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The EU Habitats Directive

Mitigation and Compensation Measures under the EU Habitats Directive in Selected Member States

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Abstract

This article aims at establishing how national courts interpret the concepts of mitigation and compensation measures under Article 6 of the Habitats Directive. Based on a comparative method of legal research, we focus on the implementation of Articles 6(3) and 6(4) of the Habitats Directive, as interpreted by the Court of Justice of the European Union in the *Sweetman, Briels* ***and*** *Orleans* ***cases, and its application in the courts of six Member States,*** *i.e.* ***France, Germany, the UK, the Netherlands, Italy and Bulgaria. Our study highlights national courts tendency to interpret the Habitats Directive and related national law so as to cover matters which have not explicitly been dealt with by the CJEU without asking for preliminary rulings. In each legal order, this lack of preliminary references comported a wrongful interpretation of Article 6(3) of the Directive. This finding shows that the lack of preliminary references affected the legal effectiveness of Article 6 HD.***

I. Introduction

A quick overview of the case law sections of European journals on environmental law shows a continuous need for clarity about the meaning of the hundreds of legally binding European Union (EU) acts covering the vast majority of environmental aspects. The preliminary reference procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU) therefore plays a key role in guaranteeing that EU law is uniformly applied across the Member States.[1]

The importance of preliminary references, and in particular of the obligation for national courts of last instance to follow this procedure, for the effectiveness of EU law cannot be doubted. In environmental matters, the importance of a correct interpretation and application of the EU regulatory framework is of pivotal importance, as errors can lead to irreversible damages to an already not positive status of environmental protection.[2]

Yet, the Court of Justice of the European Union (CJEU) struggles in finding the right balance between marshalling and emancipating national courts in the context of the preliminary ruling procedure.[3] In environmental matters, previous research shows that apex courts can be reluctant in relying on Article 267 TFEU.[4] Yet, there are no studies looking at whether the lack of a preliminary reference actually leads to a wrongful interpretation of EU environmental law, and there are no studies looking at multiple jurisdictions at the same time, making it impossible to appreciate the extent of the phenomenon under scrutiny.

A systematic analysis of the case law of the Dutch Council of State under Article 6 the Habitats Directive

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[1] Case 166/73, *Rheinmühlen Düsseldorf* v *Einfuhr* [1974] ECLI:EU:C:1974:3, para. 2.

[2] For an overview of the status of the environment in the EU, we refer to the European Environmental Agency website, https://www.eea.europa.eu/ [accessed April 2018].

[3] H. Rasmussen, "The European Court's Acte Claire Strategy in Cilfit' (1984) 9 *European Law Review*, pp. 242–59, at 242; A. Arnull, "The Use and Abuse of Article 177 EEC" (1989) 52(5) *The Modern Law Review*, pp. 622–39 at 624; F. Mancini & D. Keeling, "From CILFIT to ERT: The Constitutional Challenge Facing the European Court' (1991) 11(1) *Yearbook of European Law*, pp. 1–13, at 4; P. Allott, "Preliminary Rulings: Another Infant Disease?" (2000) 25(5) *European Law Review*, pp. 538–47, at 538; T. Tridimas, "Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40(1) *Common Market Law Review*, pp. 9–50, at 9; P.J. Wattel, "Köbler, CILFIT and Welthgrove: We Can't Go on Meeting Like This' (2004) 41(1) *Common Market Law Review*, pp. 177–90, at 177; N. Fenger & M.P. Broberg, "Finding Light in the Darkness: On the Actual Application of the Acte Clair Doctrine" (2011) 30(1) *Yearbook of European Law*, pp. 180–212, at 180; and V. Heyvaert, J. Thornton & R. Drabble, "With Reference to the Environment: The Preliminary Reference Procedure, Environmental Decisions and the Domestic Judiciary' (2014) 130 *Law Quarterly Review*, pp. 413–22, at 413, 5.

[4] V. Heyvaert, J. Thornton & R. Drabble, n. 3 above.

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(HD),[5] by Squintani and Zijlmans in 2018 showed that this apex court interpreted the HD in many cases, without making a preliminary reference.[6] In none of these cases, the CILFIT ruling[7] or criteria were referred to by the Dutch judges. This modus operandi can be expected to take place also in other jurisdictions.

Indeed, this Directive plays a pivotal role in protecting nature, while putting under pressure public authorities and private undertakings willing to boost economic development. Being non anthropocentric in nature, nature conservation can be seen as the environmental sector in which the tension between the full effectiveness of EU environmental law and the wish not to refer in order to speed-up development projects is the most acute.[8] Among the provisions of the Birds Directive[9] and the HD that could interfere with development projects, Articles 6(3) and 6(4) HD are the most problematic provisions.[10] In order to alleviate the stringency of these provisions, national governments seem to have come up with creative interpretations, turning around concepts such as "mitigation measures", "offsetting" and "no net loss", that are not in the Directive.[11]

Accordingly, this article aims at establishing how national courts approached the concepts of *mitigation* and *compensation* measures under Article 6 HD. Thanks to the judgments in *Sweetman*, *Briels*, and the *Orleans* cases,[12] we can now assess the creative work of national governments and the manner in which national courts scrutinised it. Hence, the rich national jurisprudence on the meaning of Article 6 HD allows establishing whether cases in which national apex courts failed to make a preliminary reference undermined the effectiveness of Article 6 HD.

With effectiveness of Article 6 HD, we mean whether the obligations under Article 6 HD have been respected or not, thus we look at so-called "legal effectiveness".[13] Whether the status of conservation of the affected Natura 2000 site has actually decreased or increased due to the illegal authorisation is not investigated in this article, as existing reports on the status of conservation of the investigated sites do not allow establishing a link between undue authorisations and the worsening of the status of conservation of the sites. Additional research based on non-legal methods of research is therefore needed to focus on this level of effectiveness. We also do not look at "behavioural effectiveness", hence at the relationship between legal rules and human behaviour.[14] Indeed, we do not research the reasons behind national courts behaviour in the investigated field, as also in this case a multi-disciplinary research is needed. Still, our research is essential for understanding the functioning of, in first instance, Article 6 HD and, further, Article 267 TFEU in environmental law and for the setting-up of a follow-up research project aiming at both behaviours effectiveness and whether the status of conservation of Natura 2000 sites has been affected by the lack of legal effectiveness.

To fulfil the aim of this contribution, we first set the benchmark upon which evaluate national courts behaviour (section 2). In this regard, we describe the meaning of Articles 6(3) and 6(4) HD, in the light of *Sweetman*, *Briels*, and the *Orleans* cases (Sections 2.1, 2.2, 2.3 and 2.4). Next, based on a comparative method of legal research, we focus on the implementation of Articles

[5] Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora [1997] OJ L305/42.

[6] L. Squintani and J. Zijlmans, "Toepassing van de CILFIT-doctrine door de Afdeling Bestuursrechtspraak Raad van State: de ingevolge de Habitatrichtlijn te Treffen Mitigerende (en Compenserende) Maatregelen", *Tijdschrift voor Natuurbescherming*, 2017/2.

[7] Case 283/*81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, ECLI:EU:C:1982:335 (*CILFIT*). Recently, Case C-379/15, *Association France Nature Environnement v Premier ministre and Ministre de l'Écologie, du Développement durable et de l'Énergie*, ECLI:EU:C:2016:603

[8] It should be considered that the average time necessary to answer a preliminary question is, nowadays, about fifteen months, see European Court of Justice, "Annual Report 2014", available at: <www.curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/en_ecj_annual_report_2014_pr1.pdf> accessed 17 June 2016.

[9] Directive 2009/147/EC on the Conservation of Wild Birds [2010] OJ L20/7.

[10] G. Wandesforde-Smith & N.S.J. Watts, "Wildlife Conservation and Protected Areas: Politics, Procedure, and the Performance of Failure under the EU Birds and Habitats Directives' (2014) 17(1–2) *Journal of International Wildlife Law and Policy,* pp. 62–80, at 62; F. Kistenkas, "Rethinking European Nature Conservation Legislation: Towards Sustainable Development" (2013) 10(1) *Journal for European Environmental & Planning Law*, pp. 72–84, at 72, 83; and H. Schoukens, "Habitats Restoration Measures as Facilitators for Economic Development within the Context of EU Habitats Directive: Balancing No Net Loss with the Preventive Approach?" (2017) 29(1) *Journal of Environmental Law*, pp. 47–73. For a discussion on legislative reforms to speed up development consent procedures, see for instance, the contributions in B. Vanheusden & L. Squintani (eds.) *EU Environmental Planning Law Aspects of Large-Scale Projects* (Intersentia, 2016).

[11] H. Schoukens, n. 10 above.

[12] Respectively, Case C-521/12, *T.C. Briels and Others v Minister van Infrastructuur en Milieu* [2014] ECLI:EU:C:2014:330 (*Briels*); Case C-258/11, *Peter Sweetman and Others v An Bord Pleanála* [2013] ECLI:EU:C:2013:220 (*Sweetman*); and Joined Cases C-387/15 and 388/15, *Hilde Orleans and Others v Vlaams Gewest* [2016] ECLI:EU:C:2016:583 (*Orleans*).

[13] See S. Maljean-Dubois, "The Effectiveness of Environmental Law: A Key Topic", in S. Maljean-Dubois (ed.), *The Effectiveness of Environmental Law*, (Intersentia, 2017), pp. 1–12, with further references.

[14] A better understanding of behavioral effectiveness will in turn allow focusing on "problem solving effectiveness", hence on how to achieve the desired goals, cf. Idem.

