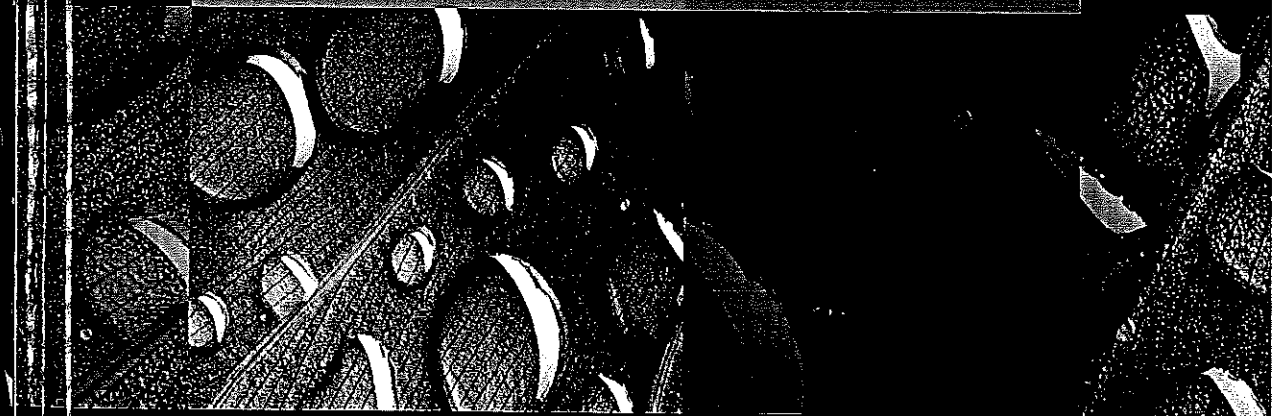
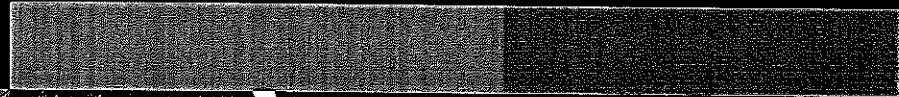


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Abstract

The chapter aims to summarize the current knowledge and highlight further research directions on the role of EU primary and secondary law in preserving biodiversity. Whereas several issues (habitats, GMOs) have been giving rise to much academic discussion, thus far scant attention has been paid to the integration of nature conservation requirements into policies promoting growth.

Keywords

Allocation of powers within the EU, environmental policy, common commercial policy, common agricultural policy, common fisheries policy, species diversity, genetic diversity, habitats, GMOs

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III.30.1 Introduction

International rules on the conservation of biodiversity are by no means lacking in Europe. Both the Council of Europe and the UN Economic Commission for Europe (UNECE) have been adopting several international environmental agreements (MEAs) focusing on nature conservation.¹ However, the existence of these MEAs should not lull us into thinking that all areas of biodiversity are now well protected. Conservation objectives vary from one agreement to the next, such that no harmonization, even on a geographical level, is assured. Although particular areas of biodiversity are covered well on a continental scale (including migratory or the most endangered vertebrate species, international watercourses, semi-inland seas), others have only recently been brought under international law (landscapes), while yet others are practically ignored (micro-organisms or fungi, fundamental ecological processes, animal genetic resources).² Only rarely do conventions require the conservation of all wild species, or of all species of the same group (birds, marine mammals).³ Finally, some significant geographical disparities are also apparent. While the Bern Convention on the conservation of European wildlife and natural habitats covers the entire continent, it does not extend to the whole spectrum of biodiversity. Moreover, if some regions are well covered (Mediterranean Sea, Black Sea, North East Atlantic, Alps, Carpathians, Benelux area), the protection of others is markedly lower (steppes ecosystems, boreal forests) or even non-existent (Arctic region).

One might then wonder whether the implementation of a biodiversity policy under the auspices of European Union (EU) law might be likely to offer better protection for ecosystems and species than a highly variegated international law. Indeed, EU law today extends to 28 Member States. Furthermore, the EU is far from being a toothless legal order. EU law represents a clear advantage over public international law in terms of efficacy. The European Commission (hereafter the Commission) enjoys specific powers to require Member States to apply the rules of EU law and environmental policy. Enforcement policy has already cut its teeth in this area. The Court of Justice of the EU (CJEU) has also been playing a key role given that hundreds of judgments have been delivered in nature protection matters. It can, at the very least, due to the doctrine of direct effect and the preliminary ruling mechanism,⁴ come to the forefront of disputes brought by applicants before their national courts.

A central feature of EU environmental law is its multi-level character. Even if a biodiversity policy were to succeed in the EU, the European natural capital would still suffer from polluting sources located outside its Member States territories. Conversely, to fuel its economic growth, the EU has become increasingly dependent on imports of natural resources at the expense of a broad range of ecosystems. It follows that nature conservation problems associated with the extraction and processing of many materials and natural resources are shifting from the EU to the respective exporting countries.

¹ For a complete list of the different agreements protecting biodiversity in force in Europe, see de Sadeleer and Born (2004) 743–762.

