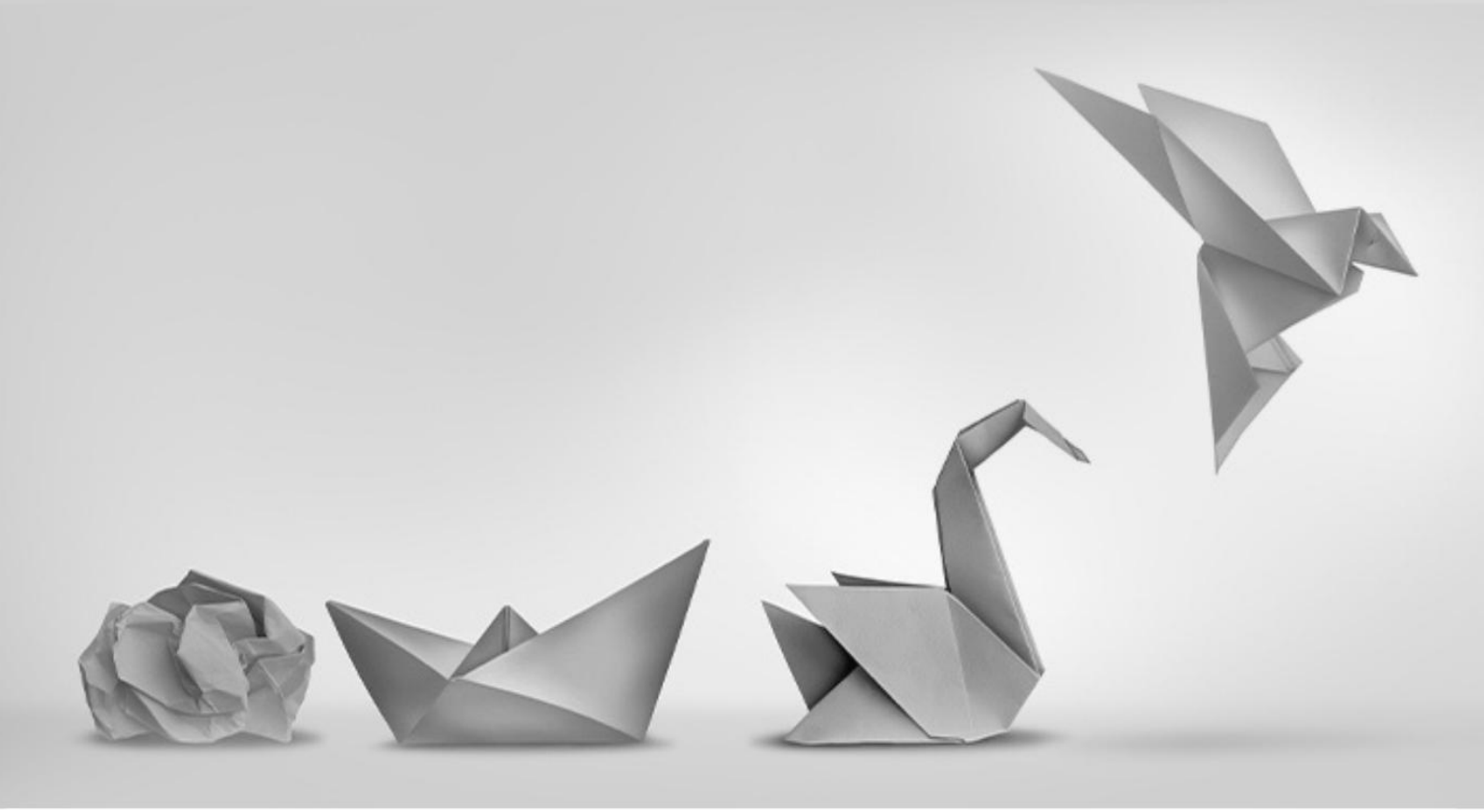
HOUTHOFF



'Paper trails'

Proposals for a Habitats Directive that protects more than paper tigers

FINAL VERSION dated 20 April 2026

Chapter 1: No more paper trials

Improvements compared to the baseline situation

Solution direction:

1A: Taking into account directly related positive effects

1B: Assessment in relation to the baseline situation

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Concretisation / harmonisation of the significance test

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2B: Substantive harmonisation of the appropriate assessment with the EIA

Chapter 3: From paper to practice

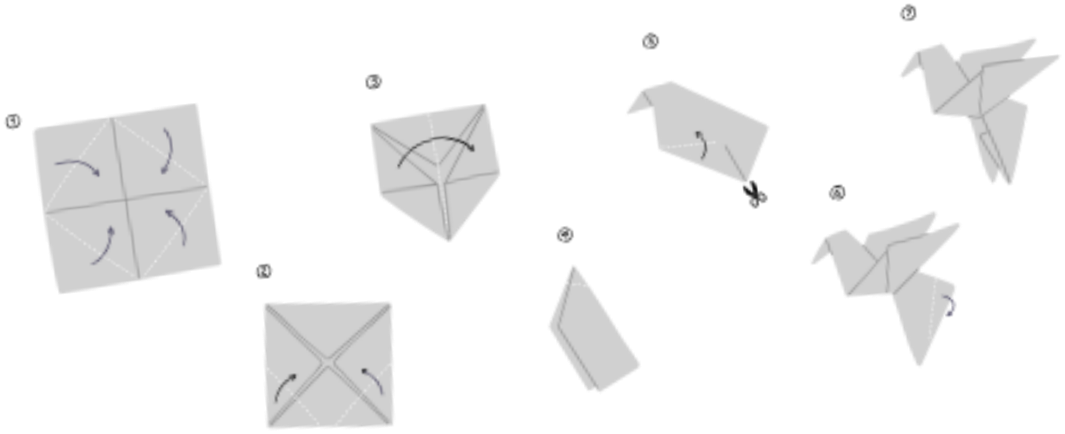
Room for a more systematic approach

Solution direction:

3A: Implementation of the German method

3B: Systematic balance approach to the deposition of substances

Annex 1: Houthoff, *'More than paper'*, dated 18 February 2025.