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6(3) and 6(4) HD and its application in court, in six Member States, *i.e.* the Netherlands, France, Germany, the UK, Italy and Bulgaria (Section 3).[15] In this context, we look at whether the concepts of mitigation and compensation measures were interpreted without making a preliminary reference. Finally, we check whether the outcome of the case is in line with the later clarifications offered by the CJEU. Our research shows that in all jurisdictions there are authorisations granted in breach of Article 6 HD that have been uphold by the judiciary, hence undermining the legal effectiveness of the Directive. This finding is discussed in Section 4 from the perspective of the functioning of both Article 6 HD and Article 267 TFEU, bringing us to the recommendations made in the Conclusions to this work.

II. Setting the Benchmark: Articles 6(3) and 6(4) of the Habitats Directive in the light of the *Sweetman, Briels*, and *Orleans* Cases

One of the pillars for non-considering the HD a "paper tiger" is Article 6 of the Directive.[16] This provision sets out the framework for the conservation of Natura 2000 sites designated following the Birds and Habitats Directives,[17] and includes proactive, preventive and procedural requirements. This section provides a rough outline of the different paragraphs of Article 6 HD and more in particular of the concepts of mitigation and compensation measures as developed by the CJEU. It therefore completes the benchmark to review national judges' behaviour.

Whereas Article 6(1) HD requires establishing *conservation* measures and focuses on positive and proactive interventions, Article 6(2) makes provision for avoidance of habitat deterioration and significant species disturbance and is therefore based on the adoption of *preventive* measures.[18] Following Article 6(2) HD, Member States shall take appropriate steps to avoid the deterioration of natural habitats and the habitats of species as well as disturbances 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 the directive.[19]

The scope of Article 6(2) is broader than that of Articles 6(3) and 6(4) which apply only to plans and projects. Articles 6(3) and 6(4) contain a step-wise procedure for granting development consent to plans/projects likely to have a significant effect on a Natura 2000-site.[20] Article 6(3) specifies that "any *plan* or *project* not directly connected with or necessary to the [conservation] management of the site but *likely to have* a significant effect thereon, either individually or in combination with other plans or projects – based on the "first come, first served" approach,[21] shall be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of this assessment, 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."

The clarity of this provision is linked to the clarity of certain key concepts therein. First, the terms "plan" (such as land-use plans, sectoral plans, etc.) and "projects" (such as construction works or other interventions in the natural environment) have to be interpreted broadly,[22] and include also developments *outside* Natura 2000-sites which have likely a significant effect on it (the so-called "external effect").[23]

[15] These Member States represent the various legal cultures existing in Europe to which we could have access based on linguistic reasons.

[16] See also G. Wandesforde-Smith and N.S.J. Watts, n. 10 above, 62, 64; Cf. P. Scott, "Appropriate Assessment: A Paper Tiger" in Gregory Jones (ed.), *The Habitats Directive – A Developer's Obstacle Course* (Hart, 2012), pp. 103–18, at 103. This statement applies only to the protection of "core" areas. Conversely, for non-core areas the binding force of the Directive can be questioned, see L. Squintani, "The development of ecological corridors" (2012) 9(2) *Journal for European Environmental & Planning Law*, 180–200.

[17] On the selection process see, among others: H. Schoukens & Woldendorp, "Site Selection and Designation under the Habitats and Birds Directives" in C.H. Born and Others (eds.), *The Habitats Directive in its EU Environmental Law Context – European Nature's Best Hope?* (Routledge, 2015), 31–55, at 31. Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora, Article 7.

[18] The terminology *conservation* and *preventive* measures are used by the CJEU in the *Orleans* case. On the relationship between this provision and legal certainty, see H. Schoukens "Ongoing Activities and Natura 2000: Biodiversity Protection vs Legitimate Expectations" (2014) 11(1) *Journal for European Environmental & Planning Law*, 1–30, at 1.

[19] On the concept of "significance", see in particular Case C-355/90, *Commission* v *Spain* [1993] ECR I-4221, ECLI:EU:C:1993:331 (*Santoña Marshes*) and Case C-392/96, *Commission of the European Communities* v *Ireland* [1999] ECR I-5901.

[20] See in detail: N. De Sadeleer, "Assessment and Authorization of Plans and Projects Having a Significant Impact on Natura 2000 Sites," in B. Vanheusden & L. Squintani (eds.), *EU Environmental and Planning Law Aspects of Large-Scale Projects*, (Intersentia, 2016), 281–320, at 286–94.

[21] E. Lees, "Allocation of Decision-Making Power under the Habitats Directive" (2016) 28(2) *Journal of Environmental Law,* 191–219, at 194.

[22] On the concepts of plans and projects see N. De Sadeleer, n. 20 above, 286–94.

[23] Case C-293/17, *Stichting Werkgroep Behoud de Peel*, Application (OJ) 18 August 2017, which aims at clarifying the linkage between the concept of project under the Habitats Directive with that followed under the EIA Directive.

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Secondly, the expression "likely to have" refers to the precautionary principle underlying that the likelihood of significant effects from plans of projects inside or outside Natura 2000-sites, either individually or in combination with other plans or projects (cumulative impacts), suffices to have to undertake an assessment.[24] Thirdly, the concept of "integrity of the site" involves the site's ecological functions and thus the site's conservation objectives.[25]

Finally Article 6(4) HD specifies that 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*, the Member State shall take all *compensatory* measures necessary to ensure that the overall coherence of Natura 2000 is guaranteed.[26] As we can see, the clarity of this provision is strictly linked to three concepts, which have to be interpreted restrictively.[27] Accordingly, this derogation clause is not a panacea from solving issues concerning the balancing of environmental protection and economic development.[28]

An adequate implementation and enforcement of Article 6 HD do enhance nature conservation.[29] Yet, the complex relationship between Article 6(3) and 6(4) leads to uncertainty as regards to what "adequately implemented and enforced" means,[30] and where gold-plating starts.[31] In particular, in certain Member States questions arose as to the extent by which measures adopted to avoid damage can be taken into account in order to come to the conclusion that no significant adverse effect will occur:[32] the concept of *mitigation*

[24] N. De Sadeleer, n. 20 above, 286–94. See also H. Schoukens, n. 10 above; Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-07405, ECLI:EU:C:2004:482, para. 36 (*Waddenzee*); E. Stokes, "Liberalising the Threshold of Precaution – Cockle Fishing, the Habitats Directive, and Evidence of a New Understanding of 'Scientific Uncertainty' " (2005) 7(3) *Environmental Law Review*, 206–14, at 206; and J. Verschuuren, "Shellfish for Fishermen or for Birds? Article 6 Habitats Directive and the Precautionary Principle" (2005) 17(2) *Journal of Environmental Law,* 265–83, at 265.

[25] *Sweetman*, at 31 ff.

[26] Specifically on this provision see: A. Nollkamper, "Habitat Protection in European Community Law: Evolving Conceptions of a Balance of Interests" (1997) 9(2) *Journal of Environmental Law*, 271–86, at 271; R. Clutten & I. Tafur, "Are Imperative Reasons Imperiling the Habitats Directive? An Assessment of Article 6(4) and the IROPI Exception" in G. Jones (ed.), *The Habitats Directive: A Developer's Obstacle Course?* 167–82, at 167; L. Krämer, "The European Commission's Opinions under Article 6(4) of the Habitats Directive" (2009) 21(1) *Journal of Environmental Law*, 59–85, at 59; C.P. Rodgers, *The Law of Nature Conservation: Property, Environment, and the Limits of Law* (Oxford University Press, 2013), at 225–232; N. De Sadeleer, n. 20 above; Projects authorized based on Article 6(4) of the Directive are at times called "unsustainable development" projects, see Schoukens, n. 10 above, 52.

[27] See most notably, Case C-399/14, *Grüne Liga Sachsen eV and Others v Freistaat Sachsen* [2016] ECLI:EU:C:2016:10, paras. 72–3 (*Grüne Liga Sachsen*). See also European Commission, "Guidance on Article 6(4) of the "Habitats Directive" 92/42/EEC. Classification of the Concepts of: Alternative Solutions, Imperative Reasons of Overriding Public Interest, Compensatory measures, Overall Coherence, Opinion of the Commission" (Brussels 2007/2012). On the Commission's approach, see D. McGillivray, "Compensating Biodiversity Loss: the EU Commission's Approach to Compensation under Article 6 of the Habitats Directive" (2012) 24(3) *Journal of Environmental Law*, 417–50, at 417.

[28] H. Schoukens, n. 10 above; H. Schoukens and A. Cliquet, "Mitigation and Compensation under EU Nature Conservation Law in the Flemish Region: Beyond the Deadlock for Development Projects" (2014) 10(2) *Utrecht Law Review,* 194–215, at 207.

[29] J.V. Lopez-Bao and Others, "Toothless Wildlife Protection Laws" (2015) 24(8*) Biodiversity and Conservation*, 2105–2108; P.F. Donald and Others, "International Conservation Policy Delivers Benefits for Birds in Europe" (2007) 317(5839) *Science*, 810–3; G. Chapron and Others, "Recovery of Large Carnivores in Europe's Modern Human-Dominated Landscapes" (2014) 346(6216) *Science*, 1517–9; H. Schoukens, n. 10 above.

