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CONTENTS

Editorial

This current issue of the elni Review is set in the light of the tragic loss of a friend of ELNI, Marc Pallemaerts (see the obituary below).

The topical spectrum of elni Review 1/2014 encompasses EU nature protection and pollution control law as well as the implementation of international law on transboundary impacts on the environment in Ukraine.

Hendrik Schoukens analyses the ECJ *Sweetman*-Case and new developments in the judicial fixation of the scope of Art. 6(3) Habitats Directive about the permissibility of industrial or infrastructural interventions in Natura 2000 areas. The author argues that the Court's ruling should be welcomed since it provides an additional safeguard for the EU's most vulnerable habitats.

The article by *Christian Schaible* illuminates shortcomings of the Industrial Emissions Directive as regards transparency in the elaboration and evaluation of certain derogations for large combustion plants. The focus lies on an EEB action concerning a Greek derogation approval decision of the European Commission, which the NGO has since contested before the General Court on 18 June 2014.

Victoria Rachynska examines the implementation of the "Espoo Convention" in the Ukraine. Based on a case study she identifies the country as one of the most persistent violators of the Convention and traces this in part back to the political and economic situation in Ukraine.

The next issue of the elni Review will concentrate on the current TTIP negotiations. Contributions concerning the clash of international trade and environmental protection, the role of arbitral jurisdiction and related topics are most welcome. Please inform us of your interest in a publication. Please send contributions to the editors by mid-September 2014.

Julian Schenten/Gerhard Roller
July 2014

Obituary Marc Pallemaerts

Most elni-Members have already learnt about the very sad news. Marc Pallemaerts, one of the co-founders of elni, has died at the age of only 53. Marc participated in the first elni conference in Frankfurt in 1990. In the final discussion of the conference he took the floor once again and argued for an international treaty providing for procedures to enforce environmental legislation (see the minutes kept by Gabriele Britz and Sven Deimann, in: Führ/Roller, Participation and Litigation Rights of Environmental Associations in Europe, p. 181): in nucleo the aim of the Aarhus-Convention. The "Aarhus" issue has been one important of the numerous subjects of Marc's work. His book on "The Aarhus Convention at Ten", to which also elni members contributed, was an outstanding example of Marc´s research. This also holds true for his contributions to the debate on WTO rules and product regulation as well as in the field of chemicals legislation (his PhD was about Toxics and Transnational Law) where he served as a member of the Management Board of the European Chemicals Agency (ECHA) and – until his final weeks – as an alternate member of the Board of Appeal of ECHA. He was also UN Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes since November 2012 (see http://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/MarcPallemaerts.aspx) and had planned two new missions for 2014 in that regard, in the Middle-East and in Europe.

Climate change was also one of the many fields in which Marc excelled and reached very important achievements. He plaid a truly decisive role in the international climate change negotiations, as a chief negotiator under the Belgian presidency of the EU in 2001, as an architect of the Marrakesh Accords, as a member of the Kyoto Protocol Committee and much more (see http://www.climat.be/fr-be/news/2014/hommage-marc-pallemaerts - (http://www.ieep.eu/about-us/in-memory-of-marc-pallemaerts/).

In 2013, he was awarded the prestigious Elizabeth Haub Prize for environmental law by the University of Stockholm "in recognition of his extensive and outstanding contributions to the development of environmental law and his successful efforts to combine theory and practice in pursuit of concrete results in multilateral negotiations".

Not the least and most importantly for him, as a lawyer and a political scientist, Marc was an academic. He was a professor in various universities, in Belgium and abroad, much appreciated by its students and always ready to engage into new scientific research projects.

Marc was brilliant and had a very sharp mind. He always knew and explained where the real issues were. He rarely hesitated to speak his mind and frankly stated his opinions.

He will be greatly missed by us, as a colleague as well as personally. European Environmental Law has lost an important figure

The Ruling of the Court of Justice in Sweetman: How to avoid a death by a thousand cuts?

Hendrik Schoukens

1 Introduction

Two years ago saw the twentieth anniversary of the adoption of the Habitats Directive[1]. Back in 1992, there was widespread consensus amongst policy-makers for a comprehensive environmental directive, which would set out protection rules in order to maintain and restore Europe's most threatened habitats and species[2]. At the time, it had become clear that the protection rules laid down by the Birds Directive[3] were too limited in scope in order to safeguard the EU's most valuable natural heritage from disappearance[4].

The growing concerns about the predicament of the EU's biodiversity moved the Commission and the Council to enact a specific set of rules in order to reverse that situation. In one of its key provisions the Habitats Directive requires Member States select the ecologically most important sites in their territory to be designated as Special Conservation Areas (SAC). Along with the Special Protection Areas (SPAs), which had already been selected under the framework of the Birds Directive, these sites make up the Natura 2000 Network – regarded by some as the most ambitious ecological network of the world. It comprises at present almost 18% of the territory of the EU[5].

Since 1992, however, a lot has changed. Slowly it dawned on many politicians and business people that the basic rationale underpinning the Habitats Directive was capable of seriously hampering business interests and economic development. One of the great hallmarks of EU environmental law had fallen victim to severe criticism. Since it was ever more often invoked by opponents of development works in national litigation, it became widely known as one of the major obstacles for development projects within the EU[6]. The extension of port areas[7], the creation of new industrial estate or the construction of major infrastructure works, including renewable energy projects, increasingly collided with the protection regime for the Natura 2000 Network[8]. And thus the notable Art. 6 of the Habitats Directive, which laid down the substantive protection requirements that apply to Natura 2000 sites, ended up being the nemesis of many project developers and politicians.

Particular attention is paid to Art. 6(3) of the Habitats Directive, which set out strict substantive and procedural requirements to be followed in respect of plans or projects prone to cause significant damage to Natura 2000-site.