1. Introduction – 'Paper trails'

1.1. The Draghi report has put the simplification of legislation and regulations at the heart of strengthening European competitiveness, with an emphasis on speed, predictability and investability.[1] The European Commission ("**Commission**") has developed this (first) line in the *Competitiveness Compass*[2] and subsequently in, among other things, the Communication on *Simplifying for sustainable competitiveness*, which includes a legislative package aimed at achieving the Union's environmental objectives in a more efficient, less costly and smarter way.[3]

1.2. As part of the Environmental Omnibus, the Commission has announced a stress test of the European Birds Directive[4] and the Habitats Directive[5] for 2026 (the "**Stress Test**"). This Stress Test is part of the Commission's 'simplification agenda' and explicitly also relates to Article 6 of the Habitats Directive and the appropriate assessment for Natura 2000 sites.[6] In addition, a proposal for a regulation on accelerating environmental assessments has been available since 10 December 2025, also as part of the environmental simplification package[7]. This proposal defines the terms screening and scoping for directives in which this has not yet been laid down,[8] introduces an *environmental single point of contact* and aims at more coherence, predictability and legal certainty in permit procedures.[9] The proposal also explicitly contains various acceleration measures relating to the Habitats Directive and the Birds Directive. The same applies to the European Grids Package, which is all about accelerating strategic projects and also has specific acceleration and simplification measures for both directives.[10]

1.3. It is not illogical that the Commission is looking at the Habitats Directive and the Birds Directive. The Dutch nitrogen crisis – which is the result of implementation choices and case law based on these two directives – shows that in practice, at least in the way currently applied, they have a negative impact on competitiveness, investment certainty and sustainability. Recent Dutch case law shows that the nitrogen problem is expanding to other areas: on the basis of the Habitats Directive, the deposition/precipitation of plant protection products in the agricultural sector[11], and of substances such as SO2 and (potential) SVHCs in industry, is now also being examined[12].

1.4. Against this background, the present memorandum was drawn up at the request of the Dutch Agricultural and Horticultural Organisation (*Land- en Tuinbouw Organisatie Nederland*, "**LTO**") as input for the Brussels (legislative) process on the Stress Test. This memorandum, entitled 'Paper trails', follows the 'paper trail' of the Habitats Directive in case law and policy insofar as it hinders competitiveness, and aims to remove obstacles to it

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1 M. Draghi, The Future of European Competitiveness, Report for the President of the European Commission, September 2024, Part A, Chapter 3, p. 45.
2 Communication from the Commission, A Competitiveness Compass for the EU, COM(2025) 30 final, 29 January 2025.
3 Communication from the Commission, Simplifying for sustainable competitiveness, COM(2025) 980 final, 10 December 2025 (the "**Environmental Omnibus**").
4 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version) (the "**Birds Directive**").
5 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the "**Habitats Directive**").
6 European Commission, 'Stress test of the Birds and Habitats Directives', Green Forum, 2026.
7 Proposal for a Regulation of the European Parliament and of the Council on accelerating environmental assessments, COM(2025) 984 final.
8 For example, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) (the "**EIA Directive**") and Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (the "**SEA Directive**").
9 Including the proposal for a Regulation of the European Parliament and of the Council on accelerating environmental assessments, COM(2025) 984 final, in particular Articles 2, 3, 5 and 7 and the explanatory memorandum thereto.
10 Communication from the Commission, European Grids Package, COM(2025) 1005 final, 10 December 2025, as part of the Proposal for a revised Directive to speed up permit-granting procedures for infrastructure projects (COM/2025/1007 final).
11 See, for example: Council of State 2 April 2025, ECLI:NL:RVS:2025:1428.
12 See, for example: District Court of Noord-Holland 23 January 2025, ECLI:NL:RBNHO:2025:1587.

with targeted proposals. The focus is deliberately on the space at Union level, not on the space for Member States. For the scope that the Netherlands has as a Member State, reference is made to the memorandum 'More than paper', which Houthoff previously drew up on behalf of LTO and the incorporation of which in the building blocks document of LTO, the young farmers and horticulturists (NAJK), provinces (IPO), municipalities (VNG) and water boards (UvW) also forms the basis for parts of the current coalition agreement on this subject.[13] Although this memorandum was written at the request of LTO, the solutions described below do not relate to a sector-specific approach, but to generic adjustments that fit in with the Brussels agenda of simplification, legal certainty, competitiveness and reduction of administrative burdens.

1.5. In addition to the above, there is a second line in Brussels: the Commission and the Member States aim to focus more intensively on nature restoration in the coming years. For example, the Nature Restoration Regulation confirms that Member States are obliged to restore nature and adds that a draft national restoration plan covering an extended form of this nature restoration must be submitted no later than 1 September 2026.[14] Partly in the light of this second line, the proposals in this memorandum are aimed at a simpler, more predictable and more applicable design of nature protection without lowering the level of protection for nature within the Union.

Contents

1.6. Chapter 1 (*'No more paper trials'*) deals with ecological improvements compared to the baseline situation. The central question is how changes or expansions of activities can remain legally possible when nitrogen emissions decrease on balance. The two starting points here are the consideration of directly related positive consequences and the assessment in relation to the reference situation.

1.7. Chapter 2 (*'Less paper, more predictability'*) deals with the concretisation and harmonisation of the significance test. It elaborates on two separate aspects: codification of an already existing lower limit and substantive harmonisation of the appropriate assessment with the environmental impact assessment (EIA).

1.8. Chapter 3 (*'From paper to practice'*) deals with room for a more systematic approach. The central question is how measures at system or area level can be more easily involved in the granting of permits, especially with regard to certainty, timing, allocation and additionality.

