Judgment of 29 April 2021 - BVerwG 4 C 2.19

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Temporary prohibition of operation of an offshore wind farm due to adverse effects on diver populations not excluded

Headnotes

1. The term monitoring and supervisory measures within the meaning of section 1 (1) first sentence no. 6 UmwRG must be interpreted broadly (following BVerwG, judgment of 23 June 2020 - 9 A 22.19 - BVerwGE 168, 368).

2. A prohibition of operation based on section 16 (3) first sentence SeeAnlV of an installation approved under the Offshore Installations Ordinance is always temporary; it is not a final prohibition regulating the installation's operating conditions in the form of a permanent solution - which would be the case had a subsequent condition been issued on the basis of section 16 (2) SeeAnlV -, but only a temporary measure.

3. The prohibition of operation does not require the prior annulment of the licence granted under the provisions of the law on offshore installations on the grounds that the operator has failed to comply with its duties.

4. Pursuant to section 1 first sentence USchadG, the provisions on the ordering of threat avoidance measures pursuant to section 7 (2) no. 2 and section 6 USchadG are superseded by the authorisation to order threat prevention measures pursuant to section 16 (3) first sentence SeeAnlV.

Sources of law

Offshore Installations Ordinance	SeeAnlV, *Seeanlagenverordnung*	section 5 (6) no. 2, section 14 no. 1, section 16
Offshore Installations Act	SeeAnlG, *Seeanlagengesetz*	section 14 (3)
Offshore Wind Energy Act	WindSeeG, *Windenergie-auf-See-Gesetz*	section 57 (3)

Environmental Appeals Act	UmwRG, *Umwelt-Rechtsbehelfsgesetz*	sections 1 (1) first sentence no. 1 and 6, second sentence, (2) and (4), 8 (2) no. 1
Environmental Damage Act	USchadG, *Umweltschadensgesetz*	sections 1, 3 (1) no. 2, sections 6, 7 (2) no. 2
Federal Nature Conservation Act	BNatSchG, *Bundesnaturschutzgesetz*	sections 19 (1) second sentence, 56 (1)
Code of Administrative Court Procedure	VwGO, *Verwaltungsgerichtsordnung*	sections 44, 121 no. 1
Habitats Directive		article 6 (2) and (3)
United Nations Convention on the Law of the Sea (UNCLOS)		article 1 (1) no. 4, articles 56 (1) (a), 60, 194

Summary of the facts

The claimant, a recognised environmental organisation, seeks the issuance of a temporary prohibition of operation of the offshore wind farm "Butendiek" in order to prevent further environmental damage due to adverse effects on diver populations.

The wind farm, which was built in 2014/2015 and commenced operation in the summer of 2015, consists of 80 wind turbines and ancillary facilities on an area of approximately 34 km². It is located approximately 30 km off the island of Sylt in the German exclusive economic zone and in the nature conservation area "Sylt Outer Reef - Eastern German Bight" ("*Sylter Außenriff - Östliche Deutsche Bucht*"). Since 2017, it has combined a marine area designated in April 2005 as a European special protection area under the Birds Directive and determined in September 2005 as a nature conservation area, and a Habitats Directive site designated in July 2011. The protective purposes pursued in the nature conservation area include maintenance or restoration of a favourable conservation status, in particular regarding the red-throated diver (*Gavia stellata*) and the black-throated diver (*Gavia arctica*), and of the area in its function as a feeding, wintering, moulting, migration and resting area for these birds.

By notice of 18 December 2002, the Federal Maritime and Hydrographic Agency (BSH, *Bundesamt für Seeschifffahrt und Hydrographie*), based on the Offshore Installations Ordinance (SeeAnlG, *Seeanlagenverordnung*), granted a license for the construction and operation of the wind farm. The action brought by the claimant against the licence was dismissed by the Hamburg Administrative Court (*Verwaltungsgericht*) as inadmissible on the grounds that the claimant did not have standing to bring proceedings.

In May 2014, the claimant filed an application with the BSH requesting the prohibition of the further construction and operation of the wind farm. The BSH rejected the application by notice of 1 August 2014: The claimant did not have standing to file an application regarding the threat prevention measures under the Environmental Damage Act (USchadG, *Umweltschadensgesetz*).

In response to the action filed against this decision, the lower instances dismissed the action. The appeal on points of law was partially successful and resulted in a remittal of the case.