² See Chapter 18 in this volume.

³ With the exception of the EC 1979 Birds Directive [1979] OJ L103/1 (see below section III.30.5.2). See Chapter 7 in this volume.

⁴ Treaty on the Functioning of the EU [2012] OJ C326/47 (TFEU) art 267.

Thus, the EU cannot conduct its policy in isolation. Accordingly, environmental issues are at the core of the Union's external action.⁵ Over the past four decades, EU law has also been enriched by a raft of MEAs intended to put a stop to this deterioration of the living world. In particular, the EU as well as its 28 Member States have ratified the 1992 Convention on Biological Diversity (CBD), which represented a watershed in the development of the international law on biodiversity. As a framework convention, it establishes the foundations which must underpin both national and EU legislations on the conservation and sustainable use of biodiversity.

However, it should be noted at the outset that, unlike international law, the EU legal acts enacted with the view to protecting biodiversity are not equivalent to either the 1992 CBD or the 1982 UN Convention on the Law of the Sea, agreements which laid the basis for conservation regimes covering both inland and marine biodiversity.⁶ Moreover, as will be argued below, biodiversity in EU law is covered by relatively heterogeneous legislation, adopted at different times without any general overview and coming in the form of both regulations and directives.⁷ Although these rules were normally passed within the context of the EU's environmental policy, they have also resulted from other policies, such as the Common Agricultural Policy (CAP), the Common Fisheries Policy (CFP), the Common Commercial Policy (CCP) or that of the internal market (see below section III.30.3). Although they are highly diverse in nature, these rules may be classified under three broad categories, the first covering the exploitation of biological resources, where necessary limiting exploitation to guarantee its continuity (e.g. agriculture and fishery regulations), the second aiming at protecting the elements of biodiversity (e.g., CITES Regulation, Birds and Habitats Directives, etc.), and the third intended to curb processes which affect the biosphere, whether on a global scale or not.⁸

The purpose of this chapter is to take stock of the contribution of EU law to the conservation of biodiversity in Europe. The difficulty is how to describe that amalgam of directives, regulations, plans and programmes. We will begin our analysis with a brief overview of the present state of biodiversity on our continent (section III.30.2), going on to address the competences of the EU and the 28 Member States that can give rise to acrimonious debates regarding the choice of the legal basis of the acts adopted with a view to conserving biodiversity (section III.30.3). After a brief look at the political developments taking place in that field (section III.30.4), the focus will shift to both species and habitat conservation measures (section III.30.5), and, last but not least, the regulation of

⁵ Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU) arts 3(5) and 21(2)(f).

⁶ See Chapter 9 in this volume.

⁷ It is important to emphasize the different features of these two legal binding instruments. Regulations have general application, are binding in their entirety and are directly applicable in all Member States. They bind the institutions, the Member States as well as the individuals to whom they are addressed. In contrast, a directive is deemed to be a very flexible tool mainly used to harmonize national legislations. It obliges the Member States to achieve a certain result but leaves them free to choose how to do so. Accordingly, in contrast to a regulation, a directive must first be transposed by the Member States, which are free to choose the form and the means for fleshing out the obligations in their legal orders.

⁸ For a comprehensive analysis of the trends embedded within international law, see de Sadeleer and Born (2004) 24–343.

genetically modified organisms (GMOs) (section III.30.6).⁹ Account is also taken of the integration principle (section III.30.7) and funding (section III.30.8).¹⁰

III.30.2 The state of biodiversity in Europe

Although less marked than on other continents, Europe's biodiversity displays a number of particular characteristics. Significant variations in the physical environment (climate, soils, hydrology, winds, topography), the influence of the Atlantic Ocean and the different regional seas, as well as the geological and climatic history of the region (glaciation) have contributed to the evolution of a rich diversity of animal species, ecosystems and natural landscapes on the continent. The diversity of the European landscape is testament to the millennial symbiosis between man and his natural environment.

Today however, biodiversity faces a major crisis at both world and European levels, the implications of which still have not been fully appreciated. In Europe, most natural or semi-natural, continental and coastal ecosystems are now subject to significant modifications as a result of human activity. Increasingly fragmented,¹¹ subject to intensive urbanization, cultivation or cattle grazing, polluted and eutrophized, the ecosystems sink to the lowest common denominator, losing their cultural and natural specificity. For animal and plant species this results in a fragmentation and isolation of their habitats, constituting one of the most serious threats to their long-term survival. As a result of this, they are suffering an unprecedented rate of extinction on account of the degradation of their habitats, which is only exacerbated by additional threats (poaching, excessive hunting, damage inflicted by tourism).¹² On a more global scale, global warming¹³ and the depletion of the ozone layer risk precipitating much more profound changes to the distribution, structure and functions of European ecosystems. Scientists expect that these disruptions will cause an unprecedented drop in the wealth of specific and genetic diversity.¹⁴

III.30.3 Competence and legal bases

III.30.3.1 Competences

In accordance with the principle of conferral of powers,¹⁵ the EU only enjoys the competences attributed to it by virtue of the founding treaties. Given the cross-cutting nature of biodiversity, it is a tall order to specify with exactitude the division of competence between the EU and the Member States regarding this issue. In effect, the allocation of competence between the supra-national level and the national level tends to be not so

⁹ See Chapters 16 and 32 in this volume.

