

Restore Now, Destroy Later?

A Legal Analysis of the Non-Deterioration Obligations in the Nature Restoration Regulation and beyond

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Executive Summary

- Non-deterioration obligations are found not only in the NRL, but also in other pieces of EU legislation, such as the Birds & Habitats Directives and the Water Framework Directive.
- There are different types of non-deterioration obligations, schematically falling under the following categories:
 - "Obligations of result" (outcome-based obligations), whereby Member States' compliance with the obligation occurs only when the desired result has been achieved. One such example is Art.6(2) of the Habitats Directive, where even the *risk* or *likelihood* of deterioration of the site could serve as grounds for non-compliance.
 - "Obligations of conduct", whereby the actual achievement of the non-deterioration result is not needed. Two relevant types of "obligations of conduct" are the following:
 - » Measures-based obligations, whereby Member States' obligations are met once they put in place *appropriate* measures, suitable for achieving the desired outcome. On a "strictness" scale, these obligations can be considered as a "middle ground" between "obligations of result" and "pure effort-based obligations". One such example is NRL Art.4(11) second sentence/Art.5(9) second sentence
 - » Pure effort-based obligations, whereby Member States only need to exhibit that they have made an effort (attempted) to take appropriate measures, such as the enhanced connectivity (ecological corridors) obligations under the Habitats Directive (Arts.3(3) and 10) or the "pre-restoration" non-deterioration obligation of NRL Art.4(12).
- Effective non-deterioration is a precondition for Member States to yield returns on the financial investments made for restoration, as it is the only way to ensure that the benefits of restoration are continuous, sustained and long-term.
- The overlaps in terminology, scope, subject matter and geographic coverage between the NRL and the Nature Directives, as well as their mutually supportive overarching objectives, allow for the reliance on policy guidance and judicial interpretation of the latter, in order to further concretize and elucidate the meaning of the former's requirements in a coherent way.
- Member States enjoy some discretion in choosing which non-deterioration measures to take. Their discretion is limited by the requirement that such measures be *appropriate*; the assessment of which measures are *appropriate* needs to happen on a case-by-case basis, with measures being specific to the targeted habitat and applicable at site-level.
- While the mere occurrence of deterioration does not automatically mean that a Member State is non-compliant, deterioration can provide an indication that appropriate measures have not been taken and shifts the burden of proof to demonstrate otherwise to the Member State.
- The achievement of the result-based obligations of Art.4(17) and Art.5(14) will not be feasible without the combination of effective restoration and non-deterioration measures.
- Non-deterioration obligations are of an **anticipatory, not reactive, nature**, meaning that Member States will have to take measures prior to the deterioration of the area in question.
- The three non-deterioration obligations have a different **temporal scope** (applying at different moments of the implementation of the law), namely:
 - The "pre-restoration non-deterioration obligation" (NRL Art.4(12)) applies **from the entry into force of the NRL** in August 2024
 - The "continuous improvement obligation" (NRL Art.4(11) first sentence/Art.5(9) first sentence) applies **from the time the restoration measures are taken and, at the latest, by the deadlines set by Art. 4(1)/5(1) & Art.4(4)/5(2),**
 - The "non-deterioration of restored habitats (and habitats in good condition) obligation" (NRL Art.4(11) second sentence/Art.5(9) second sentence) applies **once good condition and/or sufficient quality has been reached.**

- The derogations should be interpreted narrowly and are only applicable under the strict provisions provided for by the law, meaning that they cannot be invoked and/or relied upon if, among others, they put the achievement of the Art.4 and Art.5 targets at risk.
- **The derogations to the non-deterioration obligations do not have any impact upon the obligation to take restoration measures under NRL Art.4(1), (4), (7) and NRL Art.5(1), (2), (7) and for these measures to ultimately reach the Art.4(17) and Art.5(14) target**
- The derogations for restoration areas inside Natura 2000 sites **only** apply to the non-deterioration obligations set out in the NRL and do not, in any way, affect Member States' pre-existing obligations under HD Art.6(2).
- **National Restoration Plans** (NRPs) should indicate which restoration and non-deterioration measures are taking place inside Natura 2000 sites, given that a different legal regime, with coinciding (but stricter) legal obligations, applies to such sites.
- In the NRP sections where "an indication" of the non-deterioration measures and any derogations invoked is required, Member States should provide enough detail to enable an assessment of whether they are compliant with the requirements of the NRL. The uniform NRP format, adopted via Implementing Regulation 2025/912, provides inadequate guidance on some aspects that the NRL requires, meaning that Member States will have to go beyond the requirements of the NRP format to ensure compliance with the NRL.



1. Introduction

The adoption of the Nature Restoration Regulation¹ (commonly referred to as 'Nature Restoration Law' (NRL) provides a significant opportunity to tackle the environmental multi-crises the EU is facing, by restoring crucial ecosystems, contributing also to climate change mitigation and adaptation.² In a global first, it constitutes the primary example of an instrument domesticating, in legally binding terms, political pledges made under the Convention on Biological Diversity's Kunming Montreal Global Biodiversity Framework³ and the United Nation's Decade of Ecosystem Restoration.⁴

Besides its paramount importance for the Union's biodiversity at a time of unprecedented decline,⁵ ecosystem restoration enables the strengthening and, at times, reestablishment of ecosystem services, namely the numerous and often immeasurable benefits people obtain from nature.⁶ Examples of ecosystem services, which will be directly improved by restoration and are vital for the Union's economy and prosperity are:

- Carbon sequestration, since certain ecosystems covered in the legislation can function as carbon sinks, absorbing and storing greenhouse gases and thus mitigating climate change.⁷ Restoration of such ecosystems will also contribute to and facilitate the achievement of the EU's climate goals and binding emission reduction targets, enshrined in the European Climate Law,⁸ the Effort Sharing Regulation⁹ and the LULUCF Regulation.¹⁰
- Climate regulation, flood and drought protection, given that certain ecosystems covered in the legislation can reduce both the risk and intensity of climate change-induced extreme weather events and natural disasters, functioning as nature-based solutions.¹¹ Even more alarmingly, degraded ecosystems constitute themselves one of the major drivers of disaster risk.¹²
- Pollination, pest control and improved soil fertility, all of which are crucial for the survival of the agricultural sector, as well as for guaranteeing true food security and stability in food production,¹³ in line with the Union's Common Agricultural Policy's primary objectives, as set in Article 39 of the Treaty on the Functioning of the European Union (TFEU).¹⁴

The NRL's central objective is to 'contribute to the long-term and sustained recovery of biodiverse and resilient ecosystems'¹⁵ with an overarching objective for Member States to jointly cover at least 20% of EU land and sea area with 'effective and area-based restoration measures' by 2030 and all ecosystems in need of restoration by 2050.¹⁶ To achieve this, Art.4 and 5 provide *time-bound* and *area-based* restoration targets in terrestrial and marine habitats listed in Annexes that are closely linked to Annex I of the Habitats Directive.¹⁷ Art.8-12 set out mostly indicator-based restoration obligations for urban ecosystems, river connectivity, pollinator populations, agricultural ecosystems, and forest ecosystems. Still, putting in place restoration measures will not be enough to reap the full benefits from the various and complex natural processes that may be reinstated from the implementation of the NRL: Preventing the deterioration of restored sites is critical to ensuring the long-term and sustained recovery of biodiversity, in line with the objective of the NRL.¹⁸ Without effective non-deterioration measures, restoration constitutes a poor financial

¹ Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation 2022/869 (NRL). All Article references in this document refer to the NRL, unless otherwise specified.

² E.g. An Cliquet et al. 'The negotiation process of the EU Nature Restoration Law Proposal: bringing nature back in Europe against the backdrop of political turmoil?' (2024) *Restoration Ecology*, 32 5: e14158

³ Particularly Target 2 in UN CBD, Decision adopted by the Conference of the Parties to the Convention on Biological Diversity, 15/4, *Kunming-Montreal Global Biodiversity Framework*, CBD/COP/DEC/15/4 (19 December 2022)

⁴ United Nations General Assembly, Resolution adopted by the General Assembly on 1 March 2019, Resolution 73/284: United Nations Decade on Ecosystem Restoration (2021–2030), A/RES/73/284 (1 March 2019)

⁵ European Environment Agency, *State of Nature in the EU: Results from reporting under the nature directives 2013 – 2018*, EEA Report 10/2020 (2020)

⁶ According to the official [definition of "ecosystem services"](#), provided by the International Panel on Biodiversity and Ecosystem Services (IPBES), these can be direct or indirect and can be divided into supporting, regulating, provisioning and cultural. For more on the current status, trends and functions of ecosystem services, please consult: IPBES, *Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*, E. S. Brondizio, J. Settele, S. Díaz, and H. T. Ngo (editors), IPBES secretariat, (Germany, 2019)

⁷ Pörtner, H.O., Scholes, R.J. et al, IPBES-IPCC co-sponsored workshop report on biodiversity and climate change; International Panel on Biodiversity and Ecosystem Services and International Panel on Climate Change (2021); Nabuurs, G.-J., R. Mrabet, A. Abu Hatab, et al, "Agriculture, Forestry and Other Land Uses (AFOLU)" in IPCC, 2022: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [P.R. Shukla, et al (eds.)], Cambridge University Press, Cambridge, UK and New York, NY, USA (2022)

⁸ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999

⁹ Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU

¹⁰ Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU

¹¹ For more on the links between nature restoration and climate change adaptation, mitigation and disaster risk resilience, please consult: Costa Domingo G., Aubert G, *Nature restoration: Contributions to tackling climate change*, Policy Report, Institute for European Environmental Policy (IEEP) (2022)

¹² European Environment Agency, *Nature-based solutions in Europe: Policy, knowledge and practice for climate change adaptation and disaster risk reduction*, EEA Report 01/2021 (2021) p 18

¹³ For more on the links between nature restoration and agriculture, please consult: Nadeu E., *Nature Restoration as a driver for Resilient Food Systems*, Policy Report, Institute for European Environmental Policy (IEEP) (2022)

¹⁴ Consolidated version of the Treaty on the Functioning of the European Union OJ C115/49

¹⁵ Art.1(1)(a) NRL.

¹⁶ Art.1(2) NRL.

¹⁷ Council Directive 92/43 on the conservation of natural habitats and of wild fauna and flora OJ L206/7.

¹⁸ See e.g. Ioannis Agapakis, 'Nature Restoration Regulation: Two Steps Forward, One Step Back?' (2024) EU Law Live, <https://eulawlive.com/op-ed-nature-restoration-regulation-two-steps-forward-one-step-back-by-ioannis-agapakis/>

investment and a poor use of public (both national and EU) funds.

This analysis seeks to clarify what is required by the different non-deterioration obligations in the NRL, where three different types of non-deterioration obligations are contained in Art.4 and 5¹⁹, namely:

- First, the 'continuous improvement obligation' of Art.4(11) first sentence and 5(9) first sentence that requires the continuous improvement of areas subject to restoration measures under Art.4(1), (4) and (7) and Art.5(1), (2), (7), respectively.
- Second, the 'non-deterioration of good status obligation' of Art.4(11) second sentence and 5(9) second sentence, seeking to ensure no deterioration of areas in which good condition has been reached and in areas where sufficient quality of the habitats of the species has been reached.
- Third, the 'pre-restoration obligation' of Art.4(12) and 5(10) which contains an effort-based obligation to prevent the significant deterioration of Annex I habitats which are in good condition or are necessary to meet the restoration targets of Art.4(17) and 5(14), respectively.

Art.4(13)-(16) and Art.5(11)-(13) then contain a range of derogations and exemptions from the non-deterioration obligations, for specific deterioration instances subject to strict criteria.

In this analysis, we focus on the types of obligations contained in Art.4(11)-(12) and Art.5(9)-(10), seeking to interpret the obligations set out therein, relying on the Court of Justice of the EU's (CJEU) interpretation of other cornerstone environmental legislation establishing similar obligations, namely the Habitats Directive (HD), Birds Directive²⁰ (BD) and Water Framework Directive²¹ (WFD). The analysis is structured as follows: First, it considers the type of obligation in Art.4(11) ('put in place measures which shall aim to ensure') before applying this interpretation to the continuous improvement and non-deterioration of good status obligations (section 2). Second, it turns to Art.4(12) and the effort-based obligation set out therein (section 3). Next, it considers the interaction between the three non-deterioration obligations, as well as their interplay with pre-existing obligations under the Habitats Directive (section 4). In section 5, Art.4(13), Art.4(14)-(15) and Art.4(16) are considered as the three types of derogations. Lastly, section 6 considers how the non-deterioration obligations should be reflected in the National Restoration Plans (NRPs). A brief conclusion summarises the main findings (section 7).

¹⁹ Unless otherwise stated, the Art.4 and 5 non-deterioration obligations are in essence the same. To improve readability, only the Art.4 provisions are explicitly mentioned in the text, but these apply, unless otherwise stated, *mutatis mutandis*, to Art.5 NRL.

²⁰ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds

²¹ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy



2. Art.4(11) continuous improvement and non-deterioration of good status

Art.4(11)²² provides:

Member States shall put in place measures which shall aim to ensure that the areas that are subject to restoration measures in accordance with paragraphs 1, 4 and 7 show a continuous improvement in the condition of the habitat types listed in Annex I until good condition is reached, and a continuous improvement of the quality of the habitats of the species referred to in paragraph 7, until the sufficient quality of those habitats is reached.

Without prejudice to Directive 92/43/EEC, Member States shall put in place measures which shall aim to ensure that areas in which good condition has been reached, and in which the sufficient quality of the habitats of the species has been reached, do not significantly deteriorate.

While Art.4(11) contains two separate obligations, one on continuous improvement and one on non-deterioration of sites where good status has been achieved, they share the same 'type of obligation' as an obligation to take 'measures which shall aim to ensure'. This wording will therefore be unpacked for both obligations together before looking in more detail at what is required for the continuous improvement and non-deterioration of good status obligation.

