Biodiversity damage from authorised activities; the polluter pays and precautionary principles and the significance threshold in the Environmental Liability Directive

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I. Introduction

In July 2020, the Court of Justice of the European Union (CJEU) ruled that measures carried out by a public law association could potentially cause environmental damage under the Environmental Liability Directive (ELD)[1] to a protected species of bird even though the measures were part of the management of a site in accordance with the association's statutory obligations.[2] The decision, *Naturschutzbund Deutschland — Landesverband Schleswig-Holstein eV v Kreis Nordfriesland* (*Naturschutzbund Deutschland*), involved, not accidental pollution, but chronic damage caused by authorised drainage measures that had been carried out for many years.

The case raises issues concerning the relationship between the ELD and the Birds[3] and Habitats[4] Directives (collectively referred to as the Nature Directives). It also raises issues concerning application of the precautionary principle and the polluter pays principle as they apply to liability for preventing and remediating chronic environmental damage from authorised activities, especially when those activities are carried out at or near a Natura 2000 site. Further, the case raises the issue of whether the significance threshold in the ELD for damage to species and natural habitats protected by the Nature Directives (referred to as biodiversity damage) is lower than it is perceived to be.

[1] Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56.
[2] Case C-297/19 *Naturschutzbund Deutschland — Landesverband Schleswig-Holstein eV v Kreis Nordfriesland* ECLI:EU:C:2020:533. The CJEU decided to proceed to judgment without an Opinion after hearing Advocate General H. Saugmandsgaard Øe.
[3] Directive 2009/147/EC on the conservation of wild birds [2010] OJ L20/7 (consolidated version).
[4] Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

This article discusses and analyses the issues outlined above. First, it discusses the relationship between the ELD and the Nature Directives. It then examines *Naturschutzbund Deutschland* and the background to the case. The article then analyses the polluter pays principle as it applies to the ELD; the principle does not apply to the Nature Directives. The precautionary principle as it applies to the Nature Directives and the ELD, and the differences in its application to the Directives are then discussed. The article then examines the significance threshold for biodiversity damage in the ELD, its difference from the significance threshold in the Habitats Directive, and analyses the reasons for the perceived higher threshold in the ELD. In doing so, the article argues that this perception is inaccurate.

The article concludes that the significance threshold for biodiversity damage in the ELD is much lower than perceived and applied by many, if not most, Member States and competent authorities. The article also concludes that the CJEU's ruling in *Naturschutzbund Deutschland* means that some, probably many, authorised activities that affect Natura 2000 sites should be modified or should cease being carried out in order to stop continuing damage to protected species and natural habitats, and that damage already caused by such activities should be remediated.

II. Relationship between the Environmental Liability Directive and the Nature Directives

The ELD imposes liability on an operator for preventing and remediating an imminent threat of, or actual, environmental 'damage'[5] caused by its occupational activities to 'protected species and natural habitats.'[6] The term 'Protected species and natural habitats' is defined to mean specified species and natural habitats protected by the Nature Directives and, at the option of a Member State, those protected under equivalent national legislation.[7]

Species and habitats protected by the Birds Directive are:

[5] ELD (n 1) art 3(1). The ELD defines 'damage' as 'a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly'. ibid art 2(2).
[6] ibid art 3(1).
[7] ibid art 2(3).

- regularly occurring migratory bird species (mentioned in article 4(2) of the Birds Directive) and their habitats; and
- vulnerable, rare and endangered bird species (listed in annex I) and their habitats.[8]

Species and habitats protected by the Habitats Directive are:

- natural habitat types whose conservation requires the designation of special areas of conservation (SACs) (listed in annex I of the Habitats Directive);
- animal and plant species whose conservation requires the designation of SACs (listed in annex II); and
- animal and plant species of Community interest in need of strict protection (listed in annex IV) and their breeding sites and resting places.[9]

If an occupational activity is listed in annex III of the ELD, the operator is strictly liable for preventing or remediating biodiversity damage.[10] If an occupational activity is not listed in annex III, the operator is liable only if it is negligent or otherwise at fault.[11]

The ELD also imposes strict liability on an operator that carries out an occupational activity listed in annex III of the ELD if the activity causes damage to surface, ground, transitional or coastal waters under the Water Framework Directive (WFD),[12] marine waters not covered by the WFD under the Marine Strategy Framework Directive (MSFD),[13] or damage to land/soil.[14] Unlike biodiversity

[8] ibid arts 2(3)(a), (b).
[9] ibid.
[10] ibid art 3(1)(a).
[11] ibid art 3(1)(b). The ELD imposes liability on a non-annex III operator only for biodiversity damage, not water or land damage.
[12] ibid art 2(1)(b). See Directive 2000/60/EC establishing a framework for community action in the field of water policy [2000] OJ L327/1.
[13] ELD (n 1) art 2(1)(b). See Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy [2008] OJ L164/19.
[14] ELD (n 1) art 2(1)(c). Damage to land is not linked to EU legislation because the proposal for a Soil Framework Directive was withdrawn by the Commission following opposition from a blocking minority of Member States. Proposal for a Directive establishing a framework for the protection of soil COM(2006) 232 final (22 September 2006); https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006PC0232 See Withdrawal of obsolete Commission proposals [2014] OJ C153/3; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.153.01.0003.01.ENG&toc=OJ:C:2014:153:TOC

damage, operators whose activities are not listed in annex III are not liable for preventing or remediating water or land damage.

The ELD does not impose liability for preventing and remediating all damage to biodiversity, water and land. The damage must reach or exceed a significance threshold for each type of damage. Article 2(1)(a) of the ELD defines 'damage to protected species and natural habitats' by reference to the Nature Directives as 'any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of [protected] habitats or species'.[15] The 'conservation status' of a natural habitat is defined in pertinent part as 'the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species'.[16] In a similar manner, the conservation status of a species is defined in pertinent part as 'the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations'.[17] Both definitions include the phrase 'within, as the case may be, the European territory of the Member States to which the Treaty applies or the territory of a Member State or the natural range of that [habitat/species]'.[18] The definition of conservation status in the ELD is identical to that in the Habitats Directive[19] with the exception of the geographical area which is 'the European territory of the Member States to which the Treaty applies' in the Habitats Directive.[20]

The definitions of the 'favourable conservation status' of a natural habitat and a species are also identical in the ELD and the Habitats Directive. The conservation status of a natural habitat is considered to be favourable when:

- its natural range and areas it covers within that range are stable or increasing, and

[15] ELD (n 1) art 2(1)(a). In addition, the ELD states that a Member State may extend liability under the ELD to habitats and species protected under equivalent provisions of national law on nature conservation. ibid.
[16] ibid art 2(4)(a).
[17] ibid art 2(4)(b).
[18] ibid art 2(4).
[19] Habitats Directive (n 4) art 1(e) (natural habitats); ibid art 1(i) (species). The Birds Directive similarly refers to 'the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies'. Birds Directive (n 3) art 1.
[20] Habitats Directive (n 4) art 1(e). See ibid art 2(1) (natural habitats); ibid art 2(1) (species).

- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
- the conservation status of its typical species is favourable ….[21]

The conservation status of a species is considered to be favourable when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.[22]

The Birds Directive does not include the terms 'conservation status' or 'favourable conservation status'. The principles that underpin the Directive, however, equally apply in relation to its objectives.[23]

The ELD explicitly refers to the close link between the definitions in the Nature Directives and their inclusion in the ELD. Recital 5 states that '[w]hen the concept in question derives from other relevant Community legislation, the same definition should be used so that common criteria can be used and uniform application promoted'.[24] In a further link between them, the ELD specifically excludes activities authorised under the Nature Directives,[25] namely any damage to a protected species or

[21] ibid art 1(e); ELD (n 1) art 2(4)(a).
[22] Habitats Directive (n 4) art 1(i); ELD (n 1) art 2(4)(b). The Birds Directive does not refer specifically to favourable conservation status. Arguably, however, this term has replaced the term 'ecological requirements' in it. See Birdlife International, Position paper of the Birds and Habitats Directives Task Force on the treatment of compensatory measures proposed outside affected Natura 2000 sites under Article 6(4) of the EU Habitats Directive (adopted by the BirdLife Birds and Habitats Directives Task Force on 31 July 2007) 1, fn 4.
[23] European Commission, 'Guidance document on sustainable hunting under the Birds Directive; Council Directive 79/409/EEC on the conservation of wild birds' (2008) 23 fn 36; https://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/docs/hunting_guide_en.pdf See Yaffa Epstein, José Vicente López-Bao and Guillaume Chapron, 'A Legal-Ecological Understanding of Favorable Conservation Status for Species in Europe' (2016) 9(2) Conservation Letters 81, 86.
[24] ELD (n 1) recital 5.
[25] ibid art 2(1)(a).

natural habitat from a plan or project authorised pursuant to articles 6(3) and 6(4) of the Habitats Directive (see section IV below) and derogations under the Birds Directive[26] and the Habitats Directive.[27]

The incorporation of common criteria from the Nature Directives into the ELD means that the ELD has implications for those Directives.[28] The relationship between the ELD and the Nature Directives is, in effect, circular. In essence, the ELD extends the obligations of Member States to restore and maintain species and natural habitats protected by them at favourable conservation status beyond those obligations to require private and public persons that cause an imminent threat of, or actual, damage to the species or natural habitats to carry out measures to prevent or remediate such damage.

The purpose of including the liability provisions was to fill the void of such provisions in the Nature Directives, especially because few if any Member States imposed liability for biodiversity damage when the ELD was adopted, and to encourage private and public persons to carry out measures to prevent damage to species and natural habitats protected by the Directives.[29]

The Birds Directive and the Habitats Directive provide for the designation of SPAs[30] and SACs,[31] respectively, which together form the Natura 2000 network. Both Directives direct Member States to take appropriate steps to avoid the deterioration of natural habitats and habitats of species in SPAs and SACs as well as significant disturbances of the species for which the sites have been designated.[32]

[26] Birds Directive (n 3) art 9.
[27] Habitats Directive (n 4) art 16.
[28] ELD (n 1), recital 3.
[29] European Commission Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, Explanatory Memorandum COM(2002) 17 final (23 January 2002) s 3, 5-6 (Explanatory Memorandum). The Explanatory Memorandum is not printed in the *Official Journal*.
[30] Birds Directive (n 3) art 4(1).
[31] Habitats Directive (n 4) art 3(1).
[32] Birds Directive (n 3) art 4(4); Habitats Directive (n 4) art 6(2).