Reasons (abridged)

10 The appeal on points of law is admissible and partially well-founded. The Higher Administrative Court (*Oberverwaltungsgericht*) held that, as far as having become the subject matter of the appeal proceedings on points of law, there was no claim for an intervention under the Offshore Installations Ordinance, which constitutes a breach of federal law (section 137 (1) no. 1 of the Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*)). Insofar, the matter is to be remitted to the Higher Administrative

Court for a further hearing and decision (section 144 (3) first sentence no. 2 VwGO). In all other respects, the appeal on points of law is unfounded; the contested judgment is unobjectionable in this respect, at least with regard to its result (section 144 (4) VwGO).

11 1. The appeal on points of law is admissible. (...) In the appeal proceedings on points of law, the claimant, contrary to the lower instances, no longer pursues the request to prohibit the operation of the wind farm permanently and throughout the year or - also in the sense of a permanent solution - at least in the springtime (March/April) during the main times of presence of the divers, but now only requests to temporarily prohibit the operation of the wind farm until a proper condition has been established. Only to this extent has the decision on the first subsidiary application become pending in the proceedings on the appeal on points of law.

12 2. The appeal on points of law is partially well-founded. The Court of Appeal held that there was no claim for an intervention on the basis of section 16 (3) first sentence of the Ordinance on Offshore Installations Seaward of the Limit of the German Territorial Sea - Offshore Installations Ordinance (SeeAnlV, Verordnung über Anlagen seewärts der Begrenzung des deutschen Küstenmeeres - *Seeanlagenverordnung*) of 23 January 1997 (Federal Law Gazette (BGBl., *Bundesgesetzblatt*) I p. 57, in the version of article 55 of the Ordinance (...) of 2 June 2016, BGBl. I p. 1257, 1271, (...)), invoking considerations that are unlawful according to federal law.

13 a) However, the Court of Appeal rightly carried out an examination of the merits of the case; it correctly assumed that the action based thereon was admissible.

14 aa) The defendant wrongly claims that the procedural impediment of a conflicting final and binding decision. (...)

15 (...)

16 (...)

17 bb) The Court of Appeal rightly assumed that the claimant has standing to bring proceedings under section 1 (1) first sentence no. 6, second sentence and (2), section 2 (1) of the Environmental Appeals Act (UmwRG, *Umwelt-Rechtsbehelfsgesetz*) in conjunction with section 16 (3) first sentence SeeAnlV.

18 (1) Based on the transitional provisions in section 77 (1) first sentence no. 1 (...) of the Offshore Wind Energy Act (WindSeeG, *Windenergie-auf-See-Gesetz*) (article 2 of the Act of 13 October 2016 <BGBl. I p. 2258, 2310>) (...), (...) the legal basis in the Offshore Installations Ordinance in the version of the Ordinance of 2 June 2016 (BGBl. I p. 1257) - which was repealed with effect as of 1 January 2017 - continues to be applicable to the wind farm which was built and put into operation prior to 1 January 2017 under the provisions of the Offshore Installations Ordinance. (...)

19 The claimant requests the issuance of a decision under section 16 (3) first sentence SeeAnlV. According to this provision, the BSH has the right to fully or partially prohibit the construction or operation of an installation until the proper condition has been established if the installation, its construction or its operation results in a threat to the marine environment, insofar as the threat cannot be averted by other means or the cessation of construction or operation is inevitable in order to investigate the causes of such threat. This decision constitutes an administrative act within the meaning of section 1 (1) first sentence no. 6 UmwRG.

20 (2) Pursuant to section 1 (1) first sentence no. 6 UmwRG, this Act applies to administrative acts on monitoring and supervisory measures aimed at the implementation or execution of decisions under no. 1 to 5 which serve the compliance with environment-related provisions of federal law, of federal state law, or of directly applicable legal acts of the European Union. Pursuant to section 1 (1) second sentence UmwRG, it is also applicable if such a decision was omitted in breach of applicable legal provisions. Finally, section 1 (2) UmwRG constitutively regulates that application of the Act *inter alia* also extends to the functional sovereign territory of the German exclusive economic zone located seaward of the territorial sea, and therefore outside German territory, which is governed by the provisions in articles 55, 56 (1) (a) and (b) of the United Nations Convention on the Law of the Sea of 10 December 1982 - UNCLOS - (BGBl. 1994 II p. 1798, 1799) (...).