Escalation ladder for the introduction of the proposals

1.9. In the aforementioned chapters, different degrees of instruments have been identified for each solution direction, with an increasing degree of intrusiveness according to the 'escalation ladder' below:

a. Interpretation / FAQ / Commission statement; 🏛

b. Supplement or amendment of the Guidance/Commission notice; 🏛 🏛

c. Technical methodology or procedural harmonisation; 🏛 🏛 🏛

d. (Sector) specific lex specialis directive; and 🏛 🏛 🏛 🏛

e. Amendment of the Habitats Directive itself. 🏛 🏛 🏛 🏛 🏛

[13] Houthoff, More than paper, 18 February 2025; IPO, 'Governments and agricultural organisations make joint guide to get the Netherlands off the nitrogen lock (building block nitrogen)', 10 July 2025; IPO, 'Coalition agreement chance to get the Netherlands going again', 5 February 2026.

[14] Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration, in particular Articles 16 and 17 thereof; Commission Implementing Regulation (EU) 2025/912 of 19 May 2025 establishing a uniform format for the national restoration plan.

Demarcation

1.10. The (legal) proposals made in these three chapters cannot – it must be emphasised, and also in view of the second line as described in § 1.5 – be seen in isolation from the task incumbent on Member States to actually achieve nature restoration in the EU. These proposals do not change that task. However, the burden of fulfilment or non-fulfilment of that restoration task shifts more back to the government that is failing here, instead of to the individual entrepreneur who cannot contribute to that task or can only contribute to a limited extent.

2. Chapter 1: *'No more paper trials'*

Improvements compared to the baseline situation

2.1. Question: How can the Habitats Directive itself or underlying regulations be amended so that the change or expansion of activities is legally permitted if emissions decrease on balance or the activity ultimately leads to a decrease in emissions?

2.2. Context

2.2.1. As explained in the memorandum 'More than paper', which Houthoff wrote at the request of LTO, the Administrative Jurisdiction Division of the Council of State (the "**Council of State**") in the *Rendac and Amercentrale cases*[15], referring to, among other things, the judgments of the Court of Justice of the European Union ("**Court of Justice**") in *People Over Wind*[16] and *Eco-Advocacy*,[17] ruled that internal netting cannot be regarded as a standard part of a project for the time being. As a result, internal netting may not be included in the preliminary test for the conclusion that no nature permit is required.

2.2.2. This outcome is not only legally relevant, but also directly affects the Brussels competitiveness agenda. For example, it makes sustainability procedurally more difficult than the unchanged continuation of an existing, more polluting activity. This perverse incentive is at odds with the Commission's commitment to faster, more predictable procedures for strategic and sustainable investments.[18] Even beyond the sustainability question, the (very) strict line of the Council of State makes the granting of permits so difficult that competitiveness is also under pressure.[19]

2.2.3. Legally, the blockade is mainly on two points. First, may positive consequences directly related to the project be taken into account in the screening phase / preliminary assessment? Second, may the assessment be carried out in relation to the lawfully existing reference situation, or must the effects of the new project be assessed in complete isolation – as if the existing, lawful activity did not exist?[20] Both points can be clarified at Union level without having to reduce the level of protection.

2.2.4. It is important in this regard that various authors have already argued - and also explained in the memorandum 'More than paper' - that the line set out by the Council of State is not necessarily the only correct reading of EU law. [21] To that extent, the solution is not exclusively at the European level. However, given the Commission's desire to strengthen the Union's competitiveness, there is also an interest in preventing such differences between Member States with a major impact on competitiveness and in limiting the risk of 'spillover' to other Member States.

2.3. Solution direction 1A: Taking into account directly related positive consequences

2.3.1. The first solution direction is to take into account the positive consequences that are directly related to the project in the preliminary assessment and not to treat them as mitigating measures.

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15 Council of State 18 December 2024, ECLI:NL:RVS:2024:4923 (Rendac) and Council of State 18 December 2024, ECLI:NL:RVS:2024:4909 (Amercentrale).

16 CJEU 12 April 2018, C-323/17, ECLI:EU:C:2018:244 (People Over Wind and Peter Sweetman/Coillte Teoranta).

17 CJEU 15 June 2023, C-721/21, ECLI:EU:C:2023:477 (Eco Advocacy CLG/An Bord Pleanála).

18 COM(2025) 980 final; COM(2025) 984 final; COM(2025) 1005 final.

19 Cf. M. Draghi, The Future of European Competitiveness, Part A, Chapter 3, p. 45; Communication from the Commission, A Competitiveness Compass for the EU, COM(2025) 30 final; Communication from the Commission, Simplifying for sustainable competitiveness, COM(2025) 980 final.

20 The first approach looks at the difference between the old and the new situation: a change that on balance reduces the environmental pressure can then pass the screening more easily. In the second ('isolated') approach, the existing activity is completely ignored and only the new activity is judged as if it were coming from nothing, regardless of what was already there. The Council of State currently uses this stricter isolated approach.

21 See, for example, R. Olivier and S.T.J. Olierook, annotation under ABRvS 18 December 2024, JM 2025/38, and A. Collignon, annotation under ABRvS 18 December 2024, AB 2025/297.

2.3.2. There is a legal basis for this approach. From the *Eco-Advocacy judgment* of the Court of Justice it does not follow that every part of the project that limits adverse effects must, for that reason alone, be treated as a mitigating measure. Rather, the distinction in this judgment lies between measures that are specifically designed to prevent Natura 2000 effects and project characteristics that are in any event inherent to the project.[22] The memorandum 'More than paper' elaborates that the termination or adjustment of an existing activity is sometimes inextricably linked to the new project.[23] If that element is ignored in the screening, the assessment risks becoming less complete and less realistic – see, for example, the example about double counting below in § 2.3.4 – and therefore no longer being in line with the requirements set by European case law for the completeness of the preliminary test.[24]

Supplementing Guidance 🏛 🏛

2.3.3. The quickest substantive step is to include in the Commission's Guidance[25] and/or the methodological Guidelines[26] that positive impacts directly related to the project may be taken into account in the screening.[27] Specifically, the Guidance could clarify:[28]

"In the screening stage, the competent authority may take into account (a broad range of) positive effects that are directly linked to the project under assessment."

2.3.4. This does not remove projects from the scope of the Habitats Directive - after all, a preliminary assessment remains mandatory - but it does prevent the preliminary assessment from degenerating into an unrealistic, paper assessment. This risk arises, for example, when an old factory is replaced by a new, sustainable factory and the consequences of both factories are added together in the preliminary test, while that scenario will never have to occur at the same time.