A. 'Shall put in place measures which shall aim to ensure'

Obligations are commonly distinguished as either 'obligations of result' or 'obligations of conduct',²³ with the latter also being referred to as 'effort-based obligations' or 'due diligence obligations'. The former entails an obligation to succeed in achieving the result, whereas the latter is an obligation to do one's best to achieve the result.²⁴ For an obligation of result, the non-attainment of the result can either not be justified at all, or only through narrow exemptions set out in the law, while for an obligation of conduct, the non-attainment is justifiable if all reasonable measures had been taken.²⁵

It has been suggested that all three non-deterioration obligations in the NRL are effort-based and there is no distinction in the level of effort or enforceability.²⁶ Yet, both the wording of the provisions and the legislative drafting history suggest that more nuance is required, and a distinction should be made between Art.4(11) and Art.4(12) regarding the type of obligation of conduct it entails.²⁷

On the face of it, Art.4(11) does not mandate a clear non-deterioration result but requires Member States to take measures 'which shall aim to ensure' continuous improvement and non-deterioration. The measures must be suitable to reach the respective aims while, as explicitly stated in Recital 37 'not achieving those outcomes does not imply a failure to comply with the obligation to put in place measures suitable for reaching those outcomes'.²⁸ To analyse what Art.4(11) requires in more detail, the drafting history, wording, context and objective of the NRL will be considered, following the approach of the CJEU in interpreting concepts which are not defined in the legislation itself.²⁹

1. Drafting context

Art.4(12) requires Member States 'to *endeavour* to put in place measures', whereas Art.4(11) requires Member States to 'put in place measures which shall aim to ensure' continuous improvement and non-deterioration. Looking back at the drafting history of these provisions, this appears to be a deliberate compromise choice.

²² The Art.5 equivalent is Art.5(9).

²³ E.g. Benoit Mayer, 'Obligations of conduct in the international law on climate change: A defence' (2018) RECIEL 27: 130–140. <https://doi.org/10.1111/reel.12237>, p.130; Jasper van Kempen, (2014). 'Obligations of result or best efforts: Dealing with problems of interpretation' in *EU Environmental Legislation* (Edward Elgar Publishing 2014).

²⁴ See e.g. van Kempen (n. 23) 150f.

²⁵ *ibid* 155.

²⁶ Bente J de Leeuw and Chris W Backes, 'The Non-Deterioration Obligation in the Nature Restoration Regulation – a Necessary and Proportionate Addition to the Habitats Directive or a Monstrosity with Disastrous Consequences for Society?' (2024) *Journal for European Environmental & Planning Law* 21, 22–40, 33.

²⁷ Cf also: Cliquet et al (n. 2), 4; Agapakis (n. 18)

²⁸ NRL Recital 37

²⁹ See e.g. C-461/13, para 30, 54ff; C-357/20, para 46.

The Commission's original proposal set out obligations of result ('shall ensure') for all three non-deterioration obligations.³⁰ In the Council's general approach, merely 'significant' is added to the second sentence of now Art.4(11), whereas the position on the now Art.4(12) contains the 'endeavour to put in place' wording.³¹

The Parliament's negotiation position then turned what is now Art.4(11) second sentence into 'shall endeavour to ensure', while deleting the remaining non-deterioration obligations (now Art.4(11) first sentence and Art.4(12)).³² For the marine target, the Parliament's position proposes 'shall endeavour to ensure' for the continuous improvement obligation, and 'shall endeavour to put in place, where possible, necessary measures with the aim to prevent' significant deterioration for the non-deterioration obligation once good condition is reached.³³ What is now Art.5(10) is also deleted.

None of the three institutions proposed the 'put in place measures which shall aim to ensure' wording for the now Art.4(11) in their initial positions, whereas 'endeavour to put in place' was proposed by the Council and Parliament, albeit for different provisions. The adopted wording thus appears to be a form of compromise, balancing the stricter approach of the Council and the Commission to make Art.4(11) an obligation of result with the Parliament's 'shall endeavour to put in place'.

This suggests that on a strictness scale, the 'put in place measures which shall aim to ensure' (Art.4(11)) sits in the middle, with a results-based obligation on the stricter and the effort-based obligation 'endeavour to put in place' on the weaker end.

2. Wording

The wording of 'shall put in place measures which shall aim to ensure' is not commonly used in related EU environmental legislation and does not seem to have been interpreted by the CJEU in a different context.³⁴ Yet, it seems that there are similarities with other obligations to take suitable measures.

While the wording of 'aim to ensure' in the English text could be read as a mere *attempt* to ensure,³⁵ other language versions suggest a stronger wording.³⁶

Similarly, the wording of Recital 37 then suggests that measures must be '*suitable*' / '*appropriées*' / '*geeignet*' to achieve non-deterioration.³⁷ This in turn reminds very strongly of the Art.6(2) Habitats Directive obligation to 'take *appropriate* steps'. 'Appropriate steps' and 'suitable measures' appear to have a synonymous meaning.³⁸

This suggests that while the wording of Art.4(11) NRL is on the face of it uncommon, it ultimately boils down to an obligation to take appropriate measures – an obligation that has been widely interpreted by the CJEU, particularly in the context of Art.6(2) Habitats Directive. This turn to the Habitats Directive for interpretative guidance is also supported by the strong links between the Habitats Directive and the NRL as set out below. A key difference, of course, remains that under Art.6(2) HD the measures *must* reach the result of non-deterioration which is not the case for Art.4(11) (cf. 2.A.5).

3. Objectives of the NRL

The objective of the NRL, as set out in Art.1, is to contribute to 'the long-term and sustained recovery of biodiverse and resilient ecosystems', the EU's climate objectives, food security and meeting the EU's international commitments.³⁹ The overarching target is for effective and area-based restoration measures to cover 20% of EU land and sea area by 2030, with all ecosystems in need of restoration being covered by 2050.⁴⁰

The Art.4 and 5 restoration obligations are the key area-based restoration measures in the NRL and thus central to achieving the overarching targets. While the Art.4 and 5 restoration targets themselves relate to the taking of measures (Art.4(1), (4) and (7) and Art.5(1), (2) and (5)), Art.4(17) and Art.5(14) add an obligation of result for the measures to

³⁰ European Commission, Proposal for a Regulation of the European Parliament and of the Council on nature restoration, COM/2022/304 final, Art.4(6) and (7) and Art.5(6) and (7).

³¹ Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on nature restoration – General approach, 20 June 2023, 10867/23, Art.4(6) and (7).

³² European Parliament, Amendments adopted by the European Parliament on 12 July 2023 on the proposal for a regulation of the European Parliament and of the Council on nature restoration, P9_TA(2023)0277, Art.4(6).

³³ European Parliament (n. 32) Art.5(6).

³⁴ Art.4(1)(a)(iv) WFD provides 'Member States shall implement the necessary measures in accordance with Article 16(1) and (8), with the aim of progressively reducing pollution from priority substances and ceasing or phasing out emissions, discharges and losses of priority hazardous substances'. However, as provided in Art.16 WFD, this is to be implemented through specific legislation on environmental quality standards which further specifies this obligation.

³⁵ See e.g. C-258/11, AG Opinion Sharpston, para 46ff for a similar language comparison.

³⁶ For example, the German version of 'ergreifen Maßnahmen, mit denen sichergestellt werden soll' or the French 'mettent en place des mesures visant à ce que' suggest that the obligation is to take measures that should ensure the respective outcomes.

³⁷ Recital 37 NRL states: 'not achieving those outcomes does not imply a failure to comply with the obligation to put in place measures suitable for reaching those outcomes'.

³⁸ This is also supported by the German and French wording of Art.6(2) HD of 'treffen die geeigneten Maßnahmen' and 'prennent les mesures appropriées'.

³⁹ Art.1(1) NRL.

⁴⁰ Art.1(2) NRL.

ultimately achieve their objectives of leading to good condition of habitats, favourable reference areas being reached, and the sufficient quality and quantity of habitats being achieved. To achieve and maintain this result, a combination of effective restoration and non-deterioration measures will be required.

In the recitals, the non-deterioration provisions are linked to this goal of *long-term* and *sustained* recovery with importance being placed on the efficiency of the restoration measures, the results of which can be measured over time through sites that show continuous improvement, as well as the gradual increase of habitats in good condition or sufficient quality and quantity.⁴¹ For sites that have reached good condition, Recital 37 explicitly states it is important that 'those habitat types do not significantly deteriorate, so as not to jeopardise the *long-term* maintenance or achievement of good condition.'⁴²

The non-deterioration provisions in Art.4(11) are thus core to the achievement of the overall objectives of the NRL which are focused on the long-term resilience and recovery of biodiverse and resilient ecosystems, rather than simply the achievement of short-term restoration.⁴³ In particular, the non-deterioration provisions are indispensable in achieving the long-term and sustained nature of the recovery.

4. Link to Habitats Directive

The NRL is strongly linked to the Habitats Directive (HD) and contains numerous references to it.⁴⁴ The Habitats Directive's aim is 'to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora'⁴⁵ and measures taken pursuant to the Directive 'shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest'.⁴⁶ The overarching objective is to set up a 'coherent European ecological network of special areas of conservation' under the name Natura 2000.⁴⁷ The long-term nature of this conservation is inherent in the definition of the 'favourable conservation status' for habitats with explicit references to 'long-term natural distribution, structure and function', 'long-term survival' of typical species, and structures for 'long-term maintenance' in its definition.⁴⁸ **Conservation explicitly includes the restoration of habitats and species in its Art.1(a) HD definition and the Art.6(2) HD non-deterioration obligation has been interpreted to also include a clear restoration obligation for Natura 2000 sites that have deteriorated.**⁴⁹

The NRL recitals state that restoration under the HD will not be enough to reverse biodiversity loss and that therefore, 'building on' the HD and the Birds Directive 'and in order to support the achievement of the objectives set out in those Directives' restoration measures are needed, inside and outside Natura 2000 sites.⁵⁰ Specifically, the NRL should add a deadline to the goals set by the Birds and Habitats Directives while recognising pre-existing obligations.⁵¹

Especially Art.4 and 5 are fundamentally interlinked with the Habitats Directive. The area coverage of NRL Annex I habitats corresponds to HD Annex I and NRL Annex II lists marine habitats covered by the HD and the Marine Strategy Framework Directive⁵² (MSFD). Reaching good condition of habitat types under Art.4 and 5 means either directly achieving favourable conservation status under the HD or the equivalent thereof.⁵³ Likewise, the NRL's favourable reference area and sufficient quality and quantity of species' habitats directly build upon the favourable conservation status of habitats and species under the HD.⁵⁴ Art.4(1) NRL further provides that Member States shall, 'as appropriate' prioritise restoration measures inside Natura 2000 areas for their 2030 targets.

Consequently, there is a strong overlap between the NRL and the Habitats Directive in terms of the area covered (Natura 2000 areas as well as the wider Annex I HD), their objectives (restoration and conservation of biodiversity), and the measures that are required (restoration measures). Further, the NRL is seen as an 'implementation tool' for the Habitats Directive. This strongly suggests that the provisions of the NRL should be interpreted in a manner that is coherent with the HD and interpreted in light of the case law on the HD.⁵⁵ If this was otherwise and key concepts in the NRL would be defined incoherently or in weaker terms than in the HD, the NRL would not be able to achieve the goal of aiding the implementation to the HD.

41 NRL recitals 33-36.

42 NRL recital 37, emphasis added.

43 Cf. Agapakis (n. 18).

44 A simple search of '92/43' leads to 74 mentions of the Habitats Directive in the NRL text, including the recitals.

45 Art.2(1) HD.

46 Art.2(2) HD.

47 Art.3(1) HD.

48 Art.1(e) HD; similar wording is found in the definition of the favourable conservation status for species, see Art.1(f) HD.

49 See C-117/00, para 31; C-301/12, AG Opinion Kokott, para 50; Hendrik Schoukens, 'Non-Regression Clauses in Times of Ecological Restoration Law: Article 6(2) of the EU Habitats Directive as an unusual ally to restore Natura 2000?' (2017) Utrecht Law Review 13 124.

50 NRL Recitals 25-26.

51 NRL Recitals 27-28.

52 Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy.

53 Art.3(4) and (6) NRL.

54 Art.3(8) – (10) NRL.

55 Cf. C-723/21, AG Opinion Medina, para 40ff, relying on the WFD to interpret the Drinking Water Directive (DWD) as the later was linked to the former, with the DWD providing more specific obligations for some water bodies (the case was discontinued after the AG Opinion and no judgment was given).

5. Enforceability / Burden of proof

A key difference between the Art.4(11) NRL obligations and an obligation of result to avoid deterioration lies in the burden of proof.⁵⁶ To establish an infringement of the Art.6(2) HD obligation of result to avoid deterioration, it is sufficient to establish that there is a risk or probability of significant deterioration without needing to prove a cause-and-effect relationship between the harmful activity and the deterioration.⁵⁷ In other words, it is sufficient to point at the failure to achieve the result.

For the Art.4(11) NRL measures-based obligation, merely pointing to deterioration or lack of continuous improvement in itself is not sufficient to establish non-compliance. However, even though such deterioration is not conclusive of non-compliance, it can provide an indication that the measures have not been adequate.

For a merely effort-based obligation, Advocate General Kokott considered that while deterioration does not provide 'conclusive proof' of non-compliance, it provides evidence that not enough endeavours are made, thus requiring the Member State to demonstrate that it is taking enough efforts.⁵⁸ Applying this to the measures-based obligations of Art.4(11), which are stricter than an effort-based obligation (cf section 2.A.1-2 above), would suggest that **the burden of proof to demonstrate that appropriate measures have been taken shifts to the Member State once deterioration or lacking continuous improvement has been established.**

Prior to the deterioration occurring, the information included in the National Restoration Plans (NRPs) pursuant to Art.15(3)(f) and (h) must be suitably detailed to demonstrate the appropriateness of the measures (see section 6 below). It would then seem that if the measures are inappropriate in light of the objectives of Art.4(11) and the ecological requirements of the relevant areas, based on the information in the NRPs and other implementation policies at national level, it is for the Member State (or responsible authority) to demonstrate otherwise.

Conclusion on the nature of the obligation 'shall put in place measures which shall aim to ensure' of NRL Art.4(11)

To summarise, based on the drafting process of the NRL, the obligation to take 'measures which shall aim to ensure' can be considered as a middle ground between a results-based obligation and a purely effort-based obligation. The wording of Art.4(11) suggests that it, in essence, requires the taking of appropriate measures, similar to Art.6(2) HD. The next sections will analyse what appropriate measures Art.4(11) appears to require.

