

Where the Wild Things Are: Animal Autonomy in EU Law

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One of my children's favourite books is Maurice Sendak's 'Where the Wild Things Are'. In it, Max, a young boy, is sent to bed without supper, after having behaved like a wild animal. As his room magically transforms, he embarks on a big adventure, sailing across the world to arrive at an island inhabited by monsters. While these wild things try to scare Max, they don't succeed and soon realise that Max is even wilder than them, proclaiming him their king. Wild play ensues, quickly followed by homesickness and Max' desire to sail back home to return to his bedroom.

The book has generated quite a bit of academic commentary, mainly in the context of its message on developmental psychology – focusing on the stages in a child's self-determination and their relationship with (parental) authority.¹ But what is equally striking is how it portrays 'the wild' as something that is separate from 'the civilised'. This relates both to how our own emotional state and stages of maturation are understood, but, as in Sendak's story, also in spatial terms: Max "sailed off through the night and day / and in and out of weeks / and almost for a year / to where the wild things are", which is "far away across the world". The message is clear: what is wild is both psychologically, developmentally, and spatially removed from who we are and where we live.

This deeply-seated dichotomy between 'the wild' and 'the civilised' is central to our cultural understanding of the world and also to our contemporary management of wild spaces. This includes EU law, where the Habitats and Birds Directives, for example, designate certain spaces where human activity should be limited to account for the needs of 'the wild'. For EU law, in other words, 'the wild' is something that can be best appreciated on the map: as a clearly demarcated space that operates on the basis of 'another' logic. This approach finds support in animal rights literature, which suggests that the autonomy of animals – their ability to act according to their *own* conditions – can best be protected by insulating them as much as possible from human interference.

At the same time, this strict spatial and conceptual dichotomy between wild spaces and human places is increasingly problematic. In recent years, it has been criticised in normative terms, as perpetuating a distinction that does not take wild animals or their environment seriously. Likewise, it struggles to make sense of the increasing examples of wild animals entering urban places – due to climate change, a destruction of their habitat or scarcity of food. Analytically, then, this dichotomy between wild spaces and human places is no longer particularly helpful in understanding how the two should interact, and how law – including EU law – can make sense of their interaction (section 1).

In the past years, the Court of Justice of the European Union ('Court') has had to make sense of the collapse of this dichotomy. In cases involving wild hamsters living in Vienna and wolves entering urban areas in Romania and Finland, the Court has interpreted the Habitats Directive in ways that accommodate the mobility of protected species outside their 'own' spaces. This type of movement

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¹ Colston & Kuiper, 'Figurative Language Development Research and Popular Children's Literature: Why We Should Know, "Where the Wild Things Are" 17 Metaphor and Symbol (2002) 27; Ball, 'Max's Colonial Fantasy: Rereading Sendak's "Where the Wild Things Are" 28 A Review of International English Literature (1997) 167; Gottlieb, 'Maurice Sendak's Trilogy: Disappointment, Fury, and Their Transformation through Art', 63 Psychoanalytic Study of the Child (2008) 186.

was not foreseen by the Directive, whose commitment to protection is both spatial (demarcating protected spaces) and temporal (focusing on species survival in the long term). The problem raised by these cases, then, is relatively straightforward: once the spatial separation between ‘the wild’ and ‘the civilised’ collapses, we need to rethink our legal approach to the tensions that emerge, in particular in respect of the competing claims of autonomy between humans and animals. We need to understand, in other words, how different species can share the world that they inhabit (section 2).

This article suggests that the key to rethinking the functioning of the Habitats Directive lies in taking seriously wild animals’ autonomy, that is, to translate their ability to act in accordance with their own needs, desires, and conditions into legal categories. This approaches animals not as objects to be protected and managed, but as subjects with certain claims to self-determination. It changes our understanding of wilderness from a spatial one – a space insulated from the ordinary functioning of (human) law and society – to one that is more sensitive to what makes wilderness so.

This article suggests that animal autonomy can take two forms in EU law, both of which are reflected (very implicitly and incipiently) in the case law of the Court on the Habitats Directive. The first focuses on animal *agency*, borrowing from the area of the free movement of persons to understand how animal mobility expresses agency. It offers an established template for EU law to engage with the tension between the agency of wild animals and claims by human communities. A second approach to make sense of animal autonomy focuses not on their movement but their fundamental alterity, their *otherness*. On this view, the application of the Habitats Directive should be sensitive to the conditions that allow wild animals to be themselves. This approach is less focused on the *choices* made by wild animals (in, for example, a wolf crossing urban places in search of food) and more on the conditions that are fundamental to *being* a wolf (section 3). It is argued that while the Court has favoured the agency approach to navigate the question of animal autonomy, only the latter approach, focusing on their alterity, allows EU law – like Max – to take its own wild side seriously: not as an exception to the normal state, but as an irreducible part of it.

1. Wild Spaces and Human Places

Wilderness as an analytical category has quite a legacy in US scholarship, where it is associated with a strong – constructed – dichotomy between wilderness and its counterpoint of ‘civilisation’. Wilderness is defined by what it is *not*: it is “unknown, disordered, dangerous” and “not subject to human control”.² Understanding *difference* as the fundamental trait of wilderness, of course, can both be seen as demanding a limitation of our own autonomy in our dealings with it – given that we can never truly understand it – or as a rallying cry for its taming and assimilation to a state that we *can* understand.³ In the European context, the notion of wilderness plays a different and less explored role, even if equally serving as a foil for our ‘civilised’ self. Virginie Maris’ recent work, for example, highlights the historical and conceptual colonisation of ‘the wild’ in Europe, wherein it has long been understood as something without immanent value, as something passive and whose worth is commensurate to our extraction *from* it.⁴ Maris traces this in Aristotle’s vision of nature, in Christianity’s view and in the modernist perspective. Throughout, the ‘wild’ has perhaps not been defined in opposition to ‘the civilised’ but its alterity has been denied through its annexation *into* ‘the

² Nash, *Wilderness and the American Mind* (Yale University Press 2001), 12.

³ Gomez-Pampa & Kaus, ‘Taming the Wilderness Myth’, in: Callicott, Nelson (eds.), *The Great New Wilderness Debate* (University of Georgia Press 1998); Denevan, ‘The Pristine Myth: The Landscape of the Americas in 1492’ in: Callicott, Nelson (eds.), *The Great New Wilderness Debate* (University of Georgia Press 1998).

⁴ Maris, *La Part Sauvage du Monde: Penser la Nature dans l’Anthropocène* (Seuil 2021).

civilised'.⁵ Perhaps most evident is the deeply rooted Cartesian distinction between humans as autonomous subjects and animals as 'automata', which perpetuates until today the widely-held assumption that nature and animals are objects that require management *by* humans.

This perspective, wherein 'the wild' is construed from *our* perspective and seen as a resource for *our* use – be it economic, recreational, cultural or even to secure *our* environmental objectives⁶ – and where its needs are prescribed by *us*, can perhaps best be characterized by describing what is wild as a 'space' and what is human as a 'place'. Whereas the former is an abstract geographical site that is characterised by absence and freedom from prescription,⁷ the latter is a deeply meaningful site: a place is where space takes on meaning.⁸ Places are full of smells, symbols, ideas, opportunities, and articulate questions of agency, relations and self-realisation. It is an ordered spatial category that reflects and problematises relationships, constraints and hierarchies. Spaces, on the other hand, are construed as just that: as something with one dimension: the spatial one. It is a physical and not a metaphysical site. In the past decades, in Europe, we have seen attempts to re-spatialise the wild: to remove human physical presence and their meta-physical projections of meaning. The wild is seen as a *space* that requires our active absence, that requires human regulation in order to *allow* for wildness, that actively resists the anthropocentric desire to convert space into place. This, in itself, is problematic and counterintuitive in so far as it pre-empts animal meaning by perpetuating a distinction that reduces meaning as being exclusively human. This central distinction between wild spaces and human places, however, also preordains the EU's approach to protect wilderness, of which the Habitats and Birds Directives are the most important examples.

The ambition of the Habitats Directive ('HD') is to maintain the EU's biodiversity and to protect threatened habitats and species. This ambition takes the form of two strategies: setting up protected *spaces* and protected *species*.⁹ Protected spaces, known as 'special areas of conservation', are listed as Natura 2000 sites. These sites are either prime examples of specific types of habitat that are part of the EU's natural heritage, are endangered due to a decrease in their natural range (for example due to urbanisation), or are the natural habitat of species that are endangered, vulnerable, rare or endemic.¹⁰ Natura 2000 sites now cover around 18% of the EU's land area, and includes around 2000 species and 230 habitat types.¹¹ Within (and around, below, above) these protected spaces human activity – economic, recreational, cultural – is at times permitted, at times demanded (for example in helping restore biodiversity or because threatened species depend on human activities such as scrub control or mowing),¹² and at times excluded. The permitted engagement of humans within and around protected sites depends on whether human activity adversely affects the protected habitat and species. This is determined through site-specific management plans that are required to engage with the local biotic and abiotic conditions, as well as with the latest scientific and ecological data. The

⁵ Maris, op. cit. *supra* note 4, 68: "si les modernes séparent la nature de la culture, c'est pour mieux acculturer la nature, et donc finalement l'absorber dans des modalités qui lui sont étrangères, niant tout à la fois son extériorité, son altérité et son autonomie".

⁶ See for a recent example the Commission's ambitious proposal for a Nature Restoration Law (Proposal for a Regulation of the European Parliament and of the Council on Nature Restoration), COM (2022) 304 final, 2022/0196 (COD)).

⁷ Tuan, *Space and Place: The Perspective of Experience* (University of Minnesota Press 1977).

⁸ Relph, *Place and Placelessness* (Pion 1976).

⁹ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (1992) OJ L 206/7 ('Habitats Directive')

¹⁰ Art. 1 and 3 of the Habitats Directive

¹¹ https://ec.europa.eu/environment/nature/natura2000/fag_en.htm

¹² Sobotta, 'The European Union legal boundaries for semi-natural habitats management in Natura 2000 sites' 43 *Journal for Nature Conservation* (2018) 261.

baseline obligation in Natura 2000 sites remains that Member States must implement and enforce all measures deemed necessary to prevent deterioration and secure the conservation of listed sites.¹³

This approach – whereby human activity is curbed in proportion to its impact on conservation objectives – is also visible when it comes to the protection of *species* in the Habitats Directive. While the protection of habitats understands conservation in a spatially defined sense; the protection of species complements this with a temporal understanding. Species that are listed in Annex IV of the Directive are strictly protected to ensure their long-term survival. This list contains over 400 species, including the European hamster, the wolf, arctic fox, bear, bison, ibex, green turtle and many more.