21 Pursuant to articles 1, 18 of the Act on the Adaptation of the Environmental Appeals Act and other Provisions to Requirements under EU and International Law (*Gesetz zur Anpassung des Umwelt-Rechtsbehelfsgesetzes und anderer Vorschriften an europa- und völkerrechtliche Vorgaben*) of 29 May 2017 (BGBl. I p. 1298), section 1 (1) first sentence no. 6 UmwRG entered into force on 2 June 2017, and therefore only during the ongoing court proceedings. According to the transitional provision in section 8 (2) no. 1 UmwRG, the provision is applicable here. The reason for this is that, at the time the law was changed, the contested notice of rejection had not yet become legally binding, as an action had been filed against it in good time (see recommendation for a decision and report, Bundestag printed paper (BT-Drs., *Bundestagsdrucksache*) 18/12146 p. 16; see Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*), judgments of 2 November 2017 - 7 C 25.15 - (...) para. 17 and of 29 October 2020 - 4 CN 9.19 - (...) para. 10; see also interlocutory judgment of 28 June 2002 - 4 A 59.01 - (...)).

22 The term monitoring and supervisory measures within the meaning of section 1 (1) first sentence no. 6 UmwRG must be interpreted broadly (see BVerwG, judgment of 23 June 2020 - 9 A 22.19 - Rulings of the Federal Administrative Court (BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*) 168, 368 para. 17 et seq.). This follows in particular from the legislature's intention to fully transpose into national law the requirements of article 9 (3) of the Aarhus Convention - AC - and, for this purpose, to allow actions to be brought to achieve an intervention by public authorities against third parties in the interest of compliance with environmental provisions (BT-Drs. 18/9526 p. 32, 36 et seq.; (...)). The focus towards measures of execution of the law is restricted insofar as separate monitoring measures that are independent of a project approval are not covered; rather, the measures must serve the enforcement and implementation of the decisions listed in section 1 (1) first sentence no. 1 to 5 UmwRG (...). A connection such as this exists here with an approval decision within the meaning of section 1 (1) first sentence no. 1 (a) UmwRG. The licence under the law on offshore installations, which is linked to monitoring measures pursuant to section 16 (3) first sentence SeeAnlV, was - as required by the above provision and correctly stated by the Court of Appeal - subject to an EIA obligation (...).

23 The third party summoned to attend the proceedings as a party whose rights may be affected (hereinafter summoned third party), incorrectly argues that a decision within the meaning of the above provision was not at issue here, as the licence granted prior to 25 June 2005 as the date of expiry of the implementation period for Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (OJ L 126 p. 17) - the Public Participation Directive - (see BT-Drs. 18/9526 p. 46 and BT-Drs. 18/5927 p. 11) was as such not a suitable subject for a representative action (see section 8 (1) first sentence UmwRG). According to the wording of the provision, this is irrelevant. Within the scope of application of section 8 (2) no. 1 UmwRG, it is sufficient that the approval decision to which the decision under section 1 (1) first sentence no. 6 UmwRG refers is subject to certain substantive requirements; it is, however, irrelevant whether or not a legal remedy against the previous approval decision is admissible (...). Finally, contrary to the defendant's opinion, the measures for the implementation or execution of the approval decision are not limited to those that relate to the approval of the project in the sense that such monitoring only covers compliance with the licencing conditions, for example with regard to their scope, compliance with protective obligations and the execution of compensatory and replacement measures ordered. Rather - in particular against the background of article 9 (3) AC - especially the impact of the approval decision has also to be taken into account. The reason for this is that this impact must already be considered when the decision is made. Insofar, the monitoring and supervisory measures are in particular accessory to the licence if, as in the case of a prohibition of operation, they at any rate affect the exploitation of the approval decision.

24 With its focus on the prevention of a threat to the marine environment, section 16 (3) first sentence SeeAnlV also serves compliance with environment-related provisions within the meaning of section 1 (4) UmwRG in conjunction with section 2 (3) no. 1 of the Environmental Information Act (UIG, *Umweltinformationsgesetz*); here, the environmental elements of "natural habitats, including marine areas" and "biodiversity and its components" are affected.

25 b) The Court of Appeal dismisses a claim under section 16 (3) first sentence SeeAnlV by referring to a legalising effect of the legally binding licence for the construction of the wind farm under the law on offshore installations. It argues that the adverse effects of the wind farm on the red-throated and the black-throated divers had been comprehensively considered in the licencing notice, and that, on this basis, a threat to the

marine environment had been negated. Based on the specified provision, this assessment could also not be overcome by issuing a temporary prohibition. This view constitutes a breach of federal law; it does not comply with the regulatory content of section 16 (3) first sentence SeeAnlV, as it over-stretches the legal effects and the limits of the legally binding nature of the licence under the law on offshore installations.