¹⁰ See Chapter 35 in this volume.

¹¹ Thirty per cent of the Union's territory is highly fragmented, affecting the connectivity and health of ecosystems and their ability to provide services as well as viable habitats for species. E.g. Decision No. 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on General Union Environmental Action Programme to 2020 'Living Well within the Limits of our Planet' (OJ L354/171) (7th Environment Action Programme) I, 6.

¹² See Chapter 27 in this volume.

¹³ See Chapter 21 in this volume.

¹⁴ Among the 9,735 European taxa that have been assessed by the IUCN, at least 1,677 are threatened with extinction. E.g. IUCN Red List of Threatened Species in Europe.

¹⁵ Article 5(2) of the Treaty on the EU (TEU).

much a separation but rather an intermingling of powers. Account must be made of the fact that the Treaty on the Functioning of the EU distinguishes shared, exclusive and coordinating competences, each of which are likely to encompass some aspects of biodiversity and nature conservation.

At the outset it must be stressed that the EU has no exclusive competence for protecting wildlife and ecosystems. With respect to shared competence,¹⁶ the EU has the power to legislate (the European Parliament and the Council jointly adopting legislation) in enacting legally binding acts in this area (directives and regulations). Because environmental policy is a shared competence, the Member States have to refrain from exercising their competences if the EU has exercised it (principle of pre-emption). For instance, the national authorities are free to afford protection to the species of animals and plants not listed under the Habitats Directive, whereas regarding the species falling under the scope of the Directive, they have to comply with the obligations laid down under that Directive. Another case in point is the coexistence of GMOs and neighbouring traditional agricultural crops, a subject that is not harmonized.¹⁷ As long as no legislation has been adopted with respect to the coexistence between the different categories of crops at EU level, Member States are empowered to decide the coexistence measures.

It must be noted that the harmonization process does not necessarily deprive Member States of their regulatory powers. In particular with respect to management of ecosystems and conservation of wildlife, the need for uniform rules seems less pressing than in the establishment and the functioning of the internal market. The harmonization by the EU of nature protection legislations is only minimal. Unless the subject matter has been completely harmonized (e.g. chemicals, pesticides, placing on the market of GMOs), the Member States remain free to enact more stringent national standards than the ones laid down in the nature protection acts¹⁸ provided that their regulatory measures are consistent with the economic freedoms of the Treaty on the Functioning of the EU.¹⁹ In other words, habitats and species protection and water management legislation²⁰ charges the national authorities with the programming of implementing measures. Thus, in spite of a number of harmonizing measures, Member States still retain much leeway in conducting their nature conservation policies. Moreover, the harmonization process is subject to the principle of subsidiarity,²¹ which does not aim to allocate powers, but rather regulates the exercise of shared competences.

The EU environmental shared competence interacts constantly with both exclusive (CCP, conservation of marine biological resources under the CFP) and complementary (culture, tourism) competences.²² There may very well be difficulties in applying these competences. Whereas the conservation of fisheries belongs exclusively to the EU, the EU has no exclusive competence for protecting nature. And it has no legislative competence at all to regulate ecotourism.

¹⁶ Article 4(2)(e) TFEU, by virtue of art 2(2) TFEU.

¹⁷ Opinion AG Bot in Case C-442/09 *Bablok* [2011] ECR I-7419, para 4.

¹⁸ Article 193 TFEU.

¹⁹ de Sadeleer (2014) 350–358.

²⁰ See also Chapters 7–9 and 13 in this volume.

²¹ Article 5(3) TEU.

²² Articles 3 and 6 TFEU.

III.30.3.2 Legal bases

Each EU piece of legislation must be founded on one or more legal basis set out in the EU treaties. The choice of the relevant basis is of a constitutional nature on the grounds that the relevant basis mirrors the proper allocation of powers between the EU and its Member States as well as between the EU institutions. However, given the cross-cutting nature of biodiversity issues, the choice of legal base for the adoption of an EU measure is far from being self-evident. This is compounded by the Byzantine structure of treaty law, with its diversification of legal bases.

The vast majority of the legal acts regarding nature protection (Birds Directive, Habitats Directive, etc.) have been adopted on the genuine environmental legal basis.²³ However, owing to the cross-cutting character of biodiversity, an array of EU policies are called on to integrate the requirements stemming from a genuine conservation policy.²⁴ Thus, several legal acts relating to biodiversity have been adopted under the chapters relating to the CAP,²⁵ the internal market²⁶ and the CCP.²⁷

III.30.4 Policy development

III.30.4.1 Core issues

A real policy of conserving biodiversity is gradually coming to light in a series of non-binding acts adopted by EU institutions. These acts can be classified within a pyramidal hierarchy. At the pinnacle lies the 7th Environment Action Programme, which focuses on sustainable development and the integration of the environment into other EU policies. At an intermediate level are the soft law documents relating to biodiversity. The pyramid rests on distinctly more precise sectoral strategies adopted by the Commission to tackle different environmental issues.