2.3.5. It is important here and later in this memorandum that the adjustment of the Guidance can actually make a difference in practice. The Commission has drawn up the Guidance precisely to support the application of the Directive in practice; this guidance explicitly builds on the case law of the Court of Justice. Although only the Court of Justice can give a binding interpretation of EU law,[29] in practice the Guidance is an important source of interpretation.[30] This is also apparent from the *Wadden Sea judgment* of the Court of Justice, where the Court of Justice itself refers to the Guidance in the interpretation of Article 6(3) of the Habitats Directive.[31] Moreover, adjusting the Guidance is not illogical. The recently published guidance on Articles 5 and 9 of the Birds Directive explicitly makes a reservation for adjustments as a result of the Stress Test and the Environmental Omnibus. This suggests that the Commission itself is also taking into account the need to adapt its

22 CJEU 15 June 2023, C-721/21, ECLI:EU:C:2023:477 (Eco Advocacy CLG/An Bord Pleanála).
23 Houthoff, More than paper, 18 February 2025, chapter 1, proposal 1A.
24 See also Houthoff, More than paper, 18 February 2025, chapter 1, proposal 1A.
25 Communication from the Commission, Management of Natura 2000 sites - The provisions of Article 6 of the Habitats Directive (92/43/EEC), C(2018) 7621 final (the "**Guidance**").
26 Communication from the Commission, Assessment of plans and projects relating to Natura 2000 sites - Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive (92/43/EEC), 2021/C 437/01 (the "**Guidelines**").
27 Cf. also European Commission, 'Stress test of the Birds and Habitats Directives', Green Forum, under the timeline ('Spring 2026'), in which new guidance documents are announced. As has also been proposed here, a correction to / choice in certain interpretation of case law by the CJEU can take place.
28 Where an adjustment of the Guidance has been proposed in this memorandum, this can be done by adjusting the Guidance itself or by publishing an addition/amendment to it.
29 See the Commission guidance on Article 6 of the Habitats Directive, C(2018) 7621 final, p. 5-7.
30 Communication from the Commission, Management of Natura 2000 sites - The provisions of Article 6 of the Habitats Directive (92/43/EEC), C(2018) 7621 final, p. 5-7.
31 CJEU 7 September 2004, C-127/02, ECLI:EU:C:2004:482 (Waddenvereniging and Vogelbeschermingsvereniging), paragraphs 41-44 and 49.

guidance documents in response to the Stress Test and the developments around the Environmental Omnibus.[32]

(Sector) specific lex specialis 🏛 🏛 🏛 🏛

2.3.6. Alternatively, a sector-specific directive could be advocated, analogous to or incorporated into recent Union legislation for strategic sectors (e.g. infrastructure and energy), introducing a rebuttable presumption that no appropriate assessment is necessary for project modifications that, as a design starting point, lead (on balance) to lower emissions, unless there is evidence to the contrary.[33] This adaptation could be part of the proposal for a regulation of the European Parliament and of the Council on accelerating environmental assessments, COM(2025) 984, as a new third paragraph in Article 5 on changes to projects. This text could read as follows:

"For modifications of existing projects that by design lead to a net reduction of emissions or other sources of pressure on special areas of conservation, it shall, in the context of the screening stage of Article 6(3) of Council Directive 92/43/EEC, be presumed that no significant effect on the site is likely, unless objective site-specific evidence strongly indicates otherwise."

2.3.7. It could also be considered to go a step further by amending Article 5 so that, where changes or extensions of projects now require an environmental assessment to be carried out only if they involve major works the environmental effects of which are equal to or greater than those of the original project, this provision will also explicitly apply to appropriate assessments. The text can then be amended as follows, for example (adjustments underlined – HF):

1. Changes or extensions of projects, such as the repurposing of pipelines or industrial sites, the extension of their operation period, and modifications to ensure decarbonisation and the reduction of nitrogen emissions, shall only be subject to screening, including screening in the context of Article 6(3) of Council Directive 92/43/EEC, by the competent authorities in order to determine whether they are likely to have significant effects on the environment. Those changes or extensions shall be subject to an environmental assessment and an appropriate assessment under Article 6(3) of Council Directive 92/43/EEC only where they involve major works that represent risks that are similar to or greater than those posed by the original project in terms of their effects on the environment.

2.3.8. N.B.: The EIA and the appropriate assessment are two different instruments with distinct functions: the EIA is primarily a steering instrument, while the appropriate assessment is a consent instrument. However, there is room in this memorandum to make proposals for harmonisation or to draw inspiration from the EIA for the adjustment of the appropriate assessment. Both forms of environmental assessments have some similarities. This similarity also explains why the Commission is procedurally bringing both instruments together in the Acceleration Regulation (COM(2025) 984), which provides for a 'coordinated or joint procedure' for these similar environmental assessments (Article 4(1)). It therefore appears that there is sufficient comparability between the instruments from the Commission's point of view, even though they have different functions. This is also evident from the fact that the Acceleration Regulation provides for a single environmental point of

[32] Annex to the Communication to the Commission, Brussels, 31 March 2026, C(2026) 2274 final, on the approval of the content of the draft Communication from the Commission on the Guidance on the General System of Conservation of Bird Species – Articles 5 and 9 of the Birds Directive.

[33] As an example of such a presumption of evidence, see Proposal for a revised Directive to speed up permit-granting procedures for infrastructure projects (COM/2025/1007 final) recital 2 and Article 2(11) of Article 8 of Directive (EU) 2019/944, as newly proposed therein, see also description in COM(2025) 1005 final; See also as an example of a presumption of evidence in connection with a test in the Habitats Directive, Directive (EU) 2023/2413 (RED III), Article *15e and* Article 16f.

contact for both types of assessments, uniform maximum deadlines for screening and assessment (Article 7), and digitalisation of all environmental procedures (Article 10).