[30] See especially the critiques moved against a strict reading of this provisions from an economic development perspective: H. Schoukens & A. Cliquet, n. 28 above; J.M.I.J. Zijlmans & H.E. Woldendorp, "Compensation and Mitigation: Tinkering with Natura 2000 Protection Law" (2014) 10(2) *Utrecht Law Review,* 172–93, at 172; J. Verschuuren, "Climate Change: Rethinking Restoration in the European Union's Birds and Habitats Directive" (2010) 28(4) *Ecological Restoration*, 431–9, at 433; H. Schoukens & Hans Woldendorp, "De Habitatrichtlijn als Doos van Pandora: Het A2-arrest van het Europese Hof van Justitie" (2015) *Milieu en Recht* 2–15, with further references to Dutch literature.

[31] About this concept see: L. Squintani, *Beyond Minimum Harmonisation*, Cambridge University Press 2019; L. Squintani, "Gold-plating of European Environmental Law" (Dissertation, University of Groningen 2013); H.T. Anker and Others, "Coping with EU Environmental Legislation: Transposition Principles and Practices" (2015) 27(1) *Journal of Environmental* Law, 17–44; J.H. Jans and Others, " 'Gold Plating' of European Environmental Measures?" (2009) 6(4) *Journal for European Environmental & Planning Law,* 417–35, at 418; L. Squintani, M. Holwerda & K.J. De Graaf, "Regulating Greenhouse Gas Emissions from EU ETS Installations: What Room is Left for the Member States" in M. Peeters, M. Stallworthy & J. de Cedra de Larragán (eds.), *Climate Law in EU Member States* (Edward Edgar, 2012), 67–88. For a specific application of this concept to nature conservation in the Netherlands, see L. Squintani & J. Zijlmans, " 'Nationale koppen' en de Doorwerking van Natuurbeschermingsverdragen" (2013) 3 *Milieu en Recht*, 158–71; for the UK, see R. Morris, "The Application of the Habitats Directive in the UK: Compliance or Gold Plating?" (2011) 28(1) *Land Use Policy*, 361–9.

[32] This has particularly been the case in the Netherlands, see J.M.I.J. Zijlmans & H.E. Woldendorp, n. 30 above; H. Schoukens, n. 10 above.

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measures which is used in this context, needed, and to a certain extent still needs, further refinement as well,[33] in order to avoid misusing it.[34] As further discussed below, the cases *Sweetman*, *Briels* and *Orléans* confirm that mitigation measures are possible only under strict conditions.

2.1. Linking precaution to the integrity of the site: the *Sweetman* case

The *Sweetman* case concerns the development consent for the N6 Galway City Outer Bypass road scheme granted in 2008, which ought at crossing the Site of Community Importance (SCI) Lough Corrib, hosting, among others, karstic limestone pavement, a priority protected habitat forming the subject matter of the main proceedings. The road scheme involves the permanent loss within the Lough Corrib SCI of approximately 1.47 hectares of that limestone pavement. Mr Sweetman applied to the Supreme Court to revert the ruling of the High Court who had dismissed the application for leave to issue judicial review proceedings and upheld An Bord Pleanála's decision that the project did not have an adverse effect on the site under Article 6(3) HD. The Supreme Court decided to stay the proceedings and to refer three questions to the CJEU for a preliminary ruling concerning, most notably, the meaning of the concept of "integrity of a site".

In answering the questions, the CJEU points out that 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) HD, the site needs to be preserved at a favourable conservation status; this entails, the CJEU continues, that 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.[35] No reasonable scientific doubt must remain as to the absence of lasting negative effects, integrating therefore the precautionary principle into Article 6(3) HD.[36]

In so doing, *Sweetman* clarified that each *individual* conservation objective defines the concept of "site integrity". Moreover, it clarifies that this concept is strictly linked to the precautionary principle.[37] This means that mitigation measures must ensure that no reasonable scientific doubt remains as regards the avoidance of damage to the specific biodiversity values that led to the designation of the site as Natura 2000 site.[38] Still, it remained unclear what the difference is between mitigation and compensation measures. More clarity came with the *Briels* case.

2.2. Mitigation or compensation measures: the *Briels* case

The *Briels* case concerns the development consent for widening part of the Dutch A2-motorway, affecting

[33] On the lack of full conceptual clarity, see also: D. McGillivray, "Mitigation, Compensation and Conservation: Screening for Appropriate Assessment Under the EU Habitats Directive" (2011) 8(4) *Journal for European Environmental & Planning Law*, 329–52, at 336; and G. Van Hoorick, "Compensatory Measures for Large-Scale Projects in European Nature Conservation Law after the Briels Case", in B. Vanheusden & L. Squintani (eds.), *EU Environmental and Planning Law Aspects of Large-Scale Projects* (Intersentia, 2016), 321–34. The concepts of mitigation and compensation measures are strictly liked to the concept of "biodiversity offsetting" and "no net loss"; see further R. Lapeyre, G. Froger & M. Hrabanski, "Biodiversity Offsets as Market-Based Instruments for Ecosystem Services? From Discourse to Practices" (2015) 15 *Ecosystem Services*, 125–33, at 125; C. Bonneuil, "Tell Me Where You Come From, I Will Tell You Who You Are: A Genealogy of Biodiversity Offsetting Mechanism in Historical Context" (2015) 192(1) *Biology Conservation*, pp. 485–91; BBOP (Business and Biodiversity Offsets bme), "Standards on Biodiversity Offsets" (Washington DC 2012); K. Ten Kate & M. Crowe, "Biodiversity Offsets: Policy Options for Governments – An Input Paper for the IUCN Technical Study Group on Biodiversity Offsets" (IUCN, 2014) at 7.

[34] On the use or misuse of offsetting, see: J.D. Pilgrim and Others, "A Process for Assessing the Offsettability of Biodiversity Impacts" (2013) 6(5) *Conservation Letters*, 376–84; F. Quétier and Others, "No Net Loss of Biodiversity or Paper Offsets? A Critical Review of the French No Net Loss Policy" (2014) 38(5944) *Environmental Science & Policy*, 120–31; D. Moreno-Mateos and Others, "The True Loss Caused By Biodiversity Offsets" (2015) 192 *Biological Conservation,* 552–9; R. Frins & H. Schoukens, "Balancing Wind Energy and Nature Protection: From Policy Conflicts Towards Genuine Sustainable Development" in L. Squintani and Others (eds.), *Sustainable Energy United in Diversity – Challenges and Approaches in Energy Transition in the European Union* (European Environmental Law Forum, 2014), 85–110; M. Maron and Others, "Conservation: Stop Misuse of Biodiversity Offsets" (2015) 523(7561) *Nature*, 401–3; H. Schoukens, n. 10 above.

[35] *Sweetman*, para. 39.

[36] N. De Sadeleer, n. 20 above, 306; R. Frins & H. Schoukens, n. 33 above; *Waddenzee*, para. 67; Case C-6/04, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [2005] ECR I-9017, ECLI:EU:C:2005:626; Case C-239/04, *Commission of the European Communities v. Portuguese Republic* [2006] ECR I-10183, ECLI:EU:C:2006:665, para. 24; Case C-404/09, *European Commission v. Kingdom of Spain* [2011], ECR I-0000, ECLI:EU:C:2011:768, para. 99.

[37] See also H. Schoukens, "The Ruling of the Court of Justice in *Sweetman*: Hot to Avoid the Death by a Thousand Cuts?" (2014) 1 *Environmental Law Network International Review*, 2–12.

[38] On the linkage between the precautionary principle under *Sweetman* and the concept of mitigation measures, see E.J.H. Plambeck & L. Squintani, "De Bescherming en Verbetering van de Waterkwaliteit in Nederland, of: een Troebele Implementatie van de KRW", (2017/2) *Milieu en Recht*, 2–14.

the Natura 2000-site Vlijmens Ven, Moerputten & Bossche Broek, designated by the Netherlands authorities for, in particular, the natural habitat type molinia meadows, which is a non-priority habitat type. The development consent contains a certain number of measures aimed at lessening the negative implications of the project for the existing area comprising the habitat type molinia meadows, as 6.7 hectares of molinia meadows would be affected due to drying out and acidification of the earth. Yet, the project provides for improvements to the hydrological situation in Vlijmens Ven, which will allow the molinia meadows to expand on the site. The Council of State asked, in essence, whether Article 6(3) HD must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a Natura 2000 site, which has negative implications for a type of natural habitat present thereon and which provides for the creation of an area of equal or greater size of the same natural habitat type within the same site, has an effect on the integrity of that site and, if so, whether such measures may be categorised as ''compensatory measures'' within the meaning of Article 6(4) thereof.

In its answer, the CJEU indicates that the application of the precautionary principle in the context of the implementation of Article 6(3) HD requires the competent national authority to assess the implications of the project for the Natura-2000 site concerned in view of the site's conservation objectives and taking into account the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site.[39] 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, as those in the main proceedings, cannot be taken into account in the assessment of the implications of the project provided for in Article 6(3).[40]

The ruling of the CJEU in the *Briels* case makes clear that mitigation measures under Article 6(3) HD are possible, but the appropriate assessment following Article 6(3) HD may not take account of the protective measures in a project to compensate the damaging effect of the project for a Natura 2000-site. As the measures under the A2 project considered future developments the certainty of which was difficult to be established, questions remained as to whether the CJEU would have ruled differently if the result of these measures would indeed have been certain and visible within a reasonable lapse of time.[41] Moreover, it remained unclear whether mitigation measures have to be ''functionally'' linked to a project development, i.e. whether the proposed measures is part of the scrutinized project or of a mitigation scheme or restoration programme that does not take into account the specific project under scrutiny.[42] The *Orleans* case addressed both issues.

