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Balancing nature and economic interests in the European Union: On the concept of mitigation under the Habitats Directive

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The Habitats Directive and, more specifically, its provisions on site protection have been the subject of several judgments by the Court of Justice of the European Union. These judgments have progressively clarified the balance between nature conservation interests and economic ones. Following a recent judgment of the Court about the managing of nitrogen deposition in Natura 2000 sites, this contribution highlights the known and unknown aspects of this legal field. It underlines in particular the importance of further clarification of the standards to pursue a programmatic approach in nature conservation and to evaluate science-based evidence in court.

1 | INTRODUCTION

Despite the predominant measure in European Union (EU) nature conservation law – the Habitats Directive¹ – passing its fitness check,² the status of nature conservation in the EU does not look good.³ Habitats – especially the European priority areas forming the Natura 2000 network established under the Habitats Directive – are under constant pressure due to human activities. During the economic crisis that started in 2008, reforms of permitting procedures took place in several Member States to foster economic recovery.⁴ The pursuit of climate change mitigation highlights the at times difficult relationship between nature conservation and renewable energy projects.⁵ More generally, the pursuit of economic welfare, coupled

with the abundant supply of agricultural products, are a constant threat to this environmental field.⁶

Member States and project developers search for as much room as possible to pursue their activities under EU and national nature conservation legal frameworks. One provision of the Habitats Directive seems to attract particular creativity of national legislators, public authorities and undertakings: Article 6(3).⁷ This provision requires public authorities to assess the effects of any plan or project that, potentially, significantly affects the conservation goals and status of a Natura 2000 site. If a plan or project has a negative effect on such goals, authorization should be denied. Member States clearly have an incentive to avoid this provision halting socio-economic development, including in the field of energy transition. The

¹Council Directive (EEC) 92/43 of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora [1997] OJ L305/42 (Habitats Directive).

²Commission (EU), 'Evaluation Study to Support the Fitness Check of the Birds and Habitats Directives' (March 2016) <http://ec.europa.eu/environment/nature/legislation/fitness_check/docs/study_evaluation_support_fitness_check_nature_directives.pdf>.

³European Environment Agency (EEA), 'Environmental Indicator Report 2018' (EEA 2018).

⁴For a discussion on legislative reforms to speed up development consent procedures, see the contributions in B Vanheusden and L Squintani (eds), *EU Environmental Planning Law Aspects of Large-scale Projects* (Intersentia 2016).

⁵See on this tension Case C-2/10, *Azienda Agro-Zootecnica Franchini srl and Eolica di Altamura Srl v Regione Puglia*, ECLI:EU:C:2011:502.

⁶EEA, *Effects of Air Pollution on European Ecosystems* (EEA 2014) Annex 4.

⁷G Wandesforde-Smith and NSJ Watts, 'Wildlife Conservation and Protected Areas: Politics, Procedure, and the Performance of Failure under the EU Birds and Habitats Directives' (2014) 17 *Journal of International Wildlife Law and Policy* 62; F Kistenkas, 'Rethinking European Nature Conservation Legislation: Towards Sustainable Development' (2013) 10 *Journal for European Environmental and Planning Law* 72, 72 and 83; H Schoukens, 'Habitats Restoration Measures as Facilitators for Economic Development within the Context of EU Habitats Directive: Balancing No Net Loss with the Preventive Approach?' (2017) 29 *Journal of Environmental Law* 47; H Schoukens and A Cliquet, 'Mitigation and Compensation under EU Nature Conservation Law in the Flemish Region: Beyond the Deadlock for Development Projects' (2014) 10 *Utrecht Law Review* 194, 207.

concept of a 'mitigation measure' was introduced by governmental agencies in some countries exactly with the purpose of relaxing the stringency of EU nature conservation law.⁸ This concept has explicitly or implicitly been used in several Member States in many cases, without the judiciary asking for a preliminary ruling by the Court of Justice of the European Union (CJEU).⁹

Eventually, national courts asked preliminary questions and, in a series of judgments,¹⁰ the Court of Justice has clarified the scope of public authorities' discretion to establish mitigation measures under the Directive. In November 2018, the latest of such judgments was delivered at the request of the Dutch Council of State.¹¹ After providing a summary of the judgment (Section 2), this contribution analyses the developments brought about by it, regarding two of the four criteria on the establishment of mitigation measures (Section 3). This analysis shows the limited room for manoeuvre left to the Member States by the judgment. This leads to a reflection on the role of a programmatic approach in the field of nature conservation law (Section 4), and some preliminary consideration on the way forward (Section 5).

2 | SUMMARY OF THE CASE

To regulate the deposition of nitrogen into the environment, the Netherlands has adopted a programmatic approach to nitrogen (in Dutch: *Programma Aanpak Stikstof 2015–2021*, PAS). This approach does not only aim to conserve and restore Natura 2000 sites, but also at enabling economic activities that cause nitrogen deposition in those sites. The PAS makes use of both source-based measures – such as the reduction of emissions from stables and measures for low-emission fertilizers – and site-specific measures – such as hydrological measures and additional vegetation measures – supplementary to the regular management of the Natura 2000 sites. These measures are expected to lead to a decrease of nitrogen depositions. This decrease is partially used to expand the room for deposition. What matters is that, on balance, a predetermined limit value for deposition is not crossed. Pursuant to this balancing approach, projects and other operations which cause nitrogen deposition not exceeding a limit value of 0.05 mol N/ha/yr are allowed without prior authorization. Projects and other operations which cause nitrogen deposition staying between 0.05 and 1 mol N/ha/yr are allowed without prior authorization as well, but

must be notified to the competent authority. Projects leading to higher depositions are subject to an 'appropriate assessment'. This appropriate assessment, however, is not project-specific. Instead, the assessment takes place at the level of the PAS and takes into account the balancing approach. This means that a permit may be granted for projects and operations that do not result in an increase of nitrogen deposition, even though this is only on balance.¹² If on balance there is an increase in nitrogen deposition, the permit may still be granted, by making use of the room for deposition stored within the PAS, until all additional depositions are covered.¹³

This approach led to the granting of permits to enlarge the establishment or expansion of dairy, pig and poultry farms in the Netherlands. Nongovernmental organizations challenged the application of this approach with regard to 10 cases in two Dutch provinces, which led to the preliminary rulings by the CJEU under review. These challenges were not the first time that the application of the PAS was disputed in court. The Dutch Council of State had ruled on this matter on several occasions, but, until the present cases, it had never made a referral for a preliminary ruling to disband the appeals and uphold the PAS.¹⁴ It is probably thanks to the clarification on the interpretation of Article 6(3) of the Directive in *Orleans*¹⁵ that the Council of State finally decided to stay the proceedings and seek guidance from the CJEU.

