rare, endangered and slow-to-reproduce birds are involved, the impact of poorly sited and/or designed wind turbines can be decisive particularly in situations where cumulative mortality takes place as a result of multiple installations.²⁷ Ironically, the only certainty upon which all scientists seem to agree as regards the impact on biodiversity of wind farms, is the lack of sufficient ecological surveys and studies.²⁸

3. SITE PROTECTION UNDER ARTICLE 6(3) AND (4) OF THE HABITATS DIRECTIVE: A STRICT APPLICATION OF THE PRECAUTIONARY PRINCIPLE?

Whereas the precautionary principle is often quoted as one of the main grounds for taking climate mitigation actions, it is also increasingly invoked by opponents of renewable energy projects. The strict implementation of the latter principle in the context of the site protection rules attached to the Natura 2000 Network partly helps to explain this alleged paradox. As of 2013, this ecological network approximately covers 18 per cent of the Member States' territory. Hence wind farm developers, in their quest for windy places, are increasingly confronted with the protection rules enshrined in the Habitats Directive. In light of the above featured uncertainty as to the exact effects of wind farms on biodiversity, it becomes apparent that the concrete application of the precautionary principle within the context of aforementioned protection rules might present an important bottleneck for wind farm developments in the vicinity of a Natura 2000 site.

²² CG Thelander and KS Smallwood, 'The Altamont Pass Wind Resources Area's Effects on Birds: A Case History' in M de Lucas, GFE Janss and M Ferrer (eds), *Birds and Wind Farms. Risk Assessment and Mitigation* (Quercus 2007) 25.

²³ G Hunt, 'Golden Eagles in a Perilous Landscape: Predicting the Effects of Mitigation for Wind Turbine Bladestrike Mortality, consultant report to the California Energy Commission (July 2002).

²⁴ EL Dahl et al, 'Reduced Breeding Success of White-Tailed Eagles at Smøla Windfarm, Western Norway, is caused by Mortality and Displacement' (2012) 145 *Biological Conservation* 79.

²⁵ M de Lucas et al, 'Griffon Vulture Mortality at Wind Farms in Southern Spain, Distribution of Fatalities and Active Mitigation Measures' (2012) 147 *Biological Conservation* 184.

²⁶ See, in general, Tabassum-Abbasi et al, 'Wind Energy', 277.

²⁷ Ibid.

²⁸ Ibid, but also European Environmental Agency, *Europe's Onshore and Offshore Wind Energy Potential*, 73.

3.1. *The precautionary principle as cornerstone of international and EU environmental law*

In order to grasp the essence of the current debate, it is appropriate to step back and succinctly address the background and origins of the precautionary principle. Since the beginning of the nineties, the precautionary principle, arguably one of the most renowned environmental principles, has found its way through numerous international agreements and conventions, such as the 1992 Framework Convention on Climate Change.²⁹ At the European level, it was first inserted into the European treaties in 1992 at Maastricht.³⁰ Currently, the precautionary principle is one of the most debated concepts of current environmental law, which is further underscored by the many definitions it has.³¹ Generally, it is held that the precautionary principle is comprised of three common elements, being (1) a threat of harm, (2) uncertainty, and (3) action.³² Authors, like *Stewart*,³³ make a difference between ‘weak’ formulations of the precautionary principle, according to which activities should be limited below a margin of safety, and ‘strong’ formulations, according to which an uncertain potential for significant harm should be prohibited unless the proponent of the activity shows that it presents no appreciable risk of harm. The latter is often qualified as the ‘prohibitive’ version of the precautionary principle and criticized for creating ‘paralysis by precaution’.³⁴ In that regard, it is interesting to note that the European Commission states in its 2000 Communication that ‘where there is scientific uncertainty’ Member States should implement evaluation procedures and take appropriate preventive action in order to avoid damage to the environment.³⁵ Pertaining to the uncertainty-requirement, it is generally held that, while not a single category of uncertainty seems to fall outside of the scope of the precautionary principle, at least reasonable grounds for concerns need to be present in order to apply the precautionary principle.³⁶ At the same time, it should also be stressed that mere speculation is not a realistic and workable option and that risk reduction measures do not have to aim at zero risk.³⁷

3.2. *Article 6(3) and 6(4) of the Habitats Directive: in dubio pro natura!*

Let us now turn to the implementation of the precautionary principle in the context of the Natura 2000 Network. In general, Article 6 of the Habitats Directive is seen as the most semi-

²⁹ Framework Convention on Climate Change (9 May 1992) 31 ILM 849 (1992).

³⁰ V Heyvaert, ‘Facing the Consequences of the Precautionary Principle in European Community Law’ (2006)

31 *European Law Review* 185.

³¹ See more extensively: A Trouwborst, *Precautionary Rights and Duties of States* (Brill 2006) 21–35.

³² *Ibid* 30.

³³ RB Stewart, ‘Environmental Regulatory Decision Making under Uncertainty’ (2002) 20 *Research in Law and Economics* 71, 76.

³⁴ R Cooney, ‘A Long and Winding Road? Precaution from Principle to Practice in Biodiversity Conservation’ in E Fisher, J Jones and R von Schomberg (eds), *Implementing the Precautionary Principle: Perspectives and Prospects* (Edward Elgar 2006) 238.

³⁵ European Commission, ‘Communication from the Commission on the precautionary principle’ COM(2000) 1 final.

³⁶ Trouwborst, *Precautionary Rights*, 115.

³⁷ European Commission, ‘Communication on the precautionary principle’ COM(2000) 1 final, 9 and 18.

nal provision as to determining the relationship between nature conservation and land use.³⁸ By setting out strict substantive and procedural requirements to be followed in respect of a plan or project which is not directly connected with or necessary to the management of a Natura 2000 site but which is likely to have a significant effect thereon, Article 6(3) and (4) seeks to pre-empt damage being done to the site or to minimise that damage. This begs the question to what extent this statutory framework minimizes an insurmountable burden for the construction of wind farms. Is the lack of scientific consensus on the collision risks that go along with wind farms sufficient to reject a permit application? Does the precautionary principle only come into play when the threatened harm is to be considered significant, excluding minor or trivial risks? And, ultimately, is there some margin for the competent authorities to balance environmental, social and economic interests, under the general umbrella of the proportionality principle?

3.2.1. No general ban but strict assessment rules!

Contrary to popular belief, Article 6(3) of the Habitats Directive does not put a general ban on the construction of wind farms within or in the vicinity of a Natura 2000 site. It merely lays down a specific assessment-procedure that needs to be observed by authorities when, amongst others, issuing planning permits to projects and plans. Such was also the view of the Court in its first-ever decision in a legal challenge concerning the articulation between wind farm development and Natura 2000. In *Azienda Agro-Zootenica Franchini Sarl* the Court held that Italian legislation which outright prohibits the construction of new wind turbines not intended for self-consumption in Natura 2000 sites, is more stringent than the protection rules established by the Birds and Habitats Directives.³⁹ Thus, it cannot be submitted from beforehand that every single wind farm that is sited in (the vicinity of) a Natura 2000 site will face an outright refusal. In fact, this will only be the case whenever an individual assessment in accordance with Article 6(3) of the Habitats Directive, concludes that the given wind turbines are liable to put into jeopardy the integrity of a Natura 2000 site. This raises the question as to what activities can be deemed prone of ‘adversely affecting the integrity of a site’, as meant by Article 6(3).

In order to understand the exact scope of the assessment rules laid down by Article 6(3), we first need to turn to the landmark ruling of the Court in *Waddenzee*.⁴⁰ In this landmark ruling, the Court clearly tightened down the margin of discretion for the competent authorities when issuing permits for activities which might entail potential harmful effects for Natura 2000 sites. As to the so-called ‘screening-stage’, the Court held that the requirement for an appropriate assessment of the implications of a plan or project is conditional on it being likely to

³⁸ European Commission, *Managing Natura 2000 Sites. The provisions of Art 6 of the ‘Habitats’ Directive 92/43/ECC* (Office for Official Publications of the European Communities 2000) 8.