2.3. Prevention, precaution and mitigation measures: the *Orleans* case

In 2012 the Flemish Government decided for the development of a large part of the port of Antwerp (Belgium) on the left bank of the Scheldt, affecting the Natura 2000 site known as ''Scheldt and Durme estuary from the Dutch border to Ghent''. Differently than in the *Briels* case, the Regional Development Implementation Plan allowing the project previewed that the development of affected areas will become possible only after the sustainable establishment of habitats and habitats of species in ecological core areas. Second, a decision of that government will have to declare, following an opinion from the Agency for Nature and Forests, that habitats in the nature reserves have in fact been sustainably created, and the application for a planning permit relating to implementing the intended use of the area concerned will also have to include that decision. Accordingly, the negative effects will take place only after that certainty as regards the effectiveness of the positive effects is acquired.

Still, the Belgian Council of Stare hearing the dispute between Hilde Orleans and others and the Flemish Government had doubts about the compatibility of this approach with the Habitats Directive and decided to ask clarification to the CJEU. On the basis of *Sweetman* and *Briels*, the CJEU came to the conclusion that, in light of the precautionary principle, Article 6(3) HD must be interpreted as meaning that:

> ''[. . .] measures, contained in a plan or project not directly connected with or necessary to the management of a Natura 2000 site, providing, prior to the occurrence of adverse effects on a natural habitat type present thereon, for the future creation of an area of that type, but the completion of which will take place subsequently to the assessment of the significance of any adverse effects on the integrity of that site, may not be taken into consideration in that assessment. Such measures can be categorised as 'compensatory measures', within the meaning of Article 6(4), only if the conditions laid down therein are satisfied.''[43]

Hence, the CJEU ruled in those cases that only those measures which are completed at the moment of the appropriate assessment can be taken into account as mitigation measures.[44] Further, it clarified that mitigation measures must be functionally linked to the

[39] *Briels*, para. 28.
[40] *Briels*, para. 29.
[41] On the relationship between uncertainty and compensation measures, rather than mitigation measures, see E. Lees, n. 21 above, 200.
[42] H. Schoukens, n. 10 above.
[43] *Orleans*, para. 64.
[44] See on this ruling, among others, J. Zijlmans ''Verder Verheldering van het Begrip Mitigerende Maatregelen'', (2016) 8 *Jurisprudentie Milieurecht*, 870–3.

scrutinized project.[45] Management plans and generic restoration measures taken under Articles 6(1) and 6(2) HD can be taken into account under the concept of mitigation measures when scrutinizing a specific project only if they specifically addressed the negative effects of that project.[46]

2.4. *Sweetman*, *Briels* and *Orleans*: a strict view on mitigation measures, but still not complete

Based on *Sweetman*, *Briels* and *Orleans*, we can establish that mitigation measures are allowed under the HD only if these four *cumulative* requirements are met:

a) the measure aims at preventing the damage caused by a *specific* plan/project (functional linkage criterion);
b) the measure must ensure that *this* damage (specific criterion);
c) will be *prevented* (prevention criterion); and
d) the development of such measure must be *completed before* the appropriate assessment is performed (no-doubts criterion).[47]

According to Lees, the stringency of (some of) these criteria could lead to situations in which projects developers design their projects so as to meet these requirements, although from a societal and environmental perspective it would have been better to accept failure in fulfilling them and propose well designed compensatory measures under Article 6(4).[48] Especially the no-doubts criterion could in those cases in which measures can be adopted only while developing a project, such as in the case of a noise abatement wall on the side of an extended motorway stroke, severally restrict the possibility to qualify a measure as one of mitigation,[49] especially in the context of plans. We agree that if the positive effects of a future measure are *absolutely certain* in light of the best scientific data, which means that there is no variable that could affect the certainty of this conclusion, the precautionary principle, and hence the no-doubts criterion should be considered complied with.[50] Yet, in all other cases, we do not share the negative emphasis paced by Lees on this issue, as the failure to use the most appropriate measure under Article 6 would be attributable to project developers and public authorities and not to the regulatory regime. With Schoukens we agree that ''averting unsustainable development is an unavoidable corollary of any effective nature conservation law''.[51]

The criteria set out in *Sweetman*, *Briels* and *Orleans* have a consolidated status,[52] but we can still expect new cases being referred to the CJEU. Indeed, the Dutch Council of State has submitted a new preliminary reference on the interpretation of Articles 6(3) and 6(4) HD.[53] This request concerns, in essence, whether the expected positive effects of measures adopted under Articles 6(1) and 6(2) HD, as well as factual developments in the status of conservation of a nature reserve, can be taken into account in the context of an appropriate assessment under Article 6(3) HD.[54] Also the concept of ''temporary deterioration'' and the meaning of the no-doubts criterion in the context of plans and programmes are in need further refinement.

Still, the *Sweetman*, *Briels* and *Orleans* already allow to review national courts interpretation of Article 6 HD and establish whether the lack of preliminary references affects the legal effectiveness of this provision. This is done in the next section.

[45] This had already been indicated by the European Commission in its non-binding guidance, see European Commission, ''Managing Natura 2000 Sites: The Provisions of Article 6 of the 'Habitats' Directive 92/43/EEC'' (Brussels, 2000), at 45.

[46] H. Schoukens, n. 10 above. E. Plambeck & L. Squintani, n. 38 above. This has been confirmed in Case C-441/17, *Commission v Poland (Forêt de Bialowie¿a)*, ECLI:EU:C:2017:877.

[47] These characteristics built upon those of Frins, see R.H.W. Frins, ''Mitigatie, Compensatie en Saldering in het Omgevingsrecht'', (dissertation, Nijmegen, 2016), Stichting Instituut voor Bouwrecht pp. 52–72; E. Plambeck & L. Squintani, n. 38 above.

[48] E. Lees, n. 21 above.

[49] R.H.W. Frins, ''Het Arrest Orleans e.a.: het PAS en Natuurmaatregelen Veroordeeld tot de Brandstapel?'' (2016/147) 9 *Tijdschrijft voor Bouwrecht*, 926–33.

[50] *Ibid*; see also Case C-142/16, *European Commission v Federal Republic of Germany* [2017] ECLI:EU:C:2017:301 (*Commission v Germany*), in which the Court relied on *Orleans* without quoting the passage referring to the no-doubt criterion. Still this was not necessary considering the specificity of the case.

[51] H. Schoukens, n. 10 above.

[52] See Case C-323/17, *People Over Wind, Peter Sweetman v Coillte Teoranta* [2018] ECLI:EU:C:2018:244; and Case C-441/17, *European Commission v Republic of Poland* [2018] ECLI:EU:C:2018:255.

[53] Dutch Council of State, judgment of 15 May 2017, ECLI:NL:RVS:2017:1259 and Dutch Council of State, judgment of 15 May 2017 ECLI:NL:RVS:2017:1260.

[54] On this reference, Hendrik Schoukens, Nitrogen deposition, habitat restoration and the EU Habitats Directive:-moving beyond the deadlock with the Dutch programmatic nitrogen approach?, Biological Conservation (2017), http://dx.doi.org/10.1016/j.biocon.2017.02.027. See also, Jurisprudentie Milieurecht 2017/91 en 2017/92; J.M.I.J. Zijlmans, Verwijzingsuitspraak ECLI:NL:RVS:2017:1259 (en ECLI:NL:RVS:2017:1260) d.d. 17 mei 2017: Kan het PAS de toets aan artikel 6, leden 2–3 Habitatrichtlijn doorstaan?, Jurisprudentie Milieurecht 2017/958.

III. National Courts' Interpretation of Article 6(3) and (4) Habitats Directive, in the light of the *Sweetman, Briels* and *Orleans* Cases

The cases *Sweetman*, *Briels* and *Orleans* clarify what mitigation and compensation measures are. In this section, we look at how national courts in Italy, the United Kingdom, France, Germany, Bulgaria and the Netherlands coped with these concepts *prior* to *Orleans*. This means that we look at whether these concepts existed at national level, at how they were interpreted and, if interpreted without the need of a preliminary reference, the outcome of the case is in line with the later clarifications offered by the CJEU. As indicated in the introduction to this article, we do not look at the reasons beyond national courts behaviour. Our contribution focuses on legal effectiveness and establishes the basis for a follow-up multi-disciplinary research project focusing on behavioural effectiveness under Article 267 TFEU.

Since the interpretation of legal requirements cannot occur without first establishing what the national legal provisions in need of interpretation are, this section begins by providing an overview of the implementation methods applied by the selected Member States. It should be noted that in light of the space at our disposal for this publication, this section provides a synthesis of the findings from each national case study. More precisely, section 3.1 provides a general introduction to the transposition phase in the selected Member States. Section 3.2 provides a brief quantitative overview of national cases dealing with Article 6 HD and of the preliminary references made in this context. Section 3.3 provides a qualitative overview of the cases in which national courts have interpreted Articles 6(3) and 6(4) HD without referring the matter to the CJEU, in order to show whether this brought to wrongful interpretations.