The Court of Justice reformulated the questions posed by the Council of State into seven questions,¹⁶ five of which are relevant for this analysis:

- (i) [W]hether Article 6(3) of the Habitats Directive must be interpreted as meaning that the grazing of cattle and the application of fertilisers on the surface of land or below its surface in the vicinity of Natura 2000 sites may be classified as a 'project' within the meaning of that provision, on the ground that they are likely to have significant consequences for those sites, even if those activities, in so far as they are not a physical intervention in the natural surroundings, do not constitute a 'project' within the meaning of Article 1(2)(a) of the EIA [environmental impact assessment] Directive.¹⁷
- (ii) [W]hether Article 6(3) of the Habitats Directive must be interpreted as precluding national programmatic legislation which allows the competent authorities to authorise projects on the basis of an 'appropriate assessment' within the meaning of that provision, carried out in advance and in which a specific overall amount of nitrogen deposition has been deemed compatible with that legislation's objectives of protection.¹⁸

⁸On this concept, see RHW Frins, 'Mitigatie, Compensatie en Soldering in het Omgevingsrecht' (Stichting Instituut voor Bouwrecht 2016).

⁹L Squintani et al, 'Mitigation and Compensation Measures under the EU Habitats Directive in Selected Member States' (2019) 1 European Energy and Environmental Law Review 2.

¹⁰In particular, 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 (Waddenzee)*, ECLI:EU:C:2004:482; Case C-521/12, *T.C. Briels and Others v Minister van Infrastructuur en Milieu (Briels)*, ECLI:EU:C:2014:330; Case C-258/11, *Peter Sweetman and Others v An Bord Pleanála (Sweetman)*, ECLI:EU:C:2013:220; Joined Cases C-387/15 and 388/15, *Hilde Orleans and Others v Vlaams Gewest (Orleans)*, ECLI:EU:C:2016:583.

¹¹Joined 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*, ECLI:EU:C:2018:882 (PAS judgment).

¹²Opinion of AG Kokott, Joined Cases C-293/17 and C-294/17, *Coöperatie Mobilisation for the Environment UA and others v College van Gedeputeerde Staten van Limburg and others*, ECLI:EU:C:2018:622.

¹³ibid.

¹⁴See L Squintani and JMIJ Zijlman, 'Stel Gerust een Prejudiciële Vraag!' (2017) 2 Tijdschrift Natuurbeschermingsrecht 1.

¹⁵*Orleans* (n 10).

¹⁶For the original questions of the Dutch Council of State, see PAS judgment (n 11) para 57.

¹⁷PAS judgment (n 11) para 59.

¹⁸ibid para 90.

- (iii) [W]hether Article 6(2) and (3) of the Habitats Directive must be interpreted as precluding national programmatic legislation, such as that at issue in the main proceedings, exempting certain projects which do not exceed a certain threshold value or a certain limit value in terms of nitrogen deposition from the requirement for individual approval, since the cumulative effects of all the plans or projects likely to create such deposition were subject in advance to an 'appropriate assessment' within the meaning of Article 6(3) of that directive.¹⁹
- (iv) [W]hether Article 6(3) of the Habitats Directive must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows a certain category of projects, in the present case the application of fertilisers on the surface of land or below its surface and the grazing of cattle, to be implemented without being subject to a permit requirement and, accordingly, to an individualised appropriate assessment of its implications for the sites concerned, since that legislation is itself based on an 'appropriate assessment' within the meaning of that provision.²⁰
- (v) [W]hether, and under which conditions, an 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive may take into account the existence of 'conservation measures' within the meaning of paragraph 1 of that article, 'preventive measures' within the meaning of paragraph 2 of that article, measures specifically adopted for a programme such as that at issue in the main proceedings or 'autonomous' measures, in so far as those measures are not part of that programme.²¹

Largely following the opinion of Advocate General Kokott, the Court of Justice embraced the idea of pursuing a programmatic approach under the Directive, as long as a series of strict conditions are respected – which, in the Netherlands, is actually not the case.²² The Court of Justice concluded that:

- The grazing of cattle and the application of fertilizers on the surface of land or below its surface in the vicinity of Natura 2000 sites may be classified as a 'project' under the Habitats Directive.
- Article 6(3) of the Habitats Directive does not preclude national programmatic legislation which allows the competent authorities to authorize projects on the basis of an 'appropriate assessment', carried out in advance and in which a specific overall amount of nitrogen deposition has been deemed compatible with that legislation's objectives of protection. That is so, however, only in so far

as a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned.

- The same conclusion and condition apply to the exemption of certain projects which do not exceed a certain threshold value or a certain limit value in terms of nitrogen deposition from the requirement for individual approval.
- Article 6(3) of the Habitats Directive precludes national programmatic legislation, which allows a certain category of projects to be implemented without being subject to a permit requirement and, accordingly, to an individualized appropriate assessment of its implications for the Natura 2000 sites concerned. An exception to this finding is possible if objective circumstances allow to rule out with certainty any possibility that those projects, individually or in combination with others, may significantly affect those sites.
- Article 6(3) must be interpreted as meaning that an 'appropriate assessment' may not take into account the existence of 'conservation measures' within the meaning of Article 6(1), 'preventive measures' within the meaning of Article 6(2), measures specifically adopted for a programme such as that at issue in the main proceedings or 'autonomous' measures, in so far as those measures are not part of that programme, if the expected benefits of those measures are not certain at the time of that assessment.