³⁹ Case C-2/10 *Azienda Agro-Zootecnica Franchini Sarl v Regione Puglia* [2011] ECR I-6561, para 46.

⁴⁰ Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee en Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-7405.

have a significant effect on the site.⁴¹ The Court concluded that a project or plan needs to be submitted to an appropriate assessment if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other projects or plans.⁴² By reaffirming the precautionary approach throughout the screening process, the Court underscored the need for a precise and meticulous assessment of the potential effects of plans and projects.

Arguably, the Court's ruling in *Waddenzee* is most renowned for underscoring the application of the precautionary principle in the decision-making stage under Article 6(3) of the Habitats Directive. In this respect, the Court reasserted the seminal Opinion of Advocate General Kokott⁴³ by firmly holding that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle. Hence competent national authorities are only permitted to allow projects or plans if they have made certain, in light of the appropriate assessment and the applicable conservation objectives, that they will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.⁴⁴ Thus, it becomes clear that the Court, at first glance, has opted for a rather rigid interpretation of the precautionary principle, which was subsequently reasserted in its more recent case-law.⁴⁵ By placing the burden of proof on the proponent of the potentially harmful activity, it opted for the 'prohibitive' formulation of the precautionary principle in the context of Natura 2000. In the end, it will be for the proponent of an activity to put forward the necessary conclusive evidence as regards the absence of potential significant effects in order to enable the permitting authority to ascertain that the plan or project would not give rise to significant effects on a Natura 2000 site.

In its seminal ruling in *Sweetman*, the Court further clarified that the integrity of a site is adversely affected if the project is liable to prevent 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 the site.⁴⁶ If after an appropriate assessment the authority concludes that the plan or project could lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type, the view should be taken that such a plan or project will adversely affect the integrity of that site.⁴⁷ In lay man's terms: the simple fact that, for instance, a wind farm is only liable to produce negative effects in one specific part of a Natura 2000 site, will not automatically entail that it is not prone to affect its integrity.

⁴¹ Ibid para 40.

⁴² Ibid para 44.

⁴³ Case C-127/02 *Waddenzee* [2004] ECR I-7405, Opinion of Advocate General Kokott.

⁴⁴ Case C-127/02 *Waddenzee* [2004] ECR I-7405, para 59.

⁴⁵ See, for instance, Case C-239/04 *European Commission v Portugal* [2006] ECR I-10183, paras 19 and 20; Case C-418/04 *European Commission v Ireland* [2007] ECR I-10947, paras 226, 228 and 258.

⁴⁶ Case C-258/11 *Peter Sweetman and others v An Bord Pleanála* (ECJ, 11 April 2013). See more extensively H Schoukens, 'The Ruling of the Court of Justice in *Sweetman*: How to Avoid a Death by a Thousand Cuts?' (2014) *elni Review* 2.

⁴⁷ Case C-258/11 *Sweetman* (ECJ, 11 April 2013), para 46.

3.2.2. Article 6(4) derogation clause: a workable option?

So far, it has become apparent that Article 6(3) of the Habitats Directive, if applied in a proper manner, will urge the proponents of wind farms to substantiate that there exists no reasonable risk of significant effects on Natura 2000 sites. However, Article 6(4) of the Habitats Directive still leaves the competent authorities the possibility to authorize such a project which has been subject to a ‘negative appropriate assessment for the implications of the site’, albeit under very strict conditions. Under Article 6(4) of the Habitats Directive, plans or projects may be authorized, by way of derogation, in spite of a negative assessment of the implications for the site, where there are imperative reasons of overriding public interest (IROPI), there are no alternative solutions and all compensatory measures necessary to ensure the overall coherence of Natura 2000 have been taken. A closer analysis of the 2007/2012 Guidance document produced by the European Commission as to Article 6(4)⁴⁸ seems to indicate that the derogation conditions need to be interpreted in a restrictive manner, which also appears to be reaffirmed in the Court’s more recent jurisprudence.⁴⁹

The first stage under Article 6(4) requires the competent authorities to examine the possibility of resorting to alternative solutions which better respect the integrity of the site. Admittedly, the search for alternatives can be quite broad and might involve, in the case of wind farm development, alternative locations for the wind farm or an alteration of the size of the farm, but also alternative ways of producing energy whether renewable or not. Furthermore, the zero option has to be considered as well, as recently highlighted by the European Commission in its specific Guidance document on wind energy developments and Natura 2000.⁵⁰ Additionally, the European Commission stresses that during this stage other assessment criteria, such as economic criteria, cannot overrule ecological criteria. The priority that needs to be given to ecological criteria might urge wind farm developers, who aim for the construction of wind farms in the vicinity of a Natura 2000 site, to look for other, more appropriate locations.

Once it is satisfied that no alternative solutions exist, the authority should consider whether there are IROPI which may justify the wind farm development. As highlighted by the European Commission in its Guidance documents, not every kind of public interest of a social or economic nature will be sufficient.⁵¹ In *Solvay* the Court held that an interest capable of justifying the implementation of such a plan or project, must be both ‘public’ and ‘overriding’, which means that it must be of such an importance that it can be weighed up against the Habitats Directive objective of the conservation of natural habitats and wild fauna and flora. In principle, works intended for the location or expansion of an undertaking satisfy those conditions only in exceptional circumstances.⁵² In the aforementioned Guidance document on wind

⁴⁸ European Commission, ‘Guidance Document on Article 6(4) of the “Habitats Directive” 92/43/EEC. Clarification of the Concepts of: Alternative Solutions, Imperative Reasons of Overriding Public Interest, Compensatory measures, Overall Coherence, Opinion of the Commission, 2007/2012’ available at http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/new_guidance_art6_4_en.pdf.

⁴⁹ See for instance Case C-239/04 *European Commission v Portugal* [2006] ECR I-10183.

⁵⁰ European Commission, *EU Guidance on Wind Energy Development in Accordance with the EU Nature Legislation* (Publications Office of the European Union 2011) 85–86.

⁵¹ *Ibid* 6 and 33.

⁵² Case C-182/10 *Marie-Noëlle Solvay and others v Région Wallonne* (16 February 2012), paras 75 and 76.

farm developments and Natura 2000, the European Commission underlined that ‘it is also reasonable to assume that the public interest can only be overriding if it is a long-term interest; short term economic interests or other interests which would only yield short-term benefits for the society would not appear to be sufficient to outweigh the long-term conservation interests protected by the Habitats Directive. Overriding interests, as long-term, fundamental social interests, may be properly identified beforehand by published policies, and land-use and other plans. Besides, in case the Natura 2000 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 European Commission, to other IROPI.⁵³

Although the European Commission did not go that far in quoting ‘wind farm developments’ as a prime example of an IROPI, it is nevertheless clear that the positive climate mitigation benefits that are attached to wind farms, might help it to qualify as such. This will be especially the case for large scale and, possibly, trans-boundary energy infrastructure projects. Interestingly, in the recently adopted trans-European energy infrastructure Regulation (TEN-E Regulation No 347/2013⁵⁴) it was stressed that so-called energy infrastructure projects of common interest⁵⁵ should be considered by competent authorities as being in the public interest. Pursuant to Article 7(8) of the latter Regulation, projects of common interest shall be considered as being of public interest from an energy policy perspective, and may be considered as being of overriding public interest, provided that all the conditions set out in the Habitats Directive are fulfilled. Also at the national level, increasingly efforts are put into stressing out that development projects that stimulate wind energy qualify as an IROPI.⁵⁶

That said, before being able to deviate from Article 6(3) of the Habitats Directive, wind project developers are also required to take appropriate compensatory measures to ensure that the overall coherence of the Natura 2000 Network is protected. The European Commission pointed out that compensatory measures are independent of the plan or project (as opposed to mitigation measures), should go beyond the normal/standard measures required for protection

⁵³ European Commission, *EU Guidance on Wind Energy Development*, 89. See more extensively in this regard: L Krämer, ‘The European Commission’s Opinions under Article 6(4) of the Habitats Directive’ (2009) 21 *Journal of Environmental Law* 59. See also, extensively, D McGillivray, ‘Compensating Biodiversity Loss: The EU Commission’s Approach to Compensation under Art 6 of the Habitats Directive’ (2012) 24 *Journal of Environmental Law* 417.