III.30.4.2 7th Environment Action Programme

The 7th Environment Action Programme (EAP) 'Living well, within the Limits of our Planet' aims at, among other things, protecting, conserving and enhancing 'the Union's natural capital' up to 2020. Contrary to the Commission EU biodiversity strategy, the EAP was adopted on 20 November 2013 by the European Parliament and the Council of the Union in accordance with the ordinary legislative procedure.²⁸ The EU institutions and the Member States are responsible for taking appropriate action, with a view to the delivery of the priority objectives set out in that programme. The EAP endorses the targets set forth under the Europe 2020 Strategy.

III.30.4.3 Programmes specific to biodiversity

Specific biodiversity strategies setting forth conservation objectives and policy priorities have been adopted in order to implement the CDB, to which the EU is party and, more

²³ Article 192 TFEU.

²⁴ Article 11 TFEU.

²⁵ Article 43 TFEU.

²⁶ Article 114 TFEU.

²⁷ Article 207 TFEU.

²⁸ Decision No 1386/2013/EU.

specifically, its obligations on the development of strategies, plans and programmes designed to ensure the conservation and sustainable use of biodiversity and the integration of conservation and sustainable use into the sectoral programmes, plans and policies.²⁹ In 2001 the EU undertook to halt the decline of biodiversity in the Union by 2010 and to restore habitats and natural systems, but to no avail.³⁰ A 2006 EU Biodiversity Action Plan addressed the challenge of integrating biodiversity concerns into other policy sectors in a unified way. After this failed attempt to stop biodiversity loss, the European Commission adopted a new strategy to halt biodiversity loss in the EU by 2020. As an integral part of the Europe 2020 Strategy, the EU biodiversity strategy to 2020 aims at 'reversing biodiversity loss and speeding up the EU's transition towards a resource efficient and green economy'.

III.30.4.4 Other programmes

Other communications and recommendations of the Commission are likely to contribute to the taking of specific action formulated within the framework of the EU Biodiversity Strategy. Such instruments include in particular the Commission communications on integrated coastal zone management, sustainable urban development, on soil protection, the use of pesticides, the sustainable use of the sea, the conservation of marine ecosystems, etc. Last but not least, the ministers responsible for territorial management in the Member States, in an informal meeting at Potsdam on 11 May 1999, adopted the European Spatial Development Perspective (ESDP) whose objective is to promote a balanced and sustainable development of the Union's territory. This non-binding document, examines the impact of EU policies and their contribution to a balanced and sustainable territorial development, also formulating guidelines on natural heritage.³¹ Against this background, a Territorial Agenda of the EU 2020 was agreed by the Ministers responsible for Spatial Planning and Territorial Development on 19th May 2011. The agenda affords special attention to 'areas rich in natural and cultural landscapes'.

III.30.5 Conservation of species, habitats and ecosystems

The EU is bound by a number of mixed agreements (section III.30.5.1). In that connection, the Bern Convention on the conservation of European wildlife and natural habitat (hereafter the Bern Convention) was fleshed out by two key legislations: Directive 2009/147/EC on the conservation of wild birds (hereafter the BD) and Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora (hereafter the HD). Thanks to these legal instruments, much has been achieved as a matter of nature conservation over the last thirty years. Due to the high level of interdependence of the powerful pieces of legislation for nature conservation, this section will discuss the two Directives, which have given rise to heated academic debates, in tandem (sections III.30.5.2 to III.30.5.4). Other pieces of EU law, such as the Alien Species Regulation, the Environmental Liability

²⁹ CBD art 6.

³⁰ The Commission as well as the EEA have repeatedly been acknowledging that the EU was unable to achieve its global target of significantly reducing biodiversity loss by 2010. E.g. European Commission (2008) and (2010); EEA (2009) 49–50.

³¹ Haumont (2014) 53–68.

Directive, and the various water management directives also contribute to nature protection.³² Given the space available here, these acts will just be mentioned.

III.30.5.1 EU obligations under international law

In accordance with its competence to conclude MEAs with third countries and international organizations,³³ the EU has concluded a significant number of international agreements in the area of nature protection. As well as being a party to the CBD, which is promoting the implementation of conservation measures *in situ*,³⁴ the EU has also concluded with its Member States various international and regional conventions which are more specifically targeted at the protection of the habitats of numerous animal and plant species.³⁵

- the Bern Convention on the Conservation of European Wildlife and Natural Habitats;
- the 1982 Geneva Protocol concerning specially protected areas in the Mediterranean;
- the 1991 Salzburg Convention on the protection of the Alps;
- the 1995 Barcelona Protocol concerning specially protected areas and biological diversity in the Mediterranean;
- the 1994 Convention to combat desertification.