The non-deterioration obligations in Art.4(11) are central to the objectives of the NRL and should thus be interpreted accordingly. Due to the strong links with the Habitats Directive, the non-deterioration obligations should be interpreted coherently with the HD and concepts should be given the same meaning. A difference between Art.6(2) HD and the Art.4(11) non-deterioration obligations of the NRL lies in the enforceability of Art.4(11) as the latter is not results-based.

⁵⁶ Cf de Leeuw and Backes (n. 26) 34.

⁵⁷ C-404/09, para 142; C-559/19, para 155;

⁵⁸ C-418/04, AG Opinion Kokott, para 110, in the context of Art.4(4) second sentence BD.



B. Continuous improvement

Art.4(11) first sentence provides:

*Member States shall put in place **measures which shall aim to ensure that the areas that are subject to restoration measures in accordance with paragraphs 1, 4 and 7 show a continuous improvement** in the condition of the habitat types listed in Annex I until good condition is reached, and a continuous improvement of the quality of the habitats of the species referred to in paragraph 7, until the sufficient quality of those habitats is reached.*⁵⁹

Art.4(11), first sentence applies to 'areas that are subject to restoration measures in accordance with [Art.4] paragraphs 1, 4 and 7'. These paragraphs cover the obligations to improve habitats to good condition, the re-establishment obligation to reach the favourable reference area for habitat types, and restoration measures to improve the quality and quantity of BHD species' habitats.

This section analyses the scope of this obligation, examines 'continuous improvement' and considers what appropriate measures to achieve this improvement could be.

1. Scope

Because the continuous improvement obligation is closely linked to the restoration measures to be taken under Art.4(1), (4) and (7), it appears helpful to briefly consider the content of these restoration obligations before turning to the meaning of 'areas subject to restoration measures'.

a. Art.4(1), (4) and (7) restoration obligations

Art.4(1) requires Member States to 'put in place restoration measures that are necessary to improve to good condition areas of habitat types listed in Annex I which are not in good condition', with restoration measures required to be in place on at least 30% of such areas by 2030, at least 60% of such areas by 2040 and at least 90% of such area by 2050.

Art.4(4) requires Member States to put in place the necessary restoration measures to re-establish habitat types to reach their favourable reference area (FRA) in at least 30% of the additional area needed to reach the FRA by 2030, at least 60% thereof by 2040 and on 100% thereof by 2050.

Art.4(7) requires Member States to take restoration measures to improve the quality and quantity of terrestrial, coastal and freshwater habitats of species protected under the BHD until sufficient quality and quantity of those habitats is achieved. It does not provide a timeline by when these measures need to be taken.

All three provisions therefore require the taking of restoration measures that are necessary to achieve a specified goal.

The NRL defines restoration as follows in Art.3(3) NRL:

*"'restoration' means the process of actively or passively assisting the recovery of an ecosystem in order to improve its structure and functions, with the aim of conserving or enhancing biodiversity and ecosystem resilience, **through improving an area of a habitat type to good condition, re-establishing favourable reference area, and improving a habitat of a species to sufficient quality and quantity** in accordance with Article 4(1), (2) and (3) and Article 5(1), (2) and (3), and meeting the targets and fulfilling the obligations under Articles 8 to 12, including reaching satisfactory levels for the indicators referred to in Articles 8 to 12;"*⁶⁰

Restoration, and restoration measures, are hence also defined by reference to the desired result. Therefore while Art.4(1), (4) and (7) do not explicitly require Member States to ensure the result of good condition, FRA or

⁵⁹ Emphasis added.

⁶⁰ Emphasis added. It seems that the references to Art.4(1), (2) and (3), as well as Art.5(1), (2) and (3) in this paragraph are an error and should instead be Art.4(1), (4) and (7) and Art.5(1), (2) and (5) as these are the provisions referring to the restoration obligations to improve habitats to good condition, re-establish favourable reference area and improve habitats of species to sufficient quality and quantity. The initial Commission draft of the NRL set out these obligations in the first three paragraphs of Art.4 and 5, however, the final version contains provisions relating to derogations in, amongst others, Art.4(2), (3), (5) and (6) and Art.5(3) and (4), thus changing the paragraph numbering of the restoration obligations.

sufficient quality and quantity of habitats by a certain deadline, Member States must take measures that are 'necessary' to reach the result. Art.4(17) then adds an obligation of result, albeit without a deadline, to ensure that the restoration measures ultimately achieve their objectives. The continuous improvement obligation thus seems to provide a bridge between the Art.4 and 5 restoration measures and the Art.4(17) and 5(14) obligations of result to ensure they ultimately achieve their objectives.

b. 'Areas subject to restoration'

Art.4(11) first sentence applies to areas '*subject to restoration measures in accordance with paragraph 1,4 and 7*' (emphasis added). It seems that three different approaches as to what this means are possible:

First, a broad interpretation would cover all areas where restoration measures are required under Art.4 by 2030 or even 2050. This would mean that all areas need to show a continuous improvement in their condition or quality from now on, before restoration measures have been taken and possibly even before the relevant measures have been identified in the NRP, which seems unlikely.⁶¹

Second, a narrow interpretation, supported by some scholars,⁶² would cover only those areas where restoration measures are currently being taken or have been taken on the ground, i.e. once the shovel has hit the ground.⁶³

However, if the continuous improvement obligation only applied from the moment restoration measures are physically taken, Member States could easily circumvent it by not taking restoration measures in time.⁶⁴ Given that Art.4(11) first sentence provides specifically '*subject to restoration measures in accordance with paragraphs 1, 4 and 7*' (emphasis added), it suggests that measures are being taken in compliance with paragraph 1, 4 and 7.

In addition, it seems that this second approach would make it difficult to assess compliance with the continuous improvement obligation, in particular to identify the moment from when the obligation applies. For example, for Art.4(1) generally, the Commission's NRP format⁶⁵ provides for the habitat groups, *indicative* total surface area and *indicative* maps of areas subject to restoration measures by 2030.⁶⁶ In section C on the specific restoration measures, para 14.2 on the timing only covers *broad timespans* and does not set out when measures are planned to start.

A third and middle ground approach could thus be that the continuous improvement applies once restoration measures are taken, though at the latest by the deadline by which measures must have been taken in accordance with Art.4(1) and (4). This would avoid the potential for Member States to abusively circumvent their obligation,⁶⁷ while also recognising the reality of restoration measures needing to start before continuous improvement can take place. This would mean 30% of Annex I habitats not in good condition and 30% of the FRA will need to be subject to continuous improvement measures by 2030, even if, in breach of Art.4(1) or (4) restoration measures have not yet been taken on 30% of the area.

2. Continuous improvement

The NRL recitals specify that 'to ensure that the restoration measures are efficient and that their results can be measured over time, it is essential that the areas that are subject to [Art4(1)] restoration measures [...] show continuous improvement until good condition is reached', with a similar provision for Art.4(7) restoration measures.⁶⁸

The definitions of *good status*, *favourable reference area*, and *sufficient quality and quantity of habitat* are all closely linked to the concept of favourable conservation status under the Habitats Directive. This suggests that a similar methodology as for the monitoring of the trends in conservation status could be applied.⁶⁹ A continuous improvement would then relate to the improvement of the constituent elements of the relevant status, requiring, for example, that there is an improvement in at least one of the elements of the good condition definition, i.e. structure, function and typical species composition.

While the obligation to reach favourable conservation status under Art.6(1) Habitats Directive applies at the natural

⁶¹ de Leeuw and Backes (n. 26), 35.

⁶² Emma Lees and Ole W Pedersen, 'Restoring the Regulated: The EU's Nature Restoration Law' (2025) Journal of Environmental Law, eqae032, 12; de Leeuw and Backes (n. 26) 32.

⁶³ de Leeuw and Backes seem to suggest Art.4(11) first sentence would apply only from then: de Leeuw and Backes (n. 26), 36.

⁶⁴ Cf. C-355/90, para 22 where the CJEU rejects an interpretation of Art.4 BD that would make the Art.4(4) BD obligation contingent upon full classification.

⁶⁵ Commission Implementing Regulation (EU) 2025/912 of 19 May 2025 laying down rules for the application of Regulation (EU) 2024/1991 of the European Parliament and of the Council as regards a uniform format for the national restoration plan.

⁶⁶ *Ibid*, Section 6.2.2.

⁶⁷ Cf C-355/90, para 22

⁶⁸ Recital 33 and 34 NRL.

⁶⁹ Cf EEA's compilation of Art.17 HD data indicating trends in conservation status in European Environmental Agency, State of Nature in the EU, Report 10/2020.

range of the habitat or species,⁷⁰ the obligation to reach good condition and the continuous improvement obligation apply at site-level. The specific derogation under Art.4(13) that allows Member States to apply the Art.4(11) and (12) obligations at biogeographical level, subject to strict criteria ([see section 5.A below](#)), supports this site-level approach.

The continuous improvement obligation applies until the good condition or sufficient quality of species' habitats is reached, i.e., until the restoration measures have reached their objective and the site counts towards the Art.4(17) target. Continuous improvement also fundamentally requires that the condition does not get worse and thus also entails a non-deterioration obligation. Yet, analogous to the WFD, both obligations exist autonomously, and the non-deterioration obligation is not merely an 'instrument placed at the service of the obligation to enhance' restoration areas.⁷¹

3. Appropriate measures

Building upon the above approach to continuous improvement, it thus seems that Art.4(11) first sentence already requires appropriate measures to prevent deterioration, prior to good condition or sufficient quality of species' habitats has been reached. Consequently, the appropriate measures set out in **section 2.C.3** below also appear applicable from the moment Art.4(11) first sentence applies.

Beyond non-deterioration, appropriate measures must also be taken that seek to ensure that restoration measures achieve their objectives and lead to a continuous improvement until good condition is achieved.

Guidance for what measures may be needed for continuous improvement may be found in the rationale behind the underlying restoration measures and how these were intended to achieve good condition as well as in Art.6(1) HD which requires the taking of 'necessary conservation measures' in order to achieve favourable conservation status.⁷² The necessary conservation measures must 'correspond to the ecological requirements of the natural habitat types and species'.⁷³ Alignment with the ecological requirements of the natural habitat types and species for which restoration measures are being taken will thus be critical in the assessment of which measures are considered appropriate.

Conclusion on Art.4(11) first sentence

To summarise, the continuous improvement obligation of Art.4(11) first sentence provides a bridge between the Art.4 and 5 restoration measures and the Art.4(17) and 5(14) obligations of result to ensure they ultimately achieve their objectives. The obligation applies from the moment restoration measures have been taken on the ground, or once they should have been taken in line with the Art.4 and 5 requirements and deadlines. The continuous improvement relates to the constituent elements of good condition or sufficient quality of species' habitats and applies at site-level. Appropriate measures for continuous improvement seem to be linked to the underlying restoration rationale while they also entail a non-deterioration obligation which suggests that many of the measures outlined below for Art.4(11) second sentence ([Section 2.C.3](#)) are also applicable.

C. Non-deterioration of good condition

Art.4(11) second sentence provides:

*Without prejudice to Directive 92/43/EEC, Member States **shall put in place measures which shall aim to ensure that areas in which good condition has been reached, and in which the sufficient quality of the habitats of the species has been reached, do not significantly deteriorate.***⁷⁴

As argued above ([see section 2.A.2](#)), the Art.4(11) obligations to 'put in place measures which shall aim to ensure' should be interpreted as an obligation to take appropriate measures. In addition, due to the objectives of the NRL and its significant overlap with the Habitats Directive, the NRL should be interpreted in light of the CJEU's interpretation of the Habitats Directive.

For the interpretation of Art.4(11) second sentence, the very similar obligation under Art.6(2) HD to 'take appropriate

⁷⁰ European Commission, 'Managing Natura 2000 sites – The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC', Commission Notice C(2018) 7621 final, 16; though see also Schoukens (n. 49) 142, suggesting this is debated.

⁷¹ C-461/13, para 49; C-525/20, para 35.

⁷² See also European Commission (n. 70) 15ff.

⁷³ C-508/04, EC v Austria, para 76 and 87.

⁷⁴ Emphasis added.

steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species' is therefore particularly relevant.⁷⁵ While a key difference is that Art.6(2) HD provides for a clear obligation of result to avoid deterioration, it is argued that the key principles of what 'appropriate steps' to reach this result are, should nonetheless also apply to the Art.4(11) NRL non-deterioration obligation. Similarly, guidance on the definition of 'significant deterioration' can be found in the rich Art.6(2) HD CJEU jurisprudence.

This section first examines the scope of the obligation, then analyses what 'significant deterioration' means in this context and, lastly, considers what constitute 'appropriate measures' for the purpose of Art.4(11) second sentence.

1. Scope

The obligation under Art.4(11) second sentence applies to areas in which 'good condition' or 'sufficient quality of the habitats of the species' has been reached. This obligation therefore relates to the restoration obligations in Art.4(1) and (7). While Art.4(7) requires Member States to ensure the sufficient quality and *quantity* of species' habitats, the non-deterioration provision only refers to the quality. Nonetheless, potential increases in the quantity of the species' habitats will also be covered by this provision, though only once these new increased habitat areas have also reached the sufficient quality. Before this point, the increased habitat areas will be subject to the continuous improvement obligation under Art.4(11) first sentence. Hence, the obligation relates to areas where the restoration measures have been successful and have reached their objective of achieving good condition and sufficient quality of species' habitats.⁷⁶ As Art.4(11) first sentence, this non-deterioration obligation also applies at site-level.

However, this does not mean that the obligation to take measures only needs to be considered from the moment that 'good condition' or 'sufficient quality of the habitats of the species' has been reached or from the moment that deterioration occurs. On the contrary, as for Art.6(2) HD, the Art.4(11) NRL non-deterioration obligation should also be interpreted as being of inherently 'anticipatory nature'.⁷⁷ In C-418/04 (*EC v Ireland*), the CJEU clearly stated that the mere 'reactive protection' was insufficient to prevent deterioration under Art.6(2) HD as it would only apply once the harm was already done.⁷⁸ Similarly, in C-355/90 (*Santoña Marshes*) the Court clarified that the non-deterioration obligation under the Birds Directive applied before any reduction in bird numbers is observed.⁷⁹

Such an approach seems inherent in the notion of seeking to prevent deterioration. Therefore, appropriate measures aiming to avoid deterioration should also apply pre-emptively, prior to actual deterioration being caused. This means that the temporal scope of the Art.4(11) non-deterioration obligation may, depending on the habitat needs, thus start prior to good status or sufficient quality of the habitats of the species being reached.