The latter provision reads as follows: *"(a)ny plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.*[9]"

Art. 6(3) of the Habitats Directive basically consists of two stages. In a first stage, it needs to be checked whether the plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the Natura 2000-site concerned. The second part of Art. 6(3) only allows the competent national authorities to allow plans or projects if they have made certain that they will not adversely affect the integrity of that site. However, under Art. 6(4) of the Habitats Directive plans or projects may be authorized, by way of derogation, in spite of a negative assessment of the implications for the site, where there are imperative reasons of overriding public interests, there are no alternative solutions and all compensatory

1 Directive (EEC) 92/43 on the conservation of natural habitats and wild fauna and flora (1992) OJ L206/7 (hereafter: Habitats Directive).
2 Art. 2(1) Habitats Directive.
3 Directive (EEC) 79/409 on the conservation of wild birds (Birds Directive) (1979) OJ L103/1, replaced by Directive (EC) 2009/147 (2010) OJ L20/7 (hereafter: Birds Directive).
4 M. van Keulen, The Habitats Directive. A case of contested Europeanisation, 6-7 (WRR Dutch Scientific Council for Government Policy, 2007) available at < www.oapen.org/download?type=document&docid=439862> accessed 15 March 2014.
5 See < http://ec.europa.eu/environment/nature/natura2000/> accessed 15 March 2014.
6 See on this topic: G. Jones QC (ed.), The Habitats Directive: A Deveopler's Obstacle Course? (2012, Hart Publishing).
7 For more details, see R.K.A. Morris, The application of the Habitats Directive in the UK: Compliance or gold plating?, Land Use Policy 361-369 (2011).
8 See A.L.R. Jackson, Renewable energy vs. biodiversity: Policy conflicts and the future of nature conservation, Global Environmental Change 1195-1208 (2011).
9 See on Art. 6(3) of the Habitats Directive: P. Scott, Appropriate Assessment: A Paper Tiger in The Habitats Directive – A Developer's Obstacle Course? 103-117 (G Jones QC, ed., 2012).

measures necessary to ensure the overall coherence of Natura 2000 have been taken[10].

In its seminal ruling in *Waddenzee*, the Court of Justice highlighted the application of the precautionary principle in the context of the substantive assessment rules that are included in Art. 6(3) of the Habitats Directive[11]. The competent authority is to give consent to the plan or the project only if there is no doubt as to the absence of significant impacts on the protected habitats (*in dubio pro natura*)[12].

Not surprisingly, attention rapidly shifted towards the concept of "integrity of a Natura 2000 site" included in the second sentence of Art. 6(3). Until recently, there was little guidance from the courts on what an adverse effect on site integrity was. Some authors advocated a progressive reading of the second part of Art. 6(3) of the Habitats Directive, under which a plan or project should not be rejected whenever an appropriate assessment states that it would hamper one of the specific conservation objectives for the site at issue. The mere fact that a project would impair one species for which a site had been designated could not outdo the possible positive effects it could produce for other habitats or species[13]. In the end, it would be the "integrity of the site" that mattered. Others argued that the second part of Art. 6(3) of the Habitats Directive should be construed as allowing a two-stage approach, effectively allowing the competent authority to issue a permit for a plan or project impairing only a small part of a Natura 2000 site.

Notably, the latter reasoning was upheld by the Irish Planning Board in a recent case revolving around the construction of a by-pass, cutting partly through an Irish Natura 2000 site. However, Peter Sweetman, Ireland's most well-known environmental litigator, disagreed and decided to bring the legal issue before court. The case ended up before the Court of Justice by way of a preliminary reference. All preliminary questions submitted to the Court of Justice revolved around the exact extent of what is meant under the Habitats Directive by "adverse impact" on the "integrity" of a protected site and, additionally, what would be the exact role of the precautionary principle in this regard. The Court of Justice finally handed down its highly anticipated ruling in *Sweetman v Bord Pleanála* on 11th April 2013[14]. In this contribution, the exact content of the latter decision, along with the highly readable Opinion of Advocate General Sharpston[15], will be examined. After briefly having addressed the relevant factual background to the case, we will discuss the wider implications of this ruling on the future application of the substantive protection rules laid down in the Habitats Directive. Throughout the analysis, it will be argued that the Court's ruling should be welcomed since it provides an additional safeguard for the EU's most vulnerable habitats since, if applied on a broader scale, it might help to reduce the slow incremental decline of Europe's most valuable natural habitats and species.

2 Factual and procedural background

2.1 Limestone and a road development scheme

In order to fully grasp the exact significance of the ruling of the Court of Justice in *Sweetman*, we first need to examine the relevant factual and procedural background of the case. The legal proceedings are set in the west coast of Ireland, in the County Galway and basically revolve around the challenge to a 2008 decision issued by *An Bord Pleanála* ("The Planning Board") to grant permission for the Galway outer city bypass. The latter should remedy the unsatisfactory traffic situation by connecting the R336 with the N6, which connects Dublin to Galway city. The Outer Bypass would be about 12 kilometers in length, yet also pass along the southern edge of the Loch Corrib site, which was designated as a SPA (for its birds) in November 1996 and in December 2008 as a candidate SAC, amongst others for the presence of 270ha of rare limestone pavement[16]. Limestone itself is a sedimentary rock composed largely of the minerals calcite and aragonite, which are different crystal forms of calcium carbonate ($CaCO_3$). Many limestones are composed from skeletal fragments of marine organisms such as coral or foraminifera and can be as old as 425 million years old[17]. It is listed as a priority habitat under Annex I of the Habitats Directive since it is in danger of disappearing. The loss of limestone amounted to merely 0.5% of the total of limestone within the Natura 2000 site and 0.006 % of the total area of the site.

10 See on Art. 6(4) of the Habitats Directive: R. Clutten & I. Tafur, Are Imperative Reasons Imperiling the Habitats Directive? An Assessment of Article 6(4) and the IROPI Exception in The Habitats Directive – A Developer's Obstacle Course? 167-182 (G Jones QC, ed., 2012).

11 Case C-127/02, Landelijke Vereniging tot Behoud van de Waddenzee en Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (2004) ECR I-7405, para. 40 (hereafter: Waddenzee). See J Verschuuren, Shellfish for fishermen or birds? Article 6 of the Habitats Directive, 17(2) Journal of Environmental Law 265-283 (2005).

12 Id., para. 59.

13 F.H. Kistenkas, Rethinking European Nature Conservation Legislation: Towards Sustainable Development, 1 JEEPL 72-83 (2013) at. 81.

14 Case C-258/11, Peter Sweetman and Others v. An Bord Pleanála (2013) not yet published (hereafter: Sweetman).

15 Opinion Advocate General Sharpston of 22 November 2012 in Case C-258/11, Peter Sweetman and Others v. An Bord Pleanála (2013) (hereafter: Opinion AG Sharpston).

16 At the outset, the SAC comprised some 20.582 hectares. However, in 2006 the competent minister sought to extent the site with approximately 4.760 hectares. For more information on the SAC, see < http://www.npws.ie/protectedsites/specialprotectionareasspa/loughcorribspa/ > accessed 15 March 2014.

17 For more information, see <http://en.wikipedia.org/wiki/Limestone> accessed 15 March 2014.

As such, it was not contested that the proposed road would have an impact on the Natura 2000 site.