Article 6(1) of the Habitats Directive, which applies to SACs and sites of Community importance (SCIs) if the six-year period for designating an SCI as an SAC has expired,[33] directs Member States to:

> establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for [SACs] or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.[34]

The objective of establishing conservation measures is to maintain or restore natural habitats and species of wild fauna and flora of Community interest at favourable conservation status.[35] The conservation measures must correspond to the ecological requirements of natural habitat types and species covered by annexes I and II of the Habitats Directive. Member States have no discretion in considering whether to establish conservation measures;[36] they must establish them for all SACs.[37]

The measures do not need to be in the form of management plans but if they are, the plans should include measures necessary to maintain protected habitats and species within the SAC at favourable conservation status. Article 6(1) does not describe the content of management plans.[38] The plans should, however, address all existing activities at the site including activities such as agricultural

[33] Commission notice, 'Managing Natura 2000 sites; The provisions of Article 6 of the "Habitats" Directive 92/43/EEC' C(2018) 7621 final (21 November 2018) s 2.2, 16 (Managing Natura 2000 sites); https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/Provisions_Art_6_nov_2018_en.pdf After a Member State has proposed a list of sites in its territory to the Commission, the Commission prepares a draft list of SCIs. Habitats Directive (n 4) arts 4(1)-(2). When the SCIs have been adopted, the Member State should designate it as an SAC 'as soon as possible and within six years at most'. ibid arts 4(3)-(4).
[34] Habitats Directive (n 4) art 6(1).
[35] See Christoph Sobatta, 'The European Union legal boundaries for semi-natural habitats management in Natura 2000 sites' (2018) 43 Journal for Nature Conservation 261, 265.
[36] Managing Natura 2000 sites (n 33) s 2.3.2, 21.
[37] Case C-508/04 *Commission v Austria* [2007] ECR I-3787 paras 75-76.
[38] See Agustín García Ureta and Iñigo Lazkano, 'Instruments for active site management under Natura 2000; Balancing between stakeholders and nature conservation?' in Charles-Hubert Born, An Cliquet, Hendrik Schoukins, Delphine Missonne and Geert Van Hoorick (eds), *The Habitats Directive in its EU Environmental Law Context; European Nature's Best Hope?* (Routledge 2015) 71, 82.

activities that are carried out on a regular basis.[39] Conservation measures set out in a management plan must be implemented.[40]

Article 6(1) does not apply to SPAs. Articles 4(1) and 4(2) of the Birds Directive include analogous provisions that also require the establishment of conservation measures in SPAs.[41]

The ELD does not refer directly to article 6(1) of the Habitats Directive or articles 4(1) and 4(2) of the Birds Directive but, as discussed below, there is a close link between those articles and the ELD because the criteria for determining whether damage to protected species and habitats under the ELD is significant refers to the normal management of Natura 2000 sites. In order to make such a determination, the competent authority – or operator – should assess the condition of the species or habitat before it has been damaged (baseline condition), taking into account criteria in annex I.[42]

Annex 1 has three paragraphs, the first of which sets out four examples of measurable data to assess against the baseline condition of the damaged species or habitat. The purpose of the assessment is to determine whether the effect of the damage on reaching or maintaining its conservation status, services provided by the amenities produced by it, and its capacity for natural regeneration is significant.[43] The examples include the number of individuals, the role of particular individuals, the capacity of the species for propagation, and the capacity of the damaged species to recover in a short time without intervention.[44]

The second paragraph of annex I states that damage to a protected species or natural habitat that has a proven effect on human health is automatically classified as significant damage.[45]

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[39] Managing Natura 2000 sites (n 33) s 2.4.1, 22.
[40] Case C-441/17 *Commission v Poland* [2018] ECLI:EU:C:2018:255 para 213.
[41] Commission Staff Working Document, Fitness Check of the EU Nature Legislation (Birds and Habitats Directives) Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora SWD(2016) 472 final (16 December 2016) s 6.4.1, 66 fn 201 (Fitness Check); https://ec.europa.eu/environment/nature/legislation/fitness_check/docs/nature_fitness_check.pdf.
[42] ELD (n 1) art 2(1)(a).
[43] ibid annex I, para 1.
[44] ibid annex I, para 1 and four indents to it.
[45] ibid annex I, para 2.

Finally, the third paragraph sets out three types of 'environmental damage'[46] that do not have to be classified as significant damage. They are:

- negative variations that are smaller than natural fluctuations regarded as normal for the species or habitat in question;
- negative variations due to natural causes or resulting from intervention relating to the normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators; [and]
- damage to species or habitats from which it is established that they will recover, within a short time and without intervention, either to the baseline condition or to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition.[47]

The second indentation of the third paragraph (referred to as the normal management clause) – and the clause at issue in *Naturschutzbund Deutschland* – thus provides Member States with discretion whether to regard environmental damage as significant if negative variations result from (1) natural causes, or (2) intervention that relates to the normal management of a site either as (a) defined in habitat records or target documents, or (b) as carried on previously by owners or operators.

Assessments of environmental damage are carried out on an ad hoc basis because they depend on facts and circumstances applicable to each individual incidence of damage or threatened damage.[48]

III. *Naturschutzbund Deutschland*

Naturschutzbund Deutschland involved damage allegedly caused to the black tern (*Chlidonias niger*), an aquatic bird between 15 and 30 centimetres long with blue-grey plumage and a black head listed in annex I of the Birds Directive. The natural habitat of the population of black terns at issue in the

[46] The term 'environmental damage' includes damage to protected species and natural habitats, water damage, and land damage. ibid art 2(1).
[47] ibid annex I, para 3, indents 1 and 3.
[48] *Naturschutzbund Deutschland* (n 2) para 34.

case is a bird sanctuary of approximately 7,000 hectares on the Eiderstedt peninsula, an area of approximately 30,000 hectares in the western part of Schleswig-Holstein in Germany adjacent to the Wadden Sea. The bird sanctuary is the most important breeding ground for the black tern in Schleswig-Holstein. The peninsula is drained artificially due to being enclosed by dikes that were constructed to protect it from severe flooding by storms. The drainage system, which has existed for several centuries, allows the peninsula to be used for settlements and agriculture. Nearly all the agricultural land in the peninsula has consisted of grassland since the middle of the nineteenth century.[49]

In September 2004, the bird sanctuary was classified as an SPA.[50] In 2006 and 2009, it was designated as a protected area by section 30 of the German Federal Nature Conservation Act (Gesetz über Naturschutz und Landschaftspflege (Bundesnaturschutzgesetz; BNatSchG),[51] which among other things sets out principles of good professional agricultural use.[52] The management plan for the bird sanctuary[53] predominantly manages it as a grassland area used for agriculture.[54]

Most of the bird sanctuary is privately owned, with some owners leasing their land to farmers,[55] some of whom carry out intensive cattle farming.[56] Opposing views on the use of the peninsula have existed for many years. A proposal by a former environment minister of Schleswig-Holstein to

[49] P. Michael Link and Christine Schleupner, 'Agricultural land use changes in Eiderstedt: historic developments and future plans' (2007) 9 Coastline Reports 197, 198-99; http://databases.eucc-d.de/files/documents/00000296_Artikel18_Link_Schleupner.pdf
[50] European Environment Agency, 'Eiderstedt'; https://eunis.eea.europa.eu/sites/DE1618404 The site reference is DE 1618-404. See Bundesamt fur Naturschtaz, Steckbriefe der Natura 2000 Gebiete; 1618404 Eiderstedt (EU-Vogelschutzgebiet); https://www.bfn.de/themen/natura-2000/natura-2000-gebiete/steckbriefe/natura/gebiete/show/spa/DE1618404.html (in German); and Natura 2000 – Standard Data Form DE1618404; https://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=DE1618404
[51] BNatSchG; http://www.gesetze-im-internet.de/bnatschg_2009/BJNR254210009.html (in German)
[52] ibid section 5(2).
[53] Ministerium für Landwirtschaft, Umwelt und ländliche Räume des Landes Schleswig-Holstein, Managementplan für das Europäische Vogelschutzgebiet DE-1618-404 Eiderstedt (20.9.2010) (Management Plan); http://weideland-eiderstedt.de/wordpress/wp-content/uploads/2015/09/Managmentplan_LLur-2009.pdf (in German).
[54] ibid s 5, 12.
[55] ibid s 2.3, 8.
[56] P. Michael Link and Christine Schleupner (n 49) 197.

declare 24,648 hectares of the peninsula as a Natura 2000 site was strongly opposed by farmers.[57] Conversely, a proposal in the early 2000's by the local farmers union to convert large areas of extensively used grassland to arable land for forage crops for the intensively farmed cattle on the peninsula as well as biofuels by the mid 2020's was strongly opposed by local environmental NGOs led by Naturschutzbund Deutschland, a conservation NGO. The NGOs contended that the conversion to arable land would have 'devastating effects on the breeding bird colonies' and the carrying capacity of many endangered bird species as well as changing the overall appearance of the entire region.[58]

The current drainage system for the peninsula, which predates the ELD, consists of a series of approximately 5,000 kilometres of ditches located between agricultural plots, with the ditches connected to a 900 kilometre network of sluice channels. Farmers who use the plots adjacent to the ditches are responsible for maintaining the ditches. Seventeen water and soil associations are responsible for maintaining the sluice channels as receiving water courses. An umbrella water and soil association, Deich- und Hauptsielverband Eiderstedt, Körperschaft des öffentlichen Rechts (Association), which was established as a public law corporation, has a statutory duty to maintain the channels. The Association carries out its duties by operating the Adamsiel facilities, a sluice and a pumping station, for the area covered by the 17 associations. When water reaches a specified level, the pump at the Adamsiel facilities automatically activates to drain water out of the channels and thus reduce the water level in them and consequently the ditches. Water does not run out of the ditches unless the sluice and pump are activated.[59]

[57] ibid 201; P. Michael Link and Christine Schleupner, 'Potential impacts of agricultural land use changes on the Eiderstedt peninsula (Schleswig-Holstein, Germany) on important bird habitats and species abundance' (2008).
[58] Christine Schleupner and P. Michael Link, 'Potential impacts on important bird habitats in Eiderstedt (Schleswig-Holstein) caused by agricultural land changes' (2008) 28(4) Applied Geography 237, 238; P. Michael Link and Christine Schleupner (n 49) 197.
[59] Case C-297/19 Request for a preliminary ruling, Bundesverwaltungsgericht (Federal Constitutional Court) Order delivered on 26 February 2019 in the administrative-law case of Naturschutzbund Deutschland Deutschland — Landesverband Schleswig-Holstein eV v Kreis Nordfriesland (Working Document) para 5 (English translation).

Naturschutzbund Deutschland requested the District of Nordfriesland, the relevant competent authority under the ELD, to issue an order to limit and remedy environmental damage caused by the sluice and pumping station to the black tern. The NGO considered that the measures were required under the Environmental Damage Act of 10 May 2007 (Umweltschadengesetz; USchadG), [60] the German legislation that transposed the ELD, to prevent and remedy damage to the black tern.

The District rejected Naturschutzbund Deutschland's request. The NGO contested the District's decision in an application before the Administrative Court (Verwaltungsgericht) but was unsuccessful. The NGO then lodged an appeal against the Administrative Court's judgment before the Higher Administrative Court (Oberverwaltungsgericht), which concluded that the black tern had been damaged by the operation of the pumping station, quashed the judgment and ordered the District to adopt a fresh decision.

The District and the Association appealed the Higher Administrative Court's decision to the Federal Administrative Court (Bundesverwaltungsgericht) on various issues including whether an activity such as the operation of a pumping station to drain agricultural land can be regarded as part of the 'normal management of an area' under the ELD. The Federal Administrative Court stayed the proceedings and referred the case to the CJEU for a preliminary ruling.