With respect to these MEAs, the external competence of the EU over these matters is shared between the Member States and is not exclusive. In contrast to the exclusive competence that applies to the CCP, the shared external competence implies that the MEAs are negotiated, concluded, implemented and managed jointly by the EU and the Member States. All MEAs to which the EU is a contracting party are classified in the academic literature as 'mixed agreements' since they were concluded both by the EU as well as by the Member States. In particular, the mixed representation at the conferences of parties guarantees the participation of both the EU and its Member States in the decision-making process.³⁶

Though the competence is shared, the Member States' action is limited by the duty of loyal cooperation.³⁷ The CJEU has held that where competence is shared, it is essential

³² See Directive 2004/35/EC on environmental liability [2004] OJ L143/56, Regulation (EU) No 1143/2014 on invasive alien species, etc. [2014] OJ L317/35. On the latter, see also Chapter 20 in this volume.

³³ Article 191(1) and (4) TFEU.

³⁴ CBD art 8.

³⁵ However, the EU is not party to the European Landscape Convention (adopted 20 October 2000, entered into force 1 March 2004) 2296 UNTS 141; the Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243 (CITES); and the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar, adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245 (Ramsar Convention), although the Habitats and Birds Directives guarantee the conservation by national authorities of a very large number of marine habitats similar to the Ramsar sites.

³⁶ Krämer (2007) 870–873.

³⁷ Article 4(3) TEU.

to ensure close cooperation between the EU and the Member States 'both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into'.³⁸

Once MEAs are concluded by the EU, they form an integral part of the EU legal order. It follows that, as long as it is worded in clear, precise and unconditional terms, the requirement for an MEA to subject the discharge of pollutants into surface water to an authorization procedure has direct effect.³⁹ Moreover, the EU as well as the Member States are jointly responsible for fulfilling the obligations owed to third States. By breaching a mixed agreement, a Member State can trigger the EU responsibility.⁴⁰

III.30.5.2 A two-tier conservationist approach under the Habitats and Birds Directives

Initial efforts on the part of the European Community (EC) led to the protection of avifauna with the adoption in 1979 of the Birds Directive.⁴¹ The protection of birds was considered by the framers of the Directive to be a 'trans-frontier environment problem entailing common responsibilities', in particular relating to migratory species which 'constitute a common heritage'.⁴² However, the Birds Directive only amounted to a piecemeal approach to the implementation of a policy of conservation of biodiversity because other wildlife was equally deserving of a supranational protection regime. The need to follow a coherent nature conservation policy, in particular in the light of the seriousness of the threats hanging over all wild fauna and flora, together with their habitats, prompted the EU to adopt the Habitats Directive in 1992. The adoption of this Directive was justified by the fact that it was an 'essential objective of general interest',⁴³ due on the one hand to the trans-frontier nature of the problems involved (animals and plants are surely not well acquainted with state borders) and on the other hand the Member States' role as guardians of the Community's natural heritage.⁴⁴

Following the example of the Bern Convention, the Habitats Directive intended to ensure, other than for winged creatures, the maintenance of biodiversity by requiring the conservation of particular natural habitats as well as certain species of wild fauna and flora. Required measures thus operate along twin tracks. Member States must, on the one hand, ensure the conservation of natural habitats and species habitats,⁴⁵ while, on the other, protecting the species as such by regulating their capture or their harvest.⁴⁶

In contrast with the Birds Directive, the obligation to maintain species in a favourable conservation status does not apply to the whole spectrum of biological diversity, as such a task would indubitably be too arduous. Thus paragraph 2 of Article 2 provides that 'measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of

³⁸ Case C-246/07 *Commission v Sweden* [2010] ECR I-3317.

³⁹ Case C-213/03 *Etang de Berre* [2004] ECR I-7357.

⁴⁰ *Feret* (2006) 118.

⁴¹ Directive 79/409/EEC on the conservation of wild birds that has been codified by Directive 2009/147/EC. Wills (1994) 219.

⁴² Directive 2009/147/EC [2010] OJ L20/7 Preamble, para 3.

⁴³ HD Preamble para 1.

⁴⁴ HD Preamble para 4.

⁴⁵ *ibid* arts 2–11.

⁴⁶ *ibid* arts 12–16.

Community interest', and not extended to *all* species of wild fauna and flora. This means that the scope of application of the Habitats Directive is restricted to natural habitats and so-called species 'of Community interest' as set out in the Annexes, the adoption of which is decided by a qualified majority vote of the Council of Ministers acting on a proposal of the Commission.⁴⁷ The Directive does not therefore cover all types of natural and species habitats within the territory of the EU. This contrasts with the position for the Birds Directive, which applies to all avifauna encountered in the EU.

III.30.5.3 *Conservation of habitats*

Species whose habitats are not conserved are condemned to disappear. In this context the linchpin of the Birds and Habitats Directives is the Natura 2000 network. Faced with the prospect of Noah's Ark literally sinking, EU lawmakers have afforded a specific importance to the conservation of the natural habitats of wild fauna and flora enshrined in two legal instruments: 'special protection areas' (SPAs), intended to protect the habitats of Annex I rare and vulnerable bird species as well as migratory species under the Birds Directive; and 'special areas of conservation' (SACs), intended to protect particular non-bird habitats of interest under the Habitats Directive. SACs are to contribute significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type (200 types) or of a species (over 1,000 animal and plant species).