Targeted amendment of Article 1 of the Habitats Directive 🏛 🏛 🏛 🏛 🏛

2.3.9. As the most far-reaching alternative, it can be defined in Article 1 of the Habitats Directive what is meant by the preliminary test (screening) and appropriate assessment. In concrete terms, it is then obvious to add to the definition of screening (*preliminary test*) that it may also take into account project characteristics that are inextricably linked to the project and reduce the actual pressure on a protected habitat or species habitat. A workable proposal could be:

"'screening' means the preliminary assessment whether a plan or project, separately or in combination with other plans or projects, is likely to have significant effects on a site, taking into account positive effects that are directly linked to the project under assessment."

2.3.10. This adjustment is also conceivable within the context of a lex specialis, for example as part of the proposal for a regulation on accelerating environmental assessments, COM(2025) 984, as a new sixth paragraph in Article 7 on the screening phase. It could then be added that:

'screening in the context of Article 6(3) of Council Directive 92/43/EEC means'.

2.4. Solution direction 1B: Assessment in relation to the reference situation

2.4.1. The second solution direction is to have the screening take place (more explicitly) in relation to the lawfully existing reference situation when changing existing activities, instead of assessing the new activities in isolation. This also increases the predictability of the system and prevents an improvement project, for example, from being more severely affected than allowing the existing situation to continue.

2.4.2. The main argument for this is methodological and ecological in nature. The question of whether a project is likely to have a significant effect requires an assessment of not only the legal, but also the factual reality against which that project is situated. It is precisely in the case of changes to existing activities that the test degenerates into a paper exercise if the existing lawful activity is first completely ignored and then only the new activity is assessed in isolation, especially if - as in the Dutch situation - that existing situation is part of the background concentration against which the assessment is made.[34]

Commission FAQ or interpretative statement 🏛

2.4.3. A first step in implementing this solution is an explicit clarification that the *Sweetman judgment* and the *Eco-Advocacy judgment* of the Court of Justice do not preclude the assessment of the modification of existing projects from being based on the lawfully existing reference situation. For example, an FAQ answer might read:

"Where an existing lawful project is modified, the screening under Article 6(3) of Council Directive 92/43/EEC may assess likely significant effects by reference to the lawful baseline situation, rather than by comparing only the isolated effects of the modified activity."

Supplementing Guidance 🏛 🏛

2.4.4. The same line can then be anchored in the Guidance. This is particularly relevant here, to promote the uniform application of EU law at national level. In that case, inclusion in the Guidelines is the most obvious.

[34] See Houthoff, More than paper, 18 February 2025, chapter 1, proposal 1B, which refers to the risk of a paper test if the existing lawful activity is included in the background deposition but is not included in the reference situation.

Technical methodology or procedural harmonisation 🏛 🏛 🏛

2.4.5. The current regulation on speeding up environmental assessments provides a logical starting point for this.[35] A substantive link to the reference situation fits in well with this, because it makes the (method of) screening (preliminary test) more coherent, predictable and legally certain. The text as described above for inclusion in an FAQ could be added as a new sixth paragraph in Article 7 about the screening phase. This can then stipulate that:

'screening in the context of Article 6(3) of Council Directive 92/43/EEC means'.

Targeted amendment of Article 6(3) of the Habitats Directive 🏛 🏛 🏛 🏛 🏛

2.4.6. As a final solution, it may be added to Article 6(3) of the Habitats Directive that the likelihood of significant effects in the event of modification of an existing project is to be assessed in relation to the lawfully existing baseline situation. Specifically, the following addition to the first sentence (adjustments underlined – HF) can be considered:

"Any plan or project not directly connected with or necessary to the management of the site but which, by reference to the lawful baseline situation, is 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."

[35] Proposal for a Regulation of the European Parliament and of the Council on accelerating environmental assessments, COM(2025) 984 final, in particular Articles 2, 3, 5 and 7 and the explanatory memorandum thereto on pp. 12, 23 and 24.

3. Chapter 2: *'Less paper, more predictability'*

Concretisation / harmonisation of the significance test

3.1. Question: How should the Habitats Directive or underlying legislation be amended to apply simple threshold values or lower limits when assessing significant effects?

3.2. **Context**

3.2.1. The Habitats Directive does not define the concept of "significant". At the same time, it follows from the *Wadden Sea judgment* of the Court of Justice that the threshold for starting the appropriate assessment procedure is low: the procedure is already activated when significant effects cannot be ruled out on the basis of objective data.[36] This precautionary starting point guarantees protection, but in practice also leads to a very early upscaling to the onerous appropriate assessment procedure.

3.2.2. For the Brussels competitiveness agenda, it is precisely (the moment of) that scaling up moment that is relevant. The earlier the system scales up to a full appropriate assessment, the higher the administrative burden, the greater the delay and the smaller the predictability. The Commission itself identifies this problem: environmental assessments are at the heart of the consent process and must be made simpler, more coherent and more predictable.[37]

3.2.3. It is striking that other EU law assessment systems do have more room for threshold values and selection criteria. Under the EIA Directive, Member States can work with thresholds, criteria and case-based pre-selection for Annex II projects.[38] In substance, there is – as also indicated in § 2.3.8 – an important difference between the appropriate assessment and the EIA: the outcome of the EIA must be taken into account in the decision-making process, whereas a negative outcome of the appropriate assessment blocks authorisation as long as it is not certain that the integrity of the site will not be adversely affected.[39] Similar to how the Commission does this in the Environmental Omnibus and the Acceleration Regulation (COM(2025) 984), there is room for harmonisation or drawing inspiration from the EIA for the adaptation of the appropriate assessment.