The first question addressed by the CJEU was the meaning of the phrase 'normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators' in the normal management clause of annex I of the ELD, as set out above. The court stated that the phrase must be interpreted in light of the purpose of the ELD, that is,

[60] USchadG; https://www.gesetze-im-internet.de/uschadg/ (in German). An unofficial English translation is available at https://www.bmu.de/fileadmin/Daten_BMU/Download_PDF/Strategien_Bilanzen_Gesetze/uschadg_en.pdf

> to establish a framework of environmental liability based on a high degree of environmental protection and on the precautionary principle and 'polluter-pays' principle, with a view to preventing and remedying environmental damage caused by operators.[61]

The court further stated that the phrase 'does not have to' in the third paragraph of annex I grants discretion to Member States to regard damage from the three indentations as significant or as not significant.[62]

The CJEU rejected an argument that because the German language version of the ELD did not tie the word 'normal' to the word 'management', the German language version should apply. The court stated that if there is a divergence in the language versions, the provision must be interpreted strictly by reference to the main objective of the ELD, namely to establish a common framework for the prevention and remedying of environmental damage in order effectively to combat contamination and a greater loss of biodiversity.[63] Granting Member States the power to exempt operators and owners from liability under the ELD merely because previous management measures had caused damage regardless whether those measures were normal would compromise the principles and objectives of the ELD.[64] The court further stated that whereas the first and third indentations to the third paragraph envision only minor damage, the normal management clause could include greater damage depending on the natural causes that affect a species or habitat or the management measures taken by the operator.[65] The court referred to the precautionary and the polluter pays principles in stating that such an interpretation would render the environmental liability regime established by the ELD partly redundant by allowing previous management measures:

[61] *Naturschutzbund Deutschland* (n 2) para 31.
[62] ibid para 36.
[63] ibid paras 42-45.
[64] ibid para 47.
[65] ibid para 46.

> which could be excessively harmful and unsuitable for sites hosting protected species or natural habitats and which would thus be liable to endanger or even destroy those species or habitats and increase the risk of a loss of biodiversity in breach of the conservation obligations owed by Member States under the Birds and Habitats Directives.[66]

The CJEU construed the word 'normal' to correspond to the words 'usual', 'ordinary' or 'common', with the requirement that, in order not to negate its effectiveness in the context of environmental protection, management can only be regarded as normal if it is consistent with good practices, for example good agricultural practices.[67] The court further stated that a site that hosts a species or natural habitat protected by the Nature Directives must necessarily encompass all the management measures that Member States must adopt to maintain or restore the species or natural habitat at its favourable conservation status[68] and to maintain populations of species of wild birds at a level that corresponds to their ecological, scientific and cultural requirements.[69] In other words, if a site hosts a species or natural habitat protected by the Nature Directives, its management can only be regarded as normal if it complies with the objectives and obligations set out in those Directives,[70] taking into account human and other activities at the site.[71] In the case at issue, the normal management of the site included irrigation and drainage including operation of the pumping station.[72]

The CJEU further stated that if there are administrative or organisational measures for a site in the form of a management plan under the Nature Directives, the concept of its normal management must include compliance with those measures including measures in any habitat records or target

[66] ibid paras 47-48.
[67] ibid para 52.
[68] ibid para 54 (referring to article 2(2) of the Habitats Directive ('Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest').
[69] ibid para 54 (referring to article 2 of the Birds Directive ('Member States shall take the requisite measures to maintain the population of [naturally occurring wild birds in the EU] at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level' and also referring in particular to articles 6 and 12-16 of the Habitats Directive and articles 3-9 of the Birds Directive).
[70] ibid para 55. See Fitness Check (n 41) 11 (setting out objectives and obligations).
[71] *Naturschutzbund Deutschland* (n 2) para 56.
[72] ibid para 57.

documents that form part of that plan.[73] If the management plan does not contain sufficient guidance, a court should assess the plan in light of the objectives and obligations in the Nature Directives interpreted if necessary in light of the legislation that transposed them into national law or, if this is not possible, ensure that the measures are compatible with the spirit and purpose of the Directives.[74]

Further, the court stated that the concept of 'normal management of sites … as carried on previously by owners or operators' means an administrative or organisational measure that is generally recognised and that has been carried out for a sufficiently long period of time before damage caused by it occurred to a protected species or natural habitat. In addition, the measure must be compatible with the objectives underlying the Nature Directives and, among other things, commonly accepted agricultural practices.[75]

Finally, the CJEU interpreted the term 'occupational activity' in the ELD (which is defined as 'any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character'),[76] broadly to include all activities carried out in an occupational context whether or not they are market-related or competitive in nature, with the sole exception of activities carried out in a 'purely personal or domestic context'.[77] The court rejected limiting the definition to 'purely economic, commercial or industrial' activities because doing so would exclude, among other things, annex III activities such as waste management

[73] ibid para 60. The court noted that neither the Habitats Directive nor the Birds Directive refers to 'habitat records' or 'target documents'. The court commented that a report and guidance by the Commission made it apparent that such records and documents correspond to documents prepared by Member States to meet the objectives of the Directives. ibid para 59. The report is Report from the Commission on the implementation of the Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora SEC(2003) 1478 (5 January 2004) (referring, among other things, to practices adopted by France and the UK, 13-14); https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003DC0845&from=EN The guidance is European Commission, Guidance document on Aquaculture and Natura 2000; A summary (2018) (referring to practices adopted by France, Slovakia and the Czech Republic 6); https://ec.europa.eu/environment/nature/natura2000/management/docs/AQU_Summary_EN.pdf#:~:text=The%20aim%20of%20the%20%E2%80%9CAquaculture%20and%20Natura%202000%E2%80%9D,provisions%20can%20be%20compatible%20with%20sustainable%20aquaculture%20development.

[74] *Naturschutzbund Deutschland* (n 2) paras 60, 66.

[75] ibid para 66.

[76] ELD (n 1) art 2(7).

[77] *Naturschutzbund Deutschland* (n 2) para 76.

operations that are generally carried out in the public interest according to tasks assigned by statute.[78] The court concluded that the definition of an occupational activity thus includes activities carried out in the public interest pursuant to a statutory assignment of tasks such as those carried out by the Association.[79]

The CJEU remanded the case to the Federal Administrative Court to determine whether the good professional agricultural practices set out in section 5(2) of the BNatSchG which the court contemplated using to determine whether the management of the Eiderstedt site was normal, were compatible with the spirit and purpose of the Nature Directives.[80]

IV. Environmental principles

Article 191(2) of the Treaty on the Functioning of the European Union (TFEU) provides that the aim of EU policy on the environment is a high level of protection that takes into account diverse situations across the EU. The policy is based on the precautionary, preventive and polluter pays principles and the principle that environmental damage should as a priority be rectified at its source. The polluter pays principle and the principle of rectification of pollution at its source complement the precautionary principle and the preventive principle (also called the prevention and the preventative principle) by focusing on situations in which precautionary and preventive measures have failed and pollution has occurred.[81]

Professor Krämer has stated that the extent to which the preventive principle has independent content from the precautionary principle is unclear although there must be a difference because both principles were inserted into the EC Treaty.[82] Professor de Sadeleer has suggested that the difference may be based on the difference of degree in the understanding of risk, that is the degree of uncertainty

[78] ibid paras 72-73.
[79] ibid para 77.
[80] ibid para 60.
[81] See Milieu, Study on the precautionary principle in EU environmental policies; Final Report (November 2017) 88; https://op.europa.eu/en/publication-detail/-/publication/18091262-f4f2-11e7-be11-01aa75ed71a1/language-en/format-PDF
[82] Ludwig Krämer, *EU Environmental Law* (Sweet & Maxwell, 8th edn 2016) 25.

that surrounds the probability or risk.[83] Thus, if the environmental effects of an activity are known, measures to avoid them can be termed preventive measures. If the environmental effects are uncertain, the same measures can be termed precautionary measures.[84]

As discussed in section IV(A) below, the polluter pays principle applies to the ELD but not to the Nature Directives. As further discussed in section IV(B) below, the precautionary principle applies to both the ELD and the Nature Directives.

A. Polluter pays principle

The polluter pays principle was introduced by the Organisation for Economic Co-operation and Development (OECD) in 1972 in the context of international trade to persuade businesses to adopt a harmonised approach to internalise the costs of complying with the surge in the introduction of environmental legislation.[85] In 1989, the OECD extended the principle to land-based pollution accidents,[86] having extended it to accidental marine oil spills in 1981.[87] The extension marked a shift in the role of the principle from preventing the distortion of competition in international trade to internalising costs associated with the remediation of environmental damage.[88] In 1987, the Single European Act inserted the polluter pays principle, together with the preventive and precautionary principles and the principle that environmental damage should as a priority be rectified at source in an environment article into the then EEC Treaty.[89]

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[83] Nicolas de Sadeleer, *Environmental principles: from political slogans to legal rules* (Oxford University Press 2002) 74-75. See also Milieu (n 81) 45.
[84] See Arie Trouwborst, 'Prevention, Precaution, Logic and Law; The Relationship between the Precautionary Principle and the Preventative Principle in International Law and Associated Questions (2009) 2 Erasmus Law Review 105, 116.
[85] OECD, Joint Working Party on Trade and Environment, The polluter-pays principle as it relates to international trade COM/ENV/TD(2001)44/final (23 December 2002) 6.
[86] OECD, Recommendation of the Council concerning the Application of the Polluter-Pays Principle to Accidental Pollution (C(89)88/Final, 1989), Annex cl 4.
[87] See OECD, Recommendation of the Council concerning Certain Financial Aspects of Actions by Public Authorities to Prevent and Control Oil Spills C(81)32/final (1981).
[88] See Nicolas de Sadeleer (n 83) 33-34. See also Valerie Fogleman, 'The Polluter Pays Principle for Accidental Environmental Damage; Its Implementation in the Environmental Liability Directive' in Alessandro D'Adda, Ida Angela Nicotra and Ugo Salanitro (eds) *Principi Europei e Illecito Ambientale* (G. Giappichelli Editore – Torino 2013) 114, 119-21.
[89] Consolidated Treaty of the European Union art 130r(2) (now TFEU art 191(2)).