26 aa) Pursuant to section 16 (3) first sentence SeeAnlV, the BSH is authorised to prohibit the operation of an installation, if necessary, until the proper condition has been established if the operation leads, *inter alia*, to a threat to the marine environment. This option to act is part of the monitoring measures which - as can be seen from the general clause in section 16 (2) second sentence SeeAnlV - are aimed at the safeguarding of and compliance with the operator's duties under section 14 SeeAnlV. The operator's duties under section 14 no. 1 SeeAnlV in particular include the prevention of threats to the marine environment. The other intervention options under section 16 SeeAnlV differ with regard to their regulatory content and the intensity of the intervention. Based on the general clause in section 16 (2) SeeAnlV, orders and prohibitions may be issued in the form of subsequent obligations in order to enforce the operator's duties (see also section 2 (3) first sentence SeeAnlV in conjunction with section 75 (2) second sentence of the Administrative Procedure Act (VwVfG, *Verwaltungsverfahrensgesetz*), section 2 (3) second sentence SeeAnlV in conjunction with section 36 (2) VwVfG, section 6 (4) second sentence SeeAnlV, section 4 (3) SeeAnlV 1997). Going beyond the provision in section 16 (3) first sentence SeeAnlV and - accordingly for installations without approval - section 16 (4) first sentence SeeAnlV, section 16 (3) second sentence SeeAnlV and section 16 (4) third sentence SeeAnlV respectively allow the removal of an approved or non-approved installation if the threat cannot be averted in any other manner. In addition, the general rules of administrative procedure law on the withdrawal and revocation of the approval decision apply (section 16 (6) SeeAnlV). A correct interpretation of section 16 (3) first sentence SeeAnlV must blend into this regulatory context and must also correctly account for the scope of the protected interest of the marine environment.

27 bb) The term marine environment must be interpreted broadly. In the exclusive economic zone, the Convention on the Law of the Sea grants the coastal state, in addition to sovereign rights with regard to activities for the economic exploitation of the zone, such as the production of energy from the water, currents and winds (article 56 (1) (a), article 60 UNCLOS), jurisdiction as provided for in the relevant provisions of the Convention with regard to the protection and preservation of the marine environment (article 56 (1) (b) (iii) UNCLOS). In this context, the provisions in the relevant Part XII of the Convention on the Law of the Sea refer not only to measures to prevent, reduce and control pollution of the marine environment pursuant to article 194 (1) to (4) UNCLOS within the meaning of the (narrow) definition in article 1 (1) no. 4 UNCLOS, which merely covers the introduction, directly or indirectly, of substances or energy into the marine environment (...). Rather, article 194 (5) UNCLOS, according to which the measures taken in accordance with Part XII include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life, constitutes an opening clause and as such gives the provisions the character of nature conservation law (...).

28 Accordingly, the term marine environment, apart from the fundamental environmental elements such as the quality of marine waters, hydrography and sediment conditions, also in particular comprises marine life (...). The protection of the fauna as part of the marine environment is legally specified through the codified example of bird migration. (...) Notwithstanding avifaunal terminology and differentiations between resting and migrating birds (see, for instance, BSH, Environmental Report on the Land Development Plan 2019 for the German North Sea (*Umweltbericht zum Flächenentwicklungsplan 2019 für die deutsche Nordsee*), of 28 June 2019, clauses 2.9, 2.10; 3.8, 3.9; 4.6, 4.7; 5.2), adverse effects on bird migration depending on the affected species of birds and their preservation status can only be ruled out if the offshore installations, due to their location on a traditional migration route, give rise to fears that losses due to bird strike will be particularly high; such adverse effects also come into consideration if the construction or operation of an offshore installation has a detrimental effect on the ecological quality of resting, moulting or wintering areas that are significant for the preservation of the relevant species of birds, in particular because the installation scares off the birds (see BT-Drs. 14/6378 p. 65; (...) see also article 4 (2) of Directive 2009/147/EC - Birds Directive -). In order to further clarify the concept of the threat to the marine environment through adverse effects on bird migration within this sense, it is appropriate to use the provisions of nature conservation law as an orientation - as was done in the licence granted. Recourse to the constituent element of adverse effects on "other prevailing public interests" is not necessary (...).