2. Significant deterioration

The term 'deterioration' or 'significant deterioration' is not defined in the NRL. Similarly, neither the HD nor the WFD contain definitions of 'deterioration'. However, the CJEU's interpretation of the term in these two Directives can provide guidance for the interpretation of the NRL.

a. Habitats Directive

A prima facie distinction between Art.6(2) HD and Art.4(11) second sentence NRL seems to be that the former covers all deterioration whereas the latter only applies to *significant* deterioration.

However, the CJEU has consistently held that Art.6(3) HD, which requires the exclusion of a 'significant effect' on the habitat before a project can be authorised, and Art.6(2) HD must be interpreted as a coherent whole and provide for the same level of protection.⁸⁰ Accordingly, Art.6(2) HD is effectively also not an absolute prohibition of any deterioration, but instead an obligation to ensure no significant deterioration or disturbance in light of the conservation objectives of the site.⁸¹ This does not merely mean assessing whether an activity interferes with favourable conservation status being maintained, but also assessing whether it has negative impacts on the achievement of favourable conservation status.⁸²

The Commission's guidance note on Art.6 HD similarly defines deterioration by reference to a reduction of the area

⁷⁵ Art.12(1)(d) HD, prohibiting the deterioration or destruction of breeding sites or resting places of protected species, was also considered but deemed less relevant for the interpretation of the non-deterioration provisions of the NRL due to the focus on specific protected species, rather than habitats.

⁷⁶ The provision does not explicitly specify that this obligation only applies to areas where good condition or sufficient habitat quality has only been reached due to restoration measures taken under Art.4(1) and (7). Theoretically, it could therefore also apply to other areas where good condition has been reached, for example, to areas subject to pre-restoration non-deterioration measures under Art.4(12) where, with time, the absence of harmful factors may have been enough to reach good condition. Cf. Lees and Pedersen (n. 62) 13.

⁷⁷ European Commission (n. 70) 25.

⁷⁸ C-418/04, para 208.

⁷⁹ C-355/90, para 15; confirmed also in C-186/06, para 36.

⁸⁰ C-258/11, para 32; C-241/08, para 31; C-399/14, para 52; C-293/17, para 87; C-66/23, para 41; European Commission (n. 70) 35.

⁸¹ C-258/11, para 33 and AG Opinion Sharpston, para 44; C-241/08, para 32 and AG Opinion Kokott para 28; see also Schoukens (n. 49) 140.

⁸² Schoukens (n. 49) 141.

coverage of the habitat, the structure and functions necessary for the long-term maintenance of the habitat or the status of the species associated with the habitat.⁸³ This relates directly to the elements of favourable conservation status as defined in Art.1(e) HD.

In the recent C-47/23 (*EC v Germany*) case, the CJEU further confirmed that the non-deterioration obligation applies at site-level and cannot be off-set by improvements on other sites.⁸⁴

b. Water Framework Directive

In C-461/13 (*BUND v Germany*), the CJEU established that for the purposes of the non-deterioration obligation under Art.4(1)(a)(i) WFD, 'deterioration' means the falling of a class of at least one of the quality elements related to the status of a water body, even if that does not lead to the fall in the classification of the water body as such.⁸⁵ Where this quality element is already in the lowest class, any worsening of that element is considered as 'deterioration' of that water body.⁸⁶ It has been argued that this approach could also be transferable to Art.6(2) HD and thus provide that if an activity affects one of the three elements of the favourable conservation status definition (area coverage, structure and function or status of associated species) it should be considered as deterioration for the purposes of Art.6(2) HD.⁸⁷

c. Application to NRL

As set out above ([section 2.A.3 and 4](#)), due to the strong overlap and similar objectives of the HD and NRL, the term 'deterioration' should be interpreted in a coherent manner. Consequently, the approach to deterioration under Art.6(2) HD should also be applied to the NRL. In lieu of the conservation objectives, the restoration objectives of good condition and sufficient quality of habitats should be the benchmark for what is considered to be a significant deterioration.⁸⁸

The definition of *good condition* in the NRL is very similar to that of *favourable conservation status (FCS)* in the HD and should contribute to reaching or maintaining FCS for Annex I habitats.⁸⁹ Significant deterioration of a habitat in good condition then seems to be present if an activity impacts the maintenance of 'good condition' of the specific habitat in question. Building upon the WFD approach, this would be present if one of the constituent elements of area coverage, structure and function or status of associated species was negatively impacted in its ecological integrity, stability or resilience.⁹⁰

Similarly, the definition of *sufficient quality of habitats* refers to the ecological requirements of the species to be met and should contribute to reaching or maintaining FCS for species covered by the Birds and Habitats Directives.⁹¹ Significant deterioration of a habitat in sufficient quality for a protected species then seem to be present where the ecological requirements of a species for one stage of its biological cycle is negatively affected.

3. Appropriate measures

Continuing the argument that, in essence, Art.4(11) second sentence NRL requires (as Art.6(2) HD) 'appropriate measures' (aiming) to prevent deterioration, the question arises where 'appropriate measures' end and a results-based obligation starts. In other words, are all measures that are deemed appropriate in the CJEU's interpretation of Art.6(2) HD also appropriate in the context of the NRL or does what is appropriate depend on whether the result is mandatory or not?

As summarised by the CJEU in the *Waldschlößchenbrücke* case (C-399/14), '[t]he term "appropriate steps" contained in Article 6(2) of the Habitats Directive implies that Member States enjoy discretion when applying that provision' to then recall that, 'nevertheless [...] an activity complies with Article 6(2) of the Habitats Directive only if it is guaranteed that it will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives'.⁹²

Likewise, the wording in the NRL implies that Member States enjoy discretion. Yet, the delimiting factor is a different one. Rather than only complying with Art.4(11) second sentence NRL when it is guaranteed that non-deterioration will be achieved, the limit to Member States' discretion appears to be the *appropriateness* of the measures to achieve non-

⁸³ European Commission (n. 70) 30.

⁸⁴ C-47/23, para 96.

⁸⁵ C-461/13, para 69.

⁸⁶ C-461/13, para 69.

⁸⁷ Schoukens (n. 49) 142.

⁸⁸ Cf. de Leeuw and Backes (n. 26) 38f.

⁸⁹ Art.3(4) NRL.

⁹⁰ Cf. Art.3(4) NRL.

⁹¹ Art.3(9) NRL.

⁹² C-399/14, para 40-41; see also C-404/09, para 126.

deterioration. They must be adequate to ensure no deterioration, in relation to the restoration objectives of the specific habitats.

As concluded above based on the drafting process ([section 2.A.1](#)), the measures-based obligation under Art.4(11) appears to be in the middle on a stringency scale between a results-based obligation and the pure effort-based obligation under Art.4(12). Therefore, the appropriateness of the non-deterioration measures taken in the context of Art.4(11) must be determined in a stricter manner than for the effort-based obligation under Art.4(12) (see [section 3.B below](#)).

- The following have been interpreted to be key elements of what constitute 'appropriate steps' under Art.6(2) HD:
- As a starting point, the legal regime must be '**specific, coherent and complete**'.⁹³
- Measures must be taken **preventatively**, rather than merely offer reactive protection ([cf. also section 2.C.1 above](#)).⁹⁴
- Art.6(2) HD does not explicitly limit its scope to measures inside Natura 2000 area. To prevent deterioration, measures outside Natura 2000 areas may be required where activities outside protected sites could lead to a deterioration inside.⁹⁵
- The implementation of Art.6(2) HD may, depending on the pressures on the site, require, both, **measures to avoid external human-caused harm, as well as measures to prevent natural developments that may cause deterioration of the conservation status of the protected habitats and species**.⁹⁶ Art.6(2) HD is thus also not limited to intentional acts.⁹⁷
- Provisions implementing the non-deterioration obligation must be 'specifically linked to the protection of natural habitats and of habitats of species against deterioration' and general provisions (e.g., criminal law trespass rules) are not sufficient.⁹⁸ 'Clear and precise implementation' is required to ensure legal certainty regarding the application of the HD.⁹⁹
- Art.6(2) HD applies at **site-level** meaning that significant deterioration needs to be prevented in each Natura 2000 site and cannot be offset by improvements elsewhere.¹⁰⁰
- Member States must take **site-specific, regular and consistent surveillance measures** as 'appropriate steps' to monitor and prevent non-deterioration.¹⁰¹
- The **level of protection required** under Art.6(2) HD **must**, amongst others, **be determined by reference to the conservation objectives of the site**.¹⁰² This can require legally binding measures prohibiting the drivers of deterioration, such as harmful agricultural activities.¹⁰³
- While the Art.6(3) HD process does not directly apply to projects that were authorised before the site's designation as a Natura 2000 site, 'appropriate steps' under Art.6(2) HD may require a subsequent review of existing authorisations to ensure that the ongoing non-deterioration obligation is complied with.¹⁰⁴
- Degradation of a site does not, in itself, justify its declassification.¹⁰⁵ Instead, Art.6(2) HD also entails an obligation to take restoration measures to remedy the deterioration.¹⁰⁶
- A perceived inconsistency between different EU policies – e.g. Common Agricultural Policy (CAP) subsidies and the Birds and Habitats Directives – does not justify or authorise non-compliance with the non-deterioration obligation.¹⁰⁷

⁹³ European Commission (n. 70) 27 and the case law cited.

⁹⁴ C-418/04, para 208.

⁹⁵ European Commission (n. 70) 26.

⁹⁶ C-6/04, para 34 and AG Opinion Kokott, para 19 C-404/09, para 135; C-441/17, para 209; C-444/21, para 149; C-47/23 para 95.

⁹⁷ Cf. European Commission (n. 70) 26.

⁹⁸ C-418/04, para 220.

⁹⁹ C-418/04, para 220; C-6/04, para 26.

¹⁰⁰ C-47/23, para 96.

¹⁰¹ C-47/23, para 109-110.

¹⁰² C-66/23, para 66; C-47/23, para 113.

¹⁰³ C-47/23 para 114ff.

¹⁰⁴ C-399/14, para 38-44, 54; C-404/09, AG Opinion Kokott, para 70

¹⁰⁵ C-301/12, para 36.

¹⁰⁶ C-301/12, AG Opinion Kokott, para 50; Schoukens (n. 49).

¹⁰⁷ C-96/98, para 40 (referring to Art.4(4) BD, now replaced by Art.6(2) HD, see Art.7 HD).

- It is not possible to generally declare that certain activities do not constitute deterioration without actually ensuring that they do not cause deterioration or disturbance which significantly affects the HD's objectives.¹⁰⁸

All of the above principles should also apply when assessing the appropriateness of the Art.4(11) second sentence non-deterioration measures. They provide general criteria to determine the appropriateness of the measures to achieve non-deterioration (the specifics of which depend on the needs of the relevant sites), rather than guaranteeing the result. This includes the last element listed above, as also there the emphasis is not on the guarantee of non-deterioration, but on the inadequacy of a mere declaration of non-deterioration without any scientific basis.

It therefore seems that the appropriateness of the measures does not depend on whether the result is mandatory or not, at least not based on the CJEU's interpretation of HD Art.6(2) to date. The appropriateness needs to be assessed *ex ante* against the objectives to be achieved. As the objective is the same for HD Art.6(2) and NRL Art.4(11) second sentence, what is appropriate does not appear to change with whether the objective is mandatory or not. Instead, this difference appears to play out in relation to the burden of proof and the enforceability of the obligation ([cf. section 2.A.5 above](#)).

In relation to a specific site, due to the results-based obligation, more stringent measures may be necessary to ensure the result of non-deterioration is actually achieved under HD Art.6(2) than under the NRL obligation. However, this does not seem to negate the application of the general principles of what constitutes appropriate measures when the aim is to avoid deterioration as summarised above.

Conclusion on Art.4(11) second sentence

To summarise, the obligation in Art.4(11) second sentence is the closest to the Art.6(2) HD non-deterioration obligation and it seems that many of the principles developed in the CJEU's jurisprudence on Art.6(2) HD are applicable to it.

It applies once the objective of the restoration measures has been achieved but nonetheless requires anticipatory measures to prevent deterioration before it occurs. Significant deterioration should be defined in relation to the constituent elements of good condition and sufficient quality of species habitats, drawing inspiration from both the HD and the WFD.

Art.4(11) second sentence in essence requires Member States to take appropriate measures. Despite differences in the nature of the obligation, it nonetheless seems that the key principles to consider the appropriateness of non-deterioration measures under Art.6(2) HD are transferable, including the need for measures to be specific to the risks and needs of the site in question and the potential need for legally binding measures in place to address drivers of deterioration. A key difference between the provisions constitutes the burden of proof.

¹⁰⁸ C-241/08, para 32.

3. Art.4(12) pre-restoration non-deterioration¹⁰⁹

Art.4(12)¹¹⁰ provides:

*Without prejudice to Directive 92/43/EEC, Member **States shall, by the date of publication of their national restoration plans in accordance with Article 17(6) of this Regulation, endeavour to put in place necessary measures with the aim of preventing significant deterioration of areas where the habitat types listed in Annex I to this Regulation occur and which are in good condition or are necessary to meet the restoration targets set out in paragraph 17 of this Article.***

Art.4(12) sets out a third non-deterioration obligation but provides a different type of obligation through the wording 'endeavour to put in place'. This section sets out the scope of Art.4(12) before analysing what this type of obligation requires and what 'necessary measures' are in this context.

A. Scope

Art.4(12) applies to Annex I habitats which are either already in good condition or are not in good condition but necessary to meet the restoration targets of Art.4(17).