These species are protected ‘in their natural range’¹⁴ under Article 12 HD, with their killing, capture, disturbance or a deterioration of breeding sites and resting places being prohibited.¹⁵ The concept of ‘natural range’ is, problematically, deeply ahistorical, setting a baseline for species protection that internalises the century-long *decrease* of their habitat that preceded their inclusion in Annex IV of the Directive. It is a notion, at the same time, that is dynamic, increasing the spatial protection where species either move of their own accord or are reintroduced in areas adjacent to their ‘natural range’.¹⁶ As we will see, this effect – of Article 12 HD protection ‘travelling with’ the animals as they move into new territories – is one that upsets the EU’s constructed distinction between animal spaces and human places and that has led to a reinterpretation of the Habitats Directive.

The strict rule of protection of Article 12 HD can be suspended under Article 16 HD, which allows exceptions for reasons of habitat protection; to prevent serious damage to livestock; for the interest of public health and safety; or “on a selective basis and to a limited extent, the taking or keeping” of animals.¹⁷ All these exceptions, however, can only be invoked where “there is no satisfactory alternative” and where “derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range”.¹⁸ As we will see, these last two requirements significantly limit the ability of Member States to allow the killing, taking, or disturbance of protected species. It also suggests that the baseline for species protection in the EU is set at their ‘favourable conservation status’ (‘FCS’), given that no measure may be taken that is detrimental to a species’ FCS. Article 1 (i) HD defines the conservation status of a species as *favourable* when “population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats” and “the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future”, and “there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis”.¹⁹ What FCS means is a loaded question: as Epstein highlights, this question requires an assessment of the acceptable risk of extinction – which can range from 10% chance of extinction in 100 years to a 1% chance in 1000 years. Most commonly the threshold is set at 5% chance of extinction in 100 years.²⁰ But measuring even that chance of extinction presupposes agreement on the quality of the habitat,

¹³ Case C-508/04, *Commission v Austria* ECLI:EU:C:2007:274.

¹⁴ Art. 12 of the Habitats Directive

¹⁵ Art. 12 of the Habitats Directive.

¹⁶ Commission Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC (2007).

¹⁷ Art 12 of the Habitats Directive

¹⁸ Art. 12 of the Habitats Directive.

¹⁹ Art. 1 (i) of the Habitats Directive.

²⁰ Epstein, ‘Favourable Conservation Status for Species: Examining the Habitats Directive’s Key Concept through a Case Study of the Swedish Wolf’ 28 *Journal of Environmental Law* (2016) 221.

the genetic viability and diversity to maintain population sizes,²¹ as well as an assessment on exogenous risks such as food source stability and climate change impact on these factors, which are not always evident.

The EU's approach to conservation has been dogged from the start by implementation problems and controversy in the allocation of territory and other resources between 'wild spaces' and 'human places'.²² In general terms, however, its approach (if not always its execution) has been well-received by many scholars in environmental studies, highlighting that the spatial curtailing of human activity and autonomy takes the ecological presuppositions of conservation seriously.²³ It also finds support in much of the animal rights literature, which takes the view that a respect for wild animals requires offering them the space to be themselves and act in accordance with *their* conditions and not ours.²⁴ This recasts the interaction between wild spaces and human places as a (meta)physical and conceptual barrier: on one side of the divide wild animals are protected and *our* understanding of their needs internalised in our juridical framework; whereas on the other side they are not. As several authors have highlighted, this dichotomy leads to odd results, wherein an individual animal (say, a wolf) becomes either strongly protected or killable upon crossing a river, a latitude or border.²⁵

This dichotomy between wild spaces and human places, between two distinct and spatially separate perspectives, is, however, becoming increasingly untenable. In empirical terms, we can trace an increase of 'wild' animals entering urban or other human places due to biodiversity collapse of their habitat, climate change, scarcity of food and successful restoration attempts.²⁶ High-profile anecdotal examples include the presence of bears and wolves in Romanian villages,²⁷ hamsters in Vienna,²⁸ wild boars in Berlin,²⁹ and, with a dramatic sense of symbolism, wolves in Rome.³⁰ This process of 'synurbanisation', whereby wild animals adapt their behaviour to the specific conditions required for

²¹ Epstein, op. cit. *supra* note 20, 232 suggests that genetic viability requires at least 500 effective individuals, requiring population sizes of us to 5 times as large.

²² Beunen and Kole, 'Institutional innovation in conservation law: Experiences from the implementation of the Birds and Habitats Directives in the Netherlands' 106 *Land Use Policy* (2021) 1056.

²³ Schoukens and Bastmeijer, 'Species Protection in the EU: How Strict is Strict?' in: Born, Cliquet, Schoukens, Misonne & Van Hoorick (eds.), *The Habitats Directive in its EU Environmental Law Context* (Routledge 2016) 122.

²⁴ See for example Regan, *The Case for Animal Rights* (University of California Press 1983) 357; Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (Columbia Press 2008), 13.

²⁵ The part of Spain south of the Douro is excluded from Annex IV protection, as is the part of Greece above the 39th parallel, as these areas have an abundance of wolves. The same goes for Poland and Bulgaria. The Reindeer Protection Area in Northern Finland, on the other hand, has been excluded from Annex IV as wolf here threaten the reindeer population. Trouwborst & Fleurke, 'Killing Wolves Legally: Exploring the Scope for Lethal Wolf Management under European Nature Conservation Law' 22 *Journal of International Wildlife Law & Policy* (2019) 236.

²⁶ See for the most recent overview of both the human-induced causes and the movement of animals: 'State of Nature Report' from the Commission COM (2020) 635 final; and the underlying data 'State of Nature of in the EU: Results from reporting under the nature directives 2013-2018' (EEA Report 10/2020); Babas, Sarwer Hossain, O'Mahony, Okarma, Widera, Wierzbowska, 'Public perceptions and attitudes toward urban wildlife encounters – a decade of change' *Science of the Total Environment* (2022) 843.

²⁷ <https://www.nytimes.com/2018/11/24/world/europe/bears-transylvania-romania.html>

²⁸ <https://www.npr.org/2018/10/14/650605114/with-austrias-hamsters-at-risk-better-call-the-hamster-commish#:~:text=In%20Austria%2C%20the%20common%20hamster,face%20threats%20across%20the%20continent.>

²⁹ <https://www.npr.org/2020/09/09/910651178/wild-boars-are-causing-havoc-in-germany-but-humans-are-making-it-worse?t=1652086364664>

³⁰ <https://wilderness-society.org/the-wolves-return-to-the-city-of-rome/#:~:text=After%20100%20years%20of%20absence,with%202.8%20million%20inhabitants%20again.>

life in urban environments,³¹ invariably brings to the fore the tension that emerges when the two worlds – wild spaces and human places – collide. They also, however, highlight the human complicity in these changes

In fact, the recent move towards a more ecological management of wild spaces arguably does not take wild animals very seriously. In the Anthropocene it is illusory to pretend that certain spaces remain unaffected by human actions, choices and perspectives.³² Moreover, even managing the ‘wild’ in an ecologically progressive fashion presupposes a deeply anthropocentric view which denies the alterity and autonomy of wild spaces, and continues to elevate our own concerns above those of non-humans.³³ It is one where in those spaces designated as ‘wild’, meaning is masked and ignored: nominally in order to protect the freedom of the ‘wild’ but practically to render invisible non-human forms of meaning. Virginie Maris highlights that this process accelerates now that we have the technological and bureaucratic means to ‘tame’ the wild through its datafication: what is wild is now an empirical baseline against which we measure our responses, curated to ensure that they are just about ecological ‘enough’. Wilderness, in Europe, then, is not so much a counterpoint of ‘civilised’ places, but denotes a space where ecological concerns can be ‘placed’: a demarcated space where *our* concerns for ecology, non-humans and natural heritage can be confined as (an illusory) negation of human meaning rather than as a construction of wild meaning.

This normative critique of the contemporary divide between wild spaces and human places comes in two flavours. A first version suggests that we need to rethink how we construct the dividing line: where we draw the border, how we manage its interaction, and how we frame – legally, conceptually, practically – the claims of autonomy on either side of the divide between wild spaces and human places. A second version suggests transcending this dichotomy altogether, so that our (partial) understanding of the autonomy of wild animals is internalised in the functioning of human society.³⁴ In other words, while the first strand of the critique demands rethinking of how and where we construct the divide between wild spaces and human places, the second strand suggests that this divide is problematic in itself. Instead, our focus should be on understanding how to share the world, on how to co-exist. As we will see, the tension between these two versions is central (if implicit) in the Court’s case law. On either account, however, the rigid spatial separation between wild spaces and human places in the Habitats Directive is analytically unhelpful in making sense of their interaction *across* the divide.

2. Hamsters, Wolves and Humans in EU Law

In a range of cases in the past years, the Court has had to make sense of the collapse of the dichotomy between wild spaces and human places. In cases involving wild hamsters living in the Alsace and Vienna and wolves in Romania and Finland, the Court has had to interpret the Habitats Directive in ways that accommodate the mobility of protected species outside their wild spaces. In doing so, it tells us something about how we understand the notions of wilderness and animal autonomy.

³¹ Luniak, ‘Synurbanization – adaptation of animal wildlife to urban development’ in: Shaw et al (eds), *Proceedings of the 4th International Urban Wildlife Symposium* (2004) 50.

³² Hamilton, Bonneuil, Gemenne (eds.), *The Anthropocene and the Global Environmental Crisis: Rethinking Modernity in a New Epoch* (Routledge 2015).

³³ Maris, op. cit. supra note 4, 68 and Donaldson & Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (OUP 2013), 4.

³⁴ See for an introduction to both Buller, ‘Animal Geographies I’ 38 *Progress in Human Geography* (2014) 308.