⁵⁴ Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009’ [2013] OJ L115/39 (TEN-E Regulation).

⁵⁵ According to Art 2(4) of the TEN-E Regulation ‘project of common interest’ should be understood as a project necessary to implement the energy infrastructure priority corridors and areas set out in Annex I and which is part of the Union list of projects of common interest referred to in Art 3 of the latter Regulation.

⁵⁶ See, for instance, the pending Dutch legislative proposal on Wind energy development at sea (*Wet windenergie op zee*). In the preparatory works it is underscored that wind energy project should, if necessary, be considered as an IROPI. More information on the pending legislative proposal, which project is subject to consultation, is available at <http://www.internetconsultatie.nl/wetwindenergieopzee>.

and management of Natura 2000 sites, and can be considered only after having ascertained a negative impact on the integrity of a Natura 2000 site.⁵⁷

3.3. *A critical interim assessment: a bridge too far or merely a case of perception?*

From the above presented research, it can be inferred that Article 6(3) and (4) of the Habitats Directive, whilst not laying down a general prohibition on the construction of wind farms within or in the vicinity of Natura 2000, still require additional scrutiny when considering application for planning permits in this respect. The question now arises to what extent this should be seen as an insurmountable and unjustifiable obstacle for future wind farm developments.

3.3.1. *No green pass for wind farms (and rightly so?)*

Despite the overall benefits for all species that would be the result of an increase in wind energy, the case-law of the Court displays a great deal of reluctance in taking into account the general advantages that can be attached to wind farm developments. Accordingly, Member States are barred from exempting wind farm developments from the individual assessment procedure included in Article 6(3) of the Habitats Directive.⁵⁸ At the same time, referral to the climate mitigation benefits created by an increase of wind energy, seems, as such, incapable of shifting the balance in an appropriate assessment in favour of a wind farm. In the end, such an approach would require a quantification of the positive effects that the given wind turbines might create for each specific species or habitat.⁵⁹

At first sight, one might submit that the strict stance of the Habitats Directive in this regard provides a striking example of its inability to adapt to modern day conservation strategies in light of the growing concerns on climate change. However, that criticism needs to be nuanced. In our view, a general exemption for wind farm developments would, in the first place, give rise to a great deal of practical difficulties. It can hardly be substantiated in terms of measurable benefits. For instance, how to quantify the concrete trade-off that is created by wind farms in the long run for each specific bird species that would be present in a Special Protection Area (SPA)? How to trade off the general benefits wind farms might produce for the local harm it can cause to bird populations?

⁵⁷ European Commission, *EU Guidance on Wind Energy Development*, 15.

⁵⁸ See, to that effect: Case C-241/08 *Commission v France* [2010] ECR I-1697, paras 51–56.

⁵⁹ See, by analogy, as regards the protection regime included in Section 7 and 9 of the US Endangered Species Act: Ruhl, ‘Harmonizing Commercial Wind Power’, 1791.

Moreover, the deplorable state of the EU's biodiversity (only a small margin of the EU protected habitats and species are, at present, at a favourable conservation status⁶⁰) does not justify a reform of the Habitats Directive that would give wind farm developers a free pass to construct wind farms in the vicinity of areas which, for instance, host vulnerable bird populations. Or, in other words, the general benefits that might go along with wind energy are, as such, incapable of effectively underpinning the need for a relaxation of the site protection rules enshrined in the Habitats Directive. A similar line of thinking was also displayed by the Court in its afore-mentioned decision in *Azienda Agro-Zootecnica Franchini Sarl*. Here, the Court held that, even in light of the EU Directive on Renewable Energy, which urges Member States to streamline and reduce administrative barriers applicable to plants for the production of renewable energy,⁶¹ Article 6(3) of the Habitats Directive nor more stringent national provisions, should not be seen as a major and insurmountable obstacle course for the pursuit of the EU energy policy's targets.⁶² Also the European Commission, in its turn, does not seem to believe that there is an apparent antagonism between the quest for renewable energy and the EU biodiversity goals as exemplified in its aforementioned 2010 Guidance document on wind energy developments and Natura 2000.

3.3.2. *The insurmountable burden of proof (a matter of belief or reality?)*

Still, it cannot be denied that Article 6(3) of the Habitats Directive appears to be capable of giving rise to substantial additional delays and barriers in permitting procedures for wind farms. If correctly applied, the latter provision leaves little wiggle room for potentially harmful projects. Taking into account the existing lacunae in relation to the effects of wind turbines on endangered species, it will indeed, in some instances, be cumbersome for wind farm developers to exclude the likelihood of significant effects. Also in recent literature it has been highlighted that the strict application of Article 6(3) and (4) may lead to additional delays, legal issues and difficulties when applied strictly in the context of massive renewable energy projects, such as dam building and the construction of tidal barrages.⁶³ However, arguably more fundamental are the allegations that a strict interpretation of the precautionary principle in the context of site protection seems to negate that ignorance and system unpredictability are inherent to the ecological and social system and cannot be eliminated through science.⁶⁴

Yet, whilst the above featured comments might be well-founded in general, they need to be somehow nuanced in light of the following considerations. First and foremost, it must be re-

⁶⁰ European Commission, 'Report from the Commission to the Council and the European Parliament Composite. Report on the Conservation Status of Habitat Types and Species as required under Article 17 of the Habitats Directive' COM(2009) 358 final.

⁶¹ See, for instance, Art 13(1) of the RES Directive which, amongst others, urges Member States to streamline administrative procedures in order to make them less burdensome for renewable energy projects.

⁶² Case C-2/10 *Azienda Agro-Zootecnica Franchini Sarl* [2011] ECR I-6561, paras 63 and 75.

⁶³ Jackson, 'Renewable Energy vs Biodiversity', 1198. This author treats the examples of the construction of the Sabor Dam (Portugal) and the Severn barrage (UK).

⁶⁴ PFM Opdam, MEA Broekmeyer and FH Kistenkas, 'Identifying Uncertainties in Judging the Significance of Human Impacts on Natura 2000 Sites' (2009) 12 *Environmental Science & Policy* 912, 917.

called that the Habitats Directive, as such, grants some, albeit limited, room for leverage in the context of wind farm development. The application of the precautionary principle does not require from the competent authority to refuse a permit whenever an assessment has indicated that only minor effects might be linked to a wind farm. For instance, in general, a wind farm project will not likely produce significant effects if the nearby Natura 2000 site has not been designated for birds, nor for bats. Ultimately, reviewing whether a wind farm may significantly hamper the integrity of a Natura 2000 site remains, to a large extent, an ad hoc-matter. Hence it remains hard to draw general conclusions in this regard. Moreover, whilst it is often submitted that the strict application of the precautionary principle may lead to a complete paralysis, the practice on the ground does not seem to confirm this conclusion. The reliance on these ‘hard cases’ in the media and legal literature often blurs the fact that, besides cases of non-compliance, considerable numbers of spatial projects, including wind farms, are smoothly aligned with the rules on site protection for Natura 2000 sites. A recent analysis of the application of the Habitats Directive in the UK has revealed that almost all port developments have passed the tests of the Habitats Directive. And, even for the projects that did not proceed, mostly economic and technical complications are to blame.⁶⁵ In Flanders, the highly contested construction of a new tidal dock in the Port of Antwerp could, despite initial concerns on its compatibility with the Habitats Directive and a myriad of legal proceedings, still go along, albeit with some considerable delay.⁶⁶ Even in the Netherlands, a country renowned for its relatively high number of law suits by which the Habitats Directive was enforced before courts, only a few plans and projects have been cancelled due to biodiversity legislation. However, still the prevailing idea among many Dutch actors is that European directives frustrate almost every development in the Netherlands.⁶⁷

That said, when assessing the alleged rigidity of the assessment rules included in Article 6(3) and (4), due regard should be given to the exact causes and nature of the resistance that is caused by the application of EU biodiversity law in the context of spatial projects, such as wind farms. Evidently, some of the troubles that were encountered can be linked to the poor compliance with the procedural requirements spelled out by Article 6(3) of the Habitats Directive.⁶⁸ Only just recently, a research revealed that unsatisfactory compliance with the assessment rules throughout the decision-making process, limited participation and fait accompli-scenarios seriously jeopardize the effectiveness of the Habitats Directive on the

⁶⁵ RKA Morris, ‘The Application of the Habitats Directive in the UK: Compliance or Gold Plating?’ (2011) 28 *Land Use Policy* 361.