The discussion centred on the impact of this loss for the integrity and survival of the site. Whilst the loss of 1.5 hectares of limestone pavement was surely regrettable, it would, according to the Planning Board, not adversely affect the integrity of the Natura 2000 site. In line with the outcome of a preceding analysis by an appointed expert inspector, the Planning Board concluded that the development "while having a localised severe impact on the Lough Corrib [site] would not adversely affect the integrity of the [site]. The development (…) would not, therefore, have unacceptable effects on the environment and would be in accordance with the proper planning and sustainable development of the area".

2.2 Staged approach v restrictive interpretation

Mr. Sweetman disagreed with the approach taken and complained that the Board's decision involves a manifest misinterpretation of the Habitats Directive. The dispute revolved around the second part of Art. 6(3) of the Habitats Directive. As such, there were no indications that the assessment contained manifest flaws, rather the discussion focused on the conclusion reached as a result of that assessment, on the basis of which the local authority adopted the decision at issue. It was argued that whenever an appropriate assessment concluded that a plan or project would have a significant effect on a site and that is an adverse effect, such a finding equates with a conclusion that the project is one that will adversely affect the integrity of the site concerned. Henceforth, in line with the wording of the second part of Art. 6(3) of the Habitats Directive, the application should have been refused and, if necessary, application needed to have been made of the more stringent derogation procedure of Art. 6(4) of the Habitats Directive in order for the project to proceed.

2.3 The Irish High Court reasserts the staged approach under the Art. 6(3) of the Habitats Directive

It was up to the Irish High Court to rule on the soundness of Mr. Sweetman's claims against the planning permit for the Outer Bypass. In the context of these national proceedings, both strands of arguments were further substantiated[18]. When appraising the second part of Art. 6(3) Judge Birmingham J looked at the literal wording of the provision[19]. In doing so, he held that, if the reference to "integrity of the site" had been omitted, there would be no reason for discussion. In that event, it would be crystal clear that any plan or project that could give rise to significant adverse effects should not be issued an authorization (unless application is made of Art. 6(4)). The Irish High Court also saw its view reasserted in the Commission's Guidance on the Management of Natura 2000 sites[20]. In its Guidance document, the Commission linked the issue of "integrity" to the conservation objectives that have been established for a Natura 2000 site. It was held that "a site can be described as having a high degree of integrity where the inherent potential for meeting site conservation objectives is realised, the capacity for self-repair and self-renewal under dynamic conditions is maintained, and a minimum of external management support is required"[21]. Rather surprisingly, the obvious interrelationship between integrity and the capacity for self-repair did not prompt Judge Birmingham J to reconsider its support for the staged approach, especially taking into account the fact that limestone pavement is a resource which, once destroyed, cannot be replaced.

2.4 Irish Supreme Court seeks help from Luxemburg

Mr. Sweetman's application was rejected by the Irish High Court. And yet Mr. Sweetman took the case to the Irish Supreme Court[22]. Since it became clear that the dispute involved interpretation issues in relation to a provision of Union law – the second part of Art. 6(3) of the Habitats Directive – the Attorney General sought for a reference to the Court of Justice on the matter. The Irish Supreme Court agreed and, for the first time ever in an environmental case, referred three specific questions as regards the exact implications of the notion of "integrity of the site" in the context of the second part of Art. 6(3) of the Habitats Directive to the Court of Justice in Luxemburg. Most importantly, the Irish Supreme Court sought the Court of Justice of the European Union to clarify whether, in the light of the precautionary principle, a plan or project could be authorized if it would result in the permanent non-renewable loss of the whole or any part of the habitat in question. Also, it asked the Court of Justice to elaborate on the articulation between Art. 6(4) and 6(3) of the Habitats Directive. And thus the Court of Justice had the opportunity to express its opinion on the maintenance of 1.47 hectares of limestone pavement in an Irish Natura 2000 site.

18 For more information, see G. Jones QC, Adverse effects on the Integrity of a European Site: Some Unanswered Questions in The Habitats Directive – A Developer's Obstacle Course? 151-166 (G Jones QC, ed., 2012) at 160-161.

19 Id., at 162.

20 European Commission, Managing Natura 2000 Sites. The provisions of Art. 6 of the 'Habitats' Directive 92/43/EE,C 40 (Brussels, 2000) available at < http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf > accessed 15 March 2014.

21 Id.

22 For more information, see G. Jones QC, supra footnote 18, at 164.

3 The Opinion of the Advocate General

3.1 Food for thought

Before exploring the final answers of the Court of Justice to the questions submitted by the Irish Supreme Court, we turn to the Opinion of Advocate General Sharpston, which was issued on 22 November 2012. Since the Court of Justice aligned itself with the views expressed of Advocate General Sharpston, it is worthwhile examining it more into detail. As is often the case, opinions of Advocate Generals offer valuable additional clues for a better understanding the reasoning that is underpinning the approach upheld by the Court of Justice.

3.2 Back to basics

After having reminded us of the essential objective of the Habitats Directive, it was reiterated that paragraphs 2, 3 and 4 of Art. 6 serve one common purpose – to preempt damage being done to the site or to minimise that damage. Hence they should be construed as a whole. The Advocate General recalls that the general protection obligation laid down in Art. 6(2) requires Member States to take all appropriate steps to avoid the conservation objectives being hampered[23]. In turn, Art. 6(3) is not connected with the day-to-day operation of the site, and lays down an ex ante-assessment regime which is triggered by mere possibility of there being a significant effect on a Natura 2000 site[24].

This precautionary approach serves, in the Advocate General's eyes, as a *de minimis* threshold, avoiding legislative overkill for plans and projects that would no appreciable effect on a Natura 2000 site[25]. Subsequently, the Advocate General goes on to distinguish between the threshold used at the first and second stage of Art. 6(3). In that regard, it is held that the threshold in holding whether there are effects adversely affecting the integrity of a Natura 2000 site (the so-called "second stage") is notably higher than the threshold in determining whether an appropriate assessment is needed in the first place (the so-called "first stage")[26]. It is reasserted that, in line with the Court's ruling in *Waddenzee*, the assessment needs to take account of the precautionary principle. In other words, a robust assessment, taking into account all available scientific information and knowledge about the potential effects caused by the plan or project, is required in the light of the second part of Art. 6(3) of the Habitats Directive.