(a) European Hamster (*cricketus cricketus*)

The three cases involving the habitats of wild hamsters nicely show how the changing bio-physical environment in the EU is upsetting the framework of the Habitats Directive. In one case, the Commission started an infringement procedure under Article 258 TFEU against France for the collapse of the wild hamster population in the Alsace region, arguing that the French protection system was not sufficient for long-term species maintenance.³⁵ In the second and third cases, the hamsters were not endangered but flourishing (in relative terms) in a new surprising setting: the centre of Vienna, where the demands of the Habitats Directive clashed with interests of property developers.³⁶ All three cases, in their own way, revolve around the extent to which human places must accommodate endangered species.

In 2020, the European hamster was added to the ‘critically endangered’ lists of the International Union for Conservation of Nature, which constitutes the last stage before extinction. In just 20 years their number has plummeted by 75% from a position that already required ‘strict protection’ in 1994, due to the deterioration and fragmentation of their habitats as a result of changes to agricultural practices, urbanisation, and climate change.³⁷ In the Alsace, for example, the number of hamster burrows decreased from 1167 in 2001 to between 161 and 174 in 2007.³⁸ Their European habitat, consisting of the grasslands and meadows of Central Europe, the Alsace and Belgium, continues to shrink. Much of their habitat, in fact, has not been included in the list of protected areas in the Habitats Directive by the Member States because it intersects with farming land and urban areas. Strikingly, the hamster population collapse is almost exclusively human-induced.³⁹

The dispute in *Commission v France* centred on whether the obligations of Article 12 HD entail a *positive* obligation as well as a negative one. In other words, the question is whether Member States have to undertake measures that aid the reconstruction of the habitat of Annex IV species so that their status becomes favourable, or must merely avoid taking measures that lead to their deterioration. AG Kokott takes an expansive view, suggesting that given the Directive’s aim to ensure favourable conservation status of the European hamster, Article 12 HD must be interpreted to include also an obligation “to help to restore a favourable conservation status”, which requires measures “adjusted specifically to the circumstances giving rise to the unfavourable conservation status”.⁴⁰ These measures, such as changes to the crop rotation cycles or the addition of winter greening⁴¹ are limited to the immediate vicinity of the hamsters’ breeding sites and resting places – presumably given their importance for long-term species maintenance.⁴² In other words, for Kokott a species that has unfavourable conservation status can make a claim for enhanced protection in the immediate vicinity

³⁵ Case C-383/09, *European Commission v France* (‘French Hamsters’) ECLI:EU:C:2011:369.

³⁶ Case C-477/19, *IE v Magistrat der Stadt Wien* (‘Viennese Hamsters I’) ECLI:EU:C:2020:517.

³⁷ Kletty, Pele, Capber, Hahold, ‘Are All Conservation Measures for Endangered Species Legitimate? Lines of Thinking With the European Hamster’ 14 *Frontiers in Ecology and Evolution* (2020); Neumann, Jansman, Kayser, Maak & Gattermann, ‘Multiple Bottlenecks in threatened western European populations of the common hamster *Cricetus cricetus* (L.)’ 5 *Conservation Genetics* (2004) 181. This number goes up to 90% in the Netherlands and Belgium: H. Schoukens, ‘Common Hamsters in and Outside the City: Some Reflections on Urban Biodiversity, Species Recovery and the EU Habitats Directive’ 19 *Journal for European Environmental & Planning Law* (2022) 184.

³⁸ Opinion of AG Kokott in Case C-383/09, *European Commission v France* (‘French Hamsters’) ECLI:EU:C:2011:23, para. 15.

³⁹ Schoukens, ‘Common Hamsters in and Outside the City: Some Reflections on Urban Biodiversity, Species Recovery and the EU Habitats Directive’ (2022) 19 *Journal for European Environmental & Planning Law* 185.

⁴⁰ Opinion of AG Kokott in Case C-383/09, *French Hamsters* para. 37.

⁴¹ Opinion of AG Kokott in Case C-383/09, *French Hamsters* para. 62-86.

⁴² Opinion of AG Kokott in Case C-383/09, *French Hamsters* para. 50

of *already existing* breeding or nesting places. This does *not* include claims towards their historical habitat, their *potential* breeding places or natural range, to which Article 1 (i) HD alludes.

The Court agrees with Kokott that “the system of strict protection presupposes the adoption of coherent and coordinated measures of a preventative nature”.⁴³ Unlike Kokott, however, the Court understands this to require measures with a much wider spatial scope. It highlights that the minimum viable population threshold for the European hamster is “1500 individuals spread over an area of continuous suitable land of 600 hectares”,⁴⁴ a threshold not met by a long way in the Alsace. The Court then takes aim at France’s efforts to protect the hamster, most notably by the creation of three ‘priority action areas’ (‘PPA’) where agricultural practices are altered to allow for more lucerne and grasslands, and in which urban projects require detailed investigations of their effect on the hamsters before approval. Even *if* these measures were to be effective, the Court suggests, the PAAs only comprise 2% of all land favourable for the European hamster in the region,⁴⁵ meaning that France has failed to fulfil its obligation under Article 12(1)(d) HD. The Court, in other words, focuses on the protection of the actual and potential hamster habitat rather than on the immediate vicinity of the sites where the few remaining hamsters find themselves.

IE v Magistrat der Stadt Wien (‘Viennese hamsters I’) also focuses on the interpretation of Article 12(1)(d) HD and its prohibition of the ‘deterioration or destruction of breeding sites and resting places’. In this case, the city of Vienna had fined a property developer for the deterioration and destruction of hamster burrows while preparing the ground for new buildings.⁴⁶ The intent of the developer was to create an incentive for the hamsters “to relocate to areas which had been specially protected and reserved for it”.⁴⁷ The property developer challenged the fine, arguing that the hamster burrows that were destroyed were not in use and could therefore not qualify as a ‘breeding site or resting place’. The Court clarifies that the prohibition of Article 12(1)(d) HD seeks to ensure that resting places must also be protected “where they are no longer occupied but where there is a sufficiently high probability that the species will return to such places.”⁴⁸ In more general terms, the Court held that “the scheme of protection laid down in Article 12 HD must be sufficient effectively to prevent interference with protected animal species and, in particular, their habitats.”⁴⁹

In a second reference in the same case (*‘Viennese Hamsters II’*), the national court asked further clarification regarding the spatial and temporal implications of the requirement that breeding sites and resting places be protected.⁵⁰ The Court highlights that the protection of breeding sites extends beyond the mere entrances to the burrows of the hamster, and includes areas necessary “to safeguard the ecological functionality of breeding sites”, such as “areas required for courtship, mating, nest construction or selection of egg-laying or parturition site, the place of egg development and egg hatching, and the nest or parturition site occupied by young dependent on that site”.⁵¹ This focus on what is ecologically required for successful reproduction is also visible in the Court’s temporal delimitation of the protection of the Habitats Directive, where it argues that the protection of breeding sites lasts “for as long as necessary in order for that animal species to reproduce

⁴³ Case C-383/09, *French Hamsters* para. 20.

⁴⁴ Case C-383/09, *French Hamsters* para. 24.

⁴⁵ Case C-383/09, *French Hamsters* para. 29 and 33.

⁴⁶ Case C-477/19, *Viennese Hamsters I* para. 2.

⁴⁷ Case C-477/19, *Viennese Hamsters I* para. 12.

⁴⁸ Case C-477/19, *Viennese Hamsters I* para. 34.

⁴⁹ Case C-477/19, *Viennese Hamsters I* para. 33.

⁵⁰ Case C-357/20, *IE v Magistrat der Stadt Wien (‘Viennese Hamsters II’)* ECLI:EU:C:2021:881, para 18.

⁵¹ Case C-357/20, *Viennese Hamsters II* para 26.

successfully”,⁵² so that they “must be protected even when not occupied, where there is a high probability that the animal species concerned will return to those sites”.⁵³

The second set of questions asked to the Court in *Viennese Hamsters II* revolved around the definition of ‘deterioration’ and ‘destruction’ of breeding sites or resting places. The Court again defines these terms with reference to their ecological function, which becomes a baseline against which Member State action is tested: “deterioration may be defined as a physical degradation affecting a habitat, a breeding site or a resting place which (...) may occur slowly and gradually reduce the ecological functionality of the site or place concerned, so that such deterioration may not immediately lead to a loss of functionality, but would affect functionality in terms of quality and quantity and might over a certain period of time lead to its complete loss”.⁵⁴ Logically, then, an assessment of this occurring requires the national court to make sense of the specific ecological requirements of the species and individuals of that species concerned.⁵⁵ This reading of the Habitats Directive in the urban context significantly enhances the spatial protection of endangered species, both in terms of including urban areas within their habitat and in terms of protecting their ecological functionality of that habitat.

(b) Wolf (*Canis Lupus*)

The cases involving wolves offer a different dynamic, partially because of the much greater ability of individual animals to cross large distances and thereby enter human places, and partially because of the (perceived) threat that wolves pose for humans and their livestock. In the *Finnish Wolves* case, the dispute centred on the latter, in the form of the issuing of permits to kill wolves within their own habitat as part of a program to control their population and make rural communities more ‘tolerant’ to their presence. In the *Romanian Wolves* case, the facts were inverted, and the question focused on the obligations under the Directive in cases where wolves enter and demonstrate a level of socialisation in urban settlements. Both cases revolve essentially on how to understand the interaction between wild animals and human places: as a threat to the latter or as an encounter between species.

The European wolf population has declined dramatically in the last century, retaining only small habitats scattered around the continent. In the past decades, partially due to conservation measures and reintroduction attempts, their numbers have grown and they are appearing in Member States and regions where they had been absent for centuries.⁵⁶ This renewed contact between the wolf and human places is not without its tensions: wolves have been known to attack livestock and – very rarely – humans. As Stenseke Arup has highlighted, the re-emergence of wolves – protected by EU and national law against the local population – has turned them into a symbol of both “the utmost wild and for the feelings of powerlessness towards the perceived establishment in [national capitals] and Brussels”.⁵⁷ The fear of the ‘big bad wolf’, however, is infinitely greater than their actual threat:⁵⁸ ever

⁵² Case C-357/20, *Viennese Hamsters II* para 39.

⁵³ Case C-357/20, *Viennese Hamsters II* para 40.