⁶⁶ See more on this: H Schoukens, P De Smedt and A Cliquet, ‘The Implementation of the Habitats Directive in Belgium (Flanders)’ (2007) 4 *Journal for European Environmental and Planning Law* 127, 134.

⁶⁷ See more extensively: R Beunen and M Duineveld, ‘Divergence and Convergence in Policy Meanings of European Environmental Policies: The Case of the Birds and Habitats Directive’ (2010) 15 *International Planning Studies* 321.

⁶⁸ See, for instance: B Laffan and J O’Mahony, ‘“Bringing Politics Back In”. Domestic Conflict and the Negotiated Implementation of EU Nature Conservation Law in Ireland’ (2008) 10 *Environmental Policy Planning* 175; F Ferranti, R Beunen and M Speranza, ‘Natura 2000 Network: A Comparison of the Italian and Dutch Implementation Experiences’ (2010) 12 *Environmental Policy Planning* 293; G Kütting, ‘Nature Conservation Law in Context: The Limited Influence of European Union and Greek Designations on the Future of Cavo Sidero, Crete’ (2012) 15 *Journal International Wildlife Law & Policy* 60.

CHAPTER 5 – BALANCING WIND ENERGY AND NATURE PROTECTION: FROM POLICY CONFLICTS TOWARDS GENUINE SUSTAINABLE DEVELOPMENT?

ground in many Member States.⁶⁹ However, at the end of the day, project developers are, just as most humans, not eager to ‘take no for an answer’, even in cases where there are valid grounds to let biodiversity concerns prevail over economic concerns. Not surprisingly, project developers tried to gain political awareness for ‘their problem’ and, often in the absence of clear guidance on the interpretation of some of the key notions of the Habitats Directive, urged for relaxation of biodiversity law.⁷⁰

As a matter of fact, also in relation to wind farm development, cases quoted as prime examples of the alleged rigidity of biodiversity law, often merely point out the delays that might be incurred whenever wind farm developers refuse to abide by the basic rules set out by biodiversity law. A succinct tour through the most notable ‘nature protection vs. wind farms’ jurisprudence seems to reassert this view. For instance, in the first federal lawsuit challenging an industrial wind energy project on environmental ground in the U.S., the competent court went to hold that, whilst wind development exemplifies a conflict between two environmentally minded policies, such a conflict would not have arisen in the case at hand, if the wind developer had utilized existing procedures under the U.S. biodiversity law.⁷¹ Likewise, in a recent ruling, the Scottish Court of Appeal noted that Scottish Ministers were entitled to refuse a planning permission for a 14 wind turbine development *within* a SPA, since there was a risk of adverse effects on the site designated for golden eagles. In that respect, the court based its ruling, to a large extent, on the lack of an appropriate assessment of the potential collision and disturbance effects of the wind farm on the conservation objectives for the eagle population.⁷²

Lastly, it is important to note that the precautionary approach of the Court in the context of Article 6(3) does not amount to excluding all potential risks. Advocate General Kokott herself noted in her seminal Opinion in *Waddenzee* that the necessary certitude cannot be construed as meaning absolute certainty since that is almost impossible to attain.⁷³ Moreover, there is an increasing tendency in national courts to apply the precautionary principle in a reasonable manner. Whilst, for example, in the aforementioned case the Scottish Court of Appeal found that a small (1 per cent) collision risk and a risk of the eagle displacement could reasonably amount to a risk of an ‘adverse effect on the site’s integrity’, such cases cannot be regarded as the ultimate proof of the inappropriateness of the Habitats Directive to deal with renewable energy projects. Indeed, there is considerable case-law which exhibits a more reasonable approach to the precautionary principle. For instance, in 2008 a Scottish court dismissed a claim against a wind farm located on Skye, nearby a SPA harbouring a breeding population of golden eagles. Despite assuming that the evidence presented revealed considerable uncertainty as

⁶⁹ See to that effect N de Sadeleer, C-H Born and M Prieur, ‘National Legislation and Practices Regarding the Implementation of Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, in particular Art 6’ (European Parliament 2009) available at <http://www.europarl.europa.eu/document/activities/cont/200910/20091013ATT62399/20091013ATT62399EN.pdf>.

⁷⁰ Beunen and M Duineveld, ‘Divergence and Convergence’.

⁷¹ *Animal Welfare Inst v Beech Rigde Energy LLC* 675 F Supp 2d 540, 581 (D.Md 2009).

⁷² *Bagmoor Wind Ltd v Scottish Ministers* [2012] CSIH 93.

⁷³ Case C-127/02 *Waddenzee* [2004] ECR I-7405, Opinion of Advocate General Kokott, para 107.

to the future trends of the population of golden eagles, the court finally concluded that the contested permit had sufficiently established that there existed ‘no reasonable scientific doubt’ as regards the impact of the wind farm.⁷⁴ In a 2005 Belgian case relating to the construction of a massive offshore wind farm, the Council of State was of the opinion that the alleged gaps in knowledge as to the adverse effects on the bird populations present in the area were not sufficient to quash the permit.⁷⁵ Although there will be certainly examples that point to more rigidity, especially in the hypothesis where the affected protected nature finds itself already at an unfavourable conservation status, it cannot simply be maintained that the precautionary principle is, in itself, blocking the construction of the majority of wind farms throughout the EU.

3.3.3. The exception which appears to be no exception at all (Article 6(4) derogation as a scapegoat?)

Ultimately, the perceived rigidity of Article 6(3) of the Habitats Directive would matter little if, for wind farm developments, also application could be made of the derogation regime included in Article 6(4). Originally, the inclusion of Article 6(4) was the immediate reaction of the Member States to the decision of the Court in *Leybucht*, where it had held that, under Article 4 of the Birds Directive, economic considerations could not be regarded as exceptional circumstances justifying the reduction in size of a designated SPA.⁷⁶ At the time of the final negotiations, the inclusion of Article 6(4) was seen by many Member States as a safeguard for avoiding the ‘draconian consequences’ of a strict protection scheme.⁷⁷ In fact, Article 6(4), which applies both to SACs and SPAs, overrules the earlier case-law of the Court on site protection.⁷⁸

Interestingly, Article 6(4) is often invoked to justify the rigorous approach as regards the protection regime enshrined in Article 6(3). For example, in its Opinion in *Waddenzee*, Advocate General Kokott explicitly underlined that the disproportionate results that might be caused by the application of the precautionary principle are mitigated in connection with the derogating authorisation provided for in Article 6(4).⁷⁹ In a similar vein, Advocate General Sharpston held in *Sweetman* that ‘whilst the requirements laid down in Article 6(4) are intentionally rigorous, it is important to point out that they are not insuperable obstacles to authorisation. The Commission indicated at the hearing that, of the 15 to 20 requests so far made to it for deliv-

⁷⁴ See *Skye Windfarm Action Group Ltd v Highland Council* [2008] CSOH 19. In legal literature the latter decision is criticized for applying a too lax standard of judicial review, see: C Edwards, ‘Judicial Review and the Precautionary Principle’ in G Jones (ed), *The Habitats Directive. A Developer’s Obstacle Course* (Hart 2012) 226.