The 'true aim' of the polluter pays principle is described by Professor de Sadeleer as the institution of 'a policy of pollution abatement by encouraging polluters to reduce their emissions instead of being content to pay charges'.[90] The polluter pays and the preventive principles are thus 'two complementary aspects of a single reality'.[91]

1. Polluter pays principle and the Birds and Habitats Directives

The recitals to the Habitats Directive expressly state that the polluter pays principle 'can have only limited application in the special case of nature conservation' due to the uneven distribution of priority (endangered) species and natural habitats throughout the EU.[92] The Habitats Directive further states that, in such an exceptional case, EU funding may contribute with Member State funding for nature conservation.[93]

Further, neither the Birds nor the Habitats Directive applies the polluter pays principle as an inducement to operators (or any other person) to adopt measures or to develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced. The Nature Directives are conservation, not environmental liability, legislation.[94]

This does not mean that the Nature Directives do not include preventive measures. Article 6(2) of the Habitats Directive requires Member States to take appropriate preventive measures to avoid the deterioration of natural habitats and habitats of species in SACs and SPAs and the significant disturbance of species for which the sites have been designated.[95] In addition, the appropriate

[90] Nicolas de Sadeleer (n 83) 36.
[91] ibid.
[92] Habitats Directive (n 4) recital 11.
[93] ibid recital 12. See Managing Natura 2000 Sites (n 33) s 2.4.2, 20-21.
[94] See Valerie Fogleman, 'The Threshold for Liability for Ecological Damage in the EU: Mixing Environmental and Conservation Law' in Charles-Hubert Born, An Cliquet, Hendrik Schoukens, Delphine Misonne and Geert Van Hoorick (eds), *The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?* (Routledge 2015) 181, 189-95.
[95] Joined Cases C-387/15 and C-388/15 *Orleans v Vlaams Gewest* [2016] ECLI:EU:C:2016:583 para 39. Article 6(1) provides for conservation measures. Article 6(2) provides for preventive measures. Article 6(4) provides for compensatory measures. ibid para 33.

assessment under article 6(3) (see section IV(B)(1) below) is by its nature a preventive measure.[96] Further, article 4(4) of the Birds Directive directs Member States to take preventive measures to avoid pollution or deterioration of habitats for which SPAs were designated as well as any significant disturbances affecting birds in SPAs.[97] As described in section IV(A)(2) below, however, the inclusion of preventive measures in a Directive is not necessarily the same as application of the preventive principle.

2. Polluter pays principle in the Environmental Liability Directive

The ELD is unequivocally based on the polluter pays principle. The Council emphasised its application at the common position stage when it changed article 1 to read '[t]he purpose of this Directive is to establish a framework of environmental liability based on the "polluter-pays" principle, to prevent and remedy environmental damage'.[98] Article 1 had previously stated that the purpose of the ELD 'is to establish a framework, based on environmental liability, for the prevention and remedying of environmental damage'.[99] Recital 2 of the ELD describes the form of polluter pays principle that applies as an inducement to operators to adopt measures and to develop practices to minimise the risks of environmental damage in order to reduce their exposure to financial liabilities.

The preventive measures that the polluter pays principle induces operators to adopt are not an application of the preventive principle. The term 'preventive measures' in the ELD is defined as 'any measures taken in response to an event, act or omission that has created an imminent threat of

[96] Sobatta (n 35) 263. Articles 6(2), 6(3) and 6(4) of the Habitats Directive 'provide for preventive measures to avoid deterioration, disturbance and significant effects in the Natura 2000 sites'. Managing Natura 2000 sites (n 33) s 2.2, 15. The above articles also apply to SPAs. Habitats Directive (n 4) art 7.

[97] Case C-117/00 *Commission v Ireland* [2002] ECR, I-5335 para 26. Article 6(2) of the Habitats Directive is 'largely the same' as the first sentence of article 4(4) of the Birds Directive. Case C-141/14 *Commission v Bulgaria* [2016] ECLI:EU:C:2016:8 para 69. See Sobatta (n 35) 264.

[98] Common Position (EC) No 58/2003 adopted by the Council on 18 September 2003 with a view to the adoption of a Directive 2003/…/EC of the European Parliament and of the Council of … on environmental liability with regard to the prevention and remedying of environmental damage [2003] OJ C277/E10, E12, art 1. See Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the Common Position of the Council on the adoption of a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage SEC(2003) 1027 final (19 September 2003) s 3.2, 3.

[99] Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage [2002] OJ C151/132 E/134 art 1.

environmental damage, with a view to preventing or minimising that damage'.[100] The term 'imminent threat' is defined as 'a sufficient likelihood that environmental damage will occur in the near future'.[101] Prevention in the context of the ELD thus implies that a competent authority will require an operator that has caused an imminent threat of environmental damage to carry out necessary preventive measures.[102] Only if an event, act or omission has created such an imminent threat, can preventive measures be carried out.[103]

The polluter pays principle in the ELD is, in effect, an adaptation of the polluter pays principle extended by the OECD to accidental damage in order to provide an incentive to operators to improve their accident prevention measures and, as a result, reduce pollution.[104] Advocate General Kokott explained that:

> The [ELD] seeks to implement the 'polluter pays' principle in a certain form. In essence, operators are to bear the costs of environmental damage which they cause. This allocation of costs creates an incentive for operators to prevent environmental damage. This is fair in so far as the operators carry on an activity involving risk, particularly in the case of strict liability, and generally also benefit from an economic return on that activity.[105]

Allocating the costs of preventing or remediating environmental damage caused by an operator's activities to the operator does not necessarily mean that the operator is ultimately liable for them. Rather, as noted by the OECD, allocation of the costs to the operator internalises them more efficiently

[100] ELD (n 1) art 2(10).
[101] ibid art 2(9).
[102] Explanatory Memorandum (n 29) s 6.4, 20.
[103] Case C-683/16 *Deutscher Naturschutzring, Dachverband der deutschen Natur- und Umweltschutzverbände e.V. v Bundesrepublik Deutschland* [2018] ECLI:EU:C:2018:38 Opinion of AG Wahl, para 61.
[104] See OECD Analyses and Recommendations, Explanatory Reports, Application of the Polluter-Pays Principle to Accidental Pollution s I, para 3. See also Nicolas de Sadeleer (n 83) 33-34 (commenting that the role of the polluter pays principle had shifted from preventing the distortion of competition in international trade to internalising costs associated with the remediation of environmental damage).
[105] Case C-378/08 and Joined Cases C-379/08 and C-380/08 *Raffinerie Mediterranee SpA (ERG) v Ministero dello Sviluppo Economico* [2010] ECR I-01919 Opinion of AG Kokott, para 94. See also Nicolas de Sadeleer (n 83) 54-55 (channelling liability responds to the polluter pays principle's redistributive and preventive functions).

than allocating them to one or more persons at another level in the chain of pollution.[106] Accordingly, the ELD provides that if an operator can show that a third party caused the environmental damage despite the operator having taken appropriate safety measures, the operator may seek reimbursement of its costs of preventing or remediating the damage.[107] In order to facilitate reimbursement, the ELD directs Member States to take appropriate measures to enable the operator to recover its costs.[108] The operator thus acts as a kind of guarantor[109] in that it must prevent or remediate environmental damage caused by its activities and may then seek to recover its costs, assuming of course that the third party that caused the damage can be located and is financially viable. The polluter pays principle (and the precautionary principle) in the ELD is not confined to the prevention and remediation of biodiversity and water damage caused by pollution. Whilst land damage may be caused only by 'contamination',[110] biodiversity and water damage may be caused by other types of emissions, events and incidents as well as pollution. For example, the environmental damage in *Naturschutzbund Deutschland* was damage to biodiversity caused by a drainage system. The environmental damage in *Folk v Unabhängiger Verwaltungssenat für die Steiermark* was water damage caused by disruption to the natural reproduction of fish from fluctuations in the level of a river caused by regularly shutting down a turbine at a hydroelectric power plant.[111]

[106] See Jean-Philippe Barde, Economic Instruments in Environmental Policy: Lessons from the OECD Experience and their Relevance to Developing Economies (OECD Development Centre, Working Paper No 92 OCDE/GD(93)193 (January 1993) 31.

[107] ELD (n 1) art 8(3)(a). An operator is also not liable if the damage occurred as a result of the operator's compliance with a public authority's order or instruction that was not consequent upon an emission or incident caused by the operator's activities. ibid art 3(b). See Valerie Fogleman (n 88) 140.

[108] ELD (n 1) art 8(3).

[109] See OECD, Analyses and Recommendations, Foreword s 1.2. See also OECD Analyses and Recommendations, Appendix, Guiding principles relating to accidental pollution s 4 ('When a third party is liable for the accident, that party reimburses to the operator the cost of reasonable measures to control accidental pollution taken after an accident'). The text refers to payments for compensation under tort law, but the concept applies equally to measures to remediate pollution under administrative law.

[110] ELD (n 1) art 2(1)(c). The term 'land damage' is defined as 'any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms'. ibid.

[111] Case C-529/15 *Folk v Unabhängiger Verwaltungssenat für die Steiermark* [2017] ECLI:EU:C:2017:419 para 15. The fluctuating water level had a significant adverse effect on the ecological status of the river, which includes the '[c]omposition, abundance and age structure of fish fauna'. Case C-529/15 *Folk v Unabhängiger Verwaltungssenat für die Steiermark* [2017] ECLI:EU:C:2017:419 Opinion of AG Bobek, para 12. See WFD (n 12) annex V, 1.1.1 Surface Water Status, Quality elements for the classification of ecological status, Rivers.

Application of the polluter pays principle in the ELD is thus broader than indicated in the 1975 Council recommendation that adopted the polluter pays principle and specified when it should be applied.[112] Instead, its application in the ELD reflects the scope of environmental damage described in the Commission's Guidelines on State aid for environmental protection and energy. The guidelines define the 'polluter' who should bear 'the costs of measures to deal with pollution'[113] as a person 'who directly or indirectly damages the environment or who creates conditions leading to such damage'.[114] The guidelines further define the term 'pollution' as 'the damage caused by the polluter by directly or indirectly damaging the environment, or by creating conditions leading to such damage to physical surroundings or natural resources'.[115]

The polluter pays principle (and the precautionary principle) in the ELD goes still further by introducing liability for remediating damage to the so-called 'unowned environment'.[116] The intent is that the public should not have to pay the costs of remediating such damage or suffer a lesser environment in lieu of the operator that caused the damage.

Still further, the ELD established remedies for biodiversity and water damage that had not existed in the EU before its adoption, except to a limited extent in Germany.[117] That is, the ELD introduced

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[112] Council Recommendation of 3 March 1975 regarding cost allocation matters and action by public authorities on environmental matters 75/436/Euratom [1975] OJ L194/1; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1975.194.01.0001.01.ENG&toc=OJ:L:1975:194:TOC The recommendation defines a 'polluter' as 'someone who directly or indirectly damages the environment or who creates conditions leading to such damage'. ibid annex, art 3. The focus of the recommendation, however, is pollution.

[113] Communication from the Commission, Guidelines on State aid for environmental protection and energy 2014-2020 [2014] OJ C200/1, C200/8, art 1.3(28); https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014XC0628(01)

[114] ibid art 1.3(26).

[115] ibid art 1.3(27). In contrast, the guidelines define the term 'contaminated site' as 'a site where there is a confirmed presence, caused by man, of hazardous substances of such a level that they pose a significant risk to human health or the environment taking into account current and approved future use of the land'. ibid art 1.3(29).

[116] ELD (n 1) art 2(12) (defining 'natural resource' to include protected species and natural habitats, and water, as well as land).