3.3 Three distinct scenarios

Having briefly reminded of the basics building blocks of Art. 6 of the Habitats Directive, the Advocate General delves into the issue of "integrity of the site". She notes that whilst the English-language version of Art. 6(3) of the Habitats Directive uses an abstract term ("integrity"), other language versions such as the Dutch one refer to the "natuurlijke kenmerken" (natural characteristics) of the site. Still the Advocate General seems pretty confident on the concept of "integrity of the site". In paragraph 54 of her Opinion, she holds that, in order to assess the impact of a plan or project on the "integrity" of a site, "[i]t is the essential unity of the site that is relevant. To put it another way, the notion of "integrity" must be understood as referring to the continued wholeness and soundness of the constitutive characteristics of the site concerned". In that regard, the notion of "integrity" and the site at issue are closely interrelated, in the Advocate General' opinion[27]. Thereby the Advocate General reaffirmed the view expressed by the Commission in its abovementioned 2000 Guidance document, where it held that, when reviewing whether the integrity of a site is harmed, the focus should be on the specific site, not allowing the partial destruction of a habitat by referring to the favourable conservation status of that habitat within the other parts of the territory of the Member State[28]. Advocate General Kokott pointed out that the designation of the Irish site was made, at least partly, because of the presence of the limestone pavement on the site. It added that, given limestone pavement is a priority natural habitat, it is a natural resource in danger of disappearance that, once destroyed, cannot be replaced and which is therefore essential to conserve[29].

Interestingly, a distinction was drawn between three basic situations in order to determine whenever there might be a negative or "adverse" effect on the integrity of the site. Whilst the Advocate General concedes that plans or projects that merely bring about some limited loss of amenity, which is capable of being fully undone, would not adversely affect the integrity of a site, measures which involve the permanent destruction of a part of the habitat in relation to whose existence the site was designated are destined to be categorised as adverse. In the eyes of the Advocate General, this would definitely be the case when the objectives include the maintenance of a priority habitat, such as limestone pavement, in the site at issue. The third situation would involve plans or projects whose affects lie between both extremes. It thus becomes clear that the Advocate General is

23 Opinion AG Sharpston, supra footnote 15, para. 44.
24 Id., para. 45.
25 Id., para. 48.
26 Id., para. 50.
27 Id., para. 55.
28 European Commission, supra footnote 20, at 40.
29 Opinion AG Sharpston, supra footnote 15, para. 56.

merely willing to accept a temporary setback for the natural habitats and/or species for which a site has been designated. And even then, it must be ensured that the site can easily be restored to its proper restoration status within a short period of time. The Advocate General quoted the laying of pipeline across the corner of a Natura 2000 site as a potential example of this first category of effects. By contrast, the permanent destruction of 1.5 hectares of limestone pavement is seen as a prime example of the second category of impacts, since it would inevitably compromise the site's conservation objectives[30].

3.4 Death by a thousand cuts (and how to avoid it)

Having indicated that there exists a fair chance that the Outer Bypass project would cross the threshold laid down in the second sentence of Art. 6(3), the Advocate General subsequently turned to the exception regime, included in Art. 6(4) of the Habitats Directive. As is widely known, Art. 6(4) of the Habitats Directive leaves the competent authorities the possibility of authorizing such a project which has been subject to a "negative appropriate assessment for the implications of the site", albeit under very strict conditions. Whenever a plan or projects is necessary for imperative reasons of overriding public interest and there is no alternative solution, the latter could still go ahead, provided that all compensatory measures necessary to ensure the overall coherence of Natura 2000 are taken. Originally, the inclusion of Art. 6(4) was the immediate reaction of the Member States to the decision of the Court in *Leybucht*, where it had held that, under Art. 4 of the Birds Directive, economic considerations could not be regarded as exceptional circumstances justifying the reduction in size of a designated SPA[31].

At the same time, the Advocate General makes two vital points in relation to the derogation clause in the context of major infrastructure projects.

First, she addressed the reluctance of many Member States to invoke the derogation clause for major infrastructure projects liable to cause impairments to the Natura 2000 Network. At first sight the limited success of the derogation clause seems plausible. A closer analysis of the 2007/2012 Guidance produced by the European Commission as to Art. 6(4)[32] indicates that the derogation conditions need to be interpreted in a restrictive manner, which is also reaffirmed in the Court's more recent jurisprudence[33].

Although the Advocate General seems to understand the Member States' lack of enthusiasm in applying the derogation clause, she recalls that "whilst the requirements laid down in Art. 6(4) are intentionally rigorous, it is important to point out that they are not insuperable obstacles to authorisation. The Commission indicated at the hearing that, of the 15 to 20 requests so far made to it for delivery of an opinion under that provision, only one has received a negative response"[34].

As such, this viewpoint is not new. In fact, in its Opinion in *Waddenze*e, Advocate General Kokott also referred to Art. 6(4) in order to justify the rigorous application of the precautionary principle under Art. 6(3) of the Habitats Directive[35]. Still, in the light of the content of the recent opinions, issued by the European Commission under the second subparagraph of Art. 6(4) of the Habitats Directive, it remains questionable whether the latter reasoning is convincing enough to underpin the above-mentioned reasoning. In recent years, several authors have contended that many of the Commission's opinions do not fulfil the applicable derogation requirements set about by Article 6(4)[36]. All too often mere economic considerations seem to overrule the conservation objectives of the Habitats Directive. Some scholars, such as Krämer, argue that none of the opinions of the European Commission, would survive a ruling from the Court of Justice[37].

Be that as it may, arguably more important was the referral by the Advocate General to the so-called "death by a thousand cuts" phenomenon[38]. This concept refers to the cumulative habitat loss as a result of multiple, or at least a number of, lower level projects being allowed to proceed on the same site. Rightly so, the Advocate General submitted that if one were to accept a lower level of protection in the context of Art. 6(3), compared to Art. 6(4), this would allow Member States to allow more minor projects to proceed under Art. 6(3) in spite of the permanent and long-lasting effects that might go along with it. Evidently, such an outcome would stand at odds with the purposes that underscore Art. 6(3) and (4) of the Habitats Directive. At the end of the day, the conservation

30 Id., para. 60.
31 Case C-57/89 Commission v Germany (1991) ECR I-883, para. 20.
32 European Commission, Guidance Document on Art. 6(4) of the 'Habitats Directive' 92/43/EEC. Clarification of the Concepts of: Alternative Solutions, Imperative Reasons of Overriding Public Interest, Compensatory measures, Overall Coherence, Opinion of the Commission (Brussels, 2007/2012), available at <http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/new_guidance_art6_4_en.pdf > accessed on 15 March 2014.
33 See Case C-239/04, Commission v Portugal (2006) ECR I-10183.
34 Opinion AG Sharpston, supra footnote 15, para. 65.
35 Opinion AG Kokott in Waddenzee, supra footnote 11, para. 107.
36 D. McGillivray, Compensating Biodiversity Loss: the EU Commission's Approach to Compensation under Art. 6 of the Habitats Directive, 3 Journal of Environmental Law 417-450 (2012).
37 L. Krämer, The European Commission's Opinions under Article 6(4) of the Habitats Directive, 21(1) Journal of Environmental Law, 83-84 (2009).
38 Opinion AG Sharpston, supra footnote 15, para. 67.

friendly interpretation of the second part of Art. 6(3) seemed to have prevailed.