⁷⁵ Belgian Council of State, 30 June 2005 (Application No 147.047). See more extensively: Schoukens, Cliquet and Maes, ‘Wind Farm Development in the Belgian Part of the North Sea’, 307.

⁷⁶ Case C-57/89 *European Commission v Germany* [1991] ECR I-883, para 20. See more extensively: Krämer, ‘The European Commission’s Opinions’.

⁷⁷ See more extensively: D Baldock, ‘The Status of Special Protection Areas for the Protection of Wild Birds’ (1993) 4 *Journal of Environmental Law* 139.

⁷⁸ Jackson, ‘Renewable Energy vs Biodiversity’, 1197.

⁷⁹ Case C-127/02 *Waddenzee* [2004] ECR I-7405, Opinion of Advocate General Kokott, para 106.

ery of an opinion under that provision, only one has received a negative response'.⁸⁰ In recent legal literature, in which the opinions, issued by the European Commission under the second subparagraph of Article 6(4) of the Habitats Directive were examined, it was even highlighted that economic factors are too often superseding a strict assessment of the intended compensatory measures.⁸¹

In spite of the clear *rationale* that was underpinning the inclusion of Article 6(4) and the lenient (some might even call it 'lax') application of the latter provision in the opinions issued by the European Commission, it is only rarely being invoked by Member States. In our view, this reluctance at the Member States' level is in a certain way understandable, especially since Article 6(4) represents a last resort-option for projects or plans, that still must be carried out for reasons of overriding public interest. Considering the restrictive case-law by the Court and the strict Guidance documents issued by the European Commission in this regard, the scarce reliance on Article 6(4) could hardly be seen as a surprise. By way of example, referral could be made to a 2009 ruling by the Dutch Council of State, where a permit was quashed that allowed the construction of 17 wind turbines in the seaport of Eemshaven.⁸² Whereas, according to the Council of State, the production of sustainable energy in general can be seen as a reason of overriding public interest, this also needed to be substantiated for the project at hand. Ultimately, the Council of State was not convinced that a reason of overriding public interest was served by the construction of these particular wind turbines. Seeing that, in general, private projects do not qualify as 'IROPI', private wind farm developers will need to substantiate why they present an overriding public interest. In some scenarios, they will probably fail to meet that criterion. Additionally, it is being pointed out that, especially in the context of large scale renewable projects, such as dams and barrages, the requirement of 'like for like' compensation appears challenging.⁸³ In general, the implementation of compensatory measures is often compounded or constrained by the lack of suitable sites which can be purchased in a short term in order to offset the damage caused by spatial projects.

However, despite all the possible hurdles that the derogation clause might pose, it is our belief that, especially for large scale public wind farms, more application of it should be made. As illustrated above, also the European legislator seems to adopt a similar stance in its recent TEN-E Regulation. At first glance, this might seem contradictory, since the application of a derogation clause will also be prone to giving rise to pitfalls and bottlenecks. However, in what follows, it will be established that such outcome might, at the end of the day, granting more legitimacy to public wind farm developments. First and foremost, issuing planning permits for large scale public wind farms through Article 6(4) still remains a workable option considering the obvious climate benefits that go along with it and which could qualify as 'IROPI'. To some extent, this might also be the case for large scale private wind farms.

⁸⁰ Case C-258/11 *Sweetman* (ECJ, 11 April 2013), Opinion of Advocate General Sharpston, para 65.

⁸¹ N de Sadeleer, 'Habitats Conservation in EC Law. From Nature Sanctuaries to Ecological Networks' (2005) 5 *Yearbook of European Environmental Law* 215; McGillivray, 'Compensating Biodiversity Loss', 449–50.

⁸² Dutch Council of State, 25 February 2009 (Application No 200709030/1).

⁸³ Jackson, 'Renewable Energy vs Biodiversity', 1204.

What is more, the very fact that the competent national authorities are required to consider other alternatives should be welcomed as an additional moment of deliberation before giving up ecological valuable tracts of lands to future massive scale wind farms. In that regard, we support the suggestions voiced by other authors, such as Jackson, to even broaden the scope of the alternative examination, to also include investing in end-use generation, energy conservation initiatives and overall reduction in national consumption levels.⁸⁴ More scrutiny on this level will enhance the sustainability character of large scale wind farm developments, which, in turn, will downplay possible legitimacy issues. Moreover, the fact that compensation is obligatory in such scenarios, will also enhance the sustainability claims attached to wind farm developments, since its possible negative outcome for local biodiversity is offset through restoration efforts that help to ensure the overall coherence of the Natura 2000 Network. Thus, the observance of the strict criteria spelled out by Article 6(4) of the Habitats Directive, might in the end be an appropriate way to reinforce the environmental claims attached to green energy projects.

4. TOWARDS A MORE PROGRESSIVE READING OF ARTICLE 6 OF THE HABITATS DIRECTIVE: THE ROAD TO NOWHERE OR A VIABLE ALTERNATIVE FOR WIND FARM DEVELOPMENTS?

In the preceding sections it has been argued that, given the worrisome state of the EU's protected habitats and sites, an outright relaxation of the rules of site protection would most certainly be a disproportionate answer to the recent demands for deregulation. Still, as noted, the restrictive interpretation of the precautionary principle might pose additional constraints, especially for private wind farm developments, which will probably not always meet the requirements of Article 6(4) of the Habitats Directive. Thus in recent years attention has shifted towards the inclusion of mitigation measures into the plan or project, to eliminate the potential negative effects on the integrity of a Natura 2000 site, or, at least, to reduce them to a level where they will no longer affect the integrity of the site. In its 2011 Guidance document on wind energy developments and Natura 2000 the European Commission already provided us with some examples of mitigation measures in the context of wind farms, such as an alteration of the design of a wind turbine or the concrete siting of the turbines.⁸⁵ In addition, the Commission pointed to the (obvious) perks of strategic planning in the context of wind farm development. Such strategic planning should not only help to identify the most appropriate location and scale for wind farm development, but also helps to avoid and reduce the impacts on the environment at a very early stage in the planning process.⁸⁶

Recently, a more progressive reading of mitigation has emerged in the context of wind farm development, which should allow to better align wind farm development with the high precautionary standard, laid down by Article 6(3) of the Habitats Directive. This more

⁸⁴ Ibid 1205.

⁸⁵ European Commission, *EU Guidance on Wind Energy Development*, 84–85.

⁸⁶ Ibid 47.

progressive reading of Article 6(3) encompasses the implementation of risk management strategies at permit level and additional enhancement and restoration measures, aimed at strengthening the resilience of the affected nature.⁸⁷ In the below part, it will be put forward that, whilst both approaches might grant permitting instances additional leeway for, amongst others, wind farm developments, it must be safeguarded that such practices do not undermine the mitigation hierarchy, which is underpinning EU biodiversity law.

4.1. Adaptive management at permit-level: a more sensible implementation of the precautionary principle?

In recent literature, it has been argued that ignorance, system unpredictability and ambiguity in the science-policy interface, may cause difficulties in all steps of which the assessment procedure is comprised (setting of the sites objectives and conservation status; predicting the impact; assessing the significance of the effects). If one adds to that the current lack of scientific consensus about the exact impacts of wind farms on biodiversity, which has been succinctly addressed earlier on, one ends up with a very explosive cocktail for decision-making processes. Although, as argued above, the Court does not require a zero risk when applying the precautionary principle in the context of Article 6(3), it does still set a high standard by requiring that the competent authority must have ascertained that no reasonable scientific doubt remains as to the absence of effects on the integrity of a site. Whilst we have put forward that large scale wind farm developments still might avoid a rejection of a permit application through Article 6(4), this way out seems less straightforward for more small-scale private wind farm developments.