Art.4(17) relates to the obligation to take restoration measures under Art.4(1), (4) and (7) and adds, in essence, an *obligation of result* for the objectives of the restoration measures to ultimately be achieved, *albeit without a deadline*. Art.4(17)(a) links to Art.4(1) and (4) and requires Member States to ensure that the area of Annex I habitats in good conditions increases until at least 90% of this area is in good condition and the favourable reference area for each habitat type is reached in each biogeographical region of the Member State. Art.4(17)(b) links to Art.4(7) and requires Member States to ensure an increasing trend 'towards the sufficient quality and quantity' of the terrestrial habitats of the species protected under the Birds and Habitats Directives.

In light of the Art.4(17) obligation, the territorial scope of Art.4(12) covers all areas that are necessary to reach the favourable reference area for each habitat type, at least 90% of all Annex I habitats, and all areas that are needed to ensure sufficient quality and quantity of the habitats of protected species. These three will likely overlap. This suggests that unless Member States can clearly exclude 10% of Annex I habitats that are not required to establish the favourable reference area or the sufficient quality and quantity of species' habitats and which are not needed to meet the 90% good condition target, effectively, Member States should apply the Art.4(12) pre-restoration non-deterioration obligation to all Annex I habitats.¹¹¹

Pursuant to Art.14(2)(a)(i)-(iii) and Art.14(2)(b) Member States will have to quantify these areas in preparation of their national restoration plans and include a quantification of the areas to be restored pursuant to Art.15(3)(a). The uniform NRP format foresees information on the total area of Annex I habitat types and the favourable reference areas (para 6.1.2), as well as information on the indicative total surface area subject to restoration measures under Art.4(7) (section 6.2.5). Thus, the territorial scope of Art.4(12) should be clearly identified, at the latest by the submission of the draft NRPs.

Temporally, Art.4(12) applies from the moment the NRL entered into force (August 2024) and measures should be 'put in place' by 1 September 2027, the last deadline for the publication of the final NRP pursuant to Art.17(6).¹¹² This means that Member States must consider their obligations under Art.4(12) already now to plan measures and start implementing them.

B. 'Endeavour to put in place'

In seeking to interpret the requirements of the obligation to 'endeavour to put in place necessary measures' this section builds upon the analysis of the drafting history, context, and objective of the NRL set out in section 2.A above and thus focuses on the wording of Art.4(12) and the context of the provision in the NRL.

¹⁰⁹ While Lees and Pedersen (n. 62) refer to the Art.4(12) NRL obligation as 'pre-emptive non-deterioration' the term 'pre-restoration non-deterioration' is preferred as all non-deterioration measures must apply pre-emptively before deterioration occurs, rather than retroactively (see section 3.C.1 above).

¹¹⁰ The Art.5 equivalent is Art.5(10).

¹¹¹ See also section 5.A.3 below on the link to the Art.4(13) derogation; Cf also de Leeuw and Backes (n. 26) 36.

¹¹² Assuming Member States submit their draft plan by 1 September 2026 pursuant to Art.16 and that the Commission sends their observation six months thereafter, the deadline set under Art.17(4). If the Commission sends their observations earlier, the final plans is due earlier as Art.17(6) NRL requires the final submission six months after the receipt of Commission observations.

1. Wording

While Art.3(3) and 10 HD contain similar endeavour-based wording,¹¹³ the CJEU has not interpreted these obligations,¹¹⁴ building instead on Art.6(2) HD to strengthen the connectivity of the Natura 2000 network.¹¹⁵

Although worded differently, Art.4(4) Birds Directive (BD) provides: 'Outside these protection areas, Member States shall also *strive to avoid pollution or deterioration of habitats*'.¹¹⁶ Art.7 HD provides that Art.6(2), (3) and (4) HD replace the first sentence of Art.4(4) BD. The second sentence of Art.4(4) BD, however, still applies as a self-standing obligation.¹¹⁷

'Strive' and 'endeavour' appear to have a synonymous meaning which seems to be supported by a comparison with other language versions of the NRL and the Birds Directive.¹¹⁸ Art.4(4) second sentence BD thus seems to be able to provide interpretative guidance on the type of obligation entailed in Art.4(12) NRL.

2. Context of NRL

As set out in recital 37, the pre-restoration non-deterioration obligation of Art.4(12) is 'important to avoid increasing the restoration needs in the future'.¹¹⁹ Allowing sites currently in good condition or those not in good condition but necessary to reach the targets to deteriorate will make it harder to achieve the objectives and obligations of the NRL in the future. It will also shift the baseline for restoration measures, thus risking rendering plans out of date by the time restoration measures start.¹²⁰ Avoiding the deterioration of these sites is thus imperative from a good administrative governance perspective, as it minimises the risk that already predictable and avoidable additional restoration investment costs incur.

Consequently, Art.4(12) is integral to the functioning of the NRL, the certainty of the plans and the long-term achievement of the objectives of the NRL and should be interpreted in this light.

3. Birds Directive

Although to a lesser extent than the Habitats Directive, the NRL also links and overlaps with the Birds Directive (BD). Particularly the Art.4(7) and Art.4(17)(b) obligation to restore species' habitats covers all wild bird species protected by the Birds Directive. Due to this overlap and the resulting need for a coherent approach, as well as the similarities in wording set out above, the interpretation of Art.4(4) second sentence BD can provide guidance for the interpretation of Art.4(12) NRL.

In C-418/04 (*EC v Ireland*) the CJEU provided significant guidance on the second sentence of Art.4(4) BD and the scope of effort-based obligations more broadly. It summarised in paragraph 179:

'Although the second sentence of Article 4(4) of the Birds Directive does not require that certain results be achieved, the Member States must *nevertheless make a serious attempt* at protecting those habitats which lie outside the SPAs. It is thus clear, in the present case, that Ireland *must endeavour to take suitable steps* to avoid pollution or disturbances of the habitats'¹²¹

The Court then assessed the actions Ireland had, purportedly, taken to comply with this obligation. Provisions on impact assessments or licenses that did not contain any reference to ornithological considerations, the latter of which in any case only covered a limited range of polluting activities, were deemed inadequate.¹²² Similarly, a farming incentive scheme that did not apply to all farmland or the territory outside protected habitats was not adequate to transpose the second sentence of Art.4(4) BD.¹²³ Lastly, general provisions under the Irish Wildlife Act were also not adequate as they were not specific enough to ensure the transposition of the BD provision.¹²⁴

Ireland was therefore deemed not to have made 'sufficient efforts' and the Court noted, endorsing the Advocate

¹¹³ Art.3(3) HD: 'Where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 [...]'.
¹¹⁴ C-251/21 and C-72/02 relate to Art.3(3) or 10 HD but do not provide an interpretation of the provisions.

¹¹⁵ See Jonathan Verschuren, 'Connectivity: is Natura 2000 only an ecological network on paper?' in CH Born, A Cliquet, H Schoukens, D Misonne, & G. Van Hoorick, *The Habitats Directive in its EU Environmental Law Context. European Nature's Best Hope?* (Routledge Research in EU Law 2015), 285-302.

¹¹⁶ Emphasis added.

¹¹⁷ Cf. García-Ureta Augustín, *EU Biodiversity Law: Wild Birds and Habitats Directive* (Europa Law Publishing 2020), 274.

¹¹⁸ The German wording of Art.4(12) NRL provides '*bemühen sich* die Mitgliedstaaten, [...] die Maßnahmen zu ergreifen, die erforderlich sind', while Art.4(4) second sentence BD similarly provides, 'Die Mitgliedstaaten *bemühen sich* ferner [...]'. Likewise, the French wording of Art.4(12) NRL reads 'les États membres *s'efforcent* de mettre en place, [...] les mesures qui sont nécessaires en vue de' and Art.4(4) second sentence BD provides 'les États membres *s'efforcent* également'.

¹¹⁹ Recital 37 NRL.

¹²⁰ Lees and Pedersen (n. 62) 13.

¹²¹ C-418/04, para 179, emphasis added.

¹²² C-418/04, para 182 and 186.

¹²³ C-418/04, para 185.

¹²⁴ C-417/04 para 187.

General on this point, that 'serious endeavours, namely the taking of all reasonable measures to achieve the success being sought, require targeted action'.¹²⁵ The measures were taken were 'partial, isolated measures, only some of which promote conservation of the bird populations concerned, but which do not constitute a coherent whole'.¹²⁶

In the Opinion of Advocate General Kokott, she states that '[t]he framework for determining what is reasonable is set out in Article 2 of the Birds Directive',¹²⁷ which provides for the overall objective of the Directive. She concludes that Art.4(4) second sentence BD measures 'must be arranged — on an ornithological basis — in such a way that they — in conjunction with other measures required under the directive — restore or maintain the level of the relevant species required under Article 2'.¹²⁸

Regarding the burden of proof, AG Kokott provides that while 'loss and deterioration of habitats cannot provide conclusive proof' of the failure to meet Art.4(4) second sentence BD, 'they do provide evidence that Ireland is not making endeavours or is not doing so to an adequate degree'.¹²⁹ As a result, it is for Ireland to demonstrate that it is doing enough to meet its effort-based obligation.¹³⁰ The Court did not expressly refer to the burden of proof in its judgment, but seems to have broadly followed this approach, with the Commission's evidence demonstrating the concerning status of relevant bird species and the link to agriculture, which was not contradicted by Ireland.¹³¹

To summarise, based on the C-418/04 judgment, an obligation to 'endeavour to put in place' seems to require the following:

- Member States must make a serious attempt to take suitable measures to achieve or prevent the desired outcome. This means **taking all reasonable measures** to achieve this outcome and **taking targeted measures that constitute a coherent whole**.
- The measures must be based on the requirements relevant for the objective in question and cover all areas in the territorial scope to the obligation while being **specific to the objective in question rather than general (environmental protection) measures**.
- The **purpose and objective of the legislation provides the benchmark of what is considered to be reasonably required**.

Although such an effort-based obligation remains weaker than the obligation of result initially proposed by the Commission, the CJEU's interpretation suggests that the effort-based obligation is not as weak as it may seem at first sight. Mayer has similarly argued that obligations of conduct are not necessarily inherently weaker than obligations of result, as this also depends on the vagueness of the obligation and the need to demonstrate appropriate steps were taken for an obligation of conduct.¹³²

¹²⁵ C-418/04, para 190, endorsing AG Opinion para 111.

¹²⁶ C-418/04, para 191.

¹²⁷ C-418/04, AG Op Kokott, para 111.

¹²⁸ C-418/04, AG Op Kokott, para 112.

¹²⁹ C-418/04, AG Op Kokott, para 109.

¹³⁰ C-418/04, AG Op Kokott, para 109.

¹³¹ C-418/04, para 189 and 192.

¹³² Cf Mayer (n. 23).



C. Significant deterioration

As for significant deterioration under Art.4(11) set out in section 2.C.2 above, the restoration objectives of good condition, **sufficient quality of habitats and favourable reference area should be considered as benchmark for what is considered to be a significant deterioration.**

D. Necessary measures

Based on the above analysis, it seems that the determination of the 'necessary measures' should be based on the objectives of the NRL, and particularly the Art.4(1) and (17) objectives to restore 90% of Annex I habitats to good condition. Guidance may also come from measures that have been appropriate to prevent deterioration under Art.6(2) HD, as set out above ([section 2.C.3](#)). Building upon the approach in C-418/04, measures must be based on the ecological requirements of the habitats in question. Further, they must cover all areas within the territorial scope of the provision (see section 3.A above), while being specific to the habitats objective of preventing deterioration, rather than general environmental protection measures.

It then appears that the question of what is reasonable in light of the effort-based obligation should only come in as a second step. The relevant framework would appear to be provided by Art.1, 4(1) and (17), setting the restoration objectives, as well as the specific aims to restore at least 90% of all Annex I habitats to good condition, to reach the favourable reference area for each habitat type and to ensure an increasing trend towards the sufficient quality and quantity of habitats for protected species.

Conclusion on Art.4(12)

The Art.4(12) pre-restoration non-deterioration obligation already applies since August 2024 and requires measures on at least 90%, likely more, of Annex I habitats. Art.4(12) provides for an effort-based obligation, as does Art.4(4) BD which has been analysed for interpretative guidance. This analysis suggests that the effort-based obligation is not as weak as it may appear at first sight and requires Member States to demonstrate a serious effort to do all that is reasonable in light of the objectives, covering the entire area with specific measures.

4. Interaction of the NRL non-deterioration obligations and Natura 2000

A. Interaction between the three non-deterioration obligations and Art.4(17)

The three non-deterioration obligations build upon each other but apply at different points in time. First, the pre-restoration non-deterioration obligation of Art.4(12) applies since August 2024 when the NRL entered into force, with best efforts to put the necessary measures in place needing to be made by September 2027 when the final NRPs must be submitted pursuant to Art.17(6). Then once restoration measures have been taken in accordance with Art.4(1), (4) and (7), the continuous improvement obligation of Art.4(11) first sentence applies until good condition or sufficient quality of the area is reached. Lastly, once good condition or the sufficient quality of habitats has been reached, the non-deterioration obligation of Art.4(11) second sentence applies.

The three non-deterioration obligations are further also linked to Art.4(17) and Art.5(14). As set out above ([section 3.A](#)), Art.4(17) provides an obligation of result for the Art.4(1), (4) and (7) restoration measures to ultimately achieve their objectives, albeit without a deadline. While not explicitly linked to the non-deterioration obligations in Art.4(11), this obligation of result does mean that the measures taken under Art.4(11)-(12), in combination with the restoration measures, must ultimately lead to the Art.4(17) requirements being achieved. Through the obligation to ensure a continuous increase of areas in good conditions until 90% of habitats are in good condition and an increasing trend towards sufficient quality and quantity of species' habitats, Art.4(17) also provides for a continuous improvement and non-deterioration obligation.

B. Interaction with the Habitats Directive in Natura 2000 sites

The Art.4(11) second sentence and Art.4(12) obligations apply 'without prejudice' to the Habitats Directive, meaning that the pre-existing obligations thereunder, particularly of Art.6(2) HD continue to apply.

A distinction must therefore be made between areas inside Natura 2000 sites, restoration areas that are themselves outside Natura 2000 sites but close to them, and restoration areas with no Natura 2000 interaction. For the latter, 'only' the non-deterioration obligations of the NRL itself, as set out above, apply.