3.2.4. It should be noted that the principle of procedural autonomy means that it is for the domestic legal system of each Member State, provided that the principles of equivalence and effectiveness are respected, to determine the manner in which evidence is to be adduced, the means of proof to be accepted, the principles governing the assessment of the weight of evidence and the standard of proof required, including the use of threshold values or lower limits.[40] This is therefore not just a matter for Brussels; Member States can also play a role here. However, the harmonisation ambitions of the Environmental Omnibus and other instruments argue for regulation at EU level, aimed at achieving environmental objectives in a more efficient, cheaper and smarter way. Harmonisation of threshold values and lower limits can also contribute to this. This is all the more true since there are significant differences between Member States: the Netherlands takes a

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36 CJEU 7 September 2004, C-127/02, ECLI:EU:C:2004:482, paragraphs 43-45.
37 COM(2025) 980 final; COM(2025) 984 final.
38 Directive 2011/92/EU, Art. 4(1) and (2).
39 Commission guidance on Article 6 of the Habitats Directive, Annex I, Comparison of Procedures for Appropriate Assessment, EIA and SEA; see also Communication from the Commission, Assessment of plans and projects relating to Natura 2000 sites - Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive (92/43/EEC), 2021/C 437/01.
40 See e.g. CJEU 26 February 2026, ECLI:EU:C:2026:109, paragraph 50, and CJEU 21 June 2017, C-621/15, ECLI:EU:C:2017:484, paragraph 25.

particularly strict approach, while Germany works with a threshold value of >20 mol/ha/year[41] and ecological preliminary tests in Italy are sometimes limited to just a few pages.[42]

3.3. Solution direction 2A: Codification of a lower bound or threshold approach (ORNIS)

3.3.1. The first solution direction is to lay down clearer standards at EU level when there are no significant effects, at least when a rebuttable presumption of proof can apply. The ORNIS[43] criterion offers a conceivable starting point for this.[44] This criterion was developed in the context of Article 9 of the Birds Directive and shows that EU law, or the relevant case law, is not unfamiliar with quantitative lower limits where there is a scientific basis for this.[45]

3.3.2. Such an approach is also in line with the Brussels simplification agenda. It makes screening more predictable, reduces administrative burdens and reduces disparities between Member States, without categorically disregarding ecological sensitivities.

Supplementing the Guidance 🏛 🏛

3.3.3. The least intrusive step in implementing this solution is to include in the Guidance that there are no significant effects within the meaning of Article 6(3) of the Habitats Directive in the case of 'small numbers'[46] of nitrogen deposition, i.e. deposition of no more than 1% of the critical load. Specifically, the following addition can be considered:

"For the purposes of screening under Article 6(3) of Directive 92/43/EEC, nitrogen deposition not exceeding 1% of the critical load for the habitat type concerned ('small numbers') may be presumed non-significant, unless objective site-specific evidence indicates otherwise."

3.3.4. This solution is - certainly compared to the practice in some Member States, and in particular the Netherlands - a break with the current system. Therefore, it is less obvious – although not legally impossible – to implement this solution direction via an interpretative statement, Commission FAQ or Commission statement. In addition, when introducing this solution, it is advisable to always design it as an interpretation of the significance criterion, and not as a general exception to the appropriate assessment obligation under Article 6(3) of the Habitats Directive.[47]

Technical methodology or procedural harmonisation 🏛 🏛 🏛

3.3.5. The previous text proposal could also be included in the current regulation on accelerating environmental assessments, for example by adding it to the currently envisaged Article 7 on the screening phase. This can provide for a more uniform assessment.

3.4. Solution direction 2B: Substantive harmonisation of the appropriate assessment with the EIA

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41 On the German threshold approach with a project-related Abschneidewert of 0.3 kg N/(ha*a) (approximately 21.4 mol N/ha/year), see in particular BVerwG 15 May 2019, 7 C 27.17, ECLI:DE:BVerwG:2019:150519U7C27.17.0; cf. also BVerwG 21 January 2021, 7 C 9.19, ECLI:DE:BVerwG:2021:210121U7C9.19.0.

42 See the example as set out in the Annex to the Guidelines.

43 The ORNIS Committee is the institute which, on the basis of Article 16 of the Birds Directive, assists the Commission in adapting to technical progress.

44 Communication from the Commission, Second Report on the Application of Directive 79/409/EEC on the Conservation of Wild Birds, COM(93) 572 final, 24 November 1993.

45 CJEU 15 December 2005, C-344/03, ECLI:EU:C:2005:770 (Commission v Finland), paragraphs 53-60.

46 Compare how for the ORNIS criterion for the Birds Directive, 'small numbers' are understood to mean: less than 1%. See also how 'small areas' within the meaning of Article 3(3) of the SEA Directive are interpreted in case law as areas smaller than 1% of the territory of the competent authority (ABRvS 19 March 2025, ECLI:NL:RVS:2025:1183).

47 See, in any event, CJEU 26 May 2011, C-538/09, ECLI:EU:C:2011:349 (Commission v Belgium), paragraphs 39-43, and CJEU 7 November 2018, Joined Cases C-293/17 and C-294/17, ECLI:EU:C:2018:882 (PAS), paragraphs 114-115.

3.4.1. The second solution direction is not to introduce a lower limit, but to bring the appropriate assessment and the EIA closer together in terms of content. The Commission is already committed to procedural harmonisation with the proposal on accelerating environmental assessments.[48] The next step would be to further harmonise not only procedurally, but also substantively.

3.4.2. There are two levels of ambition for this. Limited harmonisation would bring the proposed (screening) threshold categories of Article 6(3) of the Habitats Directive closer to the EIA. This increases predictability without abandoning the substantive prohibition of consent in the appropriate assessment phase. Far-reaching harmonisation also makes the appropriate assessment itself more similar to the EIA: primarily aimed at mapping out consequences and avoiding or reducing them as much as possible, no longer as a hard stop when the competent authority has not obtained certainty that it will not adversely affect the integrity of the site concerned. In practice, this second variant means that a project could in principle go ahead even in the event of a negative appropriate assessment, provided that the competent authority takes the outcome into account in the decision-making process. This is a more fundamental choice and – although not legally impossible – it is not obvious to implement this solution through requests for an interpretative statement, Commission FAQ or Commission statement.