4 The ruling of the Court of Justice and its wider impact

4.1 Nil novi sub sole…

The Court's ruling in *Sweetman* did not differ substantially from the well-substantiated opinion of Advocate General Sharpston. Already at the outset, it was clear that the Court appeared unwilling to go along with the progressive reading of the second part of Art. 6(3) of the Habitats Directive. In paragraph 32 the Court explicitly stated that, as was held by Advocate General, Art. 6(2) to (4) should be construed as a "coherent whole in the light of the conservation objectives pursued by the directive"[39]. The Court went on stating that Art. 6(2) to (4) of the Habitats Directive impose on the Member States a set of specific obligation and procedures designed to maintain, or, as the case may be, restore natural habitats at a favourable conservation status[40].

In that regard, the content of Art. 1(e) of the Habitats Directive is put to the forefront. The latter provision holds that the conservation status of a habitat is taken as "favourable" when, in particular, its natural range and areas it covers within that range are stable or increasing and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to exist for the foreseeable future[41]. The Court recalled that it had held in a previous case that Member States are required to take appropriate protective measures to preserve the ecological characteristics of sites which host natural habitat types[42]. It does infer from the latter case-law that, in order for the integrity of a site not to be adversely affected, the site needs to be preserved at a favourable conservation status. Most importantly, the latter entails the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site.

After having stressed the importance of a proper appropriate assessment, the Court goes straight to the heart of the current dispute by holding that "the competent national authorities cannot therefore authorize interventions where there is a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types"[43]. That would particularly be so where there is a risk that an intervention of a particular kind will bring about the disappearance or the partial and irreparable destruction of a priority natural habitat type present on the site concerned[44].

In the absence of concrete conservation objectives for the Natura 2000 site, the Court reasoned that, in such a situation, the conservation objective should correspond to the maintenance at a favourable conservation status of that site's constitutive characteristics, namely the presence of limestone pavement. This was all the more so the case since the limestone pavement is a natural resource which, once destroyed, cannot be replaced[45]. Since the presence of the limestone pavement was one of the main features that justified the designation of the site as part of the Natura 2000 Network, the view should be taken that any project possibly leading to the lasting and irreparable loss of the whole or part of a this habitat types will adversely affect the integrity of that site. Hence, in order for the Outer Bypass project to go through, application needed to have been made of the derogation clause included in Art. 6(4) of the Habitats Directive[46].

4.2 Wider implications?

After *Sweetman* it is clear that the loss of 1.5ha of limestone pavement could also be qualified as an adverse effect on the integrity of the Irish Natura 2000 site, regardless of the fact that it only amounted to 0.5% of the actual surface of limestone in the whole site. On a general note, the Court's judgment in *Sweetman* can be seen as the logical follow-up to its previous jurisprudence, most notably its landmark ruling in *Waddenzee*. However, it still merits closer analysis.

The apparently strict application of the "integrity"-criterion, enshrined in the second part of Art. 6(3) of the Habitats Directive, might not only urge many authorities and project developers to rethink their current approaches to the appropriate assessment of spatial projects, it can also serve as an additional tool for halting the further decline of nature in the EU's most valuable biodiversity sites. Below, the major lessons that can be drawn from the Court's decision will be presented. It will be argued that the Court's approach appears to be in line with the ambitious policy goals which are set by the European Union in order to halt the further loss of biodiversity in the EU.

4.2.1 More rigidity for spatial developments…

Arguably the Court's ruling in *Sweetman* will not be welcomed by many of the critics of the Habitats Di-

39 Sweetman, supra footnote 14, para. 32.
40 Id., para. 36.
41 Id., para. 37.
42 See for instance: Case C-308/08 Commission v Spain [2010] ECR I-4281, para. 21.
43 Sweetman, supra footnote 14, para. 42.
44 The Court of Justice had already ruled in that sense in its previous case-law, see, for instance: Case C-404/09 Commission v Spain [2011] ECR I-11853, para. 163.
45 Sweetman, supra footnote 14, para. 45.
46 Id., para. 47.

rective. From the perspective of most business people the Court's ruling will probably serve as yet another illustration of the alleged rigidity of the Habitats Directive. It showcases not only the importance of a robust appropriate assessment, but also limits the leeway for the permitting authority to get plans or projects that are liable to cause localized adverse effect across the integrity-threshold laid down by the second part of Art. 6(3) of the Habitats Directive. Quite contrary to the prevailing discourse about burden relief and flexibility for planning projects.

After *Sweetman* the rigorous derogation clause also will have to be considered for projects that entail minor irreparable effects for the constitutive elements of a Natura 2000 site. Hence a pragmatic *de minimis* approach is effectively ruled out by the Court. A deadlock scenario appears to be looming around the corner, especially for private developments which qualify as "reasons of overriding public interest". Recently, the Court of Justice indeed held that an interest capable of justifying the implementation of a plan or project under Art. 6(3) must be both "public" and "overriding", meaning that it must be of such an importance that it can be weighed up against the Habitats Directive objective of the conservation of natural habitats and wild fauna and flora. In principle, works intended for the location or expansion of an undertaking satisfy those conditions only in exceptional circumstances[47].

Either way, whilst some authors advocated a more lenient approach to the "integrity" test in the context of Art. 6(3) of the Habitats Directive during the past years, the Court's ruling seems to crush hopes for additional flexibility in the context of Art. 6(3) of the Habitats Directive. Neither the Court, nor the Advocate General was prepared to deviate from the strict rationale underpinning the significance test in the context of Art. 6(3) of the Habitats Directive in order to allow for a more balanced, less narrowed approach, which would allow, for instance, the permitting authority to weigh amongst conservation objectives or take into account other socio-economic and other ecological interests into consideration in the context of an appropriate assessment[48].