3 | THE FOUR CRITERIA TO ESTABLISH A MITIGATION MEASURE

3.1 | Mitigation measures in context

Article 6 of the Habitats Directive gives 'teeth' to the Directive²³ by establishing proactive, preventive and procedural requirements for the conservation of Natura 2000 sites.²⁴ This provision refers to three kinds of measures: conservation, preventive and compensatory measures. It does not refer to mitigation measures. Before discussing what the latter measures are, it is important to briefly explain what the former three measures are, in order to distinguish between them.

Conservation measures are covered by Article 6(1) of the Directive. These measures focus on positive and proactive interventions to maintain and improve the status of conservation of a Natura 2000 site.²⁵ Any measure leading to deterioration therefore falls

¹⁹ *ibid* para 105.

²⁰ *ibid* para 113.

²¹ *ibid* para 121.

²² CW Backes, 'Joined Cases Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van gedeputeerde staten van Limburg and tichting Werkgroep Behoud de Peel v College van gedeputeerde staten van Noord-Brabant' (2018) 436 AB Rechtspraak Bestuursrecht 2869; R Frins, 'De ADC-Toets als Reddingsvest voor het PAS? Enkele Opmerkingen naar Aanleiding van de Conclusie van Advocaat-Generaal Kokott' (2018) 119 Tijdschrift voor Bouwrecht 805; RHW Frins, 'De Gevolgen van het PAS-arrest voor de Programmatische Aanpak van Andere Thema's dan Stikstof' (2019) 2–3 Milieu en Recht 20; MM Kaajan, 'Het PAS-arrest; en nu?' (2019) 2–3 Milieu en Recht 18; H Schoukens, 'George Orwells Animal Farm en de Programmatische Aanpak stikstof in de Lage Landen: zijn de Vlaamse Varkens beter af dan Nederlandse?' (2019) 2–3 Milieu en Recht 21.

²³ See also Wandesforde-Smith and Watts (n 7); P Scott, 'Appropriate Assessment: A Paper Tiger' in G Jones (ed), *The Habitats Directive: A Developer's Obstacle Course* (Hart 2012) 103. This statement applies only to the protection of 'core' areas. Conversely, for non-core areas the binding force of the Directive can be questioned; see L Squintani, 'The Development of Ecological Corridors' (2012) 9 Journal for European Environmental and Planning Law 180.

²⁴ On the selection process, see H Schoukens and HE Woldendorp, 'Site Selection and Designation under the Habitats and Birds Directives' in CH Born et al (eds), *The Habitats Directive in its EU Environmental Law Context – European Nature's Best Hope?* (Routledge 2015) 31.

²⁵ Commission (EU), 'Managing Natura 2000 Sites: The Provisions of Article 6 of the "Habitats" Directive 92/43/EEC' (2000) <http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf> 17–21.

outside the realm of this concept.²⁶ Preventive measures are envisaged under Article 6(2) of the Directive and aim at avoiding deterioration, similarly to conservation measures.²⁷ Yet these kind of measures do not need to take the form of positive action, as in the context of Article 6(1). Non-action is also a form of preventive measure, if it prevents damage from occurring. What matters under this provision is avoiding disturbance that is likely to affect the objectives of the Directive significantly, particularly its conservation objectives in relation to Natura 2000 sites.²⁸

Compensation measures are mentioned in Article 6(4) of the Directive, which establishes an exception to the obligation contained in Article 6(3). Together, Articles 6(3) and 6(4) describe a two-step – or, in case the derogation clause is used, a three-step – procedure for granting development consent to plans or projects likely to have a significant effect on a Natura 2000 site,²⁹ based on a ‘first come, first serve’ approach.³⁰ The concepts of ‘plan’ (such as land-use plans, sectoral plans, etc.) and ‘projects’ (such as construction works or other interventions in the natural environment) have to be interpreted broadly,³¹ and include also developments *outside* a Natura 2000 site, which are likely to have a significant effect on it (the so-called ‘external effect’).³² In light of the precautionary principle, the assessment of the effects of plans of projects inside or outside Natura 2000 sites – either individually or in combination with other plans or projects (so-called cumulative impacts) – is based on the likelihood of effects, not on their certainty.³³ If the screening phase indicates the presence of a potentially significant negative effect, an appropriate assessment needs to be performed, in light of the site’s ecological functions and conservation objectives.³⁴ A negative outcome should lead to the refusal of authorization.

Yet, Article 6(4) of the Directive specifies that if, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried

out for imperative reasons of overriding public interest, a Member State must take all *compensatory* measures necessary to ensure that the overall coherence of a Natura 2000 site is guaranteed.³⁵ All the constitutive elements of this derogation clause have to be interpreted restrictively,³⁶ for balancing environmental protection and economic development.³⁷ In particular, the concept of compensation measures entails, typically, the designation of like-for-like replacement habitat.³⁸ In the view of the European Commission, what matters is that the function performed by the affected site is successfully recreated elsewhere.³⁹

Adequate implementation and enforcement of Article 6 of the Directive strengthens nature conservation.⁴⁰ Yet the complex relationship between Articles 6(3) and 6(4) has led to uncertainty as to what ‘adequately implemented and enforced’ means,⁴¹ and where ‘gold-plating’ starts.⁴² In particular, in certain Member States questions have arisen on the extent to which measures adopted to avoid damage can be taken into account in concluding

³⁵Specifically on this provision, see A Nollkaemper, ‘Habitat Protection in European Community Law: Evolving Conceptions of a Balance of Interests’ (1997) 9 *Journal of Environmental Law* 271; R Clutton and I Tafur, ‘Are Imperative Reasons Imperiling the Habitats Directive? An Assessment of Article 6(4) and the IROPI Exception’ in G Jones (ed), *The Habitats Directive: A Developer’s Obstacle Course?* (Hart 2012) 167; L Krämer, ‘The European Commission’s Opinions under Article 6(4) of the Habitats Directive’ (2009) 21 *Journal of Environmental Law* 59; CP Rodgers, *The Law of Nature Conservation: Property, Environment, and the Limits of Law* (Oxford University Press 2013) 225–232; de Sadeleer (n 29). Projects authorized on the basis of Article 6(4) of the Directive have been called ‘un-sustainable development’ projects; see Schoukens (n 7) 52.