[117] Article 15(2) of the German Federal Nature Conservation Act requires a person that causes damage to natural resources to remediate the damage. If the damage cannot be fully remediated by such compensation measures (*Ausgleichsmassnahmen*), the Act requires the person that caused the damage to carry out substitution/replacement measures (*Ersatzmassnahmen*) in the area of the damage to restore it to the equivalent natural balance before the damage. *Gesetz über Naturschutz und Landschaftspflege*; http://www.gesetze-im-internet.de/bnatschg_2009/ (in German). An unofficial English translation of the *BNatSchG* without amendments is at https://www.bmu.de/fileadmin/Daten_BMU/Download_PDF/Naturschutz/bnatschg_en_bf.pdf

primary, complementary and compensatory remediation for biodiversity and water damage.[118] Primary remediation is the remediation of a damaged species or natural habitat and services rendered by it to other natural resources (biodiversity, waters and land) and the public, to or towards its baseline condition.[119] Complementary remediation consists of measures to provide a similar level of natural resources and services provided by them if full restoration of the damaged natural resource is not feasible.[120] Compensatory remediation consists of improvements and other measures to compensate for any interim losses from the natural resource and services provided by it from the time of the damage to its full restoration.[121]

Even further, the ELD applies the polluter pays principle (and the precautionary principle) to intentional authorised activities in addition to accidental damage, as evidenced by *Naturschutzbund Deutschland* and *Folk*. Despite two of the six cases decided by the CJEU on the ELD[122] involving authorised activities, competent authorities have enforced the ELD in respect of such activities to a much lesser extent than they have enforced it for accidental environmental damage, with the caveat that enforcement in respect of the latter has also been extremely limited – or non-existent – in most Member States. Out of a total of 1,450 incidents of an imminent threat of, or actual, environmental damage reported to the Commission by Member States in their 2013 reports under then article 18(2) of the ELD only about 20% (290) concerned biodiversity damage, compared to 28% (413) for water damage, and 52% (747) for land damage.[123]

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[118] ELD (n 1) annex II, s 1. Land damage is remediated by taking necessary measures to remove, control, contain or diminish contaminants so that the land no longer poses a significant risk of adversely affecting human health. ibid annex II, s 2.

[119] ibid annex II, s 1.1.1. The term 'baseline condition' is defined as 'the condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred, estimated on the basis of the best information available'. ibid art 2(14).

[120] ELD, annex II, s 1.1.2. The measures may be carried out at another site, preferably one geographically linked to the damaged site taking account of the population of species affected by the damage. ibid.

[121] ibid annex II, s 1.1.3.

[122] The CJEU also briefly discussed the ELD in Case C-683/16 *Deutscher Naturschutzring*, *Dachverband der deutschen Natur- und Umweltschutzverbände e.V.* [2018] ECLI:EU:C:2018:433. The court concluded that Regulation (EU) No 1380/2013 on the Common Fisheries Policy precludes the adoption by a Member State of measures that are necessary to meet its obligations under the ELD. ibid para 62.

[123] Commission Staff Working Document REFIT Evaluation of the Environmental Liability Directive Accompanying the document Report from the Commission to the European Parliament and to the Council pursuant to Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and

Despite the severely limited enforcement of the ELD for intentional environmental damage to date, its application to such damage was not unforeseen. The Commission stated in 1993, long before the EU's adoption of the ELD in 2004, that although 'damage caused by … non-accidental activities may be less spectacular than damage from headline-grabbing accidents, … it is more extensive, and no less in need of remedial action'.[124]

B. Precautionary principle

There is no universally acceptable definition of the precautionary principle.[125] The principle is flexible, with its application varying depending on the legislation to which it is applied.[126] The principle applies to a wide range of EU legislation from regulatory legislation such as REACH, which concerns the manufacture, placement on the market and use of chemicals.[127] It also applies to the withdrawal of a permit under the Invasive Species Regulation, which provides among other things that competent authorities may withdraw a permit, either temporarily or permanently at any time 'if unforeseen events with an adverse impact on biodiversity or related ecosystem services occur [provided that the] withdrawal [is] justified on scientific grounds and, where scientific information is insufficient, on the grounds of the precautionary principle ….'[128] Other legislation to which the

remedying of environmental damage SWD (2016) 121 final (14 April 2016) (ELD REFIT Evaluation) 26 (ELD REFIT Evaluation); https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2016:121:FIN and http://ec.europa.eu/environment/legal/liability/index.htm Of the biodiversity damage cases: Hungary reported 124; Poland reported 92; Germany reported 27; Ireland reported eight; Latvia and the UK reported seven each; Italy reported six; Austria, Bulgaria, Estonia, Malta and Sweden reported two each; Cyprus and Finland reported one each. Belgium, the Czech Republic, Denmark, France, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovenia, Slovakia and Spain did not report any cases. ibid.

[124] Communication from the Commission to the Council and Parliament and the Economic and Social Committee: Green Paper on remedying environmental damage COM(93) 47 final (14 May 1993) s 1.0, 4.

[125] See Didier Bourguignon, 'The precautionary principle; Definitions, applications and governance (European Parliamentary Research Service, December 2015) 6.

[126] See Milieu (n 81) 11.

[127] Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) [2006] OJ L396/1 (consolidated version) art 1(3) ('manufacturers, importers and downstream users [should] ensure that they manufacture, place on the market or use such substances that do not adversely affect human health or the environment. Its provisions are underpinned by the precautionary principle').

[128] Regulation (EU) No 1143/2014 on the prevention and management of the introduction and spread of invasive alien species [2014] OJ L317/35 art 8(5). See also Regulation (EU) No 304/2011 amending Council Regulation (EC) No 708/2007 concerning use of alien and locally absent species in aquaculture [2011] OJ L88/1 art 12 ('At any point in time, the Competent Authority can withdraw the permit, temporarily or permanently, if unforeseen events with negative effects on the environment or on native populations occur. Any withdrawal of a permit

precautionary principle applies includes the Waste Framework Directive, which applies the principle, together with the preventive principle, as a general environmental objective for the management of waste.[129] The Common Fisheries Policy Regulation applies the precautionary approach to the management of fisheries with the aim of ensuring 'that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield'.[130]

Despite its flexibility, there are common prerequisites in its application. A decision to invoke the precautionary principle should be:

> exercised where scientific information is insufficient, inconclusive, or uncertain and where there are indications that the possible effects on the environment, or human, animal or plant health may be potentially dangerous and inconsistent with the chosen level of protection.[131]

The general method of applying the principle is in the context of risk analysis, a two-step process that consists of a risk assessment and risk management.[132] Following a risk assessment, the precautionary principle applies to manage the risk if the decision-maker considers that measures are necessary due to the degree of risk.[133]

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must be justified on scientific grounds and, where scientific information is as yet insufficient, on the grounds of the precautionary principle…').

[129] Directive 2008/98/EC on waste [2008] OJ L312/3, as amended by Directive (EU) 2018/851 [2018] OJ L150/109 (consolidated version) recital 30.

[130] Regulation (EU) No 1380/2013 on the Common Fisheries Policy [2013] OJ L354/22 (consolidated text) art 2(2). Recital 10 provides that 'Sustainable exploitation of marine biological resources should be based on the precautionary approach, which derives from the precautionary principle referred to in [TFEU art 191(2)] taking into account available scientific data'.

[131] Communication from the Commission on the precautionary principle COM(2000) 1 final (2 February 2000) s 1, 7 (Communication on the precautionary principle).

[132] Nicolas de Sadeleer, 'The Precautionary Principle Applied to Food Safety – Lessons from EC Courts' (2009) 1 European Journal of Consumer Law 147, 150. A risk assessment consists of identifying the biological, chemical or physical agents that may have adverse health or environmental effects, characterising the nature and severity of the effects quantitatively and qualitatively, evaluating the probability of exposure to the agent, and characterising the risk taking account of inherent uncertainties and the probable frequency and severity of the known or potential effects. Communication from the Commission (n 131) annex III, 28.

[133] Communication on the precautionary principle (n 131) s 5, 12.

1. Precautionary principle in the Birds and Habitats Directives

The precautionary principle is central to article 6(3) of the Habitats Directive and thus also to article 4 of the Birds Directive,[134] although it is not specifically mentioned in the Habitats Directive[135] or the Birds Directive. Article 6(3) provides that if a plan or project that is not directly connected with or necessary to the management of an SAC or an SPA is 'likely to have a significant effect' on it either individually or in combination with other plans or projects, an 'appropriate assessment' must be carried out to assess the implications for the site in view of its conservation objectives. A competent authority may agree to the proposed plan or project only if it ascertains that the plan or project will not adversely affect the integrity of the site.[136] In turn, section 6(4) of the Habitats Directive provides that if the assessment is negative, there are no alternative solutions, and the proposed plan or project must nevertheless be carried out for 'imperative reasons of overriding public interest', a Member State must carry out compensatory measures to ensure that the overall coherence of the Natura 2000 network is protected.[137]

The CJEU emphasised application of the precautionary principle to article 6(3) in the seminal case of *Waddenzee*, in which it stated that 'a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned'.[138] In *Sweetman v An Bord Pleanála*, the court further stated that an appropriate assessment under article 6(3) 'cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site

[134] Habitats Directive (n 4) art 7.
[135] Nicolas de Sadeleer, 'The Precautionary Principle in EU Law' (2010) 5 Aansprakelijkheid Verzekering En Schade 173, 183.
[136] Habitats Directive (n 4) art 6(3).
[137] ibid art 6(4).
[138] Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-7405 para 44. See also Case C-258/11 *Sweetman v An Bord Pleanála* [2013] ECLI:EU:C:2013:220 para 41; Case C-387/15 *Orleans v Vlaams Gewest* [2016] ECLI:EU:C:2016:583 para 53; Joined Cases C-293/17 and C-294/17 *Coöperatie Mobilisation for the Environment UA and Vereniging Leefmilieu v College van gedeputeerde staten van Limburg and College van gedeputeerde staten van Gelderland* [2018] ECLI:EU:C:2018:882 paras 82, 93.

concerned'.[139] An appropriate assessment need not necessarily require scientific verification. Some courts have suggested that a theoretical risk may justify precautionary action.[140] The precautionary principle in article 6(3) has accordingly been described as a 'strict' or 'very strict'[141] interpretation and a 'remarkably far-reaching form'[142] of the principle.

The precautionary principle also applies to derogations under the Habitats Directive. In a case involving a management plan for wolves that included a derogation under article 16(1), the CJEU stated that if, after the best scientific data available has been examined, uncertainty remains as to whether a derogation will be detrimental to the maintenance or restoration of populations of an endangered species at a favourable conservation status, the Member State may not grant or implement the derogation.[143]

2. Precautionary principle in the ELD

The ELD does not mention the precautionary principle, the principle having only been alluded to in its history when the White Paper stated that that the introduction of liability for environmental damage may lead to the application of more precaution, thus avoiding risk and damage.[144]

[139] Case C-258/11 *Sweetman v An Bord Pleanála* [2013] ECLI:EU:C:2013:220 para 44 referring to Case C-404/09 *Commission v Spain* [2011] ECLI:EU:C:2011:768 para 100 ('[a]n assessment [under article 6(3)] cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned'). See also Case C-521/12 *Briels v Minister van Infrastructuur en Milieu* [2014] ECLI:EU:C:2014:330 para 27.

[140] See Elen Stokes, 'Liberalising the Threshold of Precaution – Cockle Fishing, The Habitats Directive, and Evidence of a New Understanding of "Scientific Uncertainty"' (2005) 7 Environmental Law Review 206, 213.