3.1. Member States' transposition

Most of the Member States taken into consideration in this study have encountered difficulties in the implementation of the Directive. On paper only the UK has had legislation in force in time to implement the Directive.[55] The other Member States faced substantive delays. In particular, France passed legislation correctly transposing Article 6 HD only in 2010,[56] after three infringement procedures had been instigated by the Commission.[57] In Germany, a full transposition of Article 6(3) HD took place only in 2009. Also in this case, infringement procedures were necessary for Germany to transpose the Directive.[58] On the specific matter of mitigation and conservation measures, in April 2017, Germany has been considered in breach of the Directive when it accepted as mitigation measure a fish ladder without assessing its actual effectiveness, and was therefore in breach of the no-doubts criterion.[59] Bulgaria fully transposed the Directive in the same year,[60] following the initiation of an infringement procedure.[61] Yet, the deadline to implement the Directive elapsed already in 2007. The Netherlands and Italy transposed the Directive with delay, but less substantial ones than those seen in France and Germany.[62] As regards Italy, it can be

[55] SI 1994 No. 2716, The Conservation (Natural Habitats) Regulations. Later linked to spatial planning by a guidance, PPS9 (2005) Biodiversity and Geological Conservation; Scottisch Executive (2000) Habitats and Birds Directives. As regards Article 6 of the Directive see refinement in Schedule 1, Conservation (Natural Habiats &c) (Amendment) (England and Wales) Regulations 2006 inserting a new Pt IVA into the The Conservation (Natural Habitats) Regulations 1994.

[56] Loi no. 2010–788 du 12 juillet 2010 portant engagement national pour l'environnement, JO no. 160 13 juillet 2010; Décret no. 2011–966 du 16 août 2011 relatif au régime d'autorisation administrative propre à Natura 2000, JO 18 août 2011.

[57] Case C-256/98, *Commission of the European Communities v. French Republic* [2000] ECR I-2487, ECLI:EU:C:2000:192; Case C-220/99 *Commission of the European Communities v. French Republic* [2001] ECR I-5831, ECLI:EU:C:2001:434; V. Gervasoni & J. Makowiak, "Chronique Protection de la Nature (2006–2009)", (2010) 35 *Revue Juridique de l'Environnement*, at 190.

[58] Case C-83/97, Commission of the European Communities v Federal Republic of Germany, [1997] ECR I-07191, ECLI:EU:C:1997:606; Case C-71/99, Commission of the European Communities v Federal Republic of Germany, [2001] ERC I-05811, ECLI:EU:C:2001:433; Case C-98/03, Commission of the European Communities v Federal Republic of Germany, [2006] ERC I-0053, ECLI:EU:C:2006:3; Case C-142/16 European *Commission v Federal Republic of Germany*, ECLI:EU:C:201:301.

[59] Case C-142/16 European *Commission v Federal Republic of Germany*, ECLI:EU:C:201:301.

[60] State Gazette No 77/ 09.08.2002, as amended by National Assembly of the Republic of Bulgaria, Legislative Proposal for Amendment of the Biological Diversity Act (754-01-8, January 2007). Nowadays, articles 6(3) and 6(4) of the Directive can be found in Biological Diversity Act 2002, arts 31–34a, finally adopted and published in State Gazette No 52/ 29.06.2007.

[61] Infringement Procedure No. 2009/4423 for Non-Conformity of National Legislation with Article 6(3) of Directive 92/43/EC on Conservation of Natural Habitats and Wild Flora and Fauna. Later, Bulgaria was found in breach of the Directive as regards one specific site, Case C-141/14, European Commission v Republic of Bulgaria, ECLI:EU:C:2016:8.

[62] For the Netherlands, see the Nature Conservation Act 1998, Stb. 1998, 403. Following pressures from the Commission, Letter of the Commission of 24 October 2000, nr. SG(2000) D/107 813, in 2005 NCA-98 was modified to implement the Habitats Directive, see Stb. 2005, 185. This act came into force on 1 October 2005. This

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discussed whether transposition is fully in line with the Directive. In fact, Article 166(1) of Law 163/2006, as subsequently replaced by Article 23(6) of Law 50/2016,[63] on public tendering,[64] *inter alia,* aiming at accelerating the environmental impact assessment for projects of national interest hence potentially affecting the appropriate assessment under Article 6(3) HD as well,[65] explicitly refers to, without clearly defining (nor distinguishing), both mitigation and compensation measures.[66] The exact relationship between this act and the act implementing Articles 6(3) and 6(4) HD, ie Articles 5(7) and 5(9) of Law 357/1997, is unclear, casting shadows on the implementation of the Directive.

All Member States here considered but Bulgaria, finally transposed the Directive by means of literal transposition technique,[67] at least to a great extent. Re-elaboration occurred only in Bulgaria.[68] Indeed, also as a result of the Commission's pressure,[69] currently the Biological Diversity Act contains six articles which are intended to resemble the content of the two provisions.[70] Furthermore, there is also a separate ministerial regulation which governs the conduct of the compatibility assessment mentioned in Article 6 HD.[71] Bulgarian law explicitly regulates matters which are simply implied under the Directive. For instance, Article 34 of the Biological Diversity Act administers the adoption and conduct of compensatory measures in the cases described by Article 6(4) HD.[72] Moreover, the meanings of the terms *significant* and *integrity* from art 6(3) HD are clarified in Article 32 of the national act. Additionally, regarding the linguistic obstacles in the formula ''likely to have'', the Bulgarian legislature has adopted a strict approach which also serves to illustrate the role of the precautionary principle for the legal coherence of the Act.[73] Finally, the notion of mitigation measures is regulated by the Additional Provisions of the Regulation for the Conduct of Compatibility Assessments. Article 3(9) of these Provisions stipulates that mitigation measures are to be understood as ''measures intended to minimalize or terminate the negative impact of the plan, programme, project or investment proposal both during and after its conduct''. The clear reference to *ex post* termination in this definition makes its compatibility with the interpretation of the ''prevention criterion'' doubtful.

3.2. Short quantitative overview of cases dealing with Article 6 of the Directive

A look at national databases for the judiciary in these states shows that the subject-matter of the Directive has been object of litigation in many cases in each of the Member State investigated.[74] In some Member

cont.
act has now been incorporated in the ''Wet Natuurbescherming'' (Act Nature Conservation), Stb. 2016, 34. This transposition followed three judgments of the CoJ that found that the Netherlands infringed the Directive; for Italy see Presidential Decree (PD) No. 357 of 8 September 1997, Art. 5(4) as amended by PD No. 120 of 12 March 2003. The amendment enlarged the application of an appropriate assessment to those projects exempted from an EIA.

[63] Law No. 50 of 18 April 2016, as corrected by Law No. 56 of 19 April 2017.

[64] Law No. 163/2006, Art. 166(1). In application of Law No. 190/2002, Art. 4(1).

[65] PD 357/1997, Art. 5(4). In fact, Italian law requires an AIA to be a part of the more comprehensive EIA where projects requiring the latter are at stake. See CdS, Judgment No. 3917, 22 July 2005.

[66] Law No. 190 of 20 August 2002, in execution of Law No. 443 of 21 December 2001 on the realisation of infrastructure of national interest.

[67] On the use of this technique, see H.T. Anker and Others, n. 31 above.

[68] *IbId.*

[69] In 2010 Bulgaria's Council of Ministers initiated an amendment of the law and motivated it with the result of the Commission's infringement proceedings: National Assembly of Bulgaria, *Legislative Proposal for Amendment of the Biological Diversity Act* (002-01-45, May 2010).

[70] Biological Diversity Act, State Gazette No. 77/9.08.2002, Art. 31, 31a, 32, 33, 34, 34a.

[71] Ordinance for the Conditions and Arrangements for Assessing the Compatibility of Plans, Programmes, Projects and Investment Proposals with the Object and Aims of Conserving protected Areas, adopted by Council of Ministers Decree No. 201/31.08.2007, promulgated, State Gazette No 73/ 11.09.2007, amended and supplemented SG No. 3/ 11.01.2011 SG No. 94/ 30.11.2012.

[72] It establishes that compensatory measures ''shall consist in conservation or restoration of the same natural habitat type or habitat of the same plant or animal species'' (liberal translation).

[73] *IbId.*, Biological Diversity Act, Art. 31 (1): ''Any plans, programmes, projects and building-development proposals that are not directly related or necessary for the management of the special areas of conservation and that, either individually or in interaction with other plans, programmes, projects or building-development proposals, are likely to have a significant negative impact on the special areas of conservation, shall be assessed as to the compatibility thereof with the protection purposes of the relevant special area of conservation.''

[74] For Germany, at <www.Beck-online.de> Total number of documents: Eingeschränkt auf: Publikationstyp: Rechtsprechung, Norm: § 34 BNatSchG (excl. double hits). Double hits were excluded through manual counting of the results. (Up until 14th December 2016). For Italy, at Segretariato Generale della Giustizia amministrativa, <www.giustizia-amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/Ricerca/index.html?showadv=true&tipoRicerca=Provvedimenti>. Searched for the Italian implementing legislation (''Art. 5 dpr n 357/97''), in all its possible variations, while restricted to judgments of the regional administrative courts (TAR). For Bulgaria, at <web.apis.bg> (Apis 7): Judicial Practice relating to Art. 31, 31a, 32, 33, 34, 34a of the Biological Diversity Act and the Regulation on the Conditions and Arrangements for Assessing the Compatibility of Plans, Programmes, Projects and Investment Proposals with the Object and Aims of

States the number of cases is higher than hundred in the period 2008-2016. The Member States under consideration with the most cases is Bulgaria with 324 cases related to the provisions of Bulgarian law under Article 6(3) and 6(4) HD before January 2017. Despite the high number of cases, not a single preliminary question was requested. In Germany, only in the period 2012-2016, 151 cases can be counted concerning §34 BNatSchG. In five cases, national courts asked a preliminary question, with one of them concerning the concepts of mitigation and compensation measures.[75] In France, disputes regarding Article 6(3) and 6(4) HD and their national transpositions form a large majority of the Natura 2000 caseload, representing more than 20 cases per year on average. Despite this rather substantial stream of cases, none of them led to a referral to Luxembourg.[76] In the Netherlands, in the period 2008-2017, Dutch courts dealt with Articles 6(3) and 6(4) HD and their national transposing measures in many cases, with 170 cases dealt with by the *Raad van State* (Council of State).[77] In four cases a preliminary reference was requested in the context of Articles 6(3) and 6(4) HD, including the leading cases *Waddenzee* and *Briels*, both explicitly related to the concepts of mitigation and compensation measures.[78] In Italy, the count of cases comes close to a hundred in the 2008–2017 period, with three requests for preliminary rulings filed – by the TAR Bari in 2009[79] and the Consiglio di Stato (Council of State) in 2003 and 2012[80] – yet not concerning the specific notions of compensation and mitigation measures in the Directive.[81] The UK seems to be the Member State with the lowest amount of cases in this field, with 18 cases in the period between 2008 and 2016. In none of these cases a preliminary question was asked.