So what other options are left? A more appropriate way to overcome the alleged static black-and-white approach to the precautionary principle would consist in accepting that uncertainty is an inherent factor in the assessment process. Henceforth, permitting authorities are urged to focus more on the proper implementation of risk assessment tools and control measures in order to further reduce residual effects linked to the operation of a wind farm.⁸⁸ Such a strategy bears close resemblance to the adaptive management approach, which is generally described as a structured, iterative process of robust decision making in the face of uncertainty, with an aim to reducing uncertainty over time via system monitoring.⁸⁹ It is defined as a flexible decision making process that can be adjusted in the face of uncertainties as outcomes from management actions and other events become better understood.⁹⁰ To that end, careful monitoring of the outcome of these actions and the implementation of strict control measures is deemed necessary, not only to advance scientific understanding, but also to adjust potential

⁸⁷ Opdam, Broekmeyer and Kistenkas, 'Identifying Uncertainties', 919.

⁸⁸ Ibid 920. See also: P Scott, 'Appropriate Assessment: A Paper Tiger' in G Jones (eds), *The Habitats Directive – A Developer's Obstacle Course* (Hart 2012) 112.

⁸⁹ See, amongst others: CS Holling, *Adaptive Environmental Assessment and Management* (John Wiley & Sons 1978).

⁹⁰ See http://www.resalliance.org/index.php/adaptive_management.

harmful operation as part of an iterative learning process.⁹¹ In that sense, it is often tagged as ‘learning while doing’ instead of the common ‘trial and error’-process which is still predominantly used.⁹²

In the context of the Habitats Directive an adaptive licensing approach might entail that, notwithstanding lasting uncertainties, a project or plan could still be able to obtain a permit under Article 6(3) of the Habitats Directive, whenever the permit conditions impose strict monitoring and, added to that, it is made obligatory to stop the operation of the activity whenever significant effects are detected. In its 2011 Guidance document on the implementation of the EU nature legislation in estuaries and coastal zones, the European Commission underlined that ‘adaptive management [...] helps to address situations when, because of science limits or uncertainty about the functioning of complex and dynamic ecosystems, it is not possible for the competent authorities to fully ascertain the absence of adverse effects’.⁹³ It went on stating that ‘an adaptive approach for the implementation of a plan or project or a compensation scheme may be particularly useful to address cases where, due to uncertainty associated with different contributory factors (location, confidence, unexpected delays), it is impossible to define all the effects of the plan or project or of a compensation scheme in sufficient details and if such uncertainty cannot be factored in through increased ratios. In such a situation, a rigorous monitoring scheme and a pre-defined validated package of appropriate corrective measures must be foreseen.’⁹⁴

It is clear that the European Commission has not adopted a clear-cut position on the use of adaptive management measures as a way to scale down the rigid application of the precautionary principle. Still, it seems to be willing to allow some leeway for implementing an adaptive management approach in the context of Article 6(3) of the Habitats Directive. Turning to the recent administrative practice in the Netherlands and Flanders, we may note an increased application of this approach in the context of plans or projects where, in principle, no absolute certainty had been reached as to the absence of significant effects. The legal proceedings surrounding a large scale gas-drilling project in the Waddensea served as an eye-opener. In spite of the fact that no absolute certainty as to the absence of significant effects had been reached during the appropriate assessment, the project still was granted a permit by referral to adaptive management conditions that had to be observed throughout the operation of the project. Interestingly, the Dutch Council of State accepted the legality of the latter approach in its seminal 2007 ruling.⁹⁵ Under the Council’s view, the mere existence of some uncertainty as regards the expected effects of the project, does not necessarily warrant an outright refusal of the permit, especially taken into account the compulsory monitoring and the strict operation conditions that applied in that case. In the permit, it had been provided that,

⁹¹ Taken from the definition of ‘adaptive’ management that is used by the US Department of the Interior (BK Williams, CS Szaro and CD Shapiro, *Adaptive Management: The US Department of the Interior Technical Guide* (Adaptive Management Working Group, US Department of the Interior 2007)).

⁹² H Doremus, ‘Precaution, Science and Learning While Doing in Natural Resource Management’ (2007) 82 *Washington Law Review* 547, 550.

⁹³ European Commission, Guidance Document. The Implementation of the Birds and Habitats Directives in Estuaries and Coastal Zones with particular Attention to Port Development and Dredging’ (2011) 33–34.

⁹⁴ *Ibid.*

⁹⁵ Dutch Council of State, 29 August 2007 (Application No 200606028/1).

whenever soil subsidence or other effects might occur, entailing significant risks to the Natura 2000 site, the gas exploration had to be temporarily halted, or, if deemed necessary, completely stopped. As to Flanders, a 2011 Guidance document on wind farm development and nature protection, promulgated by the Flemish Institute for Forest and Nature Research, promoted the adaptive licensing approach as an effective means to minimize the negative effects that might go along with wind farm developments. Not much later, the principle also emerged in the context of a highly contested permit application for the construction of 3 wind turbines in the Port of Antwerp, which were localized close to a SPA. Reiterating the above presented rationale, the Antwerp Provincial Authority gave green light to the operation of the wind turbines, amongst others, with reference to active monitoring obligations of possible residual negative effects which were included in the permit.⁹⁶

We believe that the latter approach might offer competent authorities more leverage when considering wind farm developments. Seeing that the operation of wind farms can relatively easily be submitted to a monitoring protocol, adaptive licensing may rightly be regarded as a reasonable middle ground between unfettered development and nature protection. Recent Spanish research moreover held that an active monitoring approach, if linked to selective stopping techniques as regards turbines with the highest mortality, can effectively help to mitigate the impacts of wind farms on birds with a minimal effect on energy production.⁹⁷ On the legal side, whilst the Court has not pronounced itself on the legality of an adaptive management approach in light of Article 6(3), the *rationale* underpinning adaptive licensing does not, as such, seem to run counter to the Habitats Directive. Not only did the European Commission herself refer to adaptive management in the context of Article 6(3) of the Habitats Directive in its 2011 Guidance document on the implementation of EU nature legislation in estuaries and coastal zones, it did also point to the obvious link between mitigation and monitoring in its aforementioned 2010 Guidance document on wind energy developments and Natura 2000.⁹⁸ Advocate General Kokott herself seemed to reaffirm the underlying rationale of adaptive management by stating that mitigation measures can also be of relevance in order to avoid an all too harsh application of the precautionary principle.⁹⁹ Precisely where scientific uncertainty remains, it is possible to gain further knowledge of the adverse effects by means of associated scientific observation and implementation of the plan or project accordingly.¹⁰⁰

However, at the same time, a wide-spread use of the adaptive licensing approach might also entail certain significant risks, which, in our view, should lead the competent authorities to a certain reluctance in this regard. The technique should not be used to justify the siting of massive wind farms next to protected areas that support population of species that are highly sensitive for fragmentation and disturbance. Submitting that adaptive licensing is no ‘one-

⁹⁶ Provincial Authority of Antwerp, Decision of 13 January 2010. However, since an administrative appeal has been launched against the latter permit, it still remains unsettled whether the Flemish government is also willing to adopt the latter approach on a more general scale.

⁹⁷ de Lucas et al, ‘Griffon Vulture Mortality’, 188.

⁹⁸ European Commission, *EU Guidance on Wind Energy Development*, 83.

⁹⁹ Case C-127/02 *Waddenzee* [2004] ECR I-7405, Opinion of Advocate General Kokott, para 106.

¹⁰⁰ *Ibid* para 108.

size-fits-all' solution, in the end, merely amounts to stating the obvious. Indeed, in some cases, it will be tempting for the competent authorities to pass on the exact determination of effects to a later stage, whilst, in the meantime, allowing the construction of wind energy projects on poorly sited locations. In order to avoid such fait accompli-scenarios, the approach should, in our opinion, stay confined to situations where residual non-permanent effects of a project can clearly be singled out, the monitoring is able of tackling them and there is no other option to exclude such risks.¹⁰¹ In other words, there is no point in using adaptive management as a solution for the construction of wind farms within highly vulnerable SPAs. Added to that, it must be safeguarded that the operation conditions are drafted in a sufficient precise and strict way, in order to allow a strict surveillance by the competent national authorities.