[141] Jonathan Verschuuren 'Shellfish for Fishermen or for Birds? Article 6 Habitats Directive and the Precautionary Principle' (2005) 17(2) Journal of Environmental Law 265, 281.

[142] Chris W. Backes and Jonathan M. Vershuuren, 'The Precautionary Principle in International, European, and Dutch Wildlife Law (1998) 9 Colorado Journal of International Environmental Law and Policy 43, 63.

[143] Case C-674/17 *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo — Kainuu ry v Risto Mustonen* [2019] ECLI:EU:C:2019:851 para 66.

[144] White Paper on Environmental Liability COM(2000) 66 final (9 February 2000) s 3.1, 12. The White Paper also stated that the preventive and precautionary principles implement the pollute pays principle and that 'it is expected that liability creates incentives for more responsible behaviour by firms'. ibid s 3.6, 13. Also, in a speech to the Belgian Environmental Law Association on 13 June 1996, Ritt Bjerregaard, then Environment Commissioner, stated that '[e]qually important as [implementing the polluter pays principle] is the preventive and precautionary effect inherent in a liability regime'. Speech by Mrs Ritt Bjerregaard on Environmental Liability at the meeting of the Belgian Environmental Law Association Brussels (DN: Speech/96/158, 13 June 1996) 3.

The CJEU has, however, specifically referred to the precautionary principle or adopted a precautionary approach in five of the six cases it has decided on the ELD. In *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* (*Raffinerie Mediterranee* (*1*)), the court stated that under the system established by the ELD:

> operators are under a duty both to prevent and remedy environmental damage. Accordingly, in particular in accordance with the precautionary principle … those operators must, first, take the preventive measures necessary to ensure that environmental damage does not occur.[145]

The court stated that, pursuant to the precautionary principle, measures required by a competent authority before an operator could use its land must be justified 'by the objective of preventing the occurrence or resurgence of further environmental damage' on land that belonged to the operators that was adjacent to the area at which remedial measures were directed.[146]

In the companion case, also called *Raffinerie Mediterranee(ERG) SpA v Ministero dello Sviluppo economico (Raffinerie Mediterranee* (*2*)), the CJEU adopted a precautionary approach, which is an application of the precautionary principle,[147] to state that a Member State could reverse the burden of proof by establishing a rebuttable presumption that a causal link exists between the activities of one or more operators and a polluted area if there is plausible evidence for the link. The court stated that such evidence exists if an operator's installation is located near a polluted area and there is a correlation between pollutants identified at the area and substances used by the operator in connection with its activities.[148]

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[145] Joined Cases C-379/08 and C-380/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* [2010] ECR I-2007 para 75.
[146] ibid para 92.
[147] Communication on the precautionary principle (n 131) 20. The precautionary principle is often referred to as the precautionary approach. Arie Trouwborst, 'Prevention, Precaution, Logic and Law; The Relationship between the Precautionary Principle and the Preventative Principle in International Law and Associated Questions (2009) 2 Erasmus Law Review 105, 107.
[148] Case C-378/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* [2010] ECR I-1919 paras 56-58. Plausible evidence is required because under the polluter pays principle, operators may be required to carry out remedial measures only if they contribute to the creation of pollution or the risk of pollution. ibid para 57.

The CJEU mentioned but did not discuss the precautionary principle together with the other environmental principles in TFEU article 191(2) in *Ministero dell'Ambiente e della Tutela del Territorio e del Mare v Fipa Group Srl* (*Fipa Group*).[149] In her opinion on the case, Advocate General Kokott had stated that according to the precautionary principle, protective measures may be carried out when the existence or extent of risks to human health are uncertain, commenting that in such a situation there is no need to wait until the reality and seriousness of the risks had become fully apparent.[150]

Further, in *Túrkevei Tejtermelő Kft. v Országos Környezetvédelmi és Természetvédelmi Főfelügyelőségin*, which involved owners of land from which there was air pollution from illegal waste incineration, the CJEU referred to *Raffinerie Mediterranee* (*1*) to state that it was apparent 'that the liability mechanism established by [the ELD] was founded on the precautionary principle and on the polluter pays principle' and, therefore, the ELD placed operators under a duty to prevent and remedy environmental damage.[151]

Still further, in *Naturschutzbund Deutschland*, *t*he court referred to *Tejtermelő Kft*, in reiterating application of the precautionary and polluter pays principles in the ELD[152] when it rejected the argument that the more limited German language version of the ELD should apply because, as noted in section II above, it would allow management measures to be carried out that increased the risk of a loss of biodiversity in breach of the conservation obligations in the Nature Directives.[153]

3. Comparison of the precautionary principle in the Nature Directives and the Environmental Liability Directive

[149] Case C-534/13 *Ministero dell'Ambiente e della Tutela del Territorio e del Mare v Fipa Group Srl* [2015] ECLI:EU:C:2015:140 para 1.
[150] Case C-534/13 Ministero dell'Ambiente e della Tutela del Territorio e del Mare v Fipa Group Srl [2014] ECLI:EU:C:2014:2393 Opinion of AG Kokott, para 58.
[151] Case C-129/16 *Túrkevei Tejtermelő Kft. v Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség* [2017] ECLI:EU:C:2017:547 para 53.
[152] *Naturschutzbund Deutschland* (n 2) para 31.
[153] ibid para 48.

There are crucial differences between application of the precautionary principle in article 6(3) of the Habitats Directive and the ELD. The appropriate assessment under article 6(3) is carried out to determine whether a proposed plan or project that is not directly connected, or necessary, to the management of a Natura 2000 site may be carried out. In contrast, the references to the application of the precautionary principle in *Raffinerie Mediterranee* (*1*), *Fipa Group* and *Túrkevei Tejtermelő Kft.* are to preventive measures that an operator that has caused an imminent threat of environmental damage must carry out when there is scientific uncertainty concerning the threatened damage. Second, the precautionary approach referred to in *Raffinerie Mediterranee* (*2*) is a reversal of the burden of proof in order to make it easier for a competent authority to require operators that contributed to environmental damage to remediate it. Third, the risk assessment under article I of the ELD at issue in *Naturschutzbund Deutschland* is carried out to determine whether damage that has been, or that may be, caused by a management plan is significant. If it is significant, the operator must remediate the damage and/or modify the management plan in order to prevent further damage. Thus, pursuant to *Naturschutzbund Deutschland* and *Folk*, which did not mention the precautionary principle, authorised activities must be modified or cease if they cause an imminent threat of, or actual, environmental damage.

If the strong precautionary principle that is applied to article 6(3) of the Habitats Directive is applied to the third category, that is a risk assessment under annex I, and the risk assessment does not remove all scientific doubt that the authorised activity could cause biodiversity damage, the operator should arguably modify the management plan or cease carrying out the activity. Much obviously depends not only on the strength of the precautionary principle as applied to biodiversity damage under the ELD but also on the level of the significance threshold for biodiversity as discussed in section V below.

An illustration of an authorised activity that was required to cease because it caused damage to a protected species occurred in the Lake District in the United Kingdom. The competent authority

discovered that the abstraction of water from a lake was damaging a population of freshwater pearl mussels (*Margaritifera margaritifera*), which are protected by the Habitats Directive, in a river that flowed out of the lake. The stretch of the river in which the mussels lived had been designated as an SAC. Water had been abstracted from the lake since the 1800s. The competent authority served several prevention notices under the legislation that implemented the ELD on the water company that was abstracting the water in order to reduce the abstracted amount. When this failed to prevent continuing environmental damage to the mussels, the competent authority revoked the abstraction licence, resulting in the water company constructing a pipeline to abstract water from another water source.[154]

V. Significance threshold for biodiversity damage

The significance threshold for biodiversity damage in the Nature Directives and the ELD are at opposite ends of a spectrum, with the threshold in the Nature Directives considered to be very low whilst the threshold in the ELD is generally considered to be very high.

1. Significance threshold in the Nature Directives

A key issue raised by *Naturschutzbund Deutschland* and application of the precautionary principle to a risk assessment under annex I of the ELD is the relationship between the significance threshold in the Nature Directives and the significance threshold for biodiversity under the ELD, especially as the threshold relates to liability for preventing and remediating chronic damage to a protected species or natural habitat from an authorised activity that has been carried out for a long period of time.

As noted above, application of the precautionary principle to article 6(3) of the Habitats Directive is very strict. Professors Backes and Vershuuren have commented that the CJEU has arguably rendered any discussion on the word 'significant' in the context of article 6(3) 'purely academic' so that 'avoiding

[154] See Valerie Fogleman, 'The duty to prevent environmental damage in the environmental liability directive; a catalyst for halting the deterioration of water and wildlife' (2019) 20(4) ERA Forum 707, 711-14.

the duty to assess the consequences of a project [is] very difficult, if not impossible' because there will always be uncertainty concerning the potential consequences of a project.[155]

The significance threshold is also relevant to article 6(2) of the Habitats Directive, which is designed to ensure the same level of protection as article 6(3).[156] Member States must take appropriate steps to avoid a disturbance to a species for which an SAC has been designated if the disturbance is significant in relation to the objectives of the Directive, as well as to avoid deterioration of natural habitats and species for which the site has been designated.[157] The steps that are taken must guarantee that an activity will not cause a significant disturbance, especially to conservation objectives.[158] In a similar manner, article 4(4) of the Birds Directive obliges Member States to take appropriate steps to avoid disturbances 'in so far as these would be significant having regard to [the survival and reproduction of birds]' in SPAs as well as to avoid pollution or their deterioration.[159] If an event, activity or process contributes to the long-term decline of a population of a protected species at a site, a reduction or the risk of reduction of the range of the species within the site, or the reduction of the size of the available habitat of the species, the disturbance should be regarded as significant.[160] In *Santoña Marshes*, the CJEU stated that Member States must preserve, maintain and re-establish habitats of protected bids even before there is any evidence of a reduction in their number or the risk that a protected species will become extinct.[161] In *Commission v Bulgaria,* the CJEU referred by analogy to article 6(2) of the Habitats Directive in stating that preventive measures must be taken under article 4(4) of the Birds Directive if there is a probability or risk that a project will cause the habitats of protected species of birds to deteriorate or cause significance disturbance to the protected species.[162]

[155] Jonathan Verschuuren (n 141) 281.
[156] Case C-404/09 *Commission v Spain* [2011] ECR I-11853 para 142.
[157] Habitats Directive (n 4) art 6(2). See ibid art 7.
[158] Case C-404/09 *Commission v Spain* [2011] ECR I-11853 para 126.
[159] Birds Directive (n 3) art 4(4). See Case C-117/00 *Commission v Ireland* [2002] ECR, I-5335 para 26.
[160] Managing Natura 2000 sites (n 33) s 3.5.2, 32.
[161] Case C-355/90 *Commission v Spain* [1993] ECR I-4221 para 15.
[162] Case C-141/14 *Commission v Bulgaria* [2016] ECLI:EU:C:2016:8 para 70. See also Case C-461/14 *Commission v Spain* [2016] ECLI:EU:C:2016:895 para 77; Case C-117/00 *Commission v Ireland* [2002] ECR, I-5335 paras 26-32.