³⁶See most notably Case C-399/14, *Grüne Liga Sachsen eV and Others v Freistaat Sachsen (Grüne Liga Sachsen)*, ECLI:EU:C:2016:10 paras 72 and 73; See also Commission (EU), ‘Guidance on Article 6(4) of the “Habitats Directive” 92/42/EEC’ (January 2007). On the Commission’s approach, see D McGillivray, ‘Compensating Biodiversity Loss: The EU Commission’s Approach to Compensation under Article 6 of the Habitats Directive’ (2012) 24 *Journal of Environmental Law* 417.

³⁷Schoukens (n 7); Schoukens and Cliquet (n 7) 207.

³⁸Schoukens and Cliquet (n 7) 207.

³⁹Commission (EU) (n 25) 12–13.

⁴⁰JV Lopez-Bao et al, ‘Toothless Wildlife Protection Laws’ (2015) 24 *Biodiversity and Conservation* 2105; PF Donald et al, ‘International Conservation Policy Delivers Benefits for Birds in Europe’ (2007) 317 *Science* 810; G Chapron et al, ‘Recovery of Large Carnivores in Europe’s Modern Human-dominated Landscapes’ (2014) 346 *Science* 1517; Schoukens (n 7).

⁴¹See especially the negative reactions in literature about a strict reading of these provisions from an economic development perspective; Schoukens and Cliquet (n 7); JMJ Zijlman and HE Woldendorp, ‘Compensation and Mitigation: Tinkering with Natura 2000 Protection Law’ (2014) 10 *Utrecht Law Review* 172; J Verschuuren, ‘Climate Change: Rethinking Restoration in the European Union’s Birds and Habitats Directive’ (2010) 28 *Ecological Restoration* 431, 433; and H Schoukens and Hans Woldendorp, ‘De Habitatrichtlijn als Doos van Pandora: Het A2-arrest van het Europese Hof van Justitie’ (2015) 2 *Milieu en Recht* 2–15, with further references to Dutch literature.

⁴²On this concept, see L Squintani, *Beyond Minimum Harmonization* (Cambridge University Press 2019); L Squintani, *Gold-plating of European Environmental Law* (PhD Dissertation, University of Groningen 2013); HT Anker et al, ‘Coping with EU Environmental Legislation: Transposition Principles and Practices’ (2015) 27 *Journal of Environmental Law* 17; JH Jans et al, ‘“Gold Plating” of European Environmental Measures?’ (2009) 6 *Journal for European Environmental and Planning Law* 417, 418; L Squintani, M Holwerda and KJ De Graaf, ‘Regulating Greenhouse Gas Emissions from EU ETS Installations: What Room is Left for the Member States?’ in M Peeters, M Stallworthy and J de Cedra de Larragán (eds), *Climate Law in EU Member States* (Edward Elgar 2012) 67. For a specific application of this concept to nature conservation in the Netherlands, see L Squintani, ‘The Development of Ecological Corridors’ (2012) 9 *Journal for European Environmental and Planning Law* 180; and L Squintani and J Zijlman, ‘“Nationale Koppen” en de Doorwerking van Natuurbeschermingsverdragen’ (2013) 3 *Milieu en Recht* 158; for the United Kingdom, see R Morris, ‘The Application of the Habitats Directive in the UK: Compliance or Gold Plating?’ (2011) 28 *Land Use Policy* 361.

²⁶*Orleans* (n 10) para 38.

²⁷The terminology *conservation* and *preventive* measures are used by the CJEU in the *Orleans* case, *ibid*. On the relationship between this provision and legal certainty, see H Schoukens, ‘Ongoing Activities and Natura 2000: Biodiversity Protection vs Legitimate Expectations’ (2014) 11 *Journal for European Environmental and Planning Law* 1, 1.

²⁸Case C-399/14, *Grüne Liga Sachsen and Others*, ECLI:EU:C:2016:10 para 41; on the concept of ‘significance’, in particular, see Case C-355/90, *Commission v Spain (Santoña Marshes)*, ECLI:EU:C:1993:331; and Case C-392/96, *Commission of the European Communities v Ireland*, ECLI:EU:C:1999:431.

²⁹See in detail N de Sadeleer, ‘Assessment and Authorization of Plans and Projects Having a Significant Impact on Natura 2000 Sites’ in Vanheusden and Squintani (n 4) 281–318.

³⁰E Lees, ‘Allocation of Decision-making Power under the Habitats Directive’ (2016) 28 *Journal of Environmental Law* 194.

³¹On the concepts of plans and projects, see de Sadeleer (n 29) 286–294.

³²Joined Cases C-293/17 and C-294/17, *Coöperatie Mobilisatie for the Environment UA and Others v College van gedeputeerde staten van Limburg and Others*, ECLI:EU:C:2018:882; which aims at clarifying the linkage between the concept of ‘project’ under the Habitats Directive with that followed under the EIA Directive.

³³de Sadeleer (n 29) 286–294; see also Schoukens (n 7); *Waddenzee* (n 10) para 36; E 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; and J Verschuuren, ‘Shellfish for Fishermen or for Birds? Article 6 Habitats Directive and the Precautionary Principle’ (2005) 17 *Journal of Environmental Law* 265.

³⁴*Sweetman* (n 10) paras 31ff.

that no significant adverse effect will occur.⁴³ It is here that the concept of *mitigation* measures enters into the legal discussion under Article 6 of the Directive, creating much uncertainty,⁴⁴ and potential abuses.⁴⁵

Thanks to the judgments in the *Waddenzee*, *Sweetman*, *Briels* and *Orleans* cases,⁴⁶ it can confidently be established that mitigation measures are allowed under the Habitats Directive only if four cumulative requirements are met:⁴⁷

- (i) the measure aims at preventing the damage caused by a *specific* plan/project (functional linkage criterion);
- (ii) the measure must ensure that *this* damage (specificity criterion);
- (iii) will be *prevented* (prevention criterion); and
- (iv) that there is *no doubt* about this preventive effect (no-doubts criterion).