The latter also seems to be the viewpoint of the European Commission which, in its 2011 Guidance document on the implementation of the EU nature legislation in estuaries and coastal zones, pointed out that the monitoring scheme and the package of corrective measures, 'must allow to adjust mitigation and/or compensatory measures to the reality of the impact and by that way, make sure that the initially unforeseen adverse effects are being neutralized'.¹⁰² Accordingly, a full disclosure of the results of the monitoring results towards the wider public and environmental NGOs should be ensured. Ultimately, what our analysis suggests is that adaptive management will only be able to achieve its environmental objectives, which include the reduction of the biodiversity effects linked to wind farms, if implemented and observed in a proper and sufficiently strict way. To that end, it must be ensured that adaptive management measures are not to be misused as a cover-up for granting permits for unsustainable renewable energy projects that merely focus on short term gains. If that were to be the case and the matter would ever end up before the Court, it can be expected that the use of the adaptive management-approach would be debunked by the Court.

4.2 *Habitat enhancement measures as mitigation measure: towards more resilience?*

Whilst adaptive licensing might present itself as a possible go-between for some wind energy projects, it will certainly not serve as a solution in cases where long-term significant, possibly permanent, adverse effects can be expected for a Natura 2000 site. In situations where wind farms might give rise to collision risks for raptors, such as the White-tailed eagle or the Griffon vulture, enhancement measures might be envisaged to avoid a wind farm of putting into jeopardy the integrity of a Nature 2000 site. For instance, one might propose the creation of additional foraging areas for affected birds on another location in a Natura 2000 site in order to reduce disturbance and collision risks.

In general, such measures are being increasingly used in order to manage the hurdle of Article 6(3) of the Habitats Directive, without requiring the application of Article 6(4). Especially in

¹⁰¹ See also in this respect: Dutch Council of State, 27 February 2008 (Application No 20060755); Dutch Council of State, 24 August 2011 (Application No 200900425/1/R2).

¹⁰² European Commission, 'Guidance Document. The Implementation of the Birds and Habitats Directives in Estuaries and Coastal Zones', 34.

the Netherlands, recent administrative practice has shifted towards the inclusion of the positive effects linked to proactive habitat enhancement and restoration measures in the appropriate assessment for spatial projects that entailed negative effects on some parts of a Natura 2000 site.¹⁰³ Even more so, the Dutch Council of State rendered a seminal ruling, back in 2010, in which it held that the creation of no less than 132 hectares of new mussel beds, needed for the conservation of the affected birds, could qualify as a mitigation measure for the construction of a housing zone in the IJmeer.¹⁰⁴ In 2012, the Dutch Council of State reasserted this stance again by accepting the construction of 22 hectares of foraging and resting area as a mitigation measure in the context of Article 6(3).¹⁰⁵ Also in the United Kingdom, rulings have been handed down in which it was accepted that a habitat enhancement scheme could be taken into account in the screening stage under Article 6(3), thereby even rendering the carrying out of a full fledged appropriate assessment superfluous.¹⁰⁶ This begs the question: to what extent can enhancement measures help to offer additional leeway for wind farm developments in light of the Habitats Directive?

At first sight, the progressive reading of Article 6(3), under which habitat enhancement measures qualify as mitigation rather than compensation, might offer additional leeway for wind farm projects, especially when located close to sites that are harboring vulnerable bird populations. It is believed that such measures might indeed strengthen the resilience of the affected Natura 2000 site and, additionally, also lower the mortality rate by providing alternative foraging opportunities for vulnerable birds species, which are located at a greater distance from the projected wind farm.

Here, however, it is submitted that such approach, whilst arguably encouraging the proponents of plans and projects to incorporate mitigation measures at the earliest possible stage in the evolution of their plan or project, will probably not offer the deregulatory advantages craved for in the context of wind farm developments. In our view, the main reason for this is that, under such approach, one is required to take for granted the positive outcome linked to the proposed enhancement or restoration measures. However, in reality, such measures are dependent on many factors and often do not achieve the results that were hoped for. In line with the Commission's point of view,¹⁰⁷ recent Dutch and Belgian case-law rightly held that the effectiveness of proposed enhancement measures should, at any rate, further be assessed throughout the appropriate assessment.¹⁰⁸ Indeed, the lack of sufficient knowledge on the ad-

¹⁰³ See more extensively: J Zijlmans and H Woldendorp, 'Compensation and Mitigation: Tinkering with Natura 2000 Protection law' (2014) 10 *Utrecht Law Review* 172.

¹⁰⁴ Dutch Council of State, 21 July 2010 (Application No 200902644/1/R2). See in this regard also the provisional judgment in this case, to the same effect: Chairman of the Administrative Jurisdiction Division of the Dutch Council of State, 31 August 2009 (Application No 200902644/2/R2).

¹⁰⁵ Dutch Council of State, 8 February 2012 (Application No 201100875/1/R2).

¹⁰⁶ *Hart District Council v Secretary of State for Communities and Local Government, Luckmore Ltd. and Barratt Homes Ltd* [2008] EHW 1204. More extensively on this case: D McGillivray, 'Mitigation, Compensation and Conservation: Screening for Appropriate Assessment under the EU Habitats Directive' (2011) 8 *Journal for European Environmental and Planning Law* 336.

¹⁰⁷ European Commission, *EU Guidance on Wind Energy Development*, 64.

¹⁰⁸ See, for instance, Dutch Council of State, 7 May 2008 (Application No 200604924/1) and Belgian Council of State, 21 December 2010 (Application No 209.330).

equacy of the enhancement measures seems to rule out its use as a bypass for the duty to carry out an appropriate assessment, as also evidenced by the aforementioned decision of the Scottish Court of Appeal on the legality of the refusal of a planning permit for a 14 wind turbine development *within* a SPA.¹⁰⁹ It is no coincidence that in that case one of the major issues was the alleged adequacy of the enhancement measures, which were not deemed sufficient in providing alternative foraging area for an affected pair of eagles.

Yet, the precautionary principle also represents one of the major hurdles for accepting the inclusion of enhancement measures as mitigation measures within the context of an appropriate assessment for wind farms. As indicated above, the precautionary principle also plays a key-role in determining whether or not a plan or project may hamper the integrity of a site. Already in its 2000 Guidance document on Article 6 of the Habitats Directive, the European Commission drew a clear distinction between so-called mitigation measures, on the one hand, and compensatory measures *sensu strictu*, on the other hand. There it was noted that while mitigation measures are an integral part of the specifications of a plan or project, compensatory measures *sensu strictu* are independent of the plan or project (including any associated mitigation measures). Under the Commission's view, the latter measures are intended to offset the negative effects of the plan or project so that the overall ecological coherence of the Natura 2000 Network is maintained.¹¹⁰

In recent years, national case-law emerged in which the creation of new habitats in one part of a Natura 2000 area were tagged as compensatory measures. This was for instance the case in the Flemish Region, where proactive habitat management measures in order to offset the impact of a new by-pass cutting through a Natura 2000 site, were ruled out as mitigation under Article 6(3).¹¹¹ Also in *Sweetman*, the Court hinted to a strict precautionary approach when interpreting the second part of Article 6(3), thereby excluding the view according to which significant local effects could still be deemed not relevant in view of the wider integrity of a Natura 2000 site.¹¹²

The reluctance echoing from these elements can also be retrieved in the recent Opinion of Advocate General Sharpston, delivered on 27 February 2014, in the Dutch case concerning the broadening of a part of the motorway A2 between the cities of Eindhoven and Den Bosch, which would affect an area of molinia meadows in one part of the nearby Natura 2000 site.¹¹³ Here, the Court was asked to indicate whether measures with a view to ensuring the creation of new meadows elsewhere in the same site, to replace or augment those affected, could qualify as mitigation under Article 6(3). In her Opinion, the Advocate General aligned herself with

¹⁰⁹ *Animal Welfare Inst v Beech Rigde Energy LLC* 675 F Supp 2d 540, 581 (D.Md 2009).