SPAs and SACs have subsequently been consolidated into one single coherent network, Natura 2000, the world's largest network of protected areas. In 2015 the network had over 26,000 sites and covered over 1 million square km; 18 per cent of the land surface and 4 per cent of the EU waters (territorial seas and exclusive economic zones) have been designated.

Nevertheless, the legal machinery put in place to ensure the conservation of natural habitats is highly complex and understood by only a select elite of environmental law specialists. Given that SPAs and SACs are subject to distinct yet complementary classification regimes, the two Directives overlap to a large extent. To make matters worse, there have been considerable delays in the establishment of this network, which is all the more unjustifiable at a time when the deterioration of many ecosystems has never been so marked.⁴⁸ Valuable habitats were destroyed instead of being designated. Moreover, the level of designation and enforcement varies significantly from one State to another. A significant number of these sites appear to be protected only on paper.⁴⁹ Obviously there is a gap between the law in the textbooks and the law in action. A difference has also been noted between the CJEU's relatively strict interpretation of the texts and the European Commission's apparently more lax view on the granting of or derogations for infrastructure projects in protected areas.⁵⁰

Article 6 of the Habitats Directive—which applies to both SPAs and SACs—has given rise to a steady flow of cases that have spawned a vast body of literature. It requires

⁴⁷ *ibid* art 19.

⁴⁸ The ECJ condemned several Member States for belated implementation measures (Case C-2220/99 *Commission v France* [2001] ECR I-5831; Case C-67/99 *Commission v Ireland* [2001] ECR I-5757).

⁴⁹ Case C-96/98 *Commission v France* [1999] ECR I-8531.

⁵⁰ *de Sadeleer* (2005) 215.

Member States to protect designated habitats, and provides for specific procedural requirements whenever projects or plans are likely to threaten those protected habitats.⁵¹ Although this provision has not only halted ill-conceived development projects, it has nevertheless encouraged developers to find ways to reduce the damaging effects of their projects.

Lastly, with respect to the protection of aquatic ecosystems, the Water Framework Directive,⁵² the Marine Strategy Framework Directive,⁵³ and the Floods Directive⁵⁴ are likely to play a key role. The Water Framework Directive required the achievement of a 'good ecological status' by 2015, whereas the Marine Strategy Framework Directive aims to achieve 'good environmental status' by 2020, though it is unlikely that these targets will be achieved.⁵⁵ There is a need to carry out further research regarding the added value of these EU legal instruments to nature protection.

III.30.5.4 Conservation of indigenous species

Generally speaking, the Birds Directive lays down a general prohibition on the killing, capture, (deliberate) disturbance, retention and commercialization of bird species, the keeping of protected species, as well as the destruction, damage or collection of their nests and eggs.⁵⁶ Furthermore, it outlaws the use of all means, arrangements or methods to capture or kill on a large or non-selective scale.⁵⁷ This regime is however not absolute, as important exceptions are allowed, in particular relating to marketing, hunting and capture.⁵⁸

Unlike the 1979 Birds Directive, the 1992 Habitats Directive does not set up a general protection regime for wild animal and plant species living within EU territory, as the protective measures only apply to a limited number of species of Community interest. Two regimes are provided for, one covering species in need of strict protection⁵⁹ and whose capture can only be allowed in exceptional circumstances, and the other covering species whose capture may be subject to management measures.⁶⁰ However, the transposition of this Directive's provisions on species protection has subsequently given rise to numerous difficulties.⁶¹ Of particular concern is that, as for the Birds Directive, the Habitats Directive has run into resistance from certain Member States.

III.30.5.5 Conservation of exotic species

Alongside the United States and Japan, the EU represents one of the three largest markets for the international trade in wild species. While the first pillar of EU policy on nature conservation consisted of guaranteeing protection to species indigenous to

⁵¹ García Ureta (2007) 8–20; de Sadeleer (2013) 7–22.

⁵² Directive 2000/60/EC.

⁵³ Directive 2008/56/EC.

⁵⁴ Directive 2007/60/EC.

⁵⁵ 7th EAP, Annex I, 19.

⁵⁶ BD arts 5 and 6(1).

⁵⁷ BD art 8.

⁵⁸ *ibid* arts 6, 7 and 9.

⁵⁹ Annex IV.

⁶⁰ Annex V.

⁶¹ See among other cases, Case C-434/01 *Commission v UK* [2003] ECR I-13239.

the EU together with their habitats, a second pillar covers the trade in exotic species imported into the EU. The EU has first of all applied the CITES Convention without however having been able to ratify it,⁶² and has considerably broadened the scope of application of the CITES Convention within the Community legal order. The regulation classified wild animal and vegetable species under four annexes, while subjecting other species which are not necessarily included in the CITES annexes to control regimes.