⁵⁴ Case C-357/20, *Viennese Hamsters II* para 48.

⁵⁵ Case C-357/20, *Viennese Hamsters II* para 25-6.

⁵⁶ Trouwborst & Fleurke, op. cit. *supra* note 25, 231.

⁵⁷ G. Stenseke-Arup, ‘Entangled Law: A Study of the Entanglement of Wolves, Humans, and Law in the Landscape’ (2021) Karlstad University Doctoral Thesis, 10.

⁵⁸ Kuijper, Churski, Trouwborst, Heurich, Smit, Kerley & Cromsigt, ‘Keep the wolf from the door: How to conserve wolves in Europe’s human-dominated landscapes?’ 235 *Biological Conservation* (2019) 104.

since Grimm’s fables, wolves have taken a special place in cultural and social tropes as the embodiment of and metaphor for danger, evil and unpredictability.⁵⁹

Luonnonsuojeluyhdistys Tapiola (*‘Finnish Wolves’*) deals with a Finnish program that issued hunting licenses to kill a number of wolves *in order to improve* their conservation status. The ‘logic’ here was that such hunting could reduce illegal poaching of wolves by communities adjacent to the conservation area inhabited by wolves, and thereby make those communities more tolerant to the presence of wolves, especially where “individual animals causing nuisance” were targeted.⁶⁰ AG Saugmandsgaard Øe, in his assessment, takes issue with the objective of ‘tolerance’, suggesting that the fear of wolves was both too generic a claim and their danger too unsubstantiated to serve as a justification under Article 16 (1) HD.⁶¹ This objective, he suggests, could in any event only justify the issuing of hunting permits where, on the basis of rigorous scientific data, it can be demonstrated that hunting would reduce illegal poaching to such an extent that the wolf population would actually *increase*.⁶² Hunting permits could never be issued if the overall outcome was detrimental to the restoration of the wolf population, as this would run foul of the baseline of FCS in Article 16 (1) HD.⁶³ The requirement of Article 16 (1) HD that any killing is only allowed in absence of a satisfactory alternative was not met either, given that poaching could also have been prevented by more punitive measures for hunters, the establishment of electric fences, or the provision of more educational information to local communities.

The Court agrees with AG Saugmandsgaard Øe that the granting of hunting licenses in order to prevent poaching is only allowed where, on the basis of rigorous scientific data, the hunting leads to a net *positive* effect on the population.⁶⁴ In its assessment of the existence of a satisfactory alternative, the Court limits itself to highlighting that this requires Finland to offer reasons why no alternatives existed. The Court is most explicit on the third condition, which sets a baseline of FCS maintenance, requiring engagement with the population structure of Finnish wolves and the geographical and demographic effects of the hunting license.⁶⁵ In case of doubts regarding the effect of the issuing of hunting licenses on FCS, the Court highlights, the precautionary principle should be employed to limit the issuing of such licenses.⁶⁶ Even in cases where the killing of individual animals meet all these requirements, finally, the number of animals that are allowed to be killed must be decided on the basis of contextual data that secures that such killing does not have a negative effect on the population *structure*.⁶⁷

In *Alianța pentru combaterea abuzurilor* (*‘Romanian Wolves’*) the dispute centred on the same provisions of the Habitats Directive, but with a twist: in this case a wolf had left its protected areas and wandered into Șimon, a village situated between two protected areas. For several days, this particular wolf had been present on the property of a local resident, playing and eating with the

⁵⁹ Arnds, *Wolves at the Door: Migration, Dehumanization, Rewilding the World* (Bloomsbury 2021); Buller, ‘Safe from the wolf: biosecurity, biodiversity, and competing philosophies of nature’ 40 *Environment and Planning* (2008) 1583.

⁶⁰ Opinion of AG Saugmandsgaard Øe in Case C-674/17, *Luonnonsuojeluyhdistys Tapiola* (*‘Finnish Wolves’*) ECLI:EU:C:2019:394, para. 21.

⁶¹ Opinion of AG in Case C-674/17, *Finnish Wolves* para. 57.

⁶² Opinion of AG in Case C-674/17, *Finnish Wolves* para. 62.

⁶³ Opinion of AG in Case C-674/17, *Finnish Wolves* para. 63. In this specific case, Finland had issued more hunting permits than the number of illegal killings, allowing for the killing of around 15% of the wolf population, meaning that it did not contribute to restoration of the wolf population.

⁶⁴ Case C-674/17, *Finnish Wolves* para. 45.

⁶⁵ Case C-674/17, *Finnish Wolves* para. 58.

⁶⁶ Case C-674/17, *Finnish Wolves* para. 66.

⁶⁷ Case C-674/17, *Finnish Wolves* para. 72.

family's dogs.⁶⁸ The wolf was then anaesthetised, and transported to a local enclosed bear sanctuary, but managed to escape *en route* and disappeared into the woods. The capture of the wolf had not been approved under the conditions of the Habitats Directive. The case revolves around two questions, the first focusing on the spatial scope of application of the Directive (can urban settlements fall into the 'natural range' of wolves in which they are protected under the provisions of the Habitats Directive?) and the second on the conditions under which an animal can be 'taken' and released elsewhere.

On the first question, AG Kokott suggests that human settlements *can* fall within the natural range of the wolves, partially because the opposite conclusion would be incompatible with the objectives of the Habitats Directive,⁶⁹ and partially because wolves enjoy a large habitat⁷⁰ which can mean that they pass through urban settlements. The Court agrees with AG Kokott that the spatial scope of the Habitats Directive is flexible, and that it should take account of the specific properties and "biological factors essential to the life and reproduction" of a certain species.⁷¹ The presence of the wolf in Şimon, and the feeding on human resources, is therefore not such as to exclude the application of the protection rules of the Habitats Directive.⁷²

On the second point, relating to the conditions for taking (or killing) an animal under Article 16 (1) HD, AG Kokott engages in a remarkable casting of the wolf as "inherently dangerous", which affects the balancing exercise between the position of the wolf and the human place in which it finds itself.⁷³ She suggests that the taking or killing of the wolf is only possible where there is "strong scientific evidence" of danger to livestock or public safety,⁷⁴ but then continues by arguing that "there is no need to wait until the damage occurs if (...) it is safe to assume that there is a great enough risk of sufficiently serious damage. (...) A situation in which a wolf, over a period of several days, repeatedly gets to within less than 30 meters of people, is not something simply to be dismissed out of hand. Since the wolf at issue is said to have spent a number of days on a local resident's property, playing and eating with the family's dogs there, the presence of such a risk (...) cannot be ruled out".⁷⁵ AG Kokott does highlight that satisfactory alternatives, such as the removal of food or aversive conditioning, must be attempted before. She does not, however, deal with the condition under Article 16 HD that qualifies *every* decision to disturb animals on the sustainability of their population levels and their habitat.

The Court is short on the application of the rules under Article 16 HD, merely noting that a derogation to capture the wolf had not been granted by the relevant national authorities, and was therefore illegal in any case.⁷⁶ The Court does not discuss whether the granting of such a permit *would* have been compatible with Article 16 HD, merely reiterating that this question must be answered taking account of the 'no satisfactory alternatives' requirement and the baseline relating to the wolves' FCS with a focus long-term population and habitat maintenance.

⁶⁸ Opinion of AG Kokott in Case C-88/19, *Alianța pentru combaterea abuzurilor ('Romanian Wolves')* ECLI:EU:C:2020:93, para. 19.

⁶⁹ Opinion of AG in Case C-88/19, *Romanian Wolves* para. 35-36.

⁷⁰ Opinion of AG in Case C-88/19, *Romanian Wolves* para. 42.

⁷¹ Case C-88/19, *Romanian Wolves* para. 36-37.

⁷² Case C-88/19, *Romanian Wolves* para. 39.

⁷³ Opinion of AG in Case C-88/19, *Romanian Wolves* para. 56.

⁷⁴ Opinion of AG in Case C-88/19, *Romanian Wolves* para. 56-58.

⁷⁵ Opinion of AG in Case C-88/19, *Romanian Wolves* para. 61-62.

⁷⁶ Case C-88/19, *Romanian Wolves*.

3. Where the Wild Places Are?

The cases discussed in the previous section suggest a tension at the heart of the Habitats Directive when it has to make sense of the spatial interaction between wild animals and the human environment. The Court has argued that the protection of animals cannot be limited to their ‘own’ spaces, and rightfully so: the Habitats Directive aims not just to prevent the extinction of certain protected species but to contribute to their flourishing. Article 1 HD refers to the goal of ‘restoring’ the habitat and populations of protected species and the objective of attaining favourable conservation status, with protection of animals being maintained even once they have indeed achieved this status, that is, once they are flourishing.⁷⁷ The notion of ‘natural range’, likewise, is a dynamic one, enlarging the scope of protection whenever wild animals move into new territory, and the focus on long-term reproduction makes the Habitats Directive sensitive to its ecological presuppositions – be these spatial, temporal, or bio-physical.

But how to square this logic with the human claims to space? How to understand, conceptually and legally, the flourishing of wild animals in relation to us? At the centre of these questions – which remain implicit but are clearly present in the cases discussed above – lies the concept of *animal autonomy*. If we are to make sense of animals as subjects with certain legal claims, we must understand them as having a life of their own. This is nicely captured by the term *Umwelt*, which is the sensory and cognitive understanding that all species have of their own environment, which comprises smells, socialisation practices, bio-physical geographies, modes of being and so on. *Umwelt* signifies, essentially, how the world is perceived by a species, and denotes the context that both expresses and bounds their actions, needs, claims and autonomy.

Recent years have seen a dramatic increase in research focusing on animal autonomy and on an investigation of their *Umwelt*, describing their languages;⁷⁸ culture;⁷⁹ their ability to coordinate complicated social networks;⁸⁰ their experience of stress, joy, and fear;⁸¹ and their understanding of their place in the world.⁸² All this research, as well as the older work on animal sentience and consciousness,⁸³ highlights, among many other things, just how anthropocentric our legal norms are. As Braverman highlights, legal norms “are often premised on assumptions about *human agency*”,⁸⁴ suggesting that they struggle to make sense of how non-humans see and experience the world and understand their (actual and potential) place in the world. Teubner has also hinted at the problems in transposing the highly formalised conceptual techniques that law employs – focusing on juridical personality, capacity for legal action, the attribution of duties and rights – onto animals,⁸⁵ while Lindahl suggests that any act of representation in law necessarily de-represents or misrepresents

⁷⁷ Joined Cases C-473/19 and C-474/19, *Föreningen Skydda Skogen* ECLI:EU:C:2021:166, para. 65.