2. Significance threshold for biodiversity damage in the Environmental Liability Directive

In view of the low significance threshold in the Nature Directives, it is surprising that the significance threshold in the ELD is perceived to be high.[163] In some Member States, including Denmark, France and Slovenia, the significance threshold for biodiversity damage under the ELD has been described as 'severe' and applicable only to 'almost catastrophic cases'.[164] Some Member States appear to apply the ELD only if an incident involves 'excessive damage'.[165]

Application of the precautionary principle in the Nature Directives and the ELD differs, as indicated in section IV(B)(2) above. The ELD does not apply to a proposed plan or project that is likely to have a significant effect on a Natura 2000 site. Such a plan or project is necessarily still in the planning stage and cannot, therefore, cause an imminent threat of, or actual, environmental damage. The strong precautionary principle that applies to article 6(3) does not therefore apply by analogy to an imminent threat of, or actual, environmental damage in the ELD – although it may apply for other reasons. Further, as indicated in section II above, article 6(1) of the Habitats Directive directs Member States to establish necessary conservation measures for SACs. Articles 4(1) and 4(2) of the Birds Directive directs them to establish such measures for SPAs. The ELD does not require the establishment of any conservation measures.

There is very little CJEU case law on article 6(1). Arguably, Member States have more discretion concerning article 6(1) than they have under articles 6(2) and 6(3) because the standard of reasonable doubt does not apply to active conservation measures. That is, article 6(1) directs Member States to

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[163] See, e.g., ClientEarth, 'Reviewing the Environmental Liability Directive; ClientEarth recommendations' (June 2015) 7 ('current wording, or at least its interpretation, creates damage thresholds that are too high'); https://www.documents.clientearth.org/wp-content/uploads/library/2015-06-22-en-clienteath-ce-sluk-reviewing-the-environmental-liability-directive-clientearth-recommendations.pdf; Bio Intelligence Service and Stevens & Bolton LLP, 'Study on ELD Effectiveness: Scope and Exceptions' (19 February 2014) 53 (noting commentator's view that the significance thresholds are high); http://ec.europa.eu/environment/legal/liability/

[164] Milieu and IUCN, Experience gained in the application of ELD biodiversity damage (final report for the European Commission, DG Environment, February 2014) 20-21; https://ec.europa.eu/environment/legal/liability/pdf/Milieu%20report%20-%20ELD%20Biodiversity%20Damage.pdf

[165] ELD REFIT Evaluation (n 123) s 6.2, 35.

establish ‘necessary’ conservation measures that correspond to the ‘ecological requirements’ of natural habitat types in annex I and species in annex II. The words ‘necessary’ and ‘requirements’ raise issues that are subject to scientific uncertainty for which there may be conflicting conservation objectives.[166] Only in the absence of reasonable doubt regarding the necessity of conservation measures is the broad discretion given to competent authorities reduced. Further, only if measures are not conservation measures, particularly the economic exploitation of a site, will the stricter substantive standards of articles 6(2) and 6(3) of the Habitats Directive apply.[167]

Articles 4(1) and 4(2) may possibly provide less discretion to Member States than article 6(1) because they do not include the word ‘necessary’ in respect of conservation measures, referring instead to ‘special’ conservation measures that take account of endangered, vulnerable and rare species of birds. In *Naturschutzbund Deutschland*, the drainage system that affected the SPA was not a conservation measure. Instead, the system, which is a management measure, caused environmental damage to protected birds at the site. Arguably, therefore, a Member State has less – or no – discretion in introducing or continuing to carry out – such a measure. The Member State must not carry it out in a manner that causes an imminent threat of, or actual, environmental damage.

The perceived difference in significance levels between the Nature Directives and biodiversity damage under the ELD is not supported by the difference in relevant terms in the Directives. The Habitats Directive requires a disturbance to a species for which a Natura 2000 site has been designated to be assessed against the favourable conservation status of a species or natural habitat in order to determine whether it is significant. In contrast, the ELD requires damage to a protected species or natural habitat to be assessed against the effects of the damage ‘on reaching or maintaining the favourable conservation status’ of the species or natural habitat in order to

[166] Sobatta (n 35) 265-66.
[167] ibid 265.

determine whether the adverse effects are significant.[168] Significance under the ELD of such effects is assessed by taking into account the criteria set out in annex I.

According to a study for the Commission on biodiversity damage under the ELD, this 'slight difference [between the significance level in the ELD and the Nature Directives] has led to an interpretation and application of the ELD by most Member States based on higher thresholds'[169] that are 'disconnected' from the Habitats Directive.[170]

The history of the significance threshold for biodiversity in the ELD and its difference with the significance level in the Nature Directives shows, however, that the threshold in the ELD was never intended to be higher than the threshold in the Nature Directives.

The word 'significant' first appeared in 2000 in the White Paper on Environmental Liability. The White Paper stated that '[t]here should be a *minimum threshold* for triggering the regime; *only significant damage* should be covered. Criteria for this should be derived, in the first place, from the interpretation of this notion in the context of the Habitats Directive'.[171]

At this time, the CJEU had not issued its judgment in *Waddenzee*. Before the EU adopted the ELD, however, Advocate General Kokott had delivered her opinion in the case in which she stated, among other things:

> competent authorities may agree to a plan or project only where … they are certain that the integrity of the site concerned will not be adversely affected. This presupposes that the competent authorities are satisfied that there is no reasonable doubt as to the absence of such adverse effects.[172]

[168] ELD (n 1) art 2(1)(a).
[169] See Milieu and IUCN (n 164) 51.
[170] ibid 52.
[171] White Paper (n 144) s 4.5.1, 19 (emphasis original).
[172] 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-7405 Opinion of AG Kokott para 111. AG Kokott's opinion was delivered on 29 January 2004. The EU adopted the ELD on 21 April 2004.

Thus, it was at least foreseeable to the Commission, the Parliament and the Council that the CJEU could well conclude that the threshold for significance in section 6(3) of the Habitats Directive would be very low.

Nowhere in the history of the ELD is there any evidence that the Commission intended the threshold for biodiversity damage to be high. Indeed, following the Commission's issuance of the White Paper, committees in the EU requested it to clarify the threshold. The Committee of the Regions stated that it was 'concerned that the new regime will only cover damage to biodiversity where it is assessed to have been "significant", without providing a definition of what "significant" actually is'.[173] The Committee stated that assessment procedures should be issued, commenting that '[t]he reference to '"significant" damage is too limited and implies the establishment of thresholds before action, this may prove to be a weak system that needs an incentive function to ensure that it is taken seriously'.[174] The Committee argued that '[t]he concept of "significant damage" … may imply unacceptable thresholds and ceilings for the level of damage to be covered'.[175] Similarly, the European Economic and Social Committee stated that '[e]stablishing a threshold for triggering liability is necessary in the interests of legal certainty … any legislative instrument should clarify the terms "threshold" and "significant damage" in order to avoid any inconsistencies in implementation'.[176]

Still further, the relevant committees in the European Parliament stated that 'the proposed liability regime applies only to "significant biodiversity damage". The vagueness of this concept could offer opportunities to set a threshold, which would severely restrict the applicability of the regime. The definition should thus be specified'.[177]

[173] Opinion of the Committee of the Regions on the 'European Commission White Paper on Environmental Liability' [2000] OJ C317/28, C317/29, s 2.4.
[174] ibid.
[175] ibid s 2.5.
[176] Opinion of the Economic and Social Committee on the White Paper on Environmental Liability [2000] OJ C268/19, C268/21 s 4.1.2.
[177] Opinion of the Committee on the Environment, Public Health and Consumer Policy for the Committee on Legal Affairs and the Internal Market on the White Paper on Environmental Liability (COM2000) 66 – C5-0140/2000 – 2000/2084(COS) (12 September 2000) 4.

In response, the Commission defined 'significant environmental damage' for biodiversity in the Working Paper on Prevention and Restoration of Significant Environmental Damage as '[d]amage that adversely affects the favourable conservation status [as defined in the Habitats Directive] of biodiversity under [the] Habitats Directive and Annex 1 to the Wild Birds Directive – and natural sites protected [by] national legislation'.[178]

In 2002, the Proposed Directive maintained this concept by defining 'biodiversity damage' as 'any damage that has serious adverse effects on the conservation status of biodiversity …',[179] defining 'biodiversity' by reference to annexes in the Nature Directives.[180]

The change to the significance threshold from the favourable conservation status itself to 'reaching or maintaining the favourable conservation status' occurred in the Council's common position following amendments to the proposed Directive by the European Parliament.[181] The Parliament had proposed amending the definition of damage to biodiversity as 'biodiversity damage, which is any damage that has serious adverse effects on the conservation status of biodiversity' to:

> biodiversity damage, which is any damage to, or contamination of, habitats, or any harm to species (including migratory birds) that has or has had significant adverse effects on attaining and maintaining the favourable conservation status of biodiversity, or creates a significant risk of any such effects.[182]

The Parliament had also proposed amending the definition of 'conservation status' to add criteria to determine when the conservation status of natural habitats and species would 'be taken as

[178] European Commission, Environment Directorate General Working Paper on Prevention and Restoration of Significant Environmental Damage (Environmental Liability) (30 July 2001) s 3, 1.
[179] Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage [2002] OJ C151 E/132, E/135 art 2(1)(18)(a).
[180] ibid E/134 art 2(1)(2). The Proposed Directive also included areas protected by relevant national legislation on nature conservation in the definition. This requirement was subsequently changed to an option.
[181] Common Position (n 98) E/12, art 2(1)(a).
[182] European Parliament legislative resolution on the proposal for a European Parliament and Council directive on environmental liability with regard to the prevention and remedying of environmental damage COM(2002) 17 – C5-0088/2002 – 2002/0021(COD) (Co-decision procedure: first reading), Amendments 93, 94, 23, 90, 95, 96 and 97, art 2, para 1.

"favourable"'.[183] It is therefore arguable that the Parliament was simply responding to requests for procedures by the Committee of the Regions and the Economic and Social Committee, as well as eliminating the vague concept of 'significant biodiversity damage' by its committees in order to avoid restricting the implementation of the ELD.

The Council subsequently stated that it had 'modified' the definitions of 'biodiversity' and 'conservation status' 'along the lines suggested by the European Parliament, sometimes with slight re-wording'.[184] In addition and in order 'to facilitate the assessment of what would constitute a "significant" damage to protected species and natural habitats', the Council added the (new) annex I to the ELD,[185] thus responding to the requests for procedures to determine when biodiversity damage was significant.