The above quantitative overview shows the very high number of cases in which no preliminary reference has been made. It should be noted that in none of these cases we have retrieved explicit references to the *CILFIT* case or criteria. Only some implicit references were found.[82] In some cases, non-reference was justified by means of a bold statement that there is no conflict with EU law.[83] Yet, references to *Sweetman* and *Briels* can be retrieved in each jurisdiction, suggesting an implicit use of the *acte éclairé* doctrine.[84] For *Orleans* this is not the case, probably due to the novelty of this judgment in relation to the period of time taken into consideration for the search of national judgments. It can thus be concluded that Article 267 TFEU has not been relied upon in many cases. To establish whether the lack of preliminary references affects the legal effectiveness of Article 6 HD, we have to analyse whether in the cases ruled without making a preliminary ruling the HD was correctly or wrongly interpreted. This is done in the next section, by means of a qualitative method of research.

cont.
Conserving protected Areas (excl. double hits). Double hits were excluded through manual counting of the results (up until 15th December 2016). For the Netherlands, uitspraken.rechtspraak.nl: all judgments related to or involving the relevant articles of the habitats directive and the implementing legislation as laid down in the Natuurbeschermingswet 1998 and the Flora- en Faunawet excluding double and irrelevant hits by means of manual counting of the results. The cases were located in bailii.org. The search key words used were: ''conservation, habitats, adverse, SAC, natural England, Sweetman, Briels, natural habitats regulations, habitats directive'' as well as cited cases within already found cases. For France cases have been collected using the following formulas ''L. 414-4 I'', ''L. 414-4 II'',''L. 414-4 III'', ''L. 414-4 IV'', ''article 6 ET directive Habitat'', ''article 6 ET 92/43/CEE'' on the Dalloz search engine.

[75] Case C-244/05, *Bund Naturschutz in Bayern eV and Others v Freistaat Bayern*, [2006] ECR I-8445, ECLI:EU:C:2006:579; Case C-226/08, *Stadt Papenburg v Bundesrepublik Deutschland*, [2010] ECR I-0131, ECLI:EU:C:2010:10; Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, [2011] ECR I-3673, ECLI:EU:C:2011:289; Case C-683/16: *Request for a preliminary ruling from the Verwaltungsgericht Köln (Germany) lodged on 27 December 2016 — Deutscher Naturschutzring, Dachverband der deutschen Natur- und Umweltschutzverbände e.V. v Bundesrepublik Deutschland* OJ [2017] C104/31; and with reference to the concept of mitigation and compensation measures, Case C-399/14, *Grüne Liga Sachsen eV and Others v Freistaat Sachsen*, ECLI:EU:C:2016:10.

[76] Curiously, in 2008, 94 percent of French judges considered themselves as ''unfamiliar'' with the preliminary reference procedure, see EP report ''on the role of the national judge in the European judicial system'' [2008] Committee on Legal Affairs, A6-0224/2008, 20.

[77] Database source: https://uitspraken.rechtspraak.nl. The search criteria were limited to include judgments by the Dutch Council of State over the period of 2008 until October 2017. Hits conformed to include (1) ''habitatrichtlijn'' and (2) ''artikel 6 lid 3'' and/or ''artikel 6 lid 4'' and/or ''artikel 6 derde lid'' and/or ''artikel 6 vierde lid'', and were filtered concerning false hits (judgments conforming to the criteria but not relating to article 6 clauses of the Habitat Directive).

[78] *Waddenzee*; *Briels*; and Case C-293/17, *Stichting Werkgroep Behoud de Peel*, Application (OJ) 18 August 2017; Case C-294/17, *Stichting Werkgroep Behoud de Peel*, Application (OJ) 18 August 2017.

[79] C-2/10 *Azienda Agro-Zootecnica*. In fact, focus lies on the interpretation of a different notion of Article 6(3) HD.

[80] C-301/12 *Cascina*. In fact, focus lies on the interpretation of Articles 9 and 11 HD; C-117/03 *Dragaggi*. In fact, focus lies on the correct identification of sites to be protected under the HD.

[81] EUR-Lex, <www.eur-lex.europa.eu/advanced-search-form.html> accessed 8 July16. Searched for ''92/43/EEC'' under ''Requests for preliminary references'', and focused on references by the Italian State.

[82] This is particularly the case in the UK, see to that effect: *R v North Norfolk District Council and Anor* [2015] UKSC 52, para. 62; *Smyth v The Secretary of State for Communities and Local Government & Ors* [2015] EWCA Civ 174, para. 74.

[83] E.g. Italian CdS, Judgment No. 2422, of 14 May 2015.

[84] See examples made below.

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3.3. Qualitative appraisal of national courts interpretation of the Directive in cases in which no-reference was made

When it comes to the question about whether, despite the only sporadic and implicit use of *CILFIT* at national level, national courts dealt with questions concerning mitigation and compensation measures in a manner which is compatible with the interpretation of the HD in *Sweetman*, *Briels* and *Orleans*, the answer is negative in all jurisdictions analysed here. In each jurisdiction, there are cases in which additional measures were accepted under Article 6(3) HD while, in the light of the now crystallised CJEU jurisprudence, they should have been assessed in light of Article 6(4). In some of the cases below, we will show that even when national courts refer to *Sweetman* and/or *Briels*, they still wrongly interpreted Article 6(3) HD, as they did not take enough account of the no-doubts criterion clarified in *Orleans*. This means that the implicit use of the *acte éclairé* doctrine is actually wrong. National courts failed to recognise that the cases under assessment had significant differences with the cases in which *Sweetman* and/or *Briels* were rendered. They failed thus to recognise the need for a new preliminary reference.

In *Bulgaria*, as regards the concepts of mitigation and compensation measures, the definition of mitigation measures under the Additional Provisions of the Regulation for the Conduct of Compatibility Assessments seems to have led to national cases which are not in line with the *Orleans* case. National courts have been relatively consistent in concluding that if the measures envisaged in the investment plan lead to a minimization or termination of negative impact which would otherwise render the project dangerous to the protected habitat, they are considered appropriate.[85] Yet, following the wording of the Additional Provisions act, the case law do not take into account the requirement that such mitigation measures must be completed before the authorisation is granted. This practice continued even after *Orleans* was rendered.[86]

In *Germany*, as regards the distinction between mitigation and compensation measures, the BVerwG incorporates the CJEU's *Briels* judgment in the "Planfeststellungsbeschluss 'A49'" case, decided in 2014,[87] but it does so in breach of *Orleans*. This case concerns an infrastructure project affecting a Natura 2000 site. The assessment of the responsible authority concluded that the project would have significant adverse effects on the protected area, but was justified in public traffic interests and protection measures (in compensation for harming 11 ha of living area, 23ha will developed) were taken.[88] During the judicial review procedure, mitigation measures were mentioned by the Court regarding the claims by the plaintiff on the effects on animal species.[89] The Court said that no annex II species (newts, bats) can be considered adversely affected, as measures to avoid/mitigate damage can already be considered during the compatibility testing of disturbances and prevent a "significant adverse effect" when the area finds back to its balance after the disturbance.[90] The mitigating measures were laid down in the planning permission and had to be realized before construction could begin. Hence, they were not yet functioning in the sense that they were already implemented, as required under the "no-doubts" criterion. In conclusion, although there have been attempts to reconcile this national judgment with the CJEU case law,[91] the BVerwG's findings are far from clearly inferable from *Orleans* and would have required a reference the CJEU for further clarification.

In *France*, concerning the distinction between mitigation and compensation measures, courts appear to have accepted that mitigation measures can lead to the conclusion that no significant effect is at stake as early as 2008. Indeed, in a case in front of the Conseil d'État, the judges of the royal palace ruled that "in order to determine if a project was covered by the protection of article 414-4, it should be assessed whether the realization of the project was to lead to negative impact likely to threaten the state of conservation of a Natural 2000 site, after having taken into consideration the impact of measures aiming at suppressing or mitigating its negative effects".[92] The French court could not have been more explicit:

[85] Decision No. 14814 from14.11.2011 of the Supreme Administrative Court for Adm. Case No. 6377/2011, III d., reported by Judge Yordanka Kostova; Decision from 30.11.2011 of the Adm. Court at Haskovo for Adm. Case No. 543/2011; Decision No. 4677 from 2.07.2015 of the Adm. Court at Sofia for Adm. Case No. 6922/2014; Decision No. 4540 from 29.06.2015 of the Adm. Court at Sofia for Adm. Case No. 9427/2014; Decision No. 1964 from 1.08.2014 of the Adm. Court at Varna for Adm. Case No. 3746/2013; Decision No. 10410 from 25.07.2014 of the Supreme Administrative Court for Adm. Case No. 16235/2013, V d., reported by Judge Emanoil Mitev; Decision No. 2165 from 14.09.2012 of the Adm. Court at Varna for Adm. Case No. 1812/2012; Decision from 15.12.2011 of the Adm. Court at Pernik for Adm. Case No. 371/2011; Decision No. 7918 from 29.06.2015 of the Supreme Administrative Court for Adm. Case No. 15841/2014, V d., reported by Chairman Boyan Magdalinchev; Decision No. 2469 from 20.11.2015 of the Adm. Court at Varna for Adm. Case No. 475/2014. Decision No. 1424 from 21.07.2016 of the Adm. Court at Burgas for Adm. Case No. 319/2016.