⁷⁸ Meijer, *When Animals Speak* (NYUP 2019).

⁷⁹ Meijer & Bovenkerk, ‘Taking Animal Perspectives into Account in Animal Ethics’, in: Bovenkerk & Keulartz (eds.), *Animals in Our Midst: The Challenges of Co-existing with Animals in the Anthropocene* (Springer 2021).

⁸⁰ Sosa, Jacoby & Lihoreau, ‘Animal social networks: Towards an integrative framework embedding social interactions, space and time’ *12 Methods in Ecology and Evolution* (2021) 4.

⁸¹ Acharya, Hemsworth, Coleman & Kinder, ‘The Animal-Human Interface in Farm Animal Production: Animal Fear, Stress, Reproduction and Welfare’ *12 Animals* (2022) 487.

⁸² Slobodchikoff, Perla & Verdolin, *Prairie Dogs: Communication and Community in an animal society* (HUP 2009).

⁸³ Browning and Birch, ‘Animal Sentience’ *17 Philosophy Compass* (2022) 128.

⁸⁴ Braverman, ‘Animal Mobilelegalities: The Regulation of Animal Movement in the American City’ *5 Humanimalia* (2013) 104, my emphasis.

⁸⁵ Teubner, ‘Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law’ *33 Journal of Law and Society* (2006) 521.

other modes of being – other times, places, and subjectivities.⁸⁶ Recasting animals as a legal subject with claims of their own – with an autonomy of their own –, then, requires us to confront how to situate the animals’ own and distinct *Umwelt* in juridical terms. What is needed, in Philippopoulos-Mihalopoulos’ words, is “embracing law’s spatial, corporeal, emotional, sensory presence”.⁸⁷

This section takes on this challenge in offering a legal description of animal autonomy within the context of the Habitats Directive. It argues that the jurisprudence of the Court can arguably be read to articulate – in an incipient, implicit, contradictory, and incomplete fashion – two distinct visions of animal autonomy. A first, and more predominant, approach focuses on ‘animobility’ that understands movement of animals as an expression of their agency and attaches certain legal consequences to this movement. This vision of agency imbues human places with a ‘wild’ element, in so far as it forces decision-makers to confront *the reasons* for which animals find themselves in human places. This approach employs many legal instruments that are familiar to EU lawyers from the free movement of persons, including the proportionality analysis in order to gauge to what extent human objectives can be met while remaining sensitive to animal autonomy. This approach struggles, however, to escape its habitat baseline and the conceptual frame of replicability, meaning that it ultimately understands animal agency as a negative expression of *resistance* rather than as a positive expression of autonomy (section 3.1).

A second approach focuses on animal alterity, that is, on the preconditions that underpin any form of meaningful autonomy of a particular species. This approach is less focused on the *choices* made by wild animals (in, for example, a wolf crossing human habitat in search of food) and more on the conditions that are fundamental to *being* a wolf. Taking seriously animal alterity requires us, on this view, to see the world-as-a-hamster or the world-as-a-wolf, to be able to make sense of their *Umwelt*.⁸⁸ This brings into focus a whole range of legal concepts – revolving around potentiality, respect and learning – that constitute essential aspects of how we can recognise animal alterity, and that, crucially, focus on what we do not and can not know about a wild animals’ *Umwelt*. In practical terms, this moves us away from an analysis of the (dis)proportional nature of the encounter between wild animals and human places and instead hints at strategies that give meaning to the the basic presuppositions for *being* wild, highlighting the need for mutual adaptation between animals and humans (section 3.2).

Legally speaking, the difference between these two intuitions that underpin the case law of the Court seem to turn on the interpretation of the demand that a species remains “a viable component of its natural habitats” as part of the assessment of FCS under Article 1 (i) HD. Whereas the first vision of animobility collapses this demand within its assessment of proportionality, meaning that while *species* are protected, Member States retain a large degree of latitude in setting spatial boundaries for the protection of *individual* animals; the second vision, of animal alterity, takes the viability component to require a more explicit temporal view, bringing into focus the presuppositions for long-term ecological stability. Both approaches constitute ambitious attempts to shift the anthropocentric gaze towards one that is more sensitive to ecological concerns and animal autonomy. It is argued, however, that while the Court seems to predominantly focus on the animobility approach, it is the alterity approach that offers a more convincing template for a reimagination of what wild animals are: that

⁸⁶ Lindahl, ‘Place-Holding the Future. Legal Ordering and Intergenerational Justice for More-than-Human Collectivities’ *Rivista di filosofia del diritto* (2021) 317.

⁸⁷ Philippopoulos-Mihalopoulos, ‘Critical Environmental Law as Method in the Anthropocene’, in: Philippopoulos-Mihalopoulos and Brooks, *Research Methods in Environmental Law* (Elgar 2017).

⁸⁸ Maris, *op. cit. supra* note 4.

they do not simply require our absence but that they express meaning as well – albeit in a form we may struggle to see.

3.1. Animobility

Irus Braverman, in a study of the classification of animals in the city, highlights that “despite their subjugated legal position, animals are nevertheless active subjects embodying a form of agency in their ability to continue to challenge, disturb, and provoke humans”.⁸⁹ This view, of animals as ‘geographers’ who by their movement extend the scope of application of legal norms such as the Habitats Directive, and in doing so disrupt and challenge the functioning of legal regimes, is a first approach we can take to legally describe animal autonomy.⁹⁰ The notion of ‘animobility’, conceptualised by Michael in his work on roadkill,⁹¹ focuses on how animals affect laws by their physical movement and how law’s immanent need for ordering is disrupted in that process.⁹² On this view, wild animals entering human environments (be it the farmland of the Alsace, a Romanian village, or the city centre of Vienna) express their autonomy *through movement*. It is the movement itself, then, that becomes the legal category through which we make sense of animal agency and animal autonomy.

This focus on mobility is, in many ways, a natural starting point to ‘read’ or make legible wild animals. On the one hand, of course, it is exactly this spatial sensitivity that underpins the regime of the Habitats and Birds Directives. It is, moreover, expected that by 2080 60% of species in Europe will live outside their current habitat, as they adapt to challenges such as climate change, increased urbanisation and changes to agricultural practices.⁹³ On the other hand, the focus on agency through mobility offers a straightforward legal category for EU law to attach meaning to. Much of EU law’s own normative authority is in fact predicated on mobility as well – that of goods, workers, citizens, service providers and capital. In EU law, the exercise of free movement is understood as an expression of the individual’s agency. It has been seen as allowing for the emancipation of the individual from their preordained ‘state’ (meant both physically and meta-physically) and as taking seriously their subjectivity.⁹⁴ Through this legal regime, on other words, EU law squares the expression of agency by individual subjects with the collective objectives of political communities.

The approach of animobility, then, comes with the obvious advantage that EU law already disposes of a sophisticated legal and conceptual framework to make sense of the conflict between mobile (animal) actors and pre-existing (human) communities. It is also an approach that takes animal agency seriously: it not only elevates the legal status of members of a protected species, but it also forces collective objectives of the human places to engage with the expression of an individual animal’s agency rather than dismiss it as a legal exception (section a). This means that the crucial question in the assessment of the interaction between wild animals and the human environment in the animobility approach revolves around a proportionality assessment, which inevitably struggles to

⁸⁹ Braverman, op. cit. *supra* note 84, 105.

⁹⁰ Ojalammı & Blomley, ‘Dancing with wolves: Making legal territory in a more-than-human world’ 62 *Geoforum* (2015) 56.

⁹¹ Michael, ‘Roadkill: Between Humans, Nonhuman animals, and Technologies’ 12 *Society and Animals* (2004) 279. See also Braverman, op. cit. *supra* note 84, 105.

⁹² See more generally Ojalammı & Blomley, op. cit. *supra* note 90, 59 although they do not use the concept of animobility

⁹³ Maris, op. cit. *supra* note 4, 109.

⁹⁴ De Witte, ‘The Liminal European: Subject to the EU Legal Order’ 40 *Yearbook of European Law* (2021) 56.

understand how the rights of *individual* members of a protected species relates to those of the *species* as such, just as it does in the cases on free movement of persons (section b). This tension, as we will see, means that the animobility approach – exactly because it reduces autonomy to *agency* – ends up reifying the precise spatial boundaries between wild animals and human places that it tries to overcome (section c).

(a) the free movement of animals

In the cases discussed above, the Court arguably makes two moves that fit the approach of animobility, in doing so elevating the right to mobility for individual animals of protected species to something akin to the rights of movement for persons – workers, service recipients, citizens – in EU law. First, it reclassifies the Habitats Directive – without explicitly using this language – in the mould of the free movement provisions that govern the EU’s internal market, meaning that it contains a directly effective right to mobility that protected animals can claim. Article 12 HD is, in other words, not a right that protects *species* of protected animals but also the individual members *of* that species.⁹⁵ It is recast, in a way, as a ‘right to life’ for members of protected species, that protects their physical integrity, their breeding sites and habitat.⁹⁶ The language of the Court, for example, in *Viennese Hamsters*, where it highlights that Article 12 HD protects individual animals against both intentional and non-deliberate acts, even where they are not affected directly, offers more than an echo of the interpretation of the direct effect of the free movement provisions.⁹⁷ In *Finnish Wolves*, likewise, the Court highlights that Member States are required to adopt measures that guarantee the “actual avoidance” of an infringement of Article 12 HD.⁹⁸ AG Kokott, in *Romanian Wolves*, makes explicit that “the intention [of Article 12] is not to protect those species only in certain places but to protect specimens thereof that live ‘in nature’ or in the wild”,⁹⁹ a sentiment echoed by the Court in a more recent case on Article 12 HD.¹⁰⁰ The recasting of Article 12 HD as a directly applicable right offers a way to legally account for their expression of agency through movement, and tightly circumscribes any derogation. .