In its communication to the European Parliament on the common position, the Commission explained that the definition of 'biodiversity damage' in article 2(1)(a) of the ELD had been renamed 'damage to protected species and natural habitats' and that '[r]eferences to baseline condition and criteria to assess the significance of adverse effects on the habitats and species concerned have been added (see also new Annex I)'.[186] In respect of the definition of 'conservation status', the Commission stated that it had 'been completed by criteria which allow assessing when it is favourable'.[187] The Commission further stated that annex 1 'is new and sets out the criteria according to which significant adverse changes to the baseline condition should be determined'.[188]

Further, the Commission stated that '[t]he definition of 'biodiversity damage' … incorporates to a certain extent Parliament's amendment on this definition since it refers directly to significant adverse effects on maintaining or reaching favourable conservation status ….'[189]

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[183] ibid.
[184] Common Position (n 98), Statement of the Council's Reasons, Analysis of the common position [2003] OJ C 277 E/10, E/28.
[185] Common Position (n 98), Major innovations introduced by the Council. [2003] OJ C 277 E/10, E/30.
[186] Communication from the Commission (n 98) Commission's comments on the common position s 3.2, 4.
[187] ibid.
[188] ibid s 3.2, 9
[189] ibid, Parliamentary amendments accepted by the Commission fully, partly or in principle and incorporated in the Common Position fully, partly or in principle, s 3.3.1, 12

The Commission further stated that:

> [t]he Common Position is inspired to a certain extent by the willingness of the Council to simplify the procedures and clarify the concepts necessary to the good functioning of an environmental liability regime. This approach should ease the implementation of the future Directive by the Member States. The addition of a new Annex I setting out criteria on the basis of which the significance of damage to protected species and habitats should be assessed illustrates this concern.[190]

Nowhere in the passage of the proposed Directive through the legislative process is there any mention of imposing a high significance threshold in the ELD for biodiversity damage. Instead, the above discussion indicates that the Parliament, the Commission and the Council adapted the significance threshold from the Nature Directives, in which it originally appeared, so that it could apply more easily to environmental liability legislation in the form of the ELD, and that the intent was unanimously to provide a low significance threshold for biodiversity damage in the ELD.

Still further, the switch from the term 'significant' in the White Paper to 'serious' in the proposed Directive, and back again to 'significant' in the final version of the ELD does not indicate any intent by the Commission, the Parliament or the Council to raise the threshold for environmental damage under the ELD. The only reasonable reading of these changes, as stated in recital 5 of the ELD, is that when a concept derives from other EU legislation, 'the same definition should be used so that common criteria can be used and uniform application promoted'.[191] In this case, the same word 'significant' is used in the ELD to have the same meaning as in the Nature Directives.

A further reason why the difference in the description of the significance level in the Nature Directives and the ELD does not indicate a higher threshold in the ELD than the Nature Directives is that the threshold in the ELD was already perceived to be much higher than that in the Nature Directives in 2002 when the Commission submitted the proposed Directive. Comments by environmental NGOs to

[190] ibid, Conclusion s 4, 15.
[191] ELD (n 1) recital 1.

the proposed Directive include a request 'that the significance thresholds be substantially lowered so that the future regime be applicable to cases which fall in between the trivial and sensational'.[192] Arguably, that is precisely what the revisions to the proposed Directive by the Parliament and the Council, with the concurrence of the Commission, were intended to achieve.

The very high threshold for biodiversity damage in the ELD is also not supported by the use of the word 'significant'. In *Naturschutzbund Deutschland*, the CJEU referred to 'significant damage' as 'damage of a certain seriousness'.[193] The dictionary meaning of the word 'significant' is 'important', 'noteworthy' or 'noticeable'.[194] This is consistent with the use of terms other than 'significant' in the various language versions of the ELD. For example, Bulgaria uses the terms 'Сериозни' meaning serious or grave and 'съществено' meaning substantial. Finland uses the term 'huomattava' meaning substantial. France and Romania use the term 'grave' meaning severe, whilst Slovenia uses the term 'večje' meaning bigger or major. None of these terms support an interpretation of the significance threshold in the ELD as being 'almost catastrophic', 'sensational', or indeed, higher than the significance level in the Nature Directives.

A further reason why the EU did not intend the perceived high significance threshold for biodiversity damage in the ELD is the common objective of the Nature Directives and the ELD to halt the loss of biodiversity in the EU.[195] Indeed, halting the loss of biodiversity was a – if not the – primary reason for the adoption of the ELD.[196] The focus on preventing and remediating biodiversity damage in the ELD is emphasised by the imposition of liability for preventing and remediating biodiversity damage on non-annex III operators. In contrast, liability for preventing and remediating water and land damage is limited to annex III operators.

[192] Explanatory memorandum (n 29) 65.
[193] *Naturschutzbund Deutschland* (n 2) para 34.
[194] See, e.g., Oxford English Dictionary; https://www.lexico.com/definition/significant; Cambridge English Dictionary; https://www.bing.com/search?q=significant+meaning&src=IE-SearchBox&FORM=IESR3A
[195] ELD (n 1) recital 1; Habitats Directive (n 4) art 4.
[196] Explanatory Memorandum (n 29) s 3, 5-6.

Further, as indicated in section II above, when the Commission submitted the proposal for the ELD, it commented that liability for biodiversity damage under the ELD was being imposed because few if any Member States had imposed it.[197] A high or very high threshold of significance for biodiversity damage in the ELD does nothing to fill the void of liability for biodiversity damage in the national law of Member States. A high threshold necessarily assumes that the EU decided to rely on Member States' discretion whether to introduce national law to fill the void in liability rather than intending the ELD to fill the void. There is nothing in the history of the ELD to indicate that the Commission, the Parliament or the Council intended to leave such a void to the discretion of Member States.

Yet a further reason for a low significance threshold for biodiversity damage in the ELD is that it is illogical for the threshold for such damage to be high when paragraph 3 of annex I of the ELD refers to 'negative fluctuations that are smaller than natural fluctuations regarded as normal for the species or habitat in question' and damage from which species or habitats will quickly recover as damage that does not have to be classified as significant damage.[198] Such damage is, as stated by the CJEU in *Naturschutzbund Deutschland*, 'minor with regard to the species or habitat concerned'.[199] If the EU had intended the significance threshold for biodiversity damage in the ELD to be high, annex I would not have stated that minor damage may be classified as significant damage.

A particularly strong argument against a high threshold of significance for biodiversity damage is the effect of such a threshold on the effectiveness of the ELD. An operator cannot make the decision to carry out necessary preventive measures 'without delay'[200] if the significance level for biodiversity damage (and water and land damage) is high. The operator would have no way of knowing whether preventive measures were required.[201] In addition, an operator could not inform a competent authority 'as soon as possible' that an imminent threat of environmental damage had not been

[197] ibid.
[198] See ClientEarth (n 163) 9.
[199] *Naturschutzbund Deutschland* (n 2) para 46.
[200] ELD (n 1) art 5(1).
[201] See ELD REFIT Evaluation (n 123) s 6.2, 42.

dispelled by the preventive measures[202] if the operator could not know whether the high significance threshold would have been reached or exceeded.[203]

Further, an operator could not inform the relevant competent authority 'without delay' and could not take 'all practicable steps to *immediately* control, contain, remove or otherwise manage' the damage or prevent further damage (that is, carry out emergency measures) if the significance threshold is high.[204]

An operator that causes an imminent threat of, or actual, damage to protected species and natural habitats must carry out a risk assessment to determine whether such damage has had a significant adverse effect on reaching or maintaining the favourable conservation status of the damaged species or natural habitat unless its preventive measures have dispelled the imminent threat.[205] A low significance threshold provides an operator with sufficient time to carry out a rapid risk assessment before deciding whether it needs to carry out preventive or emergency measures. There is no requirement in the ELD for such an assessment to be in writing or for it to be detailed at this stage. Further, as with an appropriate assessment under article 6(3) of the Habitats Directive, as indicated in section IV(B)(1) above, a risk assessment under the ELD at the preventive or emergency measures stage arguably does not require scientific verification. If written scientific verification was required, the ELD would not require an operator to carry out preventive measures 'without delay' or to carry out emergency measures 'immediately'. If there is uncertainty as to whether an imminent threat of, or actual, biodiversity damage exists, the precautionary principle that applies to the ELD requires the operator to carry out the necessary preventive or emergency measures before a detailed scientifically verified risk assessment is carried out.

The above analysis does not mean that the measurable data set out in annex I of the ELD would not be assessed. That data would be assessed in order to determine whether damage that has had adverse

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[202] ELD (n 1) art 5(2).
[203] See Valerie Fogleman, 'Enforcing the Environmental Liability Directive: Duties, Powers and Self-Executing Provisions' (2006) 14(4) Environmental Liability 127, 137.
[204] ELD (n 1) art 6(1) (emphasis added).
[205] ibid annex I. See ibid arts 5(1), 5(2), 6(1(a), 6(1)(b).

effects on reaching or maintaining the favourable conservation status of a species or habitat is significant and, if so, the most appropriate measures to be carried out to remediate it.[206]

In contrast to the above, the perceived high level of significance for biodiversity damage under the ELD renders the requirement to carry out preventive and emergency measures a nullity in the vast majority of cases because an operator cannot carry out the measures 'without delay' or 'immediately' when the operator has no way of knowing whether the damage caused by it is biodiversity damage under the ELD.[207] In effect, a high significance level for biodiversity damage makes the effective implementation of the ELD impossible due to its limited extent, as evidenced by the very low number of incidents to prevent and remedy biodiversity damage in most Member States.[208]

VI. Conclusions

The CJEU's decision in *Naturschutzbund Deutschland* has implications for the future management of Natura 2000 sites and activities that affect them.

A 2014 study on biodiversity damage under the ELD for the Commission found that most Member States did not recognise any relationship between articles 6(1) and 6(2) of the Habitats Directive and the ELD, despite both articles and the ELD referring to the favourable conservation status of species and habitats.[209] The study found that Member States implement the ELD separately from the Nature Directives with no co-ordination or correlation between them despite a breach of the duty to avoid significant disturbances to habitats of species being a breach of article 6(2).[210] Arguably this practice must cease following the CJEU's judgment in *Naturschutzbund Deutschland*. Instead, authorised activities that affect Natura 2000 sites should be modified or should cease being carried out in order

[206] ibid arts 6(2)(c)-(d). See ibid art 7 and annex II.
[207] See Valerie Fogleman (n 203) 136-37.
[208] See ELD REFIT Evaluation (n 123) 26. See also ELD country fiches; available from Environmental Liability; https://ec.europa.eu/environment/legal/liability/index.htm and https://circabc.europa.eu/ui/group/cafdbfbb-a3b9-42d8-b3c9-05e8f2c6a6fe/library/82e90a00-fa70-4af6-bc4b-ab54207b1694?p=1&n=10&sort=modified_DESC
[209] Milieu and IUCN (n 164) s 4.1, 22.
[210] ibid.

that future damage to protected species and natural habitats ceases. In addition, biodiversity damage already caused by the activities must be remediated.

The ELD was fully transposed into the national law of all Member States in June 2010. For over 10 years since then, its effectiveness – and its ability to reach its full potential – have been prejudiced in many if not most Member States by the interpretation of the significance threshold for biodiversity damage 'as a "severity" threshold, requiring "serious" or "severe" impacts, rather than merely "significant" ones (i.e. sufficiently important to be worthy of attention)'.[211] This article has argued that this interpretation is incorrect. Unless the misinterpretation is rectified, the ELD cannot properly assist in halting the loss of biodiversity across the EU, as intended by the EU.

[211] ClientEarth (n 163) 9.