29 cc) A prohibition of operation based on section 16 (3) first sentence SeeAnlV of an installation approved under the Offshore Installations Ordinance is always temporary; it is not a final prohibition regulating the installation's operating conditions in the form of a permanent solution - which would be the case had a subsequent condition been issued on the basis of section 16 (2) SeeAnlV -, but only a temporary measure. Due to the focus on and time-limitation until the establishment of a proper condition, this applies notwithstanding the fact that, during the amendment of the Offshore Installations Ordinance through the Ordinance of 15 July 2008 (BGBl. I p. 1296), the word "temporarily" was omitted from the then applicable version of section 15 (3) first sentence SeeAnlV ("... temporarily prohibit operation in full or in part until the establishment of the proper condition ...").

30 The prohibition of operation constitutes a typical emergency measure under regulatory law, for instance as far as the prevention of the impact of an operational incident that is accompanied by the threat of marine pollution is concerned. Such a measure is by no means in conflict with a legally binding approval, as such incidents are not covered and regulated, and/or go beyond its regulatory effect.

31 Additionally, threats to the marine environment that result from the consequences of proper operation in accordance with the licencing conditions and that do not result in marine pollution but in adverse effects under aspects of nature conservation law, may also be the reason for an intervention pursuant to section 16 (3) first sentence SeeAnlV. This approach is not *a priori* barred by the legal effect of the licence.

32 (1) The "establishment of a proper condition" as an objective of the prohibition of operation means not only the outcome of the remediation of the incident which restores the installation into the compliant status within the meaning of compliance with the licencing conditions, so that measures under section 16 (3) first sentence SeeAnlV are unnecessary if operation is in compliance with the licence. Rather, the proper condition refers to compliance with the operator's duties within the meaning of section 14 SeeAnlV and their protective purposes. These duties require as a general rule that the operation is managed in accordance with the relevant legal requirements and that damage and threats are prevented insofar. This is intended to be achieved through monitoring measures. A restriction of the causes relevant in this respect to facts that only occurred during the operation of the installation does not result from the wording that the operation of the installation leads to a threat to the protected interests; rather, this only requires proof of a causal relationship.

33 A restriction of the permissible target of the prohibition order may, in principle, result from the legal effects of the legally binding licence under the law on offshore installations, based on which the wind farm is being operated. However, the regulatory content of this licence is limited. It allows the construction and operation of the approved installation and determines that the installation complies with the provisions of public law, insofar as it is covered by the assessment programme (in the present case: section 3 SeeAnlV 2002). This determination refers to the time the licence was granted. This constitutes the entire regulatory and legalising effect, as the operator's duties are dynamic in the sense that they are aligned to the relevant current legal situation and the legal requirements applicable now, as well as the environmental standards pursued with it, and must also take into account a new factual situation (...). Insofar, the legal situation in the context of a licence under the law on offshore installations, which, following the terminology of the Federal Immission Control Act (BImSchG, *Bundesimmisionsschutzgesetz*), covers the construction and operation of the offshore installation (...), does not differ from the corresponding fundamental principles of general immission control law (see sections 17, 20, 21 BImSchG). This means that subsequent changes in the law cannot be addressed by objecting that it must not be possible to interfere with the status of an existing installation that was determined to be lawful (see BVerwG, judgment of 23 October 2008 - 7 C 48.07 - BVerwGE 132, 224 para. 27). Regarding the factual circumstances, it may be left open whether the legally binding effect supersedes a mere change in the assessment of the factual basis that, as such, have remained unchanged. However, new findings regarding the impact of the installation must always be taken into account when determining the operator's duties. This applies, on the one hand, to new scientific findings; if scientific progress is reflected in generally acknowledged standards, for instance on the estimation of future developments, such standards are to be considered as new facts that are able to supersede the legally binding effect (see, for example, BVerwG, decisions of 16 July 1982 - 7 B 190.81 - (...) and of 15 February 1988 - 7 B 219.87 - (...); judgments of 28 April 2016 - 4 A 2.15 - BVerwGE 155, 81 para. 36 and of 19 September 2018 - 8 C 16.17 - BVerwGE 163, 102 para. 20; (...)). On the other hand, new facts may result from the ability to no longer determine the impact of the operation of an installation merely in the form of a prognosis, and

therefore an estimate - which was the case when the licence was granted -, but to determine this impact more reliably on the basis of empirical proof after the construction and commissioning of the installation. Even if a prognosis was prepared without any errors with regard to the basis and method, the licence, if dynamic operator's duties are being regulated, is always subject to the proviso that the impact prognosis may fail - for whatever reasons - and that the activities of the holder of the licence may have to be adjusted to the new situation when the licence is exploited.