Even in situations where a plan or project might only lead to the physical loss of a small margin of natural habitat, *Sweetman* might necessitate permitting authorities in Member States to rethink their current practices. By way of example, Richard Wilson pointed to the ongoing debate on the extension of London Ashford Airport, which will result in the physical loss of 0.23 hectares of habitat, which represents 0.007% of the total area of the SAC concerned[49]. He is probably right in holding that the decision to grant permission by the Secretary of State should be revised in the light of *Sweetman*. If the project might lead to the partial and irreparable destruction of one of the habitat types that has justified the inclusion of the site in the Natura 2000 Network in the first place, it should be concluded that the SAC's integrity would be negatively impaired.

Probably, the latter case represents only a small fraction of the actual number of spatial projects that should be reconsidered at Member States' level in the light of *Sweetman*.

Admittedly, from the Advocate General's Opinion it can be inferred that temporary adverse effects, which can be fully restored, might not amount to an adverse effect on the integrity of a Natura 2000 site. Still it remains uncertain whether this loophole might offer much additional leverage to planning authorities since it still presupposes that the deterioration of the affected nature can be fixed. Whilst it might be submitted that some habitat of pioneer species, such as the natterjack toad and the common tern, can (relatively) easily be recreated, it is widely known that this is not the case for habitat types, such as old-growth forests, which might take hundreds of years to be fully restored. For habitats such as limestone pavement, which are the result of a geological process of millions of years, recreation as such is even ruled out from the very beginning.

Yet, even for "easy to restore" habitat types, such as grassland and wetlands, recent ecological studies show the relative ineffectiveness of restoration over the last century.

Only recently, scientific research has established that, based on data from 621 sites throughout the world, that even 100 years after restoration attempts, wetlands' biological structure and biogeochemical functions (such as carbon storage in soil) only rarely equal those of reference sites[50].

Despite the above-mentioned objections, which mostly focus on the delays and economic costs linked to a rigid application of environmental law, the Court's stringent approach appears reasonable given the priority status that is attached to limestone pavement. In paragraph 42 of its ruling, the Court took the effort to underscore the "particular responsibility" the European Union has for the conservation of priority natural

47 Case C-182/10, Marie-Noëlle Solvay and Others v. Région Wallonne (2012) not yet published, paras. 75 and 76.

48 Kistenkas, supra footnote 13, at 81.

49 R. Wilson, Adverse Integrity, available at http://richardwilsonecology.wordpress.com/2013/07/15/adverse-integrity/ accessed 15 March 2014.

50 D. Moreno-Mateos, M.E. Power, F.A. Comín, R. Yockteng, Structural and Functional Loss in Restored Wetland Ecosystems, 1 PLoS Biol 1001247 - 10.1371 (2012).

habitat types. In fact, such natural habitat types are defined as "natural habitat types in danger of disappearance"[51]. And thus it remains uncontested that the Court's restrictive approach definitely applies for sites that host one or more of the 72 priority habitat types listed in Annex I to the Habitats Directive.

Evidently, a similar degree of scrutiny also plays for priority species that are present within Natura 2000 sites. Moreover, in my opinion, the Court's rationale also extends to other habitat types and species that represent one of the constitutive elements of a Natura 2000 site. In fact, in the light of the Court's previous case-law, such as *Waddenzee*, there appears to be no good reason not to confine the Court's approach to priority habitats. Such a practice would, as such, run counter to the clear wording of Art. 6(3) of the Habitats Directive, which makes no distinction between the *ex ante*-assessment rules applicable to non-priority natural habitats and species and those applicable to priority natural habitats and species. This is only been done in the context of the derogation clause in Art. 6(4), in which the grounds on which a plan or project may proceed in spite of a negative assessment are more limited in case of priority habitats and species. Additionally, it may be necessary for the competent authorities to obtain an opinion from the European Commission before proceeding with the activities. An opposite reasoning would seriously compromise the conservation goals underpinning the Habitats Directive by allowing for "a death by a thousand cuts"[52].

It is true that the Court explicitly referred to the priority status that was attached to limestone pavement in its decision. However, the Court itself also hinted towards a more wide-scale application of its rationale. By way of example, the Court stated that the strict precautionary appraisal "all the more" applies in the context of priority natural habitats. Also the Advocate General explicitly indicated in her Opinion that her line of reasoning "*a fortiori*" is applicable in the context of priority habitats, thereby recalling that her reasoning also remains valid for non-priority natural habitats and species[53].

Likewise, *Sweetman*'s rationale must also be framed in the case-law of the Court of Justice as regards the screening obligations incumbent on the Member States in the context of Art. 4(2) and (3) of the Environmental Impact Assessment (EIA)-Directive for Annex II-projects[54]. In that respect, the Court steadfastly held that "even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration"[55]. Under the Court's view, a project is likely to have significant effects where, by reason of its nature, there is a risk that it will cause a substantial or irreversible change in those environmental factors, irrespective of its size[56]. Also in its 2011 ruling in *Commission v Spain*, the Court of Justice underscored the importance of assessing the cumulative effects that a project may produce if considered jointly with other projects, especially in relation to priority species such as the Cantabrian brown bear[57].

As a result, national authorities will probably have to reconsider their reluctant approach to Art. 6(4) of the Habitats Directive. Despite all procedural and substantive hurdles that the derogation clause might pose, it should be more frequently applied in the context of large infrastructure projects. The recent tendency to frame major infrastructure projects in the context of Art. 6(3), without subsequently taking recourse to Art. 6(4), seems to have reached its outer limits. As such, issuing planning permits for large scale public works, such as the Outer Bypass, through Art. 6(4) still remains a workable option considering the public and social benefits that go along with it could qualify as "IROPI". The very fact that the competent national authorities are required to consider other alternatives such as, for instance, increased investments in public transport (e.g. railways) should be welcomed as an additional moment of deliberation before giving up ecological valuable tracts of lands to future massive spatial development. In a similar vein, the obligation to opt for robust compensation efforts in such scenarios might additionally help to bolster the legitimacy of such large scale projects.

4.2.2 …in exchange for more resilient and less-fragmented Natura 2000 sites?