[86] Decision No. 1424 from 21.07.2016 of the Adm. Court at Burgas for Adm. Case No. 319/2016.

[87] BVerwG, *Urteil* vom 23. April 2014 – 9 A 25.12.

[88] *Id.*, para 64.

[89] *Id.* para 60.

[90] *Id.* paras 65, 69.

[91] See P. Schütte, "Anmerkung: Bundesverwaltungsgericht bestätigt die Zulässigkeit von Schadensvermeidungsmaßnahmen im Habitatschutzrecht" (2014) *ZUR* 668, 675.

[92] See CE, 14 November 2008, no. 297557 and no. 297633.

> "Considérant que, contrairement à ce qu'affirment des requérants, il ressort des termes de l'étude d'impact que les mesures de nature à supprimer ou réduire les effets dommageables du projet sur les huit sites 'Natura 2000' qu'il traverse sont précisément décrites; que si des mesures compensatoires ont également été prévues, par précaution, dans le but de contrebalancer l'impact résiduel du projet et de renforcer la cohérence du réseau 'Natura 2000', cette seule circonstance n'est pas de nature à faire apparaître que le projet aurait un impact significatif sur l'état de conservation des sites en cause ainsi que des espèces et habitats prioritaires qu'ils abritent, alors qu'il ressort des pièces du dossier que, du fait de la mise en uvre des mesures d'atténuation décrites dans l'étude d'impact, tel ne sera pas le cas; que, par suite, le projet ne relevait pas des III et IV de l'article L. 414-4 du code de l'environnement cité ci-dessus; qu'il en résulte que l'autorité administrative n'était pas tenue de justifier de raisons impératives d'intérêt public pour l'autoriser et que l'avis de la Commission européenne n'avait pas à être recueilli;"

This passage shows the possibility to rely on mitigation measure, called here "mesures d'atténuation", to avoid following the procedure indicated in Article 6(4) HD. To this extent, it is enough to rely on the predicted effectiveness of such measures as indicated in the impact assessment study. This is a breach of the no-doubts criterion, thus of the *Orleans* case.

In another case earlier the same year,[93] the Conseil d'État had decided that the building of the A406 highway, which cuts through a Natura 2000 site, had no significant impact on the site after having considered two kinds of measures. The first concerned the phasing of the works to take account of the breeding period of the birds protected under the Natura 2000 site at hand; which clearly was a mitigation measure.[94] The second measure concerned a commitment taken by the contractor to reconstitute an area of alluvial grasslands to support breeding, which was clearly aimed at compensating the effect of the project. However, it is unclear whether this latter measure prevents damage from occurring or restores it.[95] It remains that measures the effects of which will be visible in the future were considered mitigation measures under Article 6(3) HD, in breach of what later became evident under the no-doubts criterion.

In *Italy*, in a judgment from 2015,[96] the Consiglio di Stato decided to uphold a judgment from the TAR Emilia Romagna[97] confirming the validity of the development consent for the construction of an intersection between the A22 highway and the national road "Pedemontana", which at one point, crossed the Natura 2000 site of the Oasi del Colombarone. As a mitigation measure, it was proposed to have a tunnel passing under the area. Yet, there were doubts as to under which conditions such a measure would have actually avoided the potential negative effects of the project. Accordingly, it was agreed that the exact specifications of the tunnel would have been refined in a later phase. The Consiglio di Stato rejected the challenge brought by a national environmental organization against, among others, this part of the decision. According to the Consiglio di Stato, this conclusion was justified by the finding that this approach was not seen as being in breach of the act implementing the Directive. Nowadays, we can state that this approach is in breach of the no-doubts criterion, thus of the *Orleans* case.

Lower Italian courts seem to follow a similar wrongful interpretation. For example, in judgment 1310/2016, the TAR Toscana[98] granted an appeal for the annulment of runway extension plan of the Florence Peretola Airport on the grounds of, inter alia, lacunae in the Strategic Environmental Assessment (SEA) procedure[99] resulting from the failure to consider the impact on an adjacent Natura 2000 site, the assessment under which is directly connected to the SEA.[100] The court stressed, in line with *Briels* yet without referencing to it, that "envisaged compensation measures may themselves have an impact on the environment which similarly has to be assessed"[101] implying that the mere provision of those compensation measures cannot be taken into account in the assessment of the implications of the project provided for in Article 6(3). However, contrary to the stringent no-doubts criterion for mitigation measures, the TAR merely required the mere existence of "knowledge of the overall effects of the project on the environment, including those deriving from the measures aimed at mitigating the environmental impact".[102] The actual

[93] CE, 7 May 2008, no. 309285.
[94] R. Frins no. 49 above, 933.
[95] Cf. *Id.*, who tends to consider this measure a compensation measure. Similar doubts exist for another judgment, see CAA Marseille, 20 mars 2014, no. 12MA02908.
[96] Italian CdS, Judgment No. 2422, of 14 May 2015.
[97] TAR Emilia Romagna, Judgment No. 741, of 10 July 2014.
[98] TAR Toscana, Judgment No. 1310, 22 June 2016.
[99] Provided for by Directive 2001/42/EC on the Assessment of the Effects of Certain Plans and Programmes on the Environment [2001] OJ L 197.
[100] Ministero dell'Ambiente e della Tutela del Territorio e del Mare "La Valutazione di Incidenza" (MINAMB, 2014) <http://www.minambiente.it/pagina/la-valutazione-di-incidenza>; Ortoleva, Tina "La direttiva VAS (2001/42/ce) e la direttiva habitat (92/43/ce) alla luce della pronuncia della Corte dì giustizia delle comunità europee nella causa C-177/11" 2013 <http://www.ambientediritto.it/home/dottrina/la-direttiva-vas-200142ce-e-la-direttiva-habitat-9243ce-alla-luce-della-pronuncia-della>; See Case C-177/11, *Syllogos Ellinon Poleodomon kai Chorotakton v Ypourgos Perivallontos, Chorotaxias & Dimosion Ergon and Others* [2012] CLI:EU:C:2012:378.
[101] TAR Toscana, Judgment No. 1310, 22 June 2016, para. 5.
[102] TAR Toscana, Judgment No. 1310, 22 June 2016, para. 5, *Ibid.*

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implementation of the mitigation measures prior to authorisation was not taken into account.

In the *UK*, the Supreme Court would have benefited from a preliminary reference in the *R v North Norfolk District Council* case.[103] This case concerns an appeal against a judgment of the England and Wales Court of Appeal (EWCA),[104] which had uphold a project potentially affecting the River Wensum, a Natura 2000 site. This risk was to be mitigated by a staged system of drainage, involving an interceptor/separator facility and thereafter a storage infiltration basin to be planted with indigenous plants to act as a secondary passive treatment system. The Supreme Court highlighted doubts about the effectiveness of this mitigation measure at the time of the approval of the project.[105] Yet, it concluded that the appealed judgment, and in turn the adopted decision, did not need to be quashed and dismissed the appeal against them. Indeed, the Supreme Court did not consider the lack of certainty at the point in time in which the authorisation was granted so as to justify a relief to the claimant.[106] According to the Court, this was not a case where the environmental issues were of particular complexity or novelty, and that finally agreement was reached among the involved agencies about the effectiveness of the proposed measures.[107] The Court was hence not convinced that a different conclusion would have been reached if the proposed mitigation measure had not been accepted. This case shows first that the Supreme Court is willing to accept as a mitigation measure a measure the effectiveness of which has not been proved to the satisfactory of the no-doubts criterion as clarified in *Orleans*. Second, it shows that the Supreme Court is of the opinion that falling under Article 6(4) HD does not lead to different outcomes then when Article 6(3) and the concept of mitigation measures is applied. In both cases, a preliminary reference could have help in reaching a different outcome.

Further, in the UK the *Briels* case runs through the *Smyth* case,[108] concerning an appeal against the granting of a planning permission by an Inspector for a development of 65 residential dwellings, and if this permission complied with the requirements set out in Article 6(3) HD. The Court dismissed the appeal, upholding the development permission, and while referencing explicitly to *Briels*, it also clarified certain points on mitigation and compensation measures. First, the Court acknowledges that "[...] *safeguarding measures mitigating possible harmful effects of a plan (in the sense that they prevent such effects from arising at all or to some degree) may be taken into account under Article 6(3)* [...]". On this spectrum, the inspector's report with the added mitigative safeguards, sufficiently reassured the Court that the permit was right. Even if these safeguards were not to be included immediately, they should not turn into a reason to pause the development.[109] Subsequently, the Court makes a distinction between mitigation and compensation measures in which he follows the *Briels* case.[110] Yet, the national court fails to recognise the relevance of what, under *Orelans*, has become the no-doubts criterion. Mitigation measure have to prove effective prior to development consent, not afterwards.