34 (2) The temporary prohibition of operation does not require the prior annulment of the licence on the grounds that the operator has failed to comply with its duties. This requirement is neither expressly codified, nor does it follow from the reference in section 16 (6) SeeAnlV to the provisions on the withdrawal and revocation of an administrative act. This reference merely clarifies that the provisions in section 16 SeeAnlV are not conclusive in relation to the general rules of administrative procedure law, but otherwise contain independent regulations. The independence of section 16 (3) first sentence SeeAnlV is confirmed by the fact that the prohibition of operation is always temporary. The time gained can in particular be used to remedy the breach of the operator's duties - if this has not yet been overcome during the examination in the course of the monitoring procedure - either through changes of the factual circumstances, such as the operating modalities, or improvements with regard to the legal circumstances by means of granting exceptions or exemptions. In a situation such as this, the temporary prohibition becomes a mere interruption of operation, after which the safeguarding of the operation through a licence is once more mandatory.

35 Insofar, the legal situation differs from the case where the installation is removed in accordance with section 16 (3) second sentence SeeAnlV. Here, the licence no longer has to be kept "in reserve". Rather, all arguments suggest that, also due to the severity of the intervention, the licence granted as the basis for the construction of the installation must first be annulled. This is not least confirmed by the fact that the corresponding successor provisions now expressly provide for an annulment (section 57 (3) second sentence WindSeeG; section 14 (3) second sentence SeeAnlG), and that the legislative materials insofar do not assume that the legislation applicable previously has changed (BT-Drs. 18/8860 p. 315, on section 57 WindSeeG; BT-Drs. 18/9096 p. 379, on the SeeAnlG).

36 (3) Even if, based on this, the continued existence of the licence does not stand against a, possibly limited, prohibition of operation in order to provisionally secure compliance with the operator's duties in the interests of threat prevention, the fact that the constituent elements are met does not lead to an obligation for the authority to use the legal basis in a specific manner. Rather, the authority has discretion. The existence of the licence will then have to be included in the discretionary considerations, at least for the decision as to how to intervene, for instance regarding the temporal aspect. This also follows from a comparison of the provisions in section 16 (3) second sentence and section 16 (4) third sentence SeeAnlV: While the removal of an approved installation is within the authority's discretion as an *ultima ratio*, it is mandatory if an installation does not have a licence.

37 Insofar, contrary to the claimant's opinion, a different conclusion can furthermore not be drawn in view of article 6 (2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora - Habitats Directive -, which section 33 (1) of the Federal Nature Conservation Act (BNatSchG, *Bundesnaturschutzgesetz*) serves to implement. As the Court of Appeal correctly stated, the general prohibition of a deterioration of natural habitats as codified in article 6 (2) of the Habitats Directive continues to be of significance even after a project has been approved, notwithstanding the general priority of the project-related provisions in article 6 (3) of the Habitats Directive. Thus, projects approved following a study that did not meet the requirements of article 6 (3) of the Habitats Directive before the site in question was listed must be the subject of a subsequent assessment of its implications in accordance with article 6 (2) of the Habitats Directive (see Court of Justice of the European Union (CJEU, hereinafter Court of Justice), judgments of 14 January 2016 - C-399/14 [ECLI:EU:C:2016:10], Grüne Liga Sachsen - para. 46 and - C-141/14 [ECLI:EU:C:2016:8], Commission/Bulgaria - para. 52; BVerwG, judgment of 15 July 2016 - 9 C 3.16 - (...) para. 36 et seqq.). It is also of significance if a project granted in accordance with article 6 (3) of the Habitats Directive subsequently proves likely to give rise to deterioration or significant disturbances (see CJEU, judgment of 7 September 2004 - C-127/02 [ECLI:EU:C:2004:482], Waddenvereniging - para. 36 et seq.). However, the Member States' general duty of protection within the meaning of a continuous obligation to take appropriate protective measures for avoiding a significant deterioration or disturbances resulting from article 6 (2) of the Habitats Directive does not predefine specific measures which the Member States

have to take (CJEU, judgment of 14 January 2016 - C-399/14 - para. 44 et seq.; BVerwG, judgment of 23 June 2020 - 9 A 22.19 - BVerwGE 168, 368 para. 69). If, as in the present case, a legal basis exists that is suitable to contribute to the protection of habitats, this issue must be taken into consideration when this provision is applied. The duty of protection must be included in the discretionary considerations on the selection of the measures.