In a second move, the Court has interpreted the conditions attached to Article 16 HD as an articulation of the principle of proportionality. This provision states that any measure taken by Member States that infringes Article 12 HD is only acceptable when there is “no satisfactory alternative” to the disruption of the wild animal and that it “is not detrimental to the maintenance of the populations (..) at a favourable conservation status in their natural range”. It requires, for example, a “clear and sufficient statement of reasons as to the absence of a satisfactory alternative”,¹⁰¹ which takes account

⁹⁵ Joined Cases C-473/19 and C-474/19, *Föreningen Skydda Skogen* ECLI:EU:C:2021:166, para. 54.

⁹⁶ Even if we were to speak of animal rights, however, how can these rights be enforced? The Romanian wolf cannot go to local court to complain of the violation of Article 16 HD. Since the *Slovak Brown Bear* case in 2011, it is clear that NGOs and other institutional actors can claim standing in order to protect the obligations towards animals that the Habitats Directive enshrines. Case C-240/09, *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* ECLI:EU:C:2011:125. Schoukens, ‘Rights of nature as an unlikely saviour for the EU’s threatened species and habitats’ in: Boeve, Akerboom, Backes & Van Rijswick, *Environmental Law for Transitions to Sustainability* (Intersentia 2021). See also a recent amendment to the Regulation transposing the Aarhus Convention, making it easier for private parties and NGOs to access judicial review in protection of the environment: Regulation 2021/1767 (OJ 8.10.2021) L 356/1.

⁹⁷ Case C-477/19, *Viennese Hamsters I* para. 27,2; Case C-88/19, *Romanian Wolves* para. 25.

⁹⁸ Case C-674/17, *Finnish Wolves* para. 27. See also Joined Cases C-473/19 and C-474/19, *Föreningen Skydda Skogen* para. 75.

⁹⁹ Opinion of AG in Case C-88/19, *Romanian Wolves* para. 51.

¹⁰⁰ Joined Cases C-473/19 and C-474/19, *Föreningen Skydda Skogen* para. 54-60.

¹⁰¹ Case C-674/17, *Finnish Wolves* para. 49-51.

of the “precise requirements and specific situation”¹⁰² of the case. This interpretation of Article 16 HD comes, once again, very close to the legal regime used by the Court throughout its case law (most prominently in the free movement provisions) wherein the principle of proportionality is employed to delimit the extent to which collective public policy objectives may infringe individual rights in EU law. AG Saugmandsgaard Øe makes this point explicit in his opinion in *Finnish Wolves*: “to my mind, that requirement [of Article 16 (1)] can be seen as a specific manifestation of the general principle of proportionality that prevails in EU law”.¹⁰³

This reconceptualization of Articles 12 and 16 HD in the mould of the free movement provisions in EU law has a number of implications. First, it drastically extends the ‘personal’ and spatial scope of protection of the Habitats Directive. Any *individual* member of a protected species is not just covered by the provisions of the Habitats Directive *wherever* they find themselves, but also against indirect, non-deliberate, and partial violations¹⁰⁴ Second, it forces decision-makers – whether policy actors, local municipalities or national courts – to take account of the exercise of animal agency, that is, to offer an account of *why* the animal has moved. This makes EU law sensitive to human actions that might have led to the deterioration of the natural habitat of wild animals, and may have contributed to their move to human places. In the *Romanian Wolves* case, for example, the Court highlights that “the development of infrastructure, unlawful logging, farms and some industrial activities have contributed to putting a strain on the wolf population and its habitat”,¹⁰⁵ while in *French Hamsters* it argues that “the French Republic accepts that the development of the urbanisation and the infrastructures inherent thereto, by causing the disappearance and partition of agricultural land, constituted another decisive factor behind the decline in the population of the European hamster”.¹⁰⁶ The direct effect of Article 12 HD allows for a much stronger *situating* of wild animals and their agency within human places and within the specific context within which such agency is exercised. The animobility approach takes animal agency seriously by demanding that the spatial and contextual factors that might underpin their movement be included in the proportionality assessment.¹⁰⁷

The second implication of the reconceptualization of the Habitats Directive is that it requires a contextual *balancing* of the different rights at stake, in as much as the actions by human communities are assessed with reference to the degree to which they recognise and internalise (a human conception of) the animal’s agency in their actions. AG Kokott in *French Hamsters* puts it as such: “the continuing ecological functionality of European hamster burrows can be ensured *only* if the surrounding agricultural land is used in a way that is favourable to the hamster”.¹⁰⁸ As in the context of free movement more generally, then, the outcome of this balancing exercise depends on how the principle of proportionality is interpreted, that is, to what extent alternatives modes of reconciliation between competing claims are found to exist. In the context of free movement, the interpretation of that principle has often been criticised as being skewed in favour of the mobile actor given that public policy that restricts their movement is only acceptable if it entails the least possible limitation on that

¹⁰² Case C-674/17, *Finnish Wolves* para. 41.

¹⁰³ Opinion of AG in Case C-674/17, *Finnish Wolves* para. 47.

¹⁰⁴ Case C-357/20, *Viennese Hamsters II* para 48. These constraints apply regardless of the conservation status of their species: Joined Cases C-473/19 and C-474/19, *Föreningen Skydda Skogen* para. 57.

¹⁰⁵ Case C-88/19, *Romanian Wolves* para. 50.

¹⁰⁶ Case C-383/09, *French Hamsters* para. 32.

¹⁰⁷ Even if, in doing so, it sees such movement as a positive act of agency as opposed to an instance of forced adaptation of expulsion from their habitat due to human activity.

¹⁰⁸ Opinion of AG *French Hamsters* para. 63. My emphasis.

movement.¹⁰⁹ Article 16 HD appears to suggest a similar interpretation, given its explicit commitment to require that ‘no satisfactory alternative’ exists and its setting of a clear baseline of FCS protection.

(b) the human proportion

Despite the ambitious conceptual re-interpretation of the Habitats Directive in line with the free movement provisions, both the Court and most AGs are less ambitious in their *application* of the Directive. While movement of an *individual* animal might trigger the application of the Habitats Directive, it is the protection and right to flourish of the *species* (rather than the individual animal) that forms the baseline for a proportionality assessment of whether the provisions of the Habitat Directive have in fact been breached. As highlighted, the proportionality analysis turns on the interpretation of the requirement that ‘no satisfactory alternatives’ exist to the capture or disturbing of the wild animal, and that it does not affect their FCS. This suggests that the disturbance or killing of protected species for any reason is *only* allowed where other alternatives are exhausted. The Court has, however, not often taken this literally – often supported by its AGs – and instead demanded that Member States offer reasons why the disturbance or killing was proportionate *to the human objective pursued*, meaning that other alternatives were unavailable as they would limit the attainment of the *human objectives* excessively.¹¹⁰

This entails that the existence of a ‘satisfactory alternative’ is collapsed with the requirement to protect the maintenance of the species population at FCS level: Member States retain a large degree of latitude in taking or relocating individual animals or disturbing their breeding sites and resting places as long as the relocation (or even killing) of the *individual* animal does not worsen the FCS level of the *species* to which they belong.¹¹¹

This is most visible in *Finnish Wolves*, where the proportionality calculus aims to understand which measures are proportionate to ensure that wolves do *not* move into human places or disrupt its ordering: “it cannot be ruled out that killing one individual in a pack certain of whose members are causing damage may – even if the individual causing the problems are not targeted – prevent or reduce that damage by making the wolves more wary of humans”,¹¹² while “killing a limited number of specimens may have no effect on (...) maintaining the wolf population at a favourable conservation level”.¹¹³ In other words, the proportionality assessment is understood as an exercise in balancing between the *collective* objectives of the human places (typically in defence of biosecurity or property) and the *collective* claims of a protective species towards FCS. The rights of *individual* animals are rendered invisible in this approach, even though it is their movement that has triggered the proportionality analysis. The opinion by AG Kokott in *Romanian Wolves* is instructive for this type of situations. In her assessment of the legality of the capture of the wolf, the activities of the wolf upon his arrival in Şimon (such as feeding and playing with local dogs) is not seen as an articulation of his agency but as strengthening the case for the human claims towards biosecurity: the wolf’s removal is proportionate *exactly because* of the exercise of his agency. *Our* Umwelt – our sensory perceptions and reading of meaning, and our sense of safety and interpretation of animal behaviour – guides the proportionality assessment, in other words. In fact, this *human* proportion might even explain why the Court is so sensitive to animal *mobility*: humans construct their Umwelt primarily on a visual level,

¹⁰⁹ Marzal, From Hercules to Plato: Of bathos, proportionality and EU law 15 ICON (2017) 621.

¹¹⁰ Opinion of AG in Case C-383/09, *French Hamsters* para. 94-96.

¹¹¹ Opinion of AG in Case C-674/17, *Finnish Wolves* para. 91; Case C-342/05, *Commission v Finland* ECLI:EU:C:2007:341, para. 29.

¹¹² Opinion of AG in Case C-674/17, *Finnish Wolves* para. 69, Case C-342/05, *Commission v Finland* para. 42.

¹¹³ Case C-674/17, *Finnish Wolves* para. 68.

both relative to our other senses and relative to other species.¹¹⁴ We struggle to think of animal meaning in different registers.

This means that *only* where the situated assessment of the animal movement reveals a *structural* problem for the *species*, the *individual* is protected as well. This comes through clearly in *French Hamsters*, for example, where it was held that “this means in particular that where hamster populations are too small, habitats in the vicinity of their burrows must be managed in such a way that hamster stocks recover sufficiently”.¹¹⁵ However, even in cases where FCS status is endangered, this demand is limited to situations where an individual animal has *actually* moved, that is, has already exercised their agency: “it should be known where burrows occur or might exist and therefore where special caution is needed (...) areas which are only potentially usable by the European hamster do not need special protection”.¹¹⁶ This shrinks the spatial context of the case, making legally invisible the animals’ *potential* agency: the human proportions and preoccupations remain central to the balancing exercise.

(c) agency as resistance

The approach of animobility in the Court’s case law makes certain assumptions about wild animals and their autonomy. While it understands the movement of animals as an articulation of agency and connects the legal protection of the Habitats Directive to that agency, it also offers a narrow view of animal autonomy, wherein movement into human places is the only type of autonomy that law can ‘read’.