In *Sweetman*, the Court clarified that the specificity criterion refers to each *individual* conservation objective, justifying the designation of that site in the list of Sites of Community Importance (SCIs) in accordance with the Directive.⁴⁸ Similarly, from *Briels* it is clear that, under the prevention criterion, measures provided to replace a damaged area with another cannot be taken into account in the assessment of the implications of a project provided for in Article 6(3).⁴⁹ In the judgment under review, the Court confirmed both criteria by stating:

... the case-law relating to Article 6 of the Habitats Directive requires a distinction to be drawn between protective measures forming part of the plan or project at issue and intended to avoid or reduce any direct adverse

effects caused by it, in order to ensure that that plan or project does not adversely affect the integrity of the sites concerned, which are covered by Article 6(3), and measures which, in accordance with Article 6(4), are aimed at compensating for the negative effects of the plan or project on that site and cannot be taken into account in the assessment of the implications of that plan or project on that site ...

Moreover, according to the Court's case-law, it is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm to the integrity of the site concerned, by guaranteeing beyond all reasonable doubt that the plan or project at issue will not adversely affect the integrity of that site, that such a measure may be taken into consideration in the 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive ...⁵⁰

The PAS judgment provides further clarification of the functional linkage criterion (i) and of the no-doubts criterion (ii), as further discussed below.

3.2 | The functional linkage criterion

As stated in Section 3.1, the concept of 'project' must be interpreted broadly. The PAS judgment clarifies that this concept is probably even broader than originally thought. Indeed, not only the Court of Justice defines this concept without linking it to that used in the EIA Directive, that is, by covering activities not covered by the EIA Directive. Most importantly, the Court defines it by linking its meaning to the effects of the activities on the protected site. Indeed, the Court states that it is important to examine whether such activities are likely to have a significant effect on a protected site.⁵¹ This is an effects-based test, which is capable of covering any kind of activity, even the spreading of fertilizers.

In the context of the establishment of mitigation measures, following *Briels*, it remained unclear whether mitigation measures have to be 'functionally' linked to a project development, that is, whether the proposed measures are part of the scrutinized project or of a mitigation scheme or restoration programme that does not take into account the specific project under scrutiny.⁵² Following *Orleans*,⁵³ the present judgment confirms that a proposed mitigation measure must aim at avoiding the damage caused by the plan or project under scrutiny *specifically*. Management plans and generic restoration measures taken under Articles 6(1) and 6(2) of the Habitats Directive can be taken into account under the

⁴³This has particularly been the case in the Netherlands, see Zijlmans and Woldendorp (n 41); Schoukens (n 7).

⁴⁴On the lack of full conceptual clarity, see also D McGillivray, 'Mitigation, Compensation and Conservation: Screening for Appropriate Assessment Under the EU Habitats Directive' (2011) 8 Journal for European Environmental and Planning Law 329, 336; and G van Hoorick, 'Compensatory Measures for Large-scale Projects in European Nature Conservation Law after the Briels Case' in Vanheusden and Squintani (n 4) 321. The concepts of mitigation and compensation measures are also relevant in the context of the discussions on 'biodiversity offsetting' and 'no net loss'; see R Lapeyre, G Froger and M Hrabanski, 'Biodiversity Offsets as Market-based Instruments for Ecosystem Services? From Discourse to Practices' (2015) 15 Ecosystem Services 125; C Bonneuil, 'Tell Me Where You Come From, I Will Tell You Who You Are: A Genealogy of Biodiversity Offsetting Mechanism in Historical Context' (2015) 192 Biology Conservation 485; BBOP (Business and Biodiversity Offsets Programme), 'Standards on Biodiversity Offsets' (2012); K ten Kate and M Crowe, 'Biodiversity Offsets: Policy Options for Governments: An Input Paper for the IUCN Technical Study Group on Biodiversity Offsets' (International Union for Conservation of Nature 2014) 7.

⁴⁵On the use or misuse of offsetting, see JD Pilgrim et al, 'A Process for Assessing the Offsetability of Biodiversity Impacts' (2013) 6 Conservation Letters 376; F Quétiér et al, 'No Net Loss of Biodiversity or Paper Offsets? A Critical Review of the French No Net Loss Policy' (2014) 38 Environmental Science and Policy 120; D Moreno-Mateos et al, 'The True Loss Caused by Biodiversity Offsets' (2015) 192 Biological Conservation 552; R Frins and H Schoukens, 'Balancing Wind Energy and Nature Protection: From Policy Conflicts Towards Genuine Sustainable Development' in L Squintani et al (eds), *Sustainable Energy United in Diversity: Challenges and Approaches in Energy Transition in the European Union* (European Environmental Law Forum 2014) 85; M Maron et al, 'Conservation: Stop Misuse of Biodiversity Offsets' (2015) 523 Nature 401; Schoukens (n 7).

⁴⁶See n 10.

⁴⁷Developed on the basis of Frins (n 8) 52–72.

⁴⁸*Sweetman* (n 10) para 39.

⁴⁹*Briels* (n 10).

⁵⁰PAS judgment (n 11) paras 125 and 126.

⁵¹*ibid* para 67.

⁵²Schoukens (n 7).

⁵³This had already been indicated by the European Commission in its non-binding guidance; see Commission (EU) (n 25) 45.

concept of mitigation measures when scrutinizing a specific project only if they specifically address the negative effects of that project.⁵⁴

What is new in the PAS judgment is that this linkage can also take place at the plan level, and does not need to take place at the level of a specific decision. More precisely, while granting authorization for a specific project, reference can be made to the positive effects of measures specifically aiming at addressing that project as assessed under the plan. Indeed, after quoting the text of Article 6(3) of the Directive, which requires an individual assessment of plans and projects, the Court of Justice explains the *ratio legis* of such a provision. According to the Court, the appropriate assessment of the implications of the plan or project for the site concerned implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site, must be identified.⁵⁵ What matters is that an *individual* assessment takes place, not when in the chain of policy instruments to protect the environment (i.e. policies, plans and specific decisions) such assessment takes place.