The EU has also forbidden of its own accord the trade in particular large mammal species well-known to the general public (whales, baby seals,⁶³ furs of major predators), all the time subject to intense pressure from the hunting lobby.⁶⁴

III.30.6 Conservation of genetic diversity

III.30.6.1 *Conservation of genetic resources and equitable sharing of the benefits arising from their utilization*

EU law regarding genetic resources is chiefly concerned with conservation of varieties of domesticated plants and animals, with little attention given to wild genetic resources.⁶⁵

Since it did not become a member of the FAO until 1991, the EU was not party to the 1983 FAO International Undertaking on Plant Genetic Resources. On the other hand, it became a party to the International Treaty on Plant Genetic Resources for Food and Agriculture.⁶⁶ As a party to the CBD and its Nagoya Protocol on Access to Genetic Resources and Benefit-sharing,⁶⁷ it is also required to take the necessary implementing measures at EU level.⁶⁸

On a political level the EU has only recently broached the issue of genetic resources. Measures promoting actions in favour of genetic resources in agriculture and forestry have been taken since 1992, within the framework of the agro-environmental regime. Moreover, a legal framework was established in 1994 to promote specially tailored projects for the conservation, characterization, collection and use of genetic resources.⁶⁹ Stressing the importance of preserving genetic resources in order to preserve biodiversity in agriculture, a regulation on the conservation, characterization, collection and

⁶² CITES (EC) Regulation No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein. However, thanks to the entry into force of an amendment allowing regional economic integration organization to join CITES, the EU became a Party to this MEAS on 8 July 2015.

⁶³ WTO DSB, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, DS 400/DS 401.

⁶⁴ See for instance Council Regulation (EEC) No 348/81 of 20 January 1981 on common rules for imports of whales or other cetacean products and Council Directive 83/129/EEC of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom.

⁶⁵ de Sadeleer and Born (2004) 569–581.

⁶⁶ See Chapter 18 in this volume.

⁶⁷ See Chapter 17 in this volume.

⁶⁸ Regulation (EU) No 511/2014.

⁶⁹ European Commission (2013).

utilization of genetic resources in agriculture⁷⁰ attempts to safeguard biodiversity in line with the CBD.⁷¹ These acts were adopted according to the CAP legal basis.⁷²

III.30.6.2 Management of GMOs

A lively debate has been raging across the EU regarding the risks related to the dispersal into the environment, as well as the placing on the market, of GMOs, both in relation to ecosystems as well as to the integrity of the non-modified or wild stock of the parent species. Distinguished by its approach based on the principle of prevention as well as the precautionary principle due to epistemological and methodological uncertainties inherent within this technology, the law on GMOs has consistently expanded its scope both in order to ensure the proper functioning of the internal market and to meet the Treaty requirements for a high level of consumer and environmental protection. It follows that the regulatory powers of the Member States have been whittled down by an almost exclusive harmonization regarding the contained use, the deliberate release, the marketing, the labelling and traceability, as well as the international transfers of GMOs. In contrast to many legal instruments dedicated to nature protection, the legal instruments on GMOs have been addressed extensively by scholars.⁷³

III.30.7 Integration

Article 11 TFEU requires the integration of environment concerns—including biodiversity—into other EU policies and action, such as agriculture, fisheries, etc. Given that agriculture and forestry together represent 78 per cent of land cover in the Union, the CAP and the CFP play a major role in maintaining biodiversity. It is beyond the scope of this chapter to comment upon these ever-evolving regimes. There is no doubt that the greening of the CAP should promote environmentally beneficial agricultural and forestry⁷⁴ practices such as crop diversification, the protection of permanent grassland and grazing land, and sustainable agroforestry, and will also promote the establishment and maintenance of ecologically valuable farmland and forest areas, including through extensive and traditional practices.⁷⁵ Since 2003, the reformed CAP has been linking direct payments to requirements that farmers maintain land in good agricultural and environmental condition and comply with relevant environment legislation. Cross-compliance is particularly important in contributing to the sustainability of agriculture, by promoting the protection of vulnerable ecosystems, such as water bodies, soil and habitats for species.⁷⁶

⁷⁰ Regulation (EC) No 1467/94 replaced by Council Regulation (EC) No 870/2004 of 24 April 2004.

⁷¹ Council Regulation (EC) No 870/2004 [2004] OJ L162/18 Preamble, para 2.

⁷² Article 43 TFEU.

⁷³ Lee (2008).

⁷⁴ See Chapter 14 in this volume.

⁷⁵ 7th EAP, Annex I, 20.

⁷⁶ Jack (2009).

III.30.8 Funding

The financing of environmental projects is a matter for the Member States.⁷⁷ Remarkably enough, although the social and economic pillars of sustainable development dispose of funds made available for these purposes,⁷⁸ the title of the TFEU dedicated to environmental policy does not make any provision for structural financing. Moreover, the significance of the socio-economic funds dwarfs the LIFE Programme that is deemed to be one of the spearheads of EU nature protection funding.⁷⁹ Therefore, the success of a nature conservation policy depends on the willingness of the Member States to provide matching funds. That being said, the contribution to agri-environmental schemes⁸⁰ may be as low as 15 per cent; unlike the first pillar of the CAP, these schemes are subject to co-financing. This appears to be a sufficient deterrent for State financial intervention.