Supplementing Guidance (limited harmonisation) 🏛 🏛

3.4.3. At guidance level, a rebuttable presumption of proof can be included that: (i) an appropriate assessment is only necessary for projects, or plans that provide for projects as referred to in Article 4, paragraph 1, in conjunction with Annex I of the EIA Directive; and (ii) a preliminary assessment is only necessary for projects, or plans that provide for projects as referred to in Article 4, paragraph 2, in conjunction with Annex II of the EIA Directive. This could include the following addition to the Guidance:

"For screening and appropriate assessment under Article 6(3) of Directive 92/43/EEC, there shall be a rebuttable presumption regarding the likelihood of a plan or project to have a significant effect, leading to the presumption that: (i) an appropriate assessment is required only for projects, or plans providing for projects, falling within Article 4(1) in conjunction with Annex I of Directive 2011/92/EU; and (ii) a screening is required only for projects, or plans providing for projects, falling within Article 4(2) in conjunction with Annex II of Directive 2011/92/EU."

3.4.4. Although the *PAS judgment* of the Court of Justice ruled that the concept of a project in the Habitats Directive is broader than that of the EIA Directive, this does not mean that the EIA Directive cannot be used to derive a presumption of proof for the likelihood of significant effects of an activity.

Technical methodology or procedural harmonisation (limited harmonisation) 🏛 🏛 🏛

3.4.5. In view of the impact of the proposed adjustment at level 2 above, and in view of what has been said there about the *PAS judgment* of the Court of Justice and the EIA Directive, it is worth considering including this line in the regulation on accelerating environmental assessments. It is precisely because this Regulation already aims to establish a horizontal framework for environmental assessments that the proposed text on the presumption of evidence can be included in it.

Targeted amendment of Article 6(3) and (4) of the Habitats Directive (extensive harmonisation) 🏛 🏛 🏛 🏛 🏛

[48] Proposal for a Regulation of the European Parliament and of the Council on speeding up environmental assessments, COM(2025) 984 final, Arts 1-4 and the explanatory memorandum thereto.

3.4.6. If there is a desire - and in view of the desired competitiveness this is not inconceivable - to further harmonise the appropriate assessment itself with the EIA, an amendment to the directive is inevitable. A possible rewording of Article 6(3) could then be:

"Any 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 an appropriate assessment of those effects, as well as of the measures by which those effects can be prevented, reduced or, where appropriate, compensated. The competent authority shall take full account of the outcome of that assessment in its decision-making and shall attach to the authorisation the conditions necessary to avoid and limit negative effects as much as possible."

3.4.7. Such a variant essentially makes the appropriate assessment an obligation to provide information and mitigation. This is only possible if Article 6(4) of the Habitats Directive is reassessed or deleted at the same time, because otherwise the current derogation structure will no longer be appropriate. This could be done, for example, by seeking a connection with Article 2(4) of the EIA Directive.

4. Chapter 3: *'From paper to practice'*

Room for a more systematic approach

4.1. Question: How can the Habitats Directive itself or underlying regulations be amended so that measures that lead to emission reductions at system or area level can be more easily included in the granting of permits?

4.2. Context

4.2.1. Case law, in particular the *PAS judgment* of the Court of Justice, shows that a programmatic approach is not categorically excluded. The problem is not in the programmatic nature as such, but in the certainty, timing, allocation and additionality of the nature measures included therein.[49] In other words, site measures can in principle play a role, but only if it is sufficiently certain that the benefits will actually occur in good time and only if those benefits do not coincide with measures that the public authorities were already required to take under Article 6(1) and (2) of the Habitats Directive.

4.2.2. The Brussels context is also relevant here. A system that operates exclusively at the project level and leaves hardly any room for systemic measures is expensive, slow and difficult to scale. This puts the burden of nature restoration more on the individual citizen or entrepreneur, while the Nature Restoration Regulation obliges Member States to restore nature and to draw up national restoration plans. Proper harmonisation and coordination between the obligations under the Habitats Directive and the Nature Restoration Regulation would therefore be a more logical starting point for defining what is public restoration responsibility and what can be used as project-specific mitigation beyond that. This is a relevant question for the Stress Test, because it touches on both competitiveness and nature restoration: a better defined role of public source measures can simplify project procedures without evading the restoration obligation.

4.3. Solution direction 3A: Implementation of the German method

4.3.1. The first solution direction is to follow the more cautious German approach to the additionality requirement. The additionality requirement has a basis in European case law. In summary, it follows from settled case law of the Court of Justice[50] that the effectiveness of the obligations under paragraphs 1 and 2 of Article 6 of the Habitats Directive is lost if measures that are necessary for this purpose (the conservation or appropriate measures) are used as a mitigating measure in the granting of permits under paragraph 3 of that article; we call this the additionality requirement. The additionality requirement thus forms the backbone of Article 6 of the Habitats Directive. In the Netherlands, this additionality requirement is applied particularly strictly in case law, whereby in particular, when a mitigation measure is appropriate, it must be justified that other measures have been or will be taken to prevent imminent deterioration and disturbance with significant consequences for species and habitat types.[51] A recent example illustrates this. For a housing project that had already resulted in a 98% reduction in nitrogen deposition on the surrounding habitats through the conversion of agricultural land to housing, it had to be demonstrated that the reduction of the remaining 2% could not still be regarded as a necessary and suitable appropriate measure. If this could not be refuted, construction would have to be abandoned in favour of nature restoration. That motivation turned out not to be provided

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49 CJEU 7 November 2018, Joined Cases C-293/17 and C-294/17, ECLI:EU:C:2018:882.

50 CJEU 17 April 2018, C-441/17, ECLI:EU:C:2018:255, para. 213 and CJEU 7 November 2018, C-293/17, ECLI:EU:C:2018:882, para. 121-124.