Accordingly, such an individual assessment can also take place at the plan level. What matters is that there is no reasonable scientific doubt as to the absence of adverse effects of *each* plan or project on the integrity of the site concerned.⁵⁶ Therefore, there is no *de-linking effect*, meaning that the conservation goals of the Directive can be used to review the appropriateness of the assessment of a specific plan, differently than in other fields of EU environmental law, such as under the Nitrates Directive.⁵⁷ The Court refers to the need of ensuring that *those* projects, individually or cumulatively considered, do not affect the goals of the Directive, both in paragraph 112 – where the Court of Justice allows exempting certain projects which do not exceed a certain threshold from the individual approval requirement – and in paragraph 120, where the Court of Justice prohibits excluding a certain category of projects from the individual approval requirement.⁵⁸

3.3 | The no-doubts criterion

The use of the adverb 'likely' in Article 6(3) of the Directive was clearly linked to the precautionary principle by the Court of Justice already in the *Waddenzee* case.⁵⁹ Since then, the requirement that there should be no scientific doubt about the ability to prevent the specific damage of a specific project has gained clarity. In the

present judgment, the Court of Justice made clear that there are two ways of complying with this criterion.

First, a proposed measure can qualify as a mitigation measure under Article 6(3) of the Directive if, at the moment of the authorization of the plan or project, 'the procedures needed to accomplish the alleged mitigation measures have already been carried out'.⁶⁰ Clearly, the implementation of a mitigation measure makes it easier to analyse whether the significant negative effects of a plan or project have been avoided or not.

This approach to the no-doubts criterion is a very stringent one. It stems from the *Orleans* case, in which the Court of Justice ruled that only those measures which are completed at the moment of the appropriate assessment can be taken into account as mitigation measures.⁶¹ *Orleans* concerned the development of a large part of the port of Antwerp (Belgium), affecting a Natura 2000 site. The Court found that the Belgian Regional Development Implementation Plan allowing the project only did so after the sustainable establishment of habitats and habitats of species in core ecological areas. Second, the Court ruled that a decision would have to declare that habitats in the nature reserves had in fact been sustainably created, and the application for a planning permit relating to implementing the intended use of the area concerned would also have had to include that decision. Accordingly, the negative effects would have taken place only after that certainty regarding the effectiveness of the positive effects had been proven. Yet, the Court ruled that such certainty would have been acquired only after the plan had been adopted, and thus that the proposed measures could not qualify as mitigation measures under Article 6(3) of the Directive.

The second way in which a measure could qualify as a mitigation measure under Article 6(3) of the Directive is when there is no scientific doubt about the effectiveness of the proposed measure. This means that, even when a measure has not been carried out yet, it is still possible to speak of a mitigation measure. What matters is that there is scientific certainty about the effectiveness of such a measure, thus avoiding the significant damage that would otherwise occur. This criterion is clearly less demanding than the previous one. Still, the question is when scientific certainty exists about the effectiveness of a measure. This criterion could therefore be more difficult to fulfil in practice than it seems. It is still unclear what burden of proof the Court would consider to be sufficient under this approach. In the present judgment, the Court left this matter to the national court to decide, in an exercise of judicial subsidiarity.⁶² Yet, it cannot be discounted that the Court of Justice will formulate some guidance in future case law if called upon to clarify this issue.

⁵⁴Schoukens (n 7); EJM Plambeck and L Squintani, 'De Bescherming en Verbetering van de Waterkwaliteit in Nederland, of: een Troebele Implementatie van de KRW' (2017) 2 Milieu en Recht 2. This has been confirmed in Case C-441/17, *Commission v Poland (Forêt de Białowieża)*, ECLI:EU:C:2017:877.

⁵⁵PAS judgment (n 11) para 95.

⁵⁶*ibid* para 104.

⁵⁷L Squintani and M van Rijswijk, 'Improving Legal Certainty and Adaptability in the Programmatic Approach' (2016) 28 *Journal of Environmental Law* 443.

⁵⁸PAS Judgment (n 11) paras 112 and 120.

⁵⁹*Waddenzee* (n 10).

⁶⁰PAS Judgment (n 11) para 130.

⁶¹See, e.g., J Zijlman, 'Verdere Verheldering van het Begrip Mitigerende Maatregelen' (2016) 8 *Jurisprudentie Milieurecht* 870.

⁶²On this practice and for more references, see S Bogojevic, 'Judicial Protection of Individual Applicants Revisited: Access to Justice through the Prism of Judicial Subsidiarity' (2015) 33 *Yearbook of European Law* 1.

4 | THE ROOM FOR A PROGRAMMATIC APPROACH IN EU NATURE CONSERVATION LAW

The main finding in the PAS judgment is that a programmatic approach under Article 6(3) of the Directive is allowed – albeit under strict conditions. At first glance, the Dutch government could be said to have satisfied the Directive's requirements. A closer look, based on the analysis presented above, tells a different story, largely in line with the doubts expressed in literature prior to the judgment.⁶³

First, the Court of Justice enlarged the scope of application of Article 6(3) of the Directive. Many more activities fall under this provision than previously thought. Indeed, the effects-based approach to the concepts of 'plan' and 'project' enlarges the scope of Article 6(3) of the Directive to such an extent that it could even encompass activities fostering, or, at least, not halting, climate change.⁶⁴ If confirmed, the legal framework regulating Member State action to combat climate change will be significantly strengthened. While the framework, consisting mainly of the Emissions Trading Directive⁶⁵ and the Effort-Sharing Decision,⁶⁶ does not include a provision that can (easily) be invoked to halt a specific project,⁶⁷ Article 6(3) of the Directive aims at doing specifically that. This would also mean that, while so far climate change litigation is largely developing via the medium of civil law proceedings,⁶⁸ such as the famous *Urgenda* case,⁶⁹ it could now also be developed under the umbrella of administrative courts, which are usually competent to hear cases under Article 6(3) of the Directive.⁷⁰ If confirmed, this would be a completely new dimension of climate change litigation, the contours of which are yet to be defined.