For areas around Natura 2000 sites, in addition to the Art.4(11) and (12) NRL obligations, it may be possible that Art.6(2) HD also requires measures to be taken in surrounding areas to ensure non-deterioration inside the Natura 2000 site. This will depend on the specific conservation objectives and drivers of deterioration of the Natura 2000 site.

For restoration areas inside Natura 2000 sites, Art.6(2) HD applies from the moment of the designation of the site and continues to apply. From the entry into force of the NRL in August 2024 Art.4(12) and from the moment good condition or sufficient species' habitat quality has been reached, Art.4(11) NRL also apply. Yet, given that Art.6(2) HD is stricter than the non-deterioration obligations of the NRL, compliance with the NRL can be presumed if the HD is complied with. **The continuous application of the HD however means that any potential derogations under the NRL do not exempt Member States from meeting their obligations under the HD. Thus, even when Art.4(16), which specifically refers to 'within Natura 2000 sites', is relied upon, Art.6(2) HD continues to apply which contains only very limited derogations of the non-deterioration in Art.6(4) HD.**

According to the last EEA State of Nature Report, terrestrial Annex I HD habitats cover 1.3 million km² and terrestrial Natura 2000 areas nearly 784 994 km².¹³³ Marine Annex I HD habitats cover around 400 000 km² while 573 131 km² of marine area are covered by Natura 2000 sites.¹³⁴ In light of these figures, **more than half of the terrestrial areas that may need to be restored to good condition under Art.4(1) NRL are Natura 2000 sites and thus already subject to the stricter Art.6(2) HD obligation with limited exemptions. Good condition should have long been reached for these sites, deterioration avoided in the first place and restoration measures taken under Art.6 HD where deterioration did occur. Consequently, a strict approach should be taken to ensuring compliance with the NRL and the pre-existing obligations under the HD.**

To provide clarity on the continuous obligations under the Habitats Directive, it is important that Member States indicate for each restoration measure whether or not it is taken inside or outside Natura 2000 areas, as also required by Art.15(3) (c) and foreseen in paragraph 14.5.3 of the uniform NRP format.

¹³³ EEA (n.69) 108.

¹³⁴ *ibid.*



5. Derogations

Art.4 sets out three types of derogations (exemptions) for the non-deterioration obligations of the NRL:

- Art.4(13) provides that, subject to several conditions, Member States can apply all three non-deterioration obligations at biogeographical level, outside of Natura 2000 sites.
- Art.4(14) and (15) exempts the application of Art.4(11) and (12) respectively for certain causes of deterioration, outside of Natura 2000 sites.
- Art.4(16) provides a similar exemption, justifying certain causes of deterioration inside Natura 2000 sites.

It is settled case law that **exemptions – across EU law areas – are to be interpreted strictly**.¹³⁵ This is also reflected in the case law and Commission guidance on e.g. the WFD exemptions¹³⁶ or Art.6(4) HD.¹³⁷

All three derogations covered below also only apply to the respective non-deterioration obligations and do not have any impact upon the obligation to take restoration measures and for these measures to ultimately reach the Art.4(17) target. They also do not alter pre-existing obligations, particularly under the Habitats Directive.

Any use of derogations must meet the criteria and be adequately explained and justified in the NRPs, as required by Art.15(3)(g) for Art.4(13). Guidance for what an adequate justification requires may come from WFD jurisprudence on derogations, e.g. the German nitrates case of the Higher administrative Court of Lüneburg, setting out that the derogations under the Water Framework Directive require an explanation of the justification for each water body.¹³⁸ A mere reference to e.g. delays is insufficient. Instead, an overview of the required measures, a clear timeline for their implementation and reasons for specific delays in the implementation of each measure are required.¹³⁹

This section provides an analysis of the three types of derogations to the non-deterioration obligations and the conditions that need to be met for Member States to rely upon them.

A. Art.4(13) – biogeographical application of non-deterioration

Art.4(13)¹⁴⁰ provides:

*With regard to paragraphs 11 and 12 of this Article, outside Natura 2000 sites, Member States may, **in the absence of alternatives**, apply the non-deterioration requirements set out in those paragraphs **at the level of each biogeographical region of their territory for each habitat type and each habitat of species**, provided that the Member State concerned notifies its intention to apply this paragraph to the Commission by 19 February 2025 and **fulfils the obligations set out in Article 15(3), point (g), Article 20(1) point (j), Article 21(1) and Article 21(2), point (b)**.*¹⁴¹

Art.4(13) allows Member States to apply the non-deterioration obligation outside Natura 2000 areas at biogeographical level for each habitat type, provided a range of conditions are met.

- First, Member States had to notify their intention to use this derogation by 19 February 2025;¹⁴²
- the derogation may only be used 'in the absence of alternatives';¹⁴³

¹³⁵ E.g. C-215/008, para 32; C-6/14, para 24; cf. Moritz Reese 'Voraussetzungen für verminderte Gewässerschutzziele nach Art. 4 Abs. 5 WRRL' (2016) Zeitschrift für Umweltrecht, 203–15, 206.

¹³⁶ European Commission: Directorate-General for Environment, Guidance document on exemptions to the environmental objectives. Guidance document No 20, (Publications Office 2009) 10.

¹³⁷ C-239/04, para 25–39; C-304/05, para 82; C-182/10, para 73; European Commission (n. 70) 54.

¹³⁸ OVG Lüneburg, 22 November 2023, 7 KS 8/21 - BeckRS 2023, 37229, Rn 73–74; NB that a question on the explanations for derogation has now been referred to the CJEU for a preliminary ruling in the appeal of the OVG decision which therefore did not deal with this particular question: BVerwG 10 C 1.24 – Ruling of 6 March 2025, see <https://www.bverwg.de/pm/2025/15>.

¹³⁹ OVG Lüneburg, 22 November 2023, 7 KS 8/21 - BeckRS 2023, 37229, Rn 83.

¹⁴⁰ There is no Article 5 equivalent for this derogation.

¹⁴¹ Emphasis added.

¹⁴² Art.4(13) NRL; According to information provided by the European Commission, the following Member States have submitted their notifications: Austria, Belgium, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Lithuania, Netherlands, Poland, Slovenia, Sweden.

¹⁴³ Art.4(13) NRL.

- iii) Member States have to explain the system of compensatory measures to be taken for each significant deterioration, as well as the monitoring and reporting of significant deterioration and the compensation measures;¹⁴⁴
- iv) the derogation can only be used if its use does not affect the achievement of the Art.1, 4 and 5 targets and objectives;¹⁴⁵
- v) Member states must monitor deteriorated sites, sites subject to compensatory measures and the effectiveness of the compensatory measures every three years, to ensure compliance with the above conditions;¹⁴⁶
- vi) Member States must report the extent of the areas that have deteriorated and of the areas that are subject to compensatory measures by June 2028 and every three years thereafter;¹⁴⁷
- vii) every six years, Member States must report on the location of deterioration, location of compensation measures, description of the effectiveness of compensatory measures in ensuring the non-deterioration obligations are still complied with at biogeographical level and in ensuring that Art.1, 4 and 5 are not jeopardised.¹⁴⁸

There are 11 biogeographical regions in Europe, 9 within EU territory.¹⁴⁹ Some Member States are only covered by one biogeographical region (e.g., the Netherlands) whereas others are covered by several (e.g., France). Applying the Art.4(13) derogation allows for the application of the non-deterioration obligations in each biogeographical level for each habitat type. This means that if a Member State is covered by more than one biogeographical region and the habitat in question occurs in more than one biogeographical region, the 'no net deterioration' of Art.4(13) only applies within each biogeographical region.

Following the principle that derogations should be interpreted narrowly, instead of being justified once to apply to all habitat types or species' habitats, it seems that Art.4(13) only applies for specified habitat types or species' habitats and that its conditions have to be met for each specific habitat type in which Member States seek to apply Art.4(13). The uniform NRP format also seems to support this interpretation, requiring an indication of the habitat type or habitat of the species.¹⁵⁰

Art.4(13) only applies for Art.4 terrestrial habitats as there is no equivalent provision for marine habitats in Art.5.

Three of the above conditions will be considered in more detail: the absence of alternatives, compensatory measures, and ensuring the Art.4(1), (4) and (5) targets are not undermined. The below analysis highlights that the conditions for Art.4(13) set a high bar that will not be easy to meet for Member States and requires additional monitoring and resource.¹⁵¹

1. Absence of alternatives

The NRL does not provide for a definition or guidance in the recitals how the 'absence of alternatives' should be interpreted. One possible interpretation could be that because Art.4(14) and (15) provide derogations for specific instances of deterioration caused by the circumstances listed (which include a project of overriding public interest with no less damaging alternatives), the 'absence of alternatives' of Art.4(13) appears to relate to a lack of alternative at a different level, beyond e.g. a plan or project or a specific deterioration instance.

Alternatively, it has been suggested that the 'absence of alternatives' means that 'deterioration of some habitats in some areas must be unavoidable and cannot be justified by applying the derogations of [Art.4(14)-(16)]'.¹⁵² The difference between the two types of derogations would then be that instead of Art.4(11) and (12) simply not applying to the specific deterioration (as for Art.4(14) and (15)), the deterioration must be compensated for. On the one hand, this would make Art.4(13) a form of middle ground, requiring the balancing out of deterioration, rather than simply exempting Member States from their non-deterioration obligations. On the other hand, it can have significantly broader consequences than Art.4(14) and (15) and the condition of 'absence of alternatives' should thus be interpreted narrowly. The 'absence of alternatives' should then also clearly apply to each deterioration instance and cause, rather than being met once per habitat type or site.

¹⁴⁴ Art.15(3)(g)(i) NRL.

¹⁴⁵ Art.15(3)(g)(ii) NRL.

¹⁴⁶ Art.20(1)(j) and Art.20(6) NRL.

¹⁴⁷ Art.21(1)(b) NRL.

¹⁴⁸ Art.21(2)(b) NRL.

¹⁴⁹ EEA, <https://www.eea.europa.eu/en/analysis/maps-and-charts/biogeographical-regions-in-europe-2>

¹⁵⁰ Para 6.4.3 uniform NRP format.

¹⁵¹ See also de Leeuw and Backes (n. 26) 35.

¹⁵² de Leeuw and Backes (n. 26) 35.

While Art.6(4) HD also contains the wording of 'absence of alternatives', the scope of the Art.6(4) HD exemption is different as it is limited to plans or project of overriding public interest and appears more akin to the exemptions in Art.4(14)(c) and Art.4(15)(c) NRL. Nonetheless, considering the limited other safeguards for Art.4(13) NRL, the Commission guidance that **the economic costs cannot be the decisive factor in the assessment of alternatives and that economic criteria cannot overrule ecological criteria** seems all the more relevant.¹⁵³ In addition, Art.4(13) does not qualify the 'absence of alternatives' through e.g. alternatives not being reasonable or being disproportionately expensive. This suggests that **the 'absence of alternatives' requires a real impossibility**.

Lastly, this impossibility needs to be demonstrated in the NRPs to explain and justify that there is in fact an 'absence of alternatives' as required by the NRL.¹⁵⁴ The NRP format does not seem adequate to achieve this as it does not even provide a dedicated space to explain this impossibility.¹⁵⁵ Consequently, Member States will be required to go beyond the NRP format, in order to demonstrate the absence of alternatives and ensure compliance with the NRL.

2. Compensatory measures

While Art.4(13) NRL does not directly refer to compensatory measures, Art.15(3)(g) NRL requires Member States to explain the system of compensatory measures to be taken for each significant deterioration occurrence, as well as the necessary monitoring in their NRPs, if they rely on Art.4(13). In addition, the application of non-deterioration at biogeographical level also implies a balancing out of deterioration at a level other than site-level through compensatory measures.

Art.6(4) HD provides an obligation to take 'all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected' as one condition for a derogation from the non-deterioration obligation under Art.6(2) HD for reasons of overriding public interest for a plan or project that has been assessed to have a negative impact on a Natura 2000 site under Art.6(3) HD.

As set out above ([Section 2.A.4](#)), due to the significant links and overlaps, the interpretation of 'compensatory measures' under the Habitats Directive can provide guidance for how to approach compensatory measures under the NRL.

While there is limited case law on the details, there is significant Commission guidance on Art.6(4) HD compensatory measures which appears transferable to the NRL. Some key elements are:

- **Mitigation and compensation measures must be clearly distinguished.**¹⁵⁶ Mitigation measures seek to limit the harmful impact, thus reducing the severity of the deterioration. Compensation measures, on the other hand, are 'intended to offset the residual negative effects [...] so that the overall ecological coherence of the Natura 2000 network is maintained'.¹⁵⁷ For the NRL, this appears to similarly mean that the deterioration of sites must still be minimised as much as possible with compensatory measures only reserved for residual, unavoidable deterioration.
- Compensatory measures must be based on the reference conditions of the deteriorated site and the negative effects caused by the deterioration.¹⁵⁸ This requires a precise identification of the deterioration and its implications.¹⁵⁹ Compensatory measures must specifically address the structural and functional integrity aspects and the species that are affected and set their objectives accordingly.¹⁶⁰ They must be based on the best scientific knowledge, following scientific criteria.¹⁶¹
- The required extent of compensation measures is linked to the quantitative and qualitative impacts of deterioration and should generally be well above 1:1.¹⁶²
- The compensation site should be as close as possible to the deterioration to reinstate the ecological elements at stake, meaning that compensation within or near the affected (Natura 2000) site is the preferred option.¹⁶³ If the location is outside a designated Natura 2000 site, the new site should also be designated as Natura 2000 to ensure long-term protection.¹⁶⁴ For the NRL, this suggests that compensation sites must also be subject to the non-deterioration obligations of Art.4(11) and (12) NRL.

¹⁵³ European Commission (n. 70) 55.

¹⁵⁴ Cf. C-239/04, para 36-39

¹⁵⁵ para 6.4.3 and 6.4.4 NRP format.

¹⁵⁶ C-387/17 and C-388/15, para 58; C-521/12 para 31-33; European Commission (n. 70) 57.

¹⁵⁷ European Commission (n. 70) 57.

¹⁵⁸ *ibid* 62.

¹⁵⁹ C-304/05, para 83; C-182/10, para 74; C-387/15 and C-388/15, para 61

¹⁶⁰ European Commission (n. 70) 62f.