Finally, in the Netherlands,[111] on 21 June 2010, the Raad van State decided in the *IJburg* case[112] that the establishing of mussel sandbanks outside a Natura 2000 site are in replacement to those affected. These mussel sandbanks are important feeding areas for protected bird species for which the IJmeer Natura 2000 area was designated. Aside from the question whether these sandbanks should have been included in this Natura 2000 area, the case discussed whether these replacement qualified as a mitigation or compensation measure. Despite the fact that the effectiveness of the new sandbanks as feedings areas for the protected birds was not proven yet – only the presence of mussels was verified – the Raad van State considered this measure a mitigation rather than compensation measure. While it is open to debate whether such measures can be effective *in potential*,[113] it is clear that accepting these kinds of measures as mitigation measures, while their effects have not been proven *in practice,* is in breach of Article 6(3) HD as interpreted, in particular, in the *Orleans* case. Also in the *Tweede Kolencentrale Eemshaven* case of 16 April 2014,[114] the

[103] *R v North Norfolk District Council and another* [2015] UKSC 52.
[104] *R v North Norfolk District Council and another* [2013] EWCA Civ 1657.
[105] *R v North Norfolk District Council and another* [2015] UKSC 52, para. 53.
[106] *Id.*, para. 59.
[107] *Id.*, para. 60.
[108] *Smyth v The Secretary of State for Communities and Local Government & Ors* [2015] EWCA Civ 174.
[109] *Id.*, p. 100.
[110] *Id.*, p. 69.
[111] For a systematic account of the case law of the Dutch Council of State on this matter, see Squintani and Zijlmans, n 6, above.
[112] ABRvS 21 juli 2010, 200902644/1, ECLI:RVS:2010:BN1933, *Jurisprudentie Milieurecht* 2010/98 m.nt. Zijlmans, Bouwrecht 2010/153 (m.nt. H.E. Woldendorp).
[113] Against, see e.g., A.G.A. Nijmeijer, "Bestemmingsplan en Passende Beoordeling onder Vigeur van de Gewijzigde Natuurbeschermingswet 1998: een Blijvend Punt van Aandacht?" *Tijdschrift voor Bouwrecht,* (2009/179); R.H.W. Frins, AB 2014/189 (noot bij *Briels*), according to Frins, the *IJburg* case concerned compensating measures. In favour see, J.M. Verschuuren, noot bij VzABRvS, 31 August 2009, 200902644/2/R2 (IJburg), *Milieu en Recht* 2010/19; en ABRvS 21 July 2010 (IJburg), 200902644/2/R2, *Milieu en Recht* 2011/160.
[114] 201304768/1/R2, ECLI:NL:RVS:2014:1312, *Jurisprudentie Milieurecht* 2014/80, m.nt. J.M.I.J. Zijlmans en G.A.J.M. Hoevenaars; *Tijdschrift voor Bouwrecht* 2014/123, m.nt. R.H.W. Frins, Bouwrecht 2014/92, m.nt. H.E. Woldendorp; *Milieu en Recht* 2014/111, m.nt. M.M. Kaajan.

Raad van State concluded that managing measures under Article 6(1) HD qualified as mitigation measures under Article 6(3) HD despite their generic nature. In this case, a clear breach of the specificity criterion can be seen. Moreover, there is no certainty that the mitigation measures will be effective, hence breaching the no-doubts criterion.

IV. Discussion

From the six case studies performed above, we can see that only in a few cases national courts made a preliminary reference. This led to shortcomings in the interpretation of the Directive in all six countries. In particular, whereas the concept of mitigation measures was accepted under all jurisdictions, no account is given of the no-doubts criterion following from the *Orleans* case. As a result, also measures the effects of which are not certain at the moment in which the development consent is given are qualified as mitigation measures under Article 6(3), hence wrongly excluding the application of Article 6(4) HD. It can therefore be concluded that the national cases in which no preliminary ruling was sought affected the legal effectiveness of Article 6 HD.

This finding leads us to two kinds of considerations. First, it could be argued that Article 6 HD was wrongly interpreted by national courts due to the fact that the CJEU interpreted the concept of mitigation measures in *Orleans* too strictly. The no-doubts criterion is indeed the most frequently infringed criterion in the case law presented above. Frins's prediction was thus correct.[115] Above, we already stated, by quoting Schoukens, that "averting unsustainable development is an unavoidable corollary of any effective nature conservation law".[116] Moreover, in light of the derogation possibilities envisaged under Article 6(4) HD, it can hardly be argued that the EU regulatory framework is too stringent, as it was the case under Article 4 of the Birds Directive that does not allow derogations.[117] Indeed, the interpretation given by the CJEU to Article 6(3) HD in *Orleans* does not stand in the way to the application of Article 6(4) of the Directive.

Yet, the question remains whether national courts could reasonably expect the outcome reached by the CJEU in *Orleans*. If not, they could be excused from affecting the legal effectiveness of the Directive. In our opinion, the CJEU interpretation given in *Orleans* could have been easily predicted. Indeed, the ruling in *Orleans*, similarly to those in *Briels* and *Sweetman*, follows a well-established patter in the interpretation of EU law. The CJEU interprets concepts that support the achievement of EU goals extensively and concepts that limit the achievement of EU goals restrictively.[118] If more interpretations of an EU provision are possible, the CJEU gives preference to the interpretation that ensures the highest guarantee of achieving the EU goals at stake.[119] The analysis performed above shows that national courts did the exact opposite. They interpreted the concept of mitigation measure extensively. They have thus favoured an interpretation which gives less guarantees that the goals of the HD are achieved than the one in which this concept is interpreted restrictively. In none of the cases analysed, we have seen references to the EU interpretation methods. National apex courts simply disregarded basic EU law, and cannot therefore be excused from having reached wrongful conclusions. This also means that the findings presented in this study are relevant to understand the functioning of Article 267 TFEU in general.

Our second consideration concerns in fact the functioning of Article 267 TFEU. As known, the CILFIT ruling has been criticised for setting too demanding standards on the national courts.[120] In our study, we have not been able to retrieve one single reference to these criteria. Only in few cases coming from the UK and Italy we have seen statements suggesting that the national court considered Article 6(3) HD clear.[121] It could be argued that this finding means that national courts consider the CILFIT criteria so strict that they ignore them all together. We do not deny that certain criteria, if applied strictly, can be quite difficult to meet.[122] This could explain why the Court in *Van Dijk* concluded that CILFIT is respected also when a lower court reached a conclusion differing from the one envisaged by the apex court in a letter moment in time.[123] Apparently the criterion that the EU provision under scrutiny must be clear to all judges in the EU does not mean that all judges must agree about the interpretation to be followed. Still, expressing disappointment with the manner in which the CJEU interprets Article 267 TFEU by completely disregarding the CILFIT ruling can hardly be considered a mature way of expressing

[115] R. Frins n 49 above.
[116] H. Schoukens, n. 10 above.
[117] The regulatory framework of Article 6 HD replaces that of Article 4(4) BD, see Article 7 HD.
[118] Eg. recently, Case C473/14, *Dimos Kropias Attikis*, ECLI:EU:C:2015:582, para. 50.
[119] Eg. Case C-434/97, *Commission v France*, ECLI:EU:C:2000:98, para. 21; and Case 187/87, *Land de Sarre e.a.*, ECLI:EU:C:1988:439, para. 19.
[120] In particular, P.J. Wattel, n. 3 above.
[121] For the UK *R v North Norfolk District Council and Anor* [2015] UKSC 52, para. 62; in the context of a lower court, *Smyth v The Secretary of State for Communities and Local Government & Ors* [2015] EWCA Civ 174, para.74. For Italy, see Italian CdS, Judgment No. 2422, of 14 May 2015.
[122] See literature quoted at n. 3 above.
[123] Joined Cases C-72/14 and 197/14, *X v Inspecteur van Rijksbelastingdienst (C-72/14) and T. A. van Dijk v Staatssecretaris van Financiën (C-197/14)* [2015] ECLI:EU:C:2015:564 (Van Dijk).

such disappointment. This is even truer in light of the fact the Article 267 TFEU is seen as being part of the human right to a fair trial under the European Convention on Human Rights.[124] An approach by which apex courts seek a dialogue with the CJEU on this matter, as did by the Dutch Supreme Court in *Van Dijk*, must hence be preferred as it allows a judicial dialogue that fosters a uniform development of EU law across the whole Union.[125]

V. Conclusions

This contribution highlights the tendency to interpret Article 6 HD without making a preliminary reference in all investigated jurisdictions. This tendency compromises the legal effectiveness of this Directive, as in all jurisdictions authorisations granted in breach of Article 6(3) HD have been uphold by national courts. It is the first time that the linkage between lacks of preliminary references and decreases in legal effectiveness of EU environmental law is proven.

Accordingly, we strongly recommend national courts to make preliminary rulings in this field of EU law. Besides, we urge for further investigating about the reasons for which the system envisaged under Article 267 TFEU is not functioning as it should in the field of nature conservation, and potentially other fields of EU environmental law. We call hence for the establishment of a follow-up research project focusing on behavioural effectiveness in this field of EU law. European Institutions, in particular the Commission, should stimulate the setting up of such studies and strictly monitor national courts behaviours.

[124] ECrtHR, *Ullens De Schooten*, (dec.), no. 3989/07 and 38353/07, 20 September 2011.

[125] On judicial dialogue, in particular, R. Allan, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' [2007] *European Journal of Legal Studies* 121–136; F. Jacobs, "Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice" [2003] *Texas International Law Journal* 547–556.