Second, it would be wrong to consider the relevance of the PAS judgment's finding that a programmatic approach is allowed without stressing the importance of the conditions imposed by the Court of Justice. The no-doubts criterion needs to be respected. This is not an easy task. The option of having to realize an effective mitigation measure prior to granting development consent clearly places a very high

burden on the developer and will lead to considerable delays in the realization of a project. The option of relying on estimations is also not easy to comply with, as it requires scientific certainty about the absence of doubts concerning the prevention of the damage. In the Netherlands, despite the *prima facie* evaluation in a report commissioned by the government, some ecologists have already stated that it is impossible to prevent damage.⁷¹ The status of the soil in Natura 2000 sites is so deteriorated due to the nitrogen depositions that only source-based measures – that is, reducing the emissions of nitrogen – can prevent damage. Any site-specific measure will not prevent damage from occurring, but only (partially) remediate it, if at all.⁷² Hence, this option does not seem to exist in the Netherlands. For all those projects and plans that do not pursue imperative reasons of overriding public interest, such as many cattle-related activities, this means that they cannot be pursued anymore. New permits should not be granted and existing permits reconsidered when updated. In some cases, it is debatable whether existing permits could be withdrawn as a consequence of the application of one of the exceptions to the principle of *res judicata* developed by the Court and discussed elsewhere.⁷³ This is most likely the case for the permits challenged before the Dutch Council of State, and whose validity the Dutch court confirmed, without referring the matter to the Court of Justice, as indicated in Section 2.⁷⁴

This finding leads to two considerations. First, in the Netherlands some have called for the Habitats Directive to be changed.⁷⁵ Comparative research shows that the Netherlands is not alone in the adoption of creative solutions to lower the stringency of Article 6(3) of the Directive.⁷⁶ Accordingly, despite the refit process of the Habitats Directive having just been concluded,⁷⁷ establishing that no change to the legal framework is needed, this judgment could reopen that discussion. After all, when in the 1980s the Court of Justice gave a strict reading of Article 4(4) of the Birds Directive,⁷⁸ Member States reacted by introducing Articles 6(3) and 6(4) in the Habitats Directive, and using them to replace Article 4(4) of the Birds Directive, at least under certain conditions.⁷⁹ From a legal perspective, there is nothing that prevents the Member States reopening the discussion now that the Court of Justice clarified how stringent Article 6(3) of the Directive actually is.

⁶³H Schoukens, 'The Quest for the Holy Grail and the Dutch Integrated Approach to Nitrogen: How to Align Adaptive Management Strategies with the EU Nature Directives?' (2018) 2 *Journal for European Environmental and Planning Law* 171.

⁶⁴Schoukens (n 22).

⁶⁵Parliament and Council Directive (EC) 2003/87 of 13 October 2003 Establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community and Amending Council Directive 96/61/EC [2003] OJ L275/32.

⁶⁶Parliament and Council Decision (EC) 406/2009 on the Effort of Member States to Reduce their Greenhouse Gas Emissions to Meet the Community's Greenhouse Gas Emission Reduction Commitments up to 2020 [2009] OJ L140/136.

⁶⁷On these two acts, see respectively E Woerdman, 'The EU Greenhouse Gas Emissions Trading Scheme' in E Woerdman, M Roggenkamp and M Holwerda (eds), *Essential EU Climate Law* (Edward Elgar 2015) 43; L Squintani, 'Regulation of Emissions from Non-ETS Sectors' in Woerdman, *ibid* 96.

⁶⁸J Jendroska, M Reese and L Squintani, 'The Courts as Guardians of the Environment: New Developments in Access to Justice and Environmental Litigation' in J Isted (ed), *International Comparative Law Guide on Climate Change and Environmental Law* (ICLG 2019) 5.

⁶⁹The Hague District Court (The Netherlands) 24 June 2015, ECLI:NL:RBDHA:2015:7145; and The Hague Appeal Court (The Netherlands) 9 October 2018, ECLI:NL:GHDHA:2018:2591.

⁷⁰Squintani et al (n 9).

⁷¹For an analysis of the rapport, see C Backes and T Nijmeijer, 'Het PAS-arrest van het Hof van Justitie: Hoe Nu Verder?' (2019) 2–3 *Milieu en Recht* 17; for the opinion of several ecologists, see AB van den Burg, 'Blijft de Rekening van Stikstofemissie nu nog bij de Natuur Liggen?' (2019) 2–3 *Milieu en Recht* 19.

⁷²van den Burg (n 71).

⁷³L Squintani and E Plambeck, 'Judicial Protection against Plans and Programmes Affecting the Environment: A Backdoor Solution to Get an Answer from Luxembourg' (2016) 13 *Journal for European Environmental and Planning Law* 294.

⁷⁴Squintani and Zijlmans (n 14).

⁷⁵'Report of Discussions during VMR Themamiddag – Het PAS-arrest van het Hof van Justitie: Hoe Nu Verder?' (2019) 2–3 *Milieu en Recht* 22.

⁷⁶Squintani et al (n 9).

⁷⁷Commission (EU), 'An Action Plan for Nature, People and the Economy' COM(2017) 198 final.

⁷⁸WPJ Wils, 'The Birds Directive 15 Years Later: A Survey of the Case Law and a Comparison with the Habitats Directive' (1994) 6 *Journal of Environmental Law* 219, 233; with reference to Case C-57/89, *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:1991:89.

⁷⁹Habitats Directive (n 1) art 7.

The second consideration is related to the first. The Court of Justice assigned the task of applying the no-doubts criterion to the national court, which, in the Netherlands, is the Council of State. As there are no clear legal requirements about how a national court has to comply with the task,⁸⁰ it can be expected that Member States will manufacture science-based arguments to escape the need to rely on Article 6(4) of the Directive. In the Netherlands, when the *Briels* case had to be decided, a second assessment was done, showing no adverse effect would have occurred, hence reversing the conclusions of the first assessment.⁸¹ The Council of State accepted the validity of the new appropriate assessment and therefore confirmed the validity for the authorization under Article 6(3) of the Directive, without making recourse to Article 6(4). I do not argue that the second assessment was wrong. My argument is that science requires scientific knowledge to be evaluated. Indeed, next to science-based arguments (i.e. evidentiary framing) also appeals to emotions via symbolic language (i.e. imaginary framing) can be used to inspire, manage and manipulate science, as shown by Wolf and van Dooren.⁸² It is hence important to consider how science-based arguments can be distinguished from imaginary framing, and how to evaluate the former.