38 c) Based on these principles, the dismissal of the claim with the grounds provided by the Court of Appeal cannot be upheld.

39 aa) On the one hand, the Court of Appeal, based on its incorrect interpretation of the law, failed to assess the new findings submitted by the claimant regarding the impact of the wind farm on the divers in their habitat, and to examine whether these findings may give rise to installation-related threat-prevention measures. The fact that such a consideration could not *a priori* be denied on the basis of the studies available to the Court of Appeal at the time of the oral hearing - which is the relevant time for the decision on a request for the issuance of an administrative act -, is confirmed not least by the assessment in the notice from the Federal Agency for Nature Conservation (BfN, *Bundesamt für Naturschutz*) of 9 March 2021, which, in order to prove legally relevant adverse effects of the divers, invokes findings that were already available in 2018. This Senate is barred from subsequently conducting this examination on the basis of the current findings. The matter is to be remitted to the Higher Administrative Court for a further hearing and decision, pursuant to section 144 (3) first sentence no. 2 VwGO.

40 bb) Remittal is furthermore required as the Court of Appeal on the other hand failed to take into account a change in legislation.

41 Prior to the granting of the licence, only a - precautionary - examination under the provisions on the protection of habitats was conducted, but not under the provisions on the protection of species. This was in line with national law as applicable at the time. The Act of 25 March 2002 (Act on the Reorganisation of the Law on Nature Conservation and Landscape Management and on the Adjustment of other Legal Provisions (BNatSchGNeuregG, *Gesetz zur Neuregelung des Rechts des Naturschutzes und der Landschaftspflege und zur Anpassung anderer Rechtsvorschriften*), BGBl. I p. 1193) inserted section 38 BNatSchG, old version, which, for the first time, regulates the protection of marine areas. As results in particular from section 38 (1) no. 5 BNatSchG with the reference to sections 33 and 34 BNatSchG, this prescribes - in accordance with the provisions of the Convention on the Law of the Sea - the applicability of the provisions on the protection of habitats under nature conservation law within the German exclusive economic zone. The provisions on the protection of species were not territorially extended at the time (...). This was done only through the insertion of section 56 (1) BNatSchG through the Act on the Reorganisation of the Law on Nature Conservation and Landscape Management (*Gesetz zur Neuregelung des Rechts des Naturschutzes und der Landschaftspflege*) of 29 July 2009 (BGBl. I p. 2542), with effect from 1 March 2010; with this, the application of the other instruments of nature conservation law, with the exception of landscape planning, was also extended to the area of the German exclusive economic zone (see BT-Drs. 16/12274 p. 73). Insofar, under German law a change in the law occurred which, as a matter of principle, must be taken into account by the holder of the licence.

42 The restriction of this extension to the provisions on the protection of habitats constitutes a breach of EU law. The Court of Justice has decided that the Habitats Directive is applicable in the exclusive economic zone, also in relation to the protection of species and, insofar, must be implemented by the Member States (judgment of 20 October 2005 - C-6/04 [ECLI:EU:C:2005:626], Commission/United Kingdom - para. 117). However, prior to its comprehensive (territorial) implementation through the extension of its applicability under the Federal Nature Conservation Act in the version of the Act of 29 July 2009, the Habitats Directive was not applicable to the detriment of the summoned third party and/or its legal predecessor. Even if the requirements for a direct application of the Directive - expiry of the implementation period, specificity regarding content and unconditionality - were met, the German authorities were unable to invoke the Directive - which insofar had not been implemented - within the meaning of an "inverse vertical direct effect" (...). The fact that a private party may be indirectly burdened by the application of a Directive which has not been properly implemented if a third party has the right to demand the authority to act in compatibility with EU law, does not lead to a different conclusion (...). A situation such as this did not exist in the present case due to the absence of a standing to bring a representative action.

43 In this legal context, a change in the law also exists when considering the licence under the law on offshore installations in the form of the amendment notice issued by the BSH on 17 February 2011. In this notice, the time limit by which work on the construction of the wind farm must have been commenced - in order to avoid an expiry of the licence - was extended until 31 December 2014. This condition subsequent was intended to prevent an unjustified stockpiling of project areas. As a consequence, the examination is limited to the time perspectives for the realisation of the project, while the licence requirements or grounds for refusal are not re-examined.