So far, the Court's ruling in *Sweetman* was primarily analysed from the developer's point of view. Yet, whilst the Court's strict stance on permanent localised effects might be seen as a possible additional impediment for spatial planning projects in the context of Natura 2000, it also serves as a clear indication of the fact that the Court of Justice is not willing to turn a blind eye to the fragmentation and accumulation effects of minor interventions in the Natura 2000 Net-

51 Art. 1(d) Habitats Directive.
52 Opinion AG Sharpston, supra footnote 15, para. 67.
53 Id., para. 40.
54 Directive 2011/92/EU on the assessment of the effects if certain public and private projects on the environment (2011) OJ L 26/1 (hereafter: EIA Directive).
55 Case C-392/96 Commission v Ireland (1999) ECR I-05901, para. 66. See, more recently: Case C-435/09 Commission v Belgium (2011) ECR I-00036. See for a similar approach in the context of the screening obligation laid down by Art. 6(3) of the Habitats Directive: Case C-241/08 Commission v France (2010) ECR I-01697, para. 62.
56 Id., para. 67.
57 Commission v Spain, supra footnote 44, paras. 80-93.

work. The sheer importance of the Court's approach in this regard cannot be understated. In recent years, it is indeed thought that the biggest impact on environment is caused by large-scale intervention in nature. The accumulation of smaller, insignificant impacts is believed to present one of the greatest concerns for biodiversity at present. Elsewhere it has been already held that "the most damaging environmental effects may result not from the direct effects of a discrete action, but from the combination of the individually minor effects of multiple actions over time"[58]. Bluntly stated, biodiversity law might matter little if it merely focused on the bigger infrastructure projects, while leaving the successive, incremental and combined effects of many minor impacts on biodiversity[59]. By incorporating such impacts, at least when they concern constitutive elements of a Natura 2000 site, under the integrity-test under the second part of Art. 6(3) of the Habitats Directive, the Court has undoubtedly done a great service to the EU's biodiversity. Any other interpretation would seriously jeopardize the objectives of the Habitats Directive.

No doubt this should be a welcome development. In the light of the bleak status of most of the enlisted natural habitats and species in the EU (only one third of the EU protected natural habitats and species currently have a favourable conservation status[60]) the Court's reasoning can surely not be deemed disproportionate, especially taken into account the fact that it merely is confined to Natura 2000 sites. In the end, the Habitats Directive aims to maintain or restore the favourable conservation status of Europe's most endangered species. Given the plight of many of the EU's habitats and species, such a task, obviously, presupposes a strict and comprehensive preventive approach, aimed at regulating human acts and activities that might jeopardise biodiversity. Moreover, a quick review of the other provisions in the Habitats Directive indicates that valuable biodiversity assets that are not included in the Natura 2000 Network do not enjoy the same protection status, unless they qualify as nests, breeding sites or resting places for strict protected species[61]. Whilst the EIA-rules might partially fill in the protection gap for some projects that are listed in Annex I and II to Directive 2011/92/EU, this can hardly be deemed sufficient to reverse the declining trend for general biodiversity within the EU. In the end, even if the cumulative effects of several minor projects are assessed in accordance with the rules laid down in Art. 5 of the EIA Directive, this does not even force the permitting authority to prohibit the completion of the project when these effects would surpass the significance threshold[62].

The high degree of fragmentation in the EU[63], seems to justify a stringent approach towards so-called "localized" adverse effects in Natura 2000 sites. The simple fact that the position of the Court might result in a more stringent assessment for plans and project in the context of Natura 2000 sites and, possibly, a crackdown for (some) economic aspirations of national authorities, is in itself not sufficient to counter the ecological rationale underpinning *Sweetman*.

True as the burden relief-inspired concerns might be, it remains hard to see what other options were left for the Court in order to safeguard the "*effet utile*" of the protection and assessment rules enshrined in Art. 6(3) of the Habitats Directive. Even more so, it could be submitted that the Court was forced to adopt such a strict stance given the explicit wording of the first part of Art. 6(3) of the Habitats Directive, which obliges the competent authorities also to include the cumulative of plans and projects into account in the context of an appropriate assessment[64]. Oddly enough, neither the Court itself, nor the Advocate General referred to the latter provision as additional supportive argument.

However, the picture is not all black for project developers, provided they are willing to take biodiversity concerns duly into consideration throughout the planning process. For instance, the Court's approach still leaves some room for manoeuvre as regards interventions that only give rise to temporary adverse effects. Likewise, it can also be inferred that interventions that do not impair the natural habitats and/or species for which a site has been classified, do not necessarily amount to effects that compromise the integrity of the site. In order for the *Sweetman* rationale to apply, the conservation objectives are liable to be fundamentally and irreversibly compromised. Accordingly, it remains unsettled to what extent the Court of Justice would apply a similar approach to species, which are

58 J. T. Dale, Death by a Thousand Cuts: Incorporating Cumulative Effects in Australia's Environment Protection and Biodiversity Conservation Act, 1 Pacific Rim Law and Policy 149-178 (2011), at 150.

59 Id., at 151.

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

61 Art. 10 of the Habitats Directive does stipulate that Member States shall endeavor, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 2000 Network, to encourage the management of features of the landscape which are of major importance for wild flora and fauna. It is generally held that Art. 10, however, does not have legal "teeth". See: L. Squitani, The Development of Ecological Corridors: Member States' Obligation under the Habitats and Birds Directive?, 2 JEEPL 180-200 (2012) at186.

62 Case C-420/11, Leth [2013] not published yet, para. 46.

63 See also in this regard: European Environmental Agency (EEA), Landscape fragmentation in Europe (2011; Joint EEA-FOEN report), available at < http://www.eea.europa.eu/publications/landscape-fragmentation-in-europe> accessed 15 March 2014.

64 See more on the obligation to assess the cumulative effects that go along with plans or projects: European Commission, supra footnote 20, at 35-36.

more mobile and thus better capable of dealing with small interventions in their habitat. In such circumstances, it might be harder to establish that localized effects might give rise to "irreparable damage" to the integrity of the site[65]. Yet, whilst mobile bird species might be less prone to incur "irreparable" damage, also due regard needs to be taken of the conservation objectives of the site concerned, as was established by the Court's 2011 ruling concerning the disturbance effects of open-cast mining operations in the Northern part of Spain (Cantabria) on species, such as the brown bear and the capercaillie[66].

That said, some authors contended that minor impacts on the natural habitats and species for which a site has been classified might still be aligned with the maintenance of the "integrity" of the site, whenever enhancement measures for the affected habitats and species are being implemented elsewhere in the same Natura 2000 site[67]. In my opinion, it remains doubtful whether such enhancement measures can be taken into consideration in the assessment of the adverse effects of a plan or project on the integrity of a site. As a matter of fact, in its recent Opinion of 27 February 2014, in the Dutch case concerning the broadening of a part of the Dutch motorway A2 between the cities of Eindhoven and Den Bosch, Advocate General Sharpston refused to qualify the creation of new meadows as mitigation measures under Art. 6(3) because they do not lead to an adequate reduction of the pollution[68]. Instead such measures basically seek to counterbalance the unavoidable negative impacts that go along with the project and, as a matter of principle, should be qualified as compensation measures, which can only be taken into account when applying the derogation clause included in Art. 6(4)[69].