Each Member State has its own approach for the evaluation of science-based arguments in court. A recent comparative study shows the existence of an array of approaches.⁸³ Sweden and Finland rely on in-house technical judges to deal with science in environmental cases.⁸⁴ The Netherlands allows the judiciary to use an advisory body – the ‘Foundation of Independent Court Experts in Environmental and Planning Law’, composed of technical experts – for advice on technical issues.⁸⁵ Other countries, such as Germany, rely on the investigative powers of the judiciary to review the decisions of public authorities.⁸⁶ Similar powers exist in Italy, where courts, however, can only carry out marginal reviews.⁸⁷

⁸⁰M Eliantonio, ‘The Impact of EU Law on Access to Scientific Knowledge and the Standard of Review in National Environmental Litigation: A Story of Moving Targets and Vague Guidance’ (2018) 27 *European Energy and Environmental Law Review* 115.

⁸¹L Squintani and D Annink, ‘Judicial Cooperation in Environmental Matters: Mapping National Courts’ Behaviour in Follow-up Cases’ (2018) 15 *Journal for European Environmental and Planning Law* 147.

⁸²EEA Wolf and W van Dooren, ‘How Policies Become Contested: A Spiral of Imagination and Evidence in a Large Infrastructure Project’ (2017) 50 *Policy Sciences* 449.

⁸³T Paloniitty and M Eliantonio, ‘Scientific Knowledge in Environmental Judicial Review: Safeguarding Effective Judicial Protection in the EU Member States?’ (2018) 27 *European Energy and Environmental Law Review* 108. See also J Darpö, ‘Understanding the Nuts and Bolts: Scientific and Technical Knowledge in Environmental Litigation: National Solutions, EU Requirements and Current Challenges’ in L Squintani et al (eds), *Managing Facts and Feelings in Environmental Governance* (Edward Elgar 2019) 82.

⁸⁴M Schultz, ‘Scientific Evidence in Court: The Use of Technical Judges in Swedish Courts for Better Integration of Scientific Data in Environmental Decision-making’ in Squintani et al (n 83) 118; and T Paloniitty and S Kangasmaa, ‘Securing Scientific Understanding: Expert Judges in Finnish Environmental Administrative Judicial Review’ (2018) 27 *European Energy and Environmental Law Review* 125.

⁸⁵C Backes, ‘Organizing Technical Knowledge in Environmental and Planning Law Disputes in the Netherlands – The Foundation of Independent Court Experts in Environmental and Planning Law’ (2018) 27 *European Energy and Environmental Law Review* 143.

⁸⁶F Grashof, ‘The “You Know Better” Dilemma of Administrative Judges in Environmental Matters – A Note on the German Legal Context’ (2018) 27 *European Energy and Environmental Law Review* 151.

⁸⁷R Caranta, ‘Still Searching for a Reliable Script: Access to Scientific Knowledge in Environmental Litigation in Italy’ (2018) 27 *European Energy and Environmental Law Review* 158.

In Poland, none of these options seems available and it can thus be questioned how fit this judicial system is to deal with the task of assessing scientific evidence assigned by the Court of Justice.⁸⁸ The lack of harmonization and clear standards on how courts should apply the no-doubts criterion means that in the coming years new discussions and preliminary questions can be expected.

Notwithstanding the limits to developing a programmatic approach in EU nature conservation law, the PAS judgment makes it clear that such an approach is not prohibited. This is a novelty that can lead to new developments in practice and in law. With van Rijswijk, I underlined the importance of enhancing legal certainty and adaptability when adopting a programmatic approach.⁸⁹ First, it is necessary to clarify how the Habitats Directive ensures legal certainty and adaptability as regards the actors involved in the decision-making process, including whether the ‘public’ has the opportunity to shape the content of programmes – either during the decision-making phase or by means of judicial review. Second, attention should be given to the manner in which EU nature conservation law regulates the content of programmes. In this context, it is relevant to look at whether there are guidelines or obligations concerning the measures which are considered appropriate to achieve the conservation goals of a Natura 2000 site; the relationship between the instruments as part of the content of programmes and such material goals; and the regulation of the time limits to achieve such material goals or to compensate their deterioration. Third, the provisions concerning the assessment of the results of programmes should be considered by looking at the method of assessment used for the material status of Natura 2000 sites, and the methodology used to establish a causal link between the content of programmes and the safeguard/achievement of a good status of conservation. It goes beyond the scope of this contribution to carry out such an analysis.

5 | CONCLUSION

With the PAS judgment, the Court of Justice has further clarified the regulatory framework applying to the protection of Natura 2000 sites. Four cumulative criteria emerge from a stream of case law, of which this judgment is the latest addition. In order to rely on the concept of ‘mitigation measures’, a measure must comply with the functional linkage criterion, the specificity criterion, the prevention criterion and the no-doubts criterion. In this judgment, the Court clarified that the functional linkage criterion and the no-doubts criterion do not exclude the use of a programmatic approach. Yet strict conditions must be complied with. Most notably, the programmatic approach does not have a de-linking effect. Hence, each individual project within the programme must comply with the conservation

⁸⁸M Bar, ‘Scientific Knowledge in Environmental Litigation before Polish Administrative Courts: A Problem of Compliance with EU Law?’ (2018) 27 *European Energy and Environmental Law Review* 169.

⁸⁹Squintani and van Rijswijk (n 57).

goals envisaged for the Natura 2000 site at stake. Moreover, there must be no scientific doubt about this finding. Approaches in several Member States will have to change accordingly, potentially including the revocation of already granted permits if the conditions for invoking one of the exceptions to the principle of *res judicata* applies – as it could be the case in the Netherlands.

In light of the above, there seem to be very little, if any, room in the Netherlands to justify a programmatic approach to nitrogen depositions. Yet the case law of the Court of Justice has not clarified what the burden of proof is to establish lack of scientific doubt, and each Member State has its own approach to the review of public authorities' reliance on scientific evidence. Hence, it seems likely that Member States will seek to continue to spur economic development at the cost of nature conservation by relying on the lack of EU standards in this field. Further disputes and related preliminary questions can therefore be expected.

More generally, the PAS judgment has opened the door to the development of a programmatic approach in the field of EU nature conservation law. This is a novelty that necessitates further research on how such an approach should be regulated. Follow-up research will have to shed further light on this issue.

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