¹⁶¹ *ibid* 63.

¹⁶² *ibid* 64.

¹⁶³ *ibid* 65

¹⁶⁴ *ibid*.

- Compensation should be in place *before* deterioration occurs¹⁶⁵ and a site must not be irreversibly damaged before compensation occurs.¹⁶⁶ Where the results of compensation measures have not fully materialised at the time the damage occurs, additional compensation for the interim losses may be necessary.¹⁶⁷
- Compensation must be additional to pre-existing obligations for Natura 2000 sites under the Habitats Directive, and, by the same logic, additional to other measures required by the NRL.¹⁶⁸
- As for Art.6(4) HD measures, compensatory measures should consider all practical elements so that compensatory measures are effective and can be implemented in the long-term. This includes:¹⁶⁹
 - a. setting clear objectives in line with the sites' conservation/restoration objectives
 - b. a scientifically robust explanation of how compensation measures will compensate for the deterioration
 - c. demonstrating the technical, legal, and financial feasibility of the compensation measures and their long-term implementation
 - d. an analysis of suitable locations for the compensation measures which considers the acquisition of necessary land rights
 - e. a timetable for implementation and explanation of the timeframe for the achievement of the objectives of the compensation measures
 - f. setting monitoring and reporting schedules that match the objectives of the compensation measures
- If monitoring shows that compensatory measures are not effective, they should be adapted accordingly.¹⁷⁰

The uniform NRP format also appears inadequate to ensure all of the above elements are considered. It requires a mere 'explanation of the system of compensatory measures, monitoring and reporting of deterioration'¹⁷¹ which can set out how all these above elements will be considered but will be inadequate to show that these aspects are in fact complied with for the specific deterioration instances and compensatory measures in question. **Member States will thus be required to go beyond the NRP format to demonstrate compliance with the conditions of the NRL for the Art.4(13) derogation.**

3. Not undermining Art.1, 4 and 5

Member States must explain how they will ensure that using the Art.4(13) derogation does not affect reaching the targets and objectives of Art.1, 4 and 5 NRL which seems particularly relevant for two aspects of these targets.

First, this appears to emphasise again that compensatory measures must be additional to the existing restoration obligations under the NRL. Practically speaking this could e.g., mean that if compensatory measures are taken in an Annex I habitat that is not in good condition, this area cannot count towards the 30, 60 or 90% that must be covered by restoration measures by 2030, 2040 and 2050 but must be additional. Otherwise, the application of Art.4(13) would affect the Art.4(1) target by effectively reducing its scope.

Second, while most of the Art.4 and 5 restoration obligations are measures-based, Art.4(17) and 5(14) do require the restoration measures to ultimately reach their results (cf. [section 4.A above](#)). The good condition and quality of species' habitats will have to be met at site-level. Given the link between 'significant deterioration' and good condition / quality of species' habitats ([see section 2.C.2.c](#)), it thus seems difficult, if not impossible, to demonstrate how allowing habitats to deteriorate at site-level will not undermine the obligation to reach good condition at site-level. Consequently, sites where significant deterioration is 'compensated for' elsewhere do not count towards the Art.4(17) target. As 90% of Annex I habitats must reach good condition, the Art.4(13) derogation can only be used on a maximum of 10% of Annex I habitats, as this is the maximum 'remaining' area (i.e. the 10% initially not covered by the 90% of Art.4(1)) that could be subject to compensatory measures to ensure the Art.4(17) obligation of result to bring 90% of Annex I habitats are in good condition. Ultimately, this would require Member States to cover a larger area of Annex I habitats (up to 100%) with restoration measures, requiring more resources and making the reliance on Art.4(13) rather inefficient.

¹⁶⁵ *ibid* 60.

¹⁶⁶ *ibid* 65.

¹⁶⁷ *ibid* 60 and 65.

¹⁶⁸ *ibid* 60.

¹⁶⁹ *ibid* 62.

¹⁷⁰ *ibid* 63.

¹⁷¹ Para 6.4.3. uniform NRP format.

In their NRPs, Member States will thus have to explain how they are ensuring additionality and how they are ensuring that the Art.4(13) derogation is used on maximum 10% of Annex I habitat area, while simultaneously ensuring that 100% of Annex I habitats can and will be subject to restoration measures that will lead to good condition being reached.¹⁷²

B. Art.4(14) and (15) – exempt circumstances outside Natura 2000 areas

Art.4(14) provides:

Outside Natura 2000 sites, the obligation set out in paragraph 11 shall not apply to deterioration caused by:

- (a) force majeure, including natural disasters;
- (b) unavoidable habitat transformations which are directly caused by climate change;
- (c) a plan or project of overriding public interest for which no less damaging alternative solutions are available, to be determined on a case by case basis; or
- (d) action or inaction by third countries for which the Member State concerned is not responsible.

Art.4(14) and (15)¹⁷³ provide for the same derogations with paragraph 14 relating to the obligations in Art.4(11) and paragraph 15 relating to the obligations in Art.4(12).¹⁷⁴ Art.4(14) and (15) do not refer to 'justifying' or 'derogating' but instead state that paragraph 11/12 'shall not apply to deterioration caused by'¹⁷⁵ the four circumstances listed. This suggests that the circumstances listed exempt Member States from the application of Art.4(11) and (12) altogether, rather than providing an excuse or a derogation.

The Art.4(14) derogations, covering the measures-based obligation under Art.4(11) seem to provide the only circumstances where no appropriate measures appear to be required as they exempt Member States from the obligation to take measures all together.¹⁷⁶ For Art.4(15) and the effort-based obligation under Art.4(12), the derogations appear to provide indicators for what is considered (not) appropriate or reasonable for Member States in complying with their Art.4(12) obligations.

To rely on this derogation, Member States must demonstrate how a specific deterioration was fully caused by one of the listed circumstances. **The burden of proof for causation falls on the Member State.** It seems that only deterioration purely caused by one of the listed circumstances would be exempt. For example, if harmful practices, such as monocultures in or around the site in question made the area more vulnerable to natural disasters or climate-related habitat transformation, a Member State should not be able to rely upon the derogations as the deterioration is partly caused by the harmful monoculture, which was in its control to address.

However, *ex ante* compliance monitoring seems difficult as Art.15 does not require information relating to the application of Art.4(14) and (15) to be included in the NRP and the NRP format merely includes an optional space to consider information about unavoidable habitat transformations directly caused by climate change (para 4.2.2). It seems that any *foreseeable* reliance upon derogations (for overriding public interest, (in)action by third countries, and, to some extent, unavoidable habitat transformations caused by climate change) should however be included in the NRP as part of the information on the relevant sites. The inherently less foreseeable derogation of *force majeure* would appear to only be assessable after the fact.

Crucially, the derogations also do not have an impact upon the Art.4(17) obligation to ensure the restoration measures ultimately reach their results. Similarly, **an exemption only applies to deterioration directly caused by the circumstances listed in Art.4(14) and (15), rather than to the entire site as such and measures will still be required to address all other drivers of deterioration on that site. Thus, overly relying on derogations to justify ongoing deterioration does not only put Member States at risk of non-compliance with the non-deterioration obligations, but will also likely lead to non-compliance with Art.4(17) as it provides for an obligation of result. Ultimately, more resources will be required in the long-term if sites are left to deteriorate even though they ultimately need to be in good condition to meet the Art.4(17) target.**

¹⁷² In para 6.4.4. of the NRP format.

¹⁷³ The Art.5 equivalents are Art.5(11) and (12).

¹⁷⁴ With the slight distinction that Art.4(14) provides that the overriding public interest will be determined 'on a case by case basis' (Art.4(14)(c)) while Art.4(15)(c) does not mention a case by case assessment – though it seems unclear what the impact of this difference is.

¹⁷⁵ Emphasis added

¹⁷⁶ cf. van Kempen (n. 23) 155f.

Lastly, as the derogations only apply to deterioration caused by limited circumstances, it suggests that to rely upon the derogations, **Member States must carry out a prior assessment of the causes or drivers of deterioration. Only if they can clearly identify that the deterioration in question is in fact caused by one of the listed circumstances, they can rely on the derogation from their non-deterioration obligation.**

The four circumstances exempting Member States from their Art.4(11) and (12) obligations will now be considered in more detail.

1. Force majeure, including natural disasters

The CJEU has considered *force majeure* in various circumstances and has interpreted it strictly. For instance, in C-297/08, an infringement case relating to waste management the Court stated:

*[...] although the notion of force majeure is not predicated on absolute impossibility, it nevertheless requires the non-performance of the act in question to be attributable to circumstances, **beyond the control of the party claiming force majeure, which are abnormal and unforeseeable and the consequences of which could not have been avoided despite the exercise of all due diligence***¹⁷⁷

Similarly, in Advocate General Jacobs' opinion in an infringement case on urban waste water treatment, he stated:

*'A plea of force majeure might at most be accepted if, as a result of **unforeseeable circumstances, which were extraneous to and beyond the control of the Member State**, that State was faced with insurmountable difficulties preventing it from implementing the directive. Moreover, such difficulties would **excuse the failure to implement only for as long as it would take a normally diligent administration to overcome them**. Those conditions are likely to be applied very strictly in practice.*¹⁷⁸

Accordingly, *force majeure* should also be interpreted very narrowly in the NRL. For natural disasters, it seems that if reasonable efforts, such as adaptation measures, could have reduced or prevented the impact, the *force majeure* derogation cannot be relied upon, particularly if there is a known or foreseeable vulnerability to some natural disasters. In addition, this derogation can only be relied upon for deterioration caused during the time that it reasonably takes to overcome the *force majeure* circumstances.¹⁷⁹

2. Unavoidable habitat transformations which are directly caused by climate change

It seems that the CJEU has not directly dealt with deterioration 'directly caused' by the impacts of the climate crisis. In Advocate General Kokott's opinion in C-6/04, she touched upon possible climate change impacts, yet these were outside of the scope of the proceedings and were thus not considered further.¹⁸⁰

The Commission's 2013 guidelines on climate change and Natura 2000 do not directly deal with deterioration caused by climate change and the Art.6(2) HD obligations.¹⁸¹ Currently, new guidance is being drafted which, in its draft form states that deterioration would not be justified for predictable natural deterioration caused by climate change, including natural disaster.¹⁸² This suggests that the NRL's derogation should be applied very narrowly.

To fall within this derogation, habitat transformations must be 'unavoidable' which, as for *force majeure*, suggests that **if reasonable steps could have avoided or reduced the transformation, the derogation cannot be relied upon.** In addition, it must be **entirely** attributable to climate change, which would be for the Member States seeking to rely upon this derogation to prove.

It has also been suggested that a Member State's compliance with EU climate legislation could be considered as sufficient to enable it to rely upon this derogation.¹⁸³ While it seems that complying with basic legal mitigation obligations is far from sufficient to demonstrate unavoidability (as it should, at least, also consider adaptation), compliance with international and EU climate mitigation obligations can constitute a minimum baseline to demonstrate unavoidability. **Consequently, if a Member State fails to comply with its international and EU climate mitigation obligations, it should not be able to rely upon this derogation of unavoidable habitat transformations.**

¹⁷⁷ C-297/08, para 85, emphasis added.

¹⁷⁸ C-236/99, AG Opinion Jacobs, para 25, emphasis added.

¹⁷⁹ For the application of *force majeure* in the context of droughts and floods, cf also ClientEarth, Living Rivers Europe, *Going with the flow: Barrier removal for healthier rivers A legal analysis of Article 9 of the Nature Restoration Law*, June 2025, p 34.

¹⁸⁰ C-6/04, AG Opinion Kokott, para 21

¹⁸¹ European Commission Directorate-General for Environment, 'Guidelines on climate change and Natura 2000 – Dealing with the impact of climate change, on the management of the Natura 2000 network of areas of high biodiversity value' (Publications Office 2013).

¹⁸² Draft not publicly available yet.

¹⁸³ Lees and Pedersen (n. 62) 19.

3. Overriding public interest

Art.4(14)(c) and (15)(c) exempt plans or projects of overriding public interest for which no less damaging solutions are available from the non-deterioration obligations.

For renewable energy, Art.6(1) NRL presumes that the 'planning, construction and operation of plants [...] their connection to the grid and the related grid itself, and storage assets' are in the overriding public interest. In addition, Member States may exempt renewable energy projects from the requirement that no less damaging alternative is available if either a strategic environmental assessment (SEA) or environmental impact assessment (EIA) has been carried out.¹⁸⁴ Yet, there appears to be uncertainty how this will be applied considering the limited application of the EIA Directive to renewable projects and the broader scope of the SEA which does not cover individual projects.¹⁸⁵ Art.7(2) similarly presumes national defence plans or projects to be of overriding public interest and similarly enables Member States to exempt these plans and projects from the requirement that no less damaging alternative solution is available.

Both presumptions are rebuttable which suggests that despite the presumption, some form of assessment is still required to avoid overlooking clear evidence that is capable of rebutting the presumption.

For all other projects, Member States will have to establish the overriding public interest nature of their plan or project and also demonstrate that no alternative solutions are available. While overriding public interest exemptions under the HD and WFD are stricter than those of the NRL, it nonetheless seems that guidance on the key concepts can be found in these Directives. For instance, it seems that as for the HD, **the assessment of 'no less damaging alternative solutions' requires 1) the identification of alternatives, 2) a comparative assessment and, 3) a justification of the absence of feasible alternatives.**¹⁸⁶ Similarly, the question of overriding public interest requires a careful assessment of the public nature of the interest as well as whether it is indeed overriding the objectives of the NRL.¹⁸⁷

4. Action or inaction by third countries

The last exempting circumstance enables Member States to avoid responsibility for third party actions or inaction 'for which the Member State concerned is not responsible'. It seems unclear whether this also requires reasonable steps to mitigate or adapt to the harmful (in)action to avoid responsibility. In any case, to rely on this derogation, Member States would have to prove that the deterioration is exclusively caused by the (in)action of a third country. Where the harm is cumulative, Member States would still seem to be responsible for their 'share' of deterioration, which may be difficult to assess in practice.