From an ecological point of view, however, the importance of the Court's insistence on the achievement of the good conservation status at the level of a Natura 2000 site cannot be understated. At present, most Member States are in the process of establishing the conservation priorities and objectives for the SACs that are located on their territory. In that regard, the question was raised whether it was sufficient to achieve the good conservation status level on the territory of the Member State, or whether the good conservation status also needs to be achieved for each individual site. The Dutch Council of State, when confronted with this legal issue, took the viewpoint that neither the Habitats Directive, nor the Birds Directive urges the Member States to attain a favourable conservation at the level of each individual site[70]. Evidently, this case-law, along with the Dutch conservation policy, will need to be revisited in the light of paragraph 39 of the Court's ruling in *Sweetman*. Whilst it is true that, as was held by the European Commission in its recent guidance document[71], site level conservation objectives must make sure that the site contributes in the best possible way to achieving the favourable conservation status at the national or regional level, the Court clearly sets the bar higher for Member States' conservation and restoration efforts. And thus the Court, indirectly, underscored the importance of adopting effective conservation and restoration efforts at the level of each individual site. It seems less plausible for a Member States to desist from establishing restoration efforts for degraded patches of natural habitats in one Natura 2000 by pointing to other conservation efforts in other Natura 2000 sites or, as the case may be, the favourable conservation status of the habitat type at stake in the territory of the Member States. As a consequence, it can be expected that, in the wake of *Sweetman*, Member States will also face strict scrutiny when reviewing the adequacy of the conservation and restoration efforts that have been drafted up for their Natura 2000 sites.

5 Concluding remarks

In recent years, the Habitats Directive has often been criticised for laying down a rigid set of rules, merely capable of blocking major infrastructure projects and economic development at the Member State level. In practice, however, there is no real deadlock since most spatial projects still go ahead for a wide variety of reasons even when they seem hardly reconcilable with the basic principles on conservation and protection included in the Habitats Directive. Recent studies reveal that, amongst others, poor compliance with the procedural and substantive requirements enshrined in Art. 6(3) and (4) of the Habitats Directive throughout the decision-making process, limited participation and access to court in environmental cases and fait accompli-scenarios seriously compromise the effectiveness of the Habitats Directive on the ground in many Member States[72]. The image has been created of the Habitats Directive as an inflexible piece of legislation,

65 See <http://www.likeminded2view.co.uk/freeth_cartwright/ecological-consultant-may-2013/sweetman.html> accessed 15 March 2014.
66 Commission v Spain, supra footnote 44, paras. 147 and 163.
67 See for instance: Wilson, supra footnote 49.
68 Opinion Advocate General Sharpston in Case C-521/12, T.C. Briels and Others v. Minister van Infrastructuur en Milieu (2014), paras. 36 and 37.
69 Id.,paras. 42 and 43.
70 Dutch Council of State, no. 200902380, 16 March 2011.
71 European Commission, Note on Setting Conservation Objectives for Natura 2000 sites (Brussels, 2012), available at < http://ec.europa.eu/environment/nature/legislation/habitatsdirective/docs/commission_note2.pdf> accessed 15 March 2014.
72 See to that effect: Milieu Ltd., National legislation and practices regarding the implementation of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in particular Article 6 (Brussels, 2009) available at <http://www.europarl.europa.eu/document/activities/cont/200910/20091013ATT62399/20091013ATT62399EN.pdf> accessed 15 March 2014.

merely focusing on maintaining the status quo and incapable the kind of long-term stable interaction between nature conservation and economic aspirations that is prerequisite to the realization sustainable development. The bleak figures of the current state of EU's biodiversity seem to underline the Habitats Directive's inappropriateness to tackle the biodiversity loss in the EU. In this regard, the Court's ruling in *Sweetman* might be qualified as yet another proof of the alleged inflexibility of Art. 6(3) of the Habitats Directive since it tightens their permitting policy in the context of Natura 2000 sites.

In this contribution, however, it has been argued that the Court's ruling should in fact be welcomed for its willingness to pay regard to the accumulation of adverse impacts on biodiversity in a Natura 2000 site. Additionally, it is also submitted that the Court's approach is not limited to priority natural habitats and species, but also plays on a wider scale. In my opinion, the Court's ruling must be tagged as a landmark ruling since, if applied at a wider scale, it will help limiting the risk of the so-called "death by a thousand cuts" phenomenon, which currently represents one of the biggest threats for the EU's biodiversity.

In order for the biodiversity law to make an appreciable difference on the ground, it should also encompass the cumulative effects that go along with all these smaller impacts. The upheld scrutiny appears all the more justified for Europe's most valuable ecological sites, of which the conservation status mostly leaves a great deal to be desired. Moreover, if necessary, application should be made of the derogation possibility provided for by Art. 6(4) of the Habitats Directive. At the same time, by underscoring the importance of maintaining or restoring every single Natura 2000 site in a favourable conservation status, the Court underlined the prime responsibility of the Member States in this regard. Whilst Member States are currently at pains to create new flexible approaches to Art. 6(3) of the Habitats Directive, even for projects that might fulfil the rigid requirements laid down by Art. 6(4), they seem to lose sight of the overall preventative rationale underpinning EU biodiversity law. There are no "one-size-fits-all" solutions or easy fixes for nature. Arguably investing in more resilient Natura 2000 sites and accelerating current restoration efforts, might be the best option in the long run to create more leverage for future spatial developments. However, having enacted protection rules for the protection of biodiversity also requires accepting "no" for an answer in some instances. Sadly enough for our Planet's nature and environment, such an outcome is a hard thing for most humans to accept.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:
- Undertaking projects in develop-ing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research

- **European environmental policy**
  - Research on implementation of European law
  - Effectiveness of legal and economic instruments
  - European governance
- **Environmental advice in developing countries**
  - Advice for legislation and institution development
  - Know-how-transfer
- **Companies and environment**
  - Environmental management
  - Risk management

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sofia

The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.
The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.
The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of homo oeconomicus institutionalis, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover
- Product policy/REACh
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conversation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

sofia is working on behalf of the
- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Na-ture Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

elni Board of Directors

- Martin Führ - Society for Institutional Analysis (sofia), Darmstadt, Germany;
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- Marga Robesin - Stichting Natuur en Milieu, Utrecht, The Netherlands;
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