44 3. With regard to all other aspects, the appeal on points of law is unsuccessful. The judgment is correct - at least with regard to its result - and the appeal on points of law is to be dismissed in accordance with section 144 (4) VwGO insofar as the claimant was not successful with his request on the basis of the Environmental Damage Act.

45 a) Insofar, the claimant's request can be the subject matter of a separate decision. The requested intervention for the purpose of threat prevention on the basis of the Offshore Installations Ordinance on the one hand and of the Environmental Damage Act on the other hand is not to be considered as a concurrence of bases for a claim (*Anspruchsnormenkonkurrenz*). Rather, different subject matters of the dispute are concerned which are pursued by means of an alternative objective accumulation of actions (*objektive Klagehäufung*; section 44 VwGO).

46 (...)

47 b) The Court of Appeal determined a lack of standing to bring proceedings under the Environmental Damage Act, with comprehensive statements. However, for reasons of judicial economy, the question as to whether this interpretation of the law is compatible with the law that is subject to an appeal on points of law (...) does not need to be decided in any case as, in this respect, the decision is upheld under section 144 (4) VwGO due to the correctness of the result.

48 This follows from the fact that the provisions on the ordering of threat avoidance measures under section 7 (2) no. 2, section 6 USchadG are not applicable here, due to the subsidiarity prescribed in section 1 first sentence USchadG. According to this provision, the Environmental Damage Act is applicable insofar as laws and regulations at federal or federal state level do not cover the prevention and remediation of environmental damage in specific detail or their provisions fall short of the Environmental Damage Act. Pursuant to section 1 second sentence USchadG, laws and regulations that go beyond this Act remain unaffected.

49 (...)

50 bb) Section 1 second sentence USchadG, implementing the opening clause in article 16 of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ L 143 p. 56) - Environmental Liability Directive -, which allows for more strict provisions under national law, clarifies that the Environmental Damage Act merely defines a minimum standard and does not prevent regulations that go beyond these rules (see BT-Drs. 16/3806 p. 13). Against this background, section 1 first sentence USchadG prescribes the priority of specific legislation, insofar as it also regulates the legal situation covered by the Environmental Damage Act for the prevention and remediation of environmental damage, and in fact contains broader or more specific regulations regarding the constituent elements both relating to personal or substantive responsibilities as well as to the legal consequences, and nevertheless achieves, as a minimum, the standard of protection provided by the Environmental Damage Act (...).

51 According to a generalising overall consideration, these conditions are met with regard to the authorisation to order threat prevention measures under section 16 (3) first sentence SeeAnlV. The substantive scope of application of this provision is broader than the Environmental Damage Act insofar as the Offshore Installations Ordinance, with the protected interest of the marine environment and, in particular, with the fauna and flora covered by it, not only takes into consideration the aspect of the natural balance and the so-called biodiversity damage covered by section 2 no. 1 (a) USchadG in conjunction with section 19 (1) first sentence, (2) and (3) BNatSchG (...). The conditions for an intervention in section 16 (3) first sentence SeeAnlV, i.e. the presence of a threat, are less strict than under section 7 (2) no. 2, section 5 USchadG where

the determination of an imminent threat of an environmental damage is required. Furthermore, it cannot be assumed that claims asserted against the operator of an approved installation would fall short of the options under the Environmental Damage Act due to a fundamentally different assessment of a legalising effect of the licence under the Offshore Installations Ordinance. As shown above, a legalising effect cannot always be held against an intervention based on section 16 (3) first sentence SeeAnlV -, this differing from the situation in the context of the general authority to intervene under nature conservation law provided for in section 3 (2) BNatSchG (...). In the context of claims under the Environmental Damage Act, it is incorrect to assume that a legalising effect insofar never applies. The holder of the licence is, as a matter of principle, the responsible party within the meaning of section 2 no. 3 USchadG. However, on the one hand, the provision in section 19 (1) second sentence BNatSchG on a release from liability if an activity was approved or is permissible in a specific examination procedure leads to a substantively limited legalising effect. On the other hand, in the case of an activity that was previously approved, the requirement of fault may not be met in the context of the examination of liability under section 3 (1) no. 2 USchadG (see BVerwG, judgment of 21 September 2017 - 7 C 29.15 - (...) para. 27 (...)). Finally, the legal consequences are regulated more specifically in section 16 (3) first sentence SeeAnlV, as this provision codifies an installation-related approach.