This focus on mobility and agency as a proxy for animal autonomy is awkward, first, because it reifies the very spatial divide that it tries to problematise. The wild spaces *from which* animals move remain the baseline against which any countervailing measure is tested. The normal state, in other words, is for animals to remain in their own habitat, whereas their presence in ‘our’ habitat is seen as exceptional, as requiring engagement and – occasionally – our acquiescence. What EU law demands, in these cases, is in the first place a commitment to a restoration of the wild animals’ habitat and their relocation *back into* that habitat as the most proportionate fashion to deal with securing human objectives.¹¹⁷ In other words, “the places ‘from which’ animals emerge are not continuous with ‘our’ places”.¹¹⁸ This comes through, for example, in Kokott’s assessment across different cases where, in her view, the Habitats Directive requires, first, that individual animals are relocated back into their ‘own’ wild spaces and, second, that a species ‘own’ habitat is restored where population dynamics indicate a structural problem.¹¹⁹ This does not see animals moving outside of that habitat as species pioneers articulating their agency but as exceptions, as an intimation that their ‘own’ habitat might be so affected by human activities that staying ‘there’ is no longer tenable.

This is, in a way, a reformulation of something called the ‘baseline problem’ which is widely discussed in animal studies, whereby each generation sets a new ‘natural’ baseline for the habitat, stability of population and activities of a species that is divorced from any historical or ecological context. The fact that wolves were once endemic across Europe, that their habitat was more or less continuous, their population much greater and their interactions with humans nuanced, for example, is lost in this animobility calculus, which artificially sets the *status quo* at the late 1990s when the Habitats Directive

¹¹⁴ Yong, *An Immense World: How Animal Senses Reveal the Hidden Realms Around Us* (Vintage 2022) 112.

¹¹⁵ Opinion of AG Case C-383/09, *French Hamsters* para. 84.

¹¹⁶ Opinion of AG Case C-383/09, *French Hamsters* para. 95-96.

¹¹⁷ See also pending Case C-436/22, *ASCEL* (pending).

¹¹⁸ Lindahl, *op. cit. supra* note 86, 318.

¹¹⁹ Opinion of AG in Joined Cases C-473/19 and C-474/19, *Föreningen Skydda Skogen*

was implemented. While the animobility approach, in other words, focuses on the crossing of borders between wild spaces and human places as an articulation of animal autonomy, it also legitimises the existence and necessity of that border.

This suggests an ethos of replicability at the heart of the Habitats Directive.¹²⁰ The reconceptualization of Article 12 HD as a directly applicable individual right means that protected animals have the ‘right’ to their own spaces, to breed, to maintain their population, but they do *not* have a right to do so ‘with us’. Instead, the Habitats Directive affirms a commitment to create, maintain or restore a space with the appropriate abiotic and biotic factors for members of a protected species to live their lives – play, hunt, breed in an ecologically sustainable fashion. It is a claim to animal autonomy and agency that remains spatially circumscribed in EU law.

Arguably, the Habitats Directive is more ambiguous than this. The habitats of a species, for example, is defined in Article 1(f) as “the environment defined by specific abiotic and biotic factors, in which the species lives at any stage of its biological cycle”. As Epstein has noted,¹²¹ this can be interpreted as setting a baseline focusing on the *current* presence of individuals of a certain species – as AG Kokott and the Court in *Finnish Wolves* seem to do – but could also be interpreted as denoting places where a species might historically, typically or even potentially live.¹²² Likewise, despite the demand in Article 16 HD that Member States demonstrate that “no satisfactory alternatives” exist to the killing of the animal or disruption of their habitat or breeding sites, the Court hardly ever engages with the abundant research on, for example, the co-habitation of large carnivores and livestock and non-lethal techniques of communication with wild animals.¹²³ The demand that “no satisfactory alternatives” exist, instead, is interpreted to mean that animals can be nudged (or captured in order) to live in alternative spaces, which are considered *more* satisfactory because their effect on human places is less pronounced. The Court’s focus on how human populations *feel* about the presence of wild animals – articulating notions of fear, mistrust or uncertainty – in its assessment of proportionality is a further indication that this approach reifies the spatial separation between humans and non-humans.¹²⁴

Ultimately, the approach of animobility suggests a limitation of human autonomy in order to accommodate the movement of wild animals, but without taking their autonomy seriously, which remains one-dimensional and irreducibly tied to a preordained baseline. This means that animal autonomy and their agency is reduced to instances of resistance: their movement into human places is legally understood as a demand that we *audit* the biotic and abiotic circumstances under which and for which this movement has taken place. It is exactly their ‘opting out’ of their prescribed wild spaces that simultaneously makes them visible to the legal regime *and* delimits their agency.¹²⁵ It removes other aspects of animal autonomy from view – such as their sensing, communities, forms of being, the

¹²⁰ Trotter, ‘The ethos of replaceability in European human rights law’, in: Segal and Owen (eds.), *On Replacement: Cultural, Social and Psychological Representations* (Palgrave 2018).

¹²¹ Epstein, *op. cit. supra* note 20, 239.

¹²² Commission Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC (2007).

¹²³ One exception being Opinion of AG in Case C-674/17, *Finnish Wolves* para. 64. See Breitenmoser, Angst, Landry, Breitenmoser-Wursten, Lunnell & Weber, ‘Non-Lethal techniques for reducing depredation’, in: Woodroffe, Thirgood & Rabinowitz, *People and Wildlife, Conflict or Co-existence* (CUP 2005).

¹²⁴ See also Trotter, ‘Birds Behaving Badly: The Regulation of Seagulls and the Construction of Public Space’ 46 *Journal of Law and Society* (2019) 1.

¹²⁵ Wilbert, ‘Anti-this-against-that: Resistances along a human non-human axis’ in: Sharp (ed), *Entanglements of Power* (Routledge 2000) 250; Blattner, ‘Turning to Animal Agency in the Anthropocene’, in: Bovenkerk & Keulartz (eds.), *Animals in Our Midst: The Challenges of Co-existing with Animals in the Anthropocene* (Springer 2021) 66-67.

constitutive factors of their cognitive and sensory *Umwelt* – and focuses instead on whether the habitat *from which* the individual animal has moved is appropriate for the species to flourish.

In a way, this comes close to a conceptualisation that Will Kymlicka and Sue Donaldson have advocated for, where they understand wild animals akin to sovereign communities, implying that humans and wild animals should respect each other's territorial and spatial claims, which “obligates us to respect the basic rights of animals but also protects us from violations in return”.¹²⁶ This nicely captures the animobility approach, wherein the movement of an animal is seen as a transgression – possibly justified depending on *our* assessment of the quality of *their* habitat and their population dynamics – but a transgression nonetheless, even in occasions, such as in the *Viennese Hamster* cases, where the animals' presence precedes the human claims to space.

In this first approach to legally describe animal autonomy, which focused on their agency and mobility, and which can implicitly be traced in most cases and opinions discussed above, Member States retain a large degree of latitude in setting spatial boundaries for the protection of vulnerable species. The mobility of individual animals in human places is seen as a call for help, as resistance: it triggers an assessment of their overall state of and – if deemed wanting – an extension of their spatial protection, but only in case that relocation *back into* the wild spaces is deemed impossible. Understanding animal movement as a proxy for their autonomy, then, comes with the risk of perpetuating the very *status quo* that such movement problematises.

3.2 Animal alterity

A second approach to animal autonomy lies not in attributing importance to movement (such as, for example, a wolf entering a Romanian village in search for food) but on the conditions that are central to *being* a wolf. This starting point of animal alterity – focusing on their fundamental *otherness* – shifts our perspective on the role of law in mediating in encounters between wild animals and the human environment. It destabilises a number of elements in the legal system that allows for a radically different approach from the animobility approach discussed above.

Starting from the conceptual premise of alterity in thinking about animal autonomy comes with three important implications. First, it highlights how limited our ability is to understand wild animals and how limited law's ability is to capture this in legal categories. Despite rapid advances in research on some elements of the diverse *Umwelten* of wild animals, we struggle to perceive what the world looks like from the perspective of the hamster or the wolf. What matters to them? What guides their actions? Taking animal alterity seriously, that is, starting from *their* *Umwelt* and the premise of the world-as-a-wolf, requires us above all else to give up on the aspiration of fully understanding their world. Every species has a different perceptual range in terms of its ability to detect touch, smell, sounds, radiation, vibration, depth, magnetic or electrical field perception, touch, infra- and ultrasonic sounds perception or air and water current detection.¹²⁷ We cannot experience these worlds: they are *of the body*, and require *being*.¹²⁸ Instead, this requires us to acknowledge our own limits in understanding such a world, avert our anthropomorphising gaze, and focus our attention to how a

¹²⁶ Donaldson & Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (OUP 2013) 167.

¹²⁷ Yong, *op. cit. supra* note 121, 23.

¹²⁸ Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter* (Duke 2007) on the impossibility of knowing without being; T. Nagel, 'What Is It Like to Be a Bat?' 83 *The Philosophical Review* (1974) 435.

legal system can, on the one hand, make sense of what it *cannot* know, and, on the other hand, carve out space in the legal system for a valorisation of what we cannot know.

A second implication of the alterity approach is that it requires engagement with the Umwelt of a particular animal or species but also the entanglements across species. As Petersmann has convincingly argued, a legal understanding of non-humans requires us to remain sensitive to a biological understanding of different species as inextricably – even vitally – tied to other species and their bio-physical environment.¹²⁹ This suggests that what matters is the autonomy of the individual wolf, but also the collective modes of being of wolves, their inter-species dynamics as well as the intra-species dynamics.¹³⁰ The Umwelt of animals – the sensory and cognitive environment that they inhabit – can be articulated on a micro-scale (focusing on one animal’s senses, its sleeping patterns, its diet and movement) and macro-level (a species’ modes of communing, habitat, reproduction, relationships at the intra- and inter-species level). This need to be sensitive to collective modes of being reinforces the first point, made above, that underlines how little we ultimately know of the ‘wild things’ and how difficult it is to legally reflect this.

Focusing on animal alterity, thirdly, reconceptualises the interaction between animals and the human environment from one that centres on opposition and competing claims to autonomy, territory or resources (as in the animobility approach) into one that sees that interaction as an *encounter*. The interaction is recast, in other words, in terms of non-oppositional and non-hierarchical difference between two (or more) different species with different perspectives on the world. This starting point, then, suggests that a legal system should not see encounters as problems to be prevented or as borders to be maintained but as an overlap of distinct but equal *Umwelten*.