III.30.9 Conclusion

Four observations flow from the above analysis: the first in relation to the international legal order; the second regarding the development of a legal framework specifically tailored to the problems touched upon; the third related to the integration of biodiversity issues into the EU legal order; and the last linked to the implementation of EU law by the Member States.

As far as the international scene is concerned, all biodiversity experts recognize that the EU has become the linchpin of international environmental policy. Without the active engagement of the EU, agreements such as the Cartagena Protocol on Biosafety would not have been concluded or would not have entered into force. Without the efforts of the EU institutions, the precautionary principle would never have come to the forefront of international policymaking. Yet the picture is not as idyllic as one might be led to think because the EU still lags behind its purported aspirations.

As far as the EU legal order itself is concerned, large gaps remain in the structure from the point of view of biodiversity conservation. Neither biodiversity nor nature conservation is enshrined in treaty law. With respect to secondary law, in the absence of a framework directive on biodiversity, the EU has found itself forced to fall back upon legislative acts stemming from diverse areas of policymaking, each adopted according to its own specific procedures, pursuing different goals, and elaborated without any general overview. Disputes over the choice of legal basis have led to interminable turf wars (section III.30.3.2). There is significant overlap in the application of legislative acts (section III.30.5), while special protection and conservation areas end up being subject to complementary yet distinct classification and protection arrangements; and the coexistence of multiple 'zonings' each answering to different directives pursuing multifarious objec-

⁷⁷ Article 192(4) TFEU.

⁷⁸ Council Regulation (EC) No 2012/2002 establishing the European Union Solidarity Fund [2002] OJ L311/3.

⁷⁹ Launched in 1992, LIFE has financed 3,115 projects contributing €2.2 billion to the protection of the environment. The latest Financial Instrument for the Environment (LIFE+) was adopted through Regulation (EC) No 614/2007 concerning the Financial Instrument for the Environment (LIFE+) [2007] OJ L149/1. See Communication from the Commission, Mid-term review of the LIFE+ Regulation, COM(2010) 516 final.

⁸⁰ Regulation (EC) No 1698/2005 on rural development.

tives is, to say the least, problematic. Furthermore, despite the merits of the Natura 2000 network, the Birds and Habitats Directives fall far short of providing a comprehensive conservation regime. Even if it were correctly implemented, this network will fall short in allowing the EU to achieve the 2020 targets.⁸¹ Indeed, in spite of all the actions taken at EU level to combat biodiversity loss, only 17 per cent of habitats and species and 11 per cent of key ecosystems protected under EU legislation are in a favourable state.⁸²

On the integration score, an issue which has been left aside here for reasons of space and has not been subject to sufficient academic research, the challenges remain considerable. For more than five decades, policy after policy has been born of a frenetic obsession with productivity, and the road to the reconciliation of economic development with the conservation of natural resources under the aegis of the principle of sustainable development⁸³—a key EU treaty objective—remains strewn with pitfalls.

Finally, the acid test for this law lies in its application, which, it is important to reiterate, is incumbent upon the Member States. The numerous findings against Member States by the CJEU constitute only the tip of the iceberg. The absence of a political will, the lack of financial resources, the predominance of traditional interests over ecological interests, outdated systems of criminal law, the inability of environmental NGOs in many Member States to bring court actions, and the ambiguity of the applicable legal provisions are just a few of the factors undermining the application of harmonized EU measures.⁸⁴ It comes as no surprise that despite the number of laws that now exist with respect to nature conservation, and the many positive impacts that they have had, these positive steps are falling short of preventing Noah's Ark from sinking.

So far, legal regulation has not taken a back seat. In particular, both the Habitats and the Birds Directives have not been subject to any major change. The intent to repatriate in the name of subsidiarity nature protection legislations has not been successful. That being said, the principle of subsidiarity has led to the production of fuzzy and soft law to the detriment of precise and unconditional rules which can be invoked by private persons against State organs. In November 2014, the Commission decided to examine the potential for 'merging' the Habitats and the Birds Directives 'into a more modern piece of legislation'. Both Directives underwent a Commission-helmed 'fitness check' to ensure they were 'fit for purpose'. At the end of 2016, the Commission concluded that, within the framework of broader EU biodiversity policy, the Habitats and the Birds Directives remain highly relevant and are fit for purpose. The calls for watering down some key obligations of these directives were thus rejected.

So far, academic lawyers are addressing the legal regimes that give rise to a steady flow of cases, such as the impact assessment of projects and plans threatening the integrity of Natura 2000 sites. Therefore, it is necessary to conduct further academic research on the effectiveness of the EU legal regimes, their relationship with MEAs, the integration of biodiversity requirements into the internal market, the CCP, the CFP and the CAP, the conservation of genetic resources, etc.

⁸¹ Born and others (2015).

⁸² European Commission (2009).

⁸³ See Chapter 4 in this volume.

⁸⁴ de Sadeleer (2014) 219–221.

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