¹¹⁰ European Commission, 'Communication on the precautionary principle' COM(2000) 1 final, 37. See also, more recently, European Commission, 'Guidance Document on Article 6(4) of the "Habitats Directive" 92/43/EEC' point 1.4.1.

¹¹¹ Belgian Council of State, 29 March 2013 (Application No 223.083). See more extensively: H Schoukens, 'Mitigation and Compensation under EU Nature Conservation Law in the Flemish Region: Beyond the Deadlock for Development Projects?' (2014) 10 *Utrecht Law Review* 207.

¹¹² Case C-258/11 *Sweetman* (ECJ, 11 April 2013).

¹¹³ Case C-521/12 *TC Briels and others v Minister van Infrastructuur en Milieu* (ECJ, 15 May 2014), Opinion of Advocate General Sharpston.

the stricter stance of the Belgian Council of State, in appraising the scope of the expression ‘adversely affecting the integrity of a Natura 2000 site’. Whilst accepting that measures which form part of a plan or project and which effectively minimize its impact may be taken into account when assessing whether that plan or project adversely affects the integrity of a site, the Advocate General refused to qualify the creation of new meadows as mitigation measures because they do not lead to an adequate reduction of the pollution.¹¹⁴ Instead, such measures basically seek to counterbalance the unavoidable negative impacts that go along with the project.

Given the absence of the expression ‘mitigation’ and ‘compensation’ in Article 6(3), the Advocate General did not stop her analysis at the semantic difference between ‘mitigation’ and ‘compensation’, but further elaborated on the exact scope of the notion of ‘integrity of a site’. However, only to conclude that the same strict precautionary approach, as spelled out in *Waddenzee*, should be applied to predictions of success for planned new areas of created ‘natural’ habitat. The simple fact that there cannot be no guarantee of success for the new artificially created habitat, turned out to be the true obstacle for allowing a more progressive reading of Article 6(3).¹¹⁵ Still, the Advocate General did acknowledge that the creation of new habitats may well be regarded as a compensatory measure, provided that it is specifically linked to the project in question and would not otherwise be implemented in the context of the ordinary management of a site, as required by Article 6(1) or (2).¹¹⁶

Again, it might be contended that the strict stance of the Advocate General, if reasserted by the Court, serves as yet another illustration of the inability of the Habitats Directive to support more progressive approaches towards biodiversity offsetting. Still, the Advocate General’s approach does make sense. Indeed, there are no easy fixes for nature. In comparison with the adaptive licensing-approach, under which, at the end of the day, the operation of a wind farm can still be halted if entailing severe collision risks, a progressive approach to enhancement schemes under Article 6(3) lacks such clear-cut guarantees. That is not to say that enhancement measures are completely useless in the context of Article 6(3). If the enhancement measures have been already carried out before the project is constructed and, subsequently, proved to be effective in, for instance, keeping raptors away from their previous foraging areas, there indeed seems to be some leeway. Yet, such approach would presuppose a more long-term strategic planning approach towards wind farm development.

Arguably, allowing (future) habitat creation as mitigation also risks to undermine the mitigation hierarchy that is underpinning Article 6 of the Habitats Directive (prevent, mitigate, compensate). The creation of new habitats should indeed be seen as a last resort, in order to offset unavoidable damages. Hence it should be reviewed under Article 6(4) of the Habitats Directive. However, whilst the creation of new habitats and other enhancement measures cannot be invoked in the context of Article 6(3), it might in the long run lead to more resilient Natura 2000 sites which, in its turn, might create more leverage for future spatial projects,

¹¹⁴ Ibid paras 36 and 37.

¹¹⁵ Ibid paras 42 and 43.

¹¹⁶ Ibid para 46.

such as wind farms. Arguably, spatial projects will be easier to reconcile with more resilient Natura 2000 sites, in which most of the natural habitats and species are at a favourable conservation status. At present, most legal issues surrounding the articulation between Natura 2000 and spatial projects stem from the unfavourable conservation status of many of the affected natural habitats and species. In such a scenario, every additional impact might give rise to significant effects ('death by a thousand cuts'), as was displayed by the above addressed Dutch case. Hence the allegedly strict view of Advocate General Sharpston on mitigation should, in our view, not be seen as another proof of the alleged rigidity of Article 6(3), but more as an encouragement for taking more robust proactive habitat management measures, also outside the context of concrete spatial development projects.¹¹⁷

5. CONCLUDING REMARKS

The EU is currently witnessing a major shift in policy towards renewable energy, which urges the Member States, amongst others, to opt for massive investments in wind farms and the associated infrastructure. By requiring the same amount of scrutiny for 'green' projects as for 'brown' projects, EU biodiversity law appears unwilling to take into account the global beneficial effects for biodiversity tied to wind farms. Whilst not effectively prohibiting wind farm developments in the vicinity of Natura 2000 sites, it does put forward a strict scrutiny approach. In the US, the impediments spurred by the stringent application of the Endangered Species Act in the context of wind energy, have recently prompted the Obama administration to allow some companies to kill or injure bald and golden eagles for up to 30 years without penalty, in an effort to spur development and investment in green energy while balancing its environmental consequences.¹¹⁸

In the EU, both the Court and the European Commission are more reluctant in deviating from the strict assessment rules enshrined in the Birds and Habitats Directives in order to boost wind energy initiatives. In this paper, it has been submitted that, in spite of the strict examination requirement which is laid down by Article 6(3) of the Habitats Directive, wind farms are, in principle, compatible with the precautionary approach which is underpinning EU biodiversity law. There is no total deadlock on the ground. Moreover, even in the current time-frame, where the push towards renewable energy has become part of the dominant policy discourse, it would be unwise to let wind power take precedence over protecting endangered bird and bat species. Despite all good intentions, such an approach could do away with many of the conservation efforts that have been put into the recovery of protected species during the past decades. At the same time, it would also significantly hamper the sustainability credentials of wind energy. After all, how 'green' is a wind farm that is decimating a local population of endangered griffons? Whilst it remains sensible to consider the long-term benefits that will be created by wind farm developments for many species and think about ways of quantifying

¹¹⁷ See also in this direction: Opdam, Broekmeyer and Kistenkas, 'Identifying Uncertainties', 920.

¹¹⁸ See <http://www.theguardian.com/world/2013/dec/06/obama-administration-will-let-some-wind-companies-kill-or-injure-eagles>.

those benefits, such argumentation does not, as such, imply that wind power should take precedence over more short-termish protection efforts for imperiled species.

Yet it cannot be neglected that the ever-more ambitious renewable energy targets are putting more pressure on the European Commission to take further initiatives to facilitate wind projects in the context of EU biodiversity law. The inclusion of the Birds and Habitats Directives in the recently published REFIT programme of the European Commission, might be seen as a token for future regulatory burden relief.¹¹⁹ However, in our opinion, a relaxation of the existing protection rules, even in the specific context of wind farm developments, would, in itself, not be desirable, especially given the predicament of many European habitats and species. This article has amply illustrated that emerging administrative practices at Member States level, such as the inclusion of selective stopping protocols and control measures in permits, might already considerably ease the administrative burden for wind project developers whilst also enabling an effective reduction of the possible biodiversity risks attached to wind farm developments. Unfortunately, as witnessed by the reluctance of some national courts and the Advocate General towards the use of habitat creation as mitigation, there are no ‘one-size-fits-all’ solutions. Still, at the end of the day, there are no quick wins for nature protection, also not in the renewable energy-context. Genuine sustainable development requires deliberation and caution, for instance, in order to find out the better options, both for biodiversity and renewable energy purposes. By urging the Member States to take a step back when opting for massive scale wind farm developments, Article 6 allows for that additional moment of reflection. It is our belief that, in the long run, the Habitats Directive will be praised for that.

¹¹⁹ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; Regulatory Fitness and Performance (REFIT): Results and Next Steps’ COM(2013) 685 final.