The premise of animal alterity, then, brings into focus a whole different range of legal concepts compared with the animobility approach. The starting point of a wild animals’ distinct Umwelt presupposes a move away from an analysis of the (dis)proportional nature of the interaction between an individual wild animal and human places and instead hints at strategies that give meaning to the encounter between ‘us’ and ‘them’ *as such*, highlighting the need for mitigation, mutual adaptation and respect *between* species.¹³¹ This means coming to grips with three things: recognising a place for potentiality (section a), a respect for difference (section b), and a commitment to learn (section c). Arguably the contours of all three of these elements can be traced in the case law of the Court on the Habitats Directive – albeit in an incomplete, implicit and very incipient fashion.

(a) the place for potentiality

An important part of what makes a place – and distinguishes it from a space – is that it contains, reflects, gives form to and offers the potential for the elaboration of different types of *meaning*.¹³² As

¹²⁹ Petersmann, ‘Response-abilities of care in more-than-human worlds’ 12 JHRE (2021) 108-9.

¹³⁰ As argued by Petersmann, we ought to be sensitive to holobionts as well – “assemblages created and sustained by the entangled agencies of different species”, offering a “symbiotic view of life” that is sensitive to the fact that species are inextricably – even vitally – tied to each other: Petersmann, *op. cit. supra* note 129, 108-9.

¹³¹ Such an approach arguably underpins some recent work that theorises the interaction between humans and wild animals – focusing alternatively on a framework of constitutionalism, de-anthropomorphised human rights or ethics of care. Buller suggests moving towards a ‘cosmopolitics’ understood as “an interspecies contact or symbiogenesis based upon a more convivial, less fixedly human approach to boundaries, to political actors and political outcomes that inherently challenges what it means to ‘belong’ or to ‘pertain’”: Buller, ‘Animal Geographies I’ 38 *Progress in Human Geography* (2014) 308. Petersmann, on the other hand, focuses on an ethics of care as central to the entanglements of species Petersmann, *op. cit. supra* note 129, 102.

¹³² Tuan, *op. cit. supra* note 7.

Sarah Trotter has suggested, however, potentiality *itself* can be thought of as a place, that is, as “a place that derives its meaning as such from the potential ascribed to it”.¹³³ This is what I have in mind when suggesting that the Habitats Directive could be interpreted so as to take account of animal alterity. It is about no longer seeing the world in which wild animals live as a space – a blank canvas where meaning is obscured – but instead as a place where meaning is constructed, not by us but by the animals themselves. The task is not to *describe* that meaning but to be sensitive to its existence. The animals’ Umwelt – the sensory and cognitive environment in which they live with its bio-physical properties, communing, needs and relationships, senses and modes of being, orientation and entanglements shapes, bounds and gives meaning to their life.¹³⁴ We cannot understand those Umwelten except in some limited examples and, even when we can grasp a basic concept (such as the use of echolocation by bats) we can never understand how this transforms their Umwelt and what meaning it articulates.¹³⁵ Our incapacity to ‘see’ animal Umwelten and meaning, then, can only be translated into law by acknowledging a place for potential, that is, by acknowledging the *context* within which that meaning is articulated. This focus on a ‘place’ for animal potential destabilises some of the core assumptions of the Habitats Directive: it is no longer sufficient to carve out space for wild animals where they can be themselves; instead we must recognise that these ‘selves’ ascribe meaning to space through their behaviour and their encounters – with their own species, other species, with us humans and our environment.

Let me use some examples from the case law where the Court arguably moves in this direction – focusing on a very basic aspect of alterity: the potential for a species to sustain itself.¹³⁶ A reference to this notion can be traced in Article 1 (i) HD, which requires an assessment of whether a species is “maintaining itself on a long-term basis as a viable component of its natural habitats” as part of the assessment of FCS. This focus on FCS is also, of course, central to the interpretation of Article 16 HD, which makes its attainment a baseline for allowing derogations for the strict protection of species listed in Annex IV.

What does it mean for a species to remain ‘viable’? In the Court’s case law, this term has been interpreted to require a prospective assessment: viability can only be understood taking account both of present conditions – the species population, their environment – and of their future stability, *their potential for viability*. AG Saugmandsgaard Øe, in *Finnish Wolves*, for example, captures this by demanding that account be taken of the “geographic, climatic, environmental and biological factors [as well as] the situation regarding the species’ reproduction” in an assessment of viability.¹³⁷ The Court’s focus on “social stability of a species”,¹³⁸ the “structure of the population”,¹³⁹ and “locations essential for the development of the young of the species”¹⁴⁰ likewise understands *potential viability*

¹³³ Trotter, ‘On the potential of place and the place of potential’ 1 *European Law Open* (2022) 138.

¹³⁴ The concept ‘Umwelt’ originates from Jakob von Uexküll *Umwelt under Innenwelt der Tiere* (Springer 1909); Von Uexküll, *A Foray not the Worlds of Animals and Humans: With a theory of meaning* (UMinnesota Press 2010).

¹³⁵ See Karen Barad on the impossibility of knowing without being Barad, *op. cit. supra* note 128.

¹³⁶ See the work of Sarah Trotter on vital potentiality: Trotter, *On coming to terms: how European human rights law imagines the human condition* (PhD LSE Law School).

¹³⁷ Opinion of AG in Case C-674/17, *Finnish Wolves* para. 45.

¹³⁸ Case C-674/17, *Finnish Wolves* para. 57.

¹³⁹ Case C-674/17, *Finnish Wolves* para. 72.

¹⁴⁰ Case C-477/19, *Viennese Hamsters I* para. 37.

of the habitat to be central. This means that the quality and quantity of the habitat is taken as a baseline for animal alterity: it is something without which an animal can *never* be.¹⁴¹

The Court, in *French Hamsters*, explicitly highlights that “there were no populations of the species in Alsace which reached its minimum viable population threshold, which is estimated at 1500 individuals spread over an area of continuous suitable land of 600 hectares”.¹⁴² Equally, in *Romanian Wolves*, the Court stresses that “as regards protected animal species which, like the wolf, range over wide areas, the concept of ‘natural range’ is broader than the geographical area that present the physical or biological factors essential to their life and reproduction”.¹⁴³ What these cases suggest is an understanding of viability – and potentiality – that explodes the spatial categories at the core of the Habitats Directive. It suggests that the potential places for wild animals are everywhere around and among ‘us’, and, therefore, that we need to *share* such places, both in terms of its use but also in terms of the meaning we ascribe to it. All these sites, after all, *potentially matter* for the animals and their capacity to sustain their species: they are part of their Umwelt as much as of ours.

The focus on potentiality, then, changes the dynamic of our interaction with wild animals into one that treats territory as having meaning for both wild animals *and* human beings. The legal question is no longer which species has a more proportionate claim to certain sites, resources or needs; but instead focuses on the preconditions for the articulation of wild meaning. We can trace a good example of this dynamic in both *Viennese Hamsters* cases, where the Court interprets Article 12 (1) (d) HD, which protects the “breeding sites and resting places” of protected species. The Court, in this case, highlight that this provision should be interpreted as not just protecting the animal species “but seeks to protect significant parts of their habitat”¹⁴⁴ including resting places “when they are not being used, but where there is a reasonably high probability that the species concerned will return to these places”.¹⁴⁵ In the second *Viennese Hamster* case, the Court specifically highlights that what must be protected is the ecological functionality of the breeding sites of *a specific species* – which requires engagement with their way of courting, mating, nest construction, egg-laying or parturition, and the care for the young.¹⁴⁶ This radical (spatial) extension of the protection of the Habitats Directive is not meant to prevent any human activity within the hamster habitat, but to highlight that such places are shared, that animal and human meaning – and *potential* meaning – are both different and both meaningful. The encounter between species is not read as a (dis)proportionate causal interaction but as articulating claims about the Umwelten they inhabit.

Of course, the aspect of potentiality that I have discussed here – a species’ potential to survive – is the most evident form of respecting animal alterity. It is one that doesn’t require us to understand (or understand that we don’t understand) what the world looks like for a hamster or life feel like for a wolf. It is exactly this difficulty in understanding animal alterity and in grasping their Umwelt – just how different these wild things are to us – that leads into a second element that is central in the approach of animal alterity: respect for difference.

¹⁴¹ See *Föreningen Skydda Skogen*, where the Court explains the special importance of breeding sites within the context of the Habitats Directive, meaning that these are also protected where the species to which an animal belongs are not under FCS pressure: the protection under Art 12 (d) extends further than that of the other grounds in Article 12. Joined Cases C-473/19 and C-474/19, *Föreningen Skydda Skogen* para. 82-84.

¹⁴² Case C-383/09, *French Hamsters* para. 24.

¹⁴³ Case C-88/19, *Romanian Wolves* para. 38; Opinion of AG in Case C-88/19, *Romanian Wolves* para. 42.

¹⁴⁴ Case C-477/19, *Viennese Hamsters I* para. 28.

¹⁴⁵ Case C-477/19, *Viennese Hamsters I* para. 30.

¹⁴⁶ Case C-357/20, *Viennese Hamsters II* para 25-26.

(b) a respect of difference

The realisation that a legal system cannot fully describe and recognise what makes a wild animal so, comes with a demand that we appreciate the difference between ‘them’ and ‘us’, and do not collapse their alterity without our own moral and legal strictures. Rolston uses the examples of cannibalism and coprophagy (the eating of faeces) to make this exact point.¹⁴⁷ These activities constitute legitimate forms of alterity even if (or especially if) they are not something that is central to the human experience. These examples are useful as they highlight that respecting animal alterity is not just about understanding that species are invested in other types of lives and activities, but also in being sensitive to forms of being that are inimical to the human species.

At the core here is the idea of (and respect for) non-oppositional difference: hamsters are as different from wolves as wolves are different from us humans. Each Umwelt is radically different, bounded by a different scale, containing different sensations and forms of life, and is yet experienced as full. Difference, then, does not presume a hierarchical structuring of which behaviour is appropriate and which claims are to be prioritised. As we saw, the instinct to subjugate behaviour that is particularly ‘wild’