It also seems unclear how this derogation would deal with 'net harms', such as two-ways transboundary nitrogen deposition. In a recent Dutch nitrogen case on Art.6(2) HD, the District Court of the Hague dismissed an argument for partial responsibility due to nitrogen emissions from abroad, stating that the Netherlands exports much more nitrogen deposition than it imports and should thus also be accountable for the 'foreign deposition'.¹⁸⁸ It seems that a similar approach should be taken under the NRL to avoid a lacuna of responsibility in two-ways transboundary impacts.

C. Art.4(16) – exempt circumstances inside Natura 2000 sites

Art.4(16)¹⁸⁹ provides:

Within Natura 2000 sites, the non-fulfilment of the obligations set out in paragraphs 11 and 12 is justified if it is caused by:

(a) force majeure, including natural disasters;

(b) unavoidable habitat transformations which are directly caused by climate change; or

(c) a plan or project authorised in accordance with Article 6(4) of Directive 92/43/EEC.

¹⁸⁴ Art.6(1) NRL.

¹⁸⁵ ClientEarth, 'Renewable Energy for Nature and People', 2025, <https://www.clientearth.org/latest/documents/renewable-energy-for-nature-and-people/>, p.73.

¹⁸⁶ European Commission 'Commission notice: Assessment of plans and projects in relation 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, 47.

¹⁸⁷ *ibid* 53ff; European Commission (n. 70) 55ff.

¹⁸⁸ *Rechtbank Den Haag* 22 January 2025, ECLI:NL:RBDHA:2025:578, para 5.38; see also Laura Hildt, 'The Habitats Directive as a Tool for Systemic Biodiversity Litigation: The Dutch Nitrogen Case II', (2025) *VerfBlog*, <https://verfassungsblog.de/the-habitats-directive-as-a-tool-for-systemic-biodiversity-litigation/>.

¹⁸⁹ The Art.5 equivalent is Art.5(13).

Art.4(16) seeks to provide a similar derogation to Art.4(14) and (15) for Natura 2000 sites. However, it is important to keep in mind that Art.4(16) does not amend the Habitats Directive and therefore does not change the non-deterioration obligations for Natura 2000 sites pursuant to Art.6(2) HD. Thus, while Art.4(16) can excuse a Member State from complying with its non-deterioration obligations under the NRL (which also apply 'without prejudice' to the HD), it must still avoid deterioration under Art.6(2) HD which provides an obligation of result. Consequently, the only real derogation for non-fulfilment of the non-deterioration obligation inside Natura 2000 sites remains Art.6(4) HD.

While the Art.4(11) first sentence continuous improvement obligation goes beyond a non-deterioration obligation, a Natura 2000 site would also be subject to the Art.6(1) HD obligation to reach favourable conservation status (FCS) and thus also subject to a continuous improvement obligation, until FCS is reached.

For the purposes of Art.4(11) and (12), the considerations set out above in relation to Art.4(16)(a) and (b) on *force majeure* and unavoidable habitat transformations directly caused by climate change equally apply here. Guidance on the interpretation of Art.6(4) HD can, for example, be found in the Commission's guidance on Art.6 HD,¹⁹⁰ some of which has been set out in the context of Art.4(13) compensatory measures above (5.A.2).

6. The non-deterioration obligations in the NRPs

A. The NRL's requirements of the NRPs for non-deterioration

Art.15(3)(f) requires 'an indication' of the measures to avoid deterioration in accordance with Art.4(11) and 5(9) while Art.15(3)(h) requires 'an indication' of the measures relating to the non-deterioration obligation pursuant to Art.4(12) and 5(10). Other EU environmental legislation does not appear to provide direct guidance on what level of detail is required from an 'indication'.

More generally, it seems that **NRPs should contain enough detail to enable an assessment of whether each NRP is compliant with the requirements of the NRL**. Inspiration may be drawn from plan-based climate litigation, such as the UK's *Net Zero Case*.¹⁹¹ The High Court found the Net Zero Strategy to be in breach of the requirements of the Climate Change Act due to the Strategy lacking essential information for Parliament and the public to be able to scrutinize the adequacy of the plans. In addition, the Minister itself was deemed to have had inadequate information before him to ensure compliance with the Climate Change Act.

By analogy, it seems that the NRPs similarly need to contain the necessary evidence base to demonstrate that governments can ensure compliance with the NRL, **as well as to enable public scrutiny thereof**. Considering the measures-based and effort-based nature of the non-deterioration obligations, the NRPs must contain enough detail to assess whether adequate measures have been taken or whether a best effort has been made, rather than simply assess whether the result of non-deterioration has been attained.¹⁹²

Because the non-deterioration obligations (and good condition) need to be met **at site-level**, the measures should also be specific to the site in question. As set out above ([section 2.C.3](#)), for non-deterioration measures to be adequate, they must be habitat-specific and relate to the relevant restoration objectives. This should also be reflected in the NRPs as it seems unclear how this can otherwise be ensured or compliance with the NRL's requirement be assessed through the NRP.

For Art.4(12), Member States must endeavour to put in place measures 'by the date of publication of their national restoration plan'. This thus requires, at least, a serious effort to put measures in place already prior to the adoption of the NRP which should, in turn be listed clearly in the NRP or, where no measures were taken, justifications should be provided to enable an assessment whether the effort-based obligation has been complied with.¹⁹³

Yet, in its section 6.4., the uniform NRP format, falls short of these requirement as it merely requires information on the 'approach', which suggests a much more general overview. Furthermore, it fails to adequately distinguish between the different Art.4(11) obligations, does not provide for site-specific information, provides very limited characters for the non-deterioration measures, and does not require an overview of the measures taken under Art.4(12) ahead of the adoption of the NRP.¹⁹⁴

¹⁹⁰ European Commission (n. 70) 53; ClientEarth (n. 185) 70ff and 73.

¹⁹¹ *R (oao Friends of the Earth) v. Secretary of State for Business Energy and Industrial Strategy* [2022] EWHC 1841 (Admin)

¹⁹² Mayer (n. 23), p 139.

¹⁹³ Cf. Society for Ecological Restoration Europe (SERE), 'Comments on the Draft Regulation for a Uniform Format of the National Restoration Plans' (2025) <https://ser-europe.org/files/2025/02/Comments-SERE-draft-regulation-format-national-restoration-plans.pdf>, p.5.

¹⁹⁴ *Ibid*, Sections 6.4.1. and 6.4.2.; SERE (n. 193), p 5

The non-deterioration obligations also appear linked to the Art.15(3)(q) requirement to include 'an indication of the provisions for ensuring the continuous, long-term and sustained effects of the restoration measures referred to in Articles 4 to 12' in the NRP. This requirement seems to directly link to the Art.1(1)(a) objective of the NRL, to which non-deterioration and continuous improvement are integral. **While the non-deterioration obligations only apply to Annex I and II habitats, it seems that Art.15(3)(q) requires Member States to at least consider non-deterioration also for the other restoration targets in Art.8-12 given its integral role in achieving the 'long-term and sustained' recovery that is the objective of the NRL.** The NRP format only provides for an optional article-specific description on 'the provision for ensuring' these long-term effects of the restoration measures, instead only rendering a "transversal description of such "indications" obligatory.¹⁹⁵

Lastly, to ensure clarity where pre-existing improvement and non-deterioration obligations apply under the Habitats Directive, specifying in the NRP whether restoration measures are within Natura 2000 areas, as required under Art.15(3)(c) is important and must be included in the NRPs.¹⁹⁶

B. Shortcomings in the uniform NRP format

The Commission was tasked with developing a uniform format for NRPs through an Implementing Regulation under Art.15(7) with a view to promoting legal clarity, standardisation and comparability of Member States' NRPs. Yet, there seems to be a mismatch between the required 'minimum contents' for the NRPs prescribed for the non-deterioration obligations in Art.15(3) and those of Section 6.4. of the uniform format. These shortcomings undermine the intended effect of Art.15(3) and the public's ability to scrutinise Member States' compliance with the NRL, thereby limiting their capacity to access judicial enforcement mechanisms in case of non-compliance.

With this in mind, it can be argued that the Commission has gone beyond the powers conferred to it by Art.15(7), within which it needs to operate,¹⁹⁷ when adopting the uniform NRP format, given that the latter sets a lower standard of what is legally required by Member States, instead of merely operationalising Art.15(3). Crucially, however, the NRP format does not alter Member States' obligations to comply with the NRL and to ensure that all required elements are included in their NRPs.

Given the non-legislative and technical nature of the Implementing Regulation adopting the uniform NRP format, it cannot amend what is legally required of Member States by the NRL. When preparing their NRPs, Member States should keep in mind the hierarchical relationship between the Implementing Regulation adopting the uniform NRP format and the NRL, with the latter being superior to the former.¹⁹⁸ In line with this, an NRP can still be challenged in national courts in case it does not comply with Art.15(3)'s requirements, even if it follows the structure of the uniform format.

Conclusion on NRPs

While Member States should follow the structure of the Implementing Regulation's uniform format in their NRPs, they will be required to go beyond the NRP format to ensure that the legal requirements of the (hierarchically superior) NRL are complied with. Namely, NRPs must provide detailed, site-specific information on non-deterioration measures, outlined in a way that enables thorough assessment of their effectiveness. This includes listing measures taken prior to the NRP's adoption, distinguishing between measures inside and outside Natura 2000 sites, providing site-specific details on measures and providing justifications where no adequate measures were implemented.

¹⁹⁵ Implementing Regulation (Annex) (n. 65), Section 5.4

¹⁹⁶ *Ibid*, Section 14.5.3

¹⁹⁷ Cf TFEU (n. 14), Article 291(2)

¹⁹⁸ Cf also: European Parliamentary Research Service (Micaela Del Monte and Rafał Mańko), *Understanding delegated and implementing acts*, Briefing, July 2021

Table 1: Overview of non-deterioration obligations in the NRL

The table summarises the three different types of non-deterioration obligations and provides an indication of other provisions that provide interpretative guidance or are key to its implementation.

Article	What	Where	When	Type	Exemptions	Guidance
TERRESTRIAL						
4(11) 1st sentence	Continuous improvement in condition / quality until good condition/sufficient quality of species' habitats is reached	Areas subject to restoration measures under Art.4(1), (4) & (7) – Annex I habitats & species' habitats	Once restoration measures are taken, at the latest by Art.4(1) & (4) deadlines	Take appropriate measures ('shall put in place measures which shall aim to ensure')	Art.4(13) outside N2K Art.4(14) outside N2K Art.4(16) inside N2K	Art.4(1), (4) & (7) NRL; Art.6(1) & (2) HD
4(11) 2nd sentence	No significant deterioration of restored habitats	Areas in which good condition / sufficient quality of habitats of species has been reached	Once good condition / sufficient quality reached			Art.6(2) HD; Art.4(1)(a)(i) WFD
4(12)	Prevent significant deterioration pre-restoration	Annex I habitats in good condition or which are necessary to meet Art.4(17) targets	From August 2024	Make a serious attempt to take appropriate measures ('endeavour to put in place necessary measures with the aim of preventing')	Art.4(13) outside N2K Art.4(15) outside N2K Art.4(16) inside N2K	Art.4(4) 2 nd sentence BD; restoration objectives
MARINE						
5(9) 1st sentence	Continuous improvement in condition/quality until good condition / sufficient quality of species' habitats is reached	Areas subject to restoration measures under Art.5(1),(2) & (5) – Annex II habitats & species' habitats	Once restoration measures are taken, at the latest by Art.5(1) & (2) deadlines	Take appropriate measures ('shall put in place measures which shall aim to ensure')	Art.5(11) outside N2K Art.5(13) within N2K	Art.4(1), (4) & (7) NRL; Art.6(1) & (2) HD
5(9) 2nd sentence	No significant deterioration of restored habitats	Areas in which good condition has been reached / in which sufficient quality of habitats of the species has been reached	Once good condition / sufficient quality reached			Art.6(2) HD; Art.4(1)(a)(i) WFD
5(10)	Prevent significant deterioration pre-restoration	Annex II habitats in good condition or which are necessary to meet Art.5(14) targets	From August 2024	Make a serious attempt to take appropriate measures ('endeavour to put in place necessary measures with the aim of preventing')	Art.5(12) outside N2K Art.5(13) within N2K	Art.4(4) 2 nd sentence BD; restoration objectives

Table 2: Overview of non-deterioration obligations found in other pieces of EU legislation

Legislation	Article	Scope & Subject Matter	Type	Exemptions	Guidance
Habitats Directive (92/43/EEC)	6(2)	Avoidance of deterioration of natural habitats; avoidance of deterioration of habitats of species; avoidance of disturbance of species for which the areas have been designated.	Result-based (measures must lead to non-deterioration outcome); even risk or probability of significant deterioration may lead to non-compliance	Limited, HD Art.6(4): IROPI projects, if following conditions are met: - project falls under IROPI - an appropriate assessment has been undertaken (HD Art.6(3)), concluding that the project may have negative effects on the integrity of the site - No alternative solutions exist - Compensatory measures are in place	European Commission, <i>'Managing Natura 2000 sites – The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC'</i>
	10 & 3(3)	Maintenance of landscape features important for flora and fauna	Pure effort-based		
	12	Avoidance of deterioration or destruction of breeding sites and resting places.	Result-based	Limited, HD Art.16(1)(a) – (e), if following conditions are met: - No satisfactory alternatives exist - Derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their national range	European Commission, <i>'Guidance document on the strict protection of animal species of Community interest under the Habitats Directive'</i>
Birds Directive (2009/147/EC)	4(4) first sentence	Inside SPAs: Avoidance of pollution or deterioration of habitats; avoidance of any disturbances affecting the birds	Result-based	Limited, HD Art.7, in combination with Art.6(4); cf Art.6(2) Exemptions	Cf Art.6(2) Guidance
	4(4) second sentence	Outside SPAs: Avoidance of pollution or deterioration of habitats.	Pure effort-based		
Water Framework Directive (2000/60/EC)	4(1)(a)(i) and 4(1)(b)(i)	Prevention of deterioration of the status of all bodies of surface water and groundwater	Result-based	WFD Art.4(6): Temporary deterioration due to natural causes or force majeure, if certain conditions are met WFD Art.4(7) (if certain conditions are met): i) deterioration of surface water or groundwater body as a result of new modifications and/or water level alterations; ii) deterioration from "high" to "good" status as a result of new sustainable human development activities	



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