51 Council of State 30 April 2025, ECLI:NL:RVS:2025:1971, para. 81.5; District Court of The Hague 4 June 2025, ECLI:NL:RBDHA:2025:9782, para. 98.2. For example, in so far as a (permanent) decrease in nitrogen deposition is necessary to counteract that (imminent) deterioration within the meaning of Article 6(2), the competent authority must make it clear that this permanent decrease will be achieved and that it also provides for the (complete) decrease in nitrogen deposition necessary to counteract that (imminent) deterioration within a foreseeable period of time, see e.g.: District Court of Oost-Brabant 16 April 2025, ECLI:NL:RBOBR:2025:2332, para. 4.12.

in that procedure and the housing plan was sent back to the drawing board.[52] German case law is less strict and there is a strong emphasis on the content of management plans: insofar as a measure is not already established as a mandatory part of a management plan, there is more scope to include that measure as mitigation in the appropriate assessment.[53] Similarly, it can be clarified at EU level that measures that are not already anchored in a management plan - and conceivably: not even in a national restoration plan - should not simply be assessed as measures that may already be 'reserved' under Article 6(1) and (2) of the Habitats Directive. The German method does require an explicit anchoring in EU law, because otherwise there may continue to be discussion about whether this method is in line with the intention of the directive and the Commission. The following amendments should, in principle, overcome these objections.

Commission FAQ or interpretative statement 🏛

4.3.2. A first possibility is an interpretative clarification that creates a presumption of proof: measures that are not included in a management plan or in a national restoration plan under the Nature Restoration Regulation are in principle considered to meet the additionality requirement and can therefore be used as a project-specific mitigation measure. This presumption offers more legal certainty in practice and makes the additionality test more manageable. This text could read as follows:

"Measures that are not included in a management plan within the meaning of Article 6(1) of Directive 92/43/EEC, or in a national restoration plan under the Nature Restoration Regulation, shall be presumed to satisfy the additionality requirement and may accordingly be relied upon as project-specific mitigation measures within the meaning of Article 6(3) of Directive 92/43/EEC."

Supplementing Guidance 🏛 🏛

4.3.3. An alternative is to explicitly include this line in the Guidance. This is particularly relevant here, because in practice the distinction between conservation measures, appropriate measures and mitigation measures is strongly coloured by Guidance and case law.

Technical methodology or procedural harmonisation 🏛 🏛 🏛

4.3.4. This line could also be linked to the regulation on speeding up environmental assessments. However, the additionality principle is a very specific concept arising from the case law on the Habitats Directive, which may be less suitable for regulation in a lex specialis or in the announced regulation.

Targeted amendment of Article 1 of the Habitats Directive 🏛 🏛 🏛 🏛 🏛

4.3.5. As a structural solution, Article 1 of the Habitats Directive can clarify what is meant by conservation measures, appropriate measures and mitigation measures. In doing so, it is obvious to make explicit what is meant by a mitigating measure, in such a way that it also follows from that definition how it differs from the other measures. This could include a text along the following line:

"'Mitigating measures' means measures intended to reduce or offset the adverse effects of a plan or project within the meaning of Article 6(3). Measures that are already included in a management plan pursuant to Article 6(1) of Directive 92/43/EEC, or in a national restoration plan under the Nature Restoration Regulation, shall not qualify as mitigating measures."

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52 Council of State 28 May 2025, ECLI:NL:RVS:2025:2404.

53 BVerwG 12 June 2019, 9 A 2.18, ECLI:DE:BVerwG:2019:120619U9A2.18.0, para. 95-96; see also: BVerwG 5 July 2022, 4 A 13.20, ECLI:DE:BVerwG:2022:050722U4A13.20.0 (*Uckermarkleitung*), para. 164-167; BVerwG 13 January 2025, 7 B 21.24, ECLI:DE:BVerwG:2025:130125B7B21.24.0, para. 5.

4.4. Solution direction 3B: Systematic balance approach for the deposition of substances

4.4.1. The second solution direction focuses specifically on deposition of substances and comparable, easily modellable chemical effects of substances. The proposal here is not to treat every single measure as "proven" at the project level, but to establish a systematic approach that works as a kind of nitrogen bank-plus (and thus builds on the experiences with the Dutch nitrogen registration system): reduction measures are credited as a balance, projects can draw on that balance under certain conditions and new measures can lead to further credits. The additionality test then takes place at the level of the programme as a whole, not for each individual debit or credit.

4.4.2. This shifts the test from project level to programme level. This is particularly in line with effects such as deposition, because these effects are relatively easy to quantify – they can be calculated as is done in the Netherlands with the AERIUS calculator – and can be systematically monitored. This is subject to the condition that the system itself contains sufficient guarantees for certainty, monitoring, reservation, correction and updating. Only then will this approach contribute to competitiveness and nature restoration at the same time.

4.4.3. The additionality component has already been discussed above. In addition, according to case law, measures that are included in an appropriate assessment must, in principle, have been taken at the time the assessment is carried out and that there must be certainty about the expected effect of those measures.[54] In Dutch implementation practice, it has previously been assumed that this certainty can exist under certain conditions.[55] However, it is preferable to harmonise and anchor this at European level.

Commission FAQ or interpretative statement 🏛

4.4.4. A first step is to clarify that Article 6 of the Habitats Directive does not preclude a programmatic balance for modellable chemical effects, provided that the additionality and certainty of the measures at programme level have been demonstrated and the issue remains within the verified balance. This text could read as follows:

"For pollutant deposition and comparable modelled chemical effects, Member States may establish a programme-level balance system, provided that: (i) credits are entered only where the effect and additionality of the underlying measures have been demonstrated at programme level; (ii) debits remain within the verified balance; and (iii) continuous monitoring, correction and update mechanisms are in place."

Supplementing Guidance 🏛 🏛

4.4.5. In addition, the inclusion of a similar text in the Guidance or the Guidelines is the logical next step. Inclusion at further levels does not seem to add more here.

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54 CJEU 7 November 2018, Joined Cases C-293/17 and C-294/17, ECLI:EU:C:2018:882 (PAS), in particular paragraphs 123 and 132.

55 Cf. Government Gazette 2025, 21366, p. 15-16, where it is explained for the microdeposition bank that the extent of the positive effects of the measures and the certainty that they will occur are assessed in advance in a manner that meets the requirements of Article 6(3) of the Habitats Directive.

Disclaimer

This memorandum was drawn up on behalf of and for the benefit of LTO. The described solution directions relate to generic adjustments that fit in with the Brussels agenda of competitiveness, simplification, legal certainty and reduction of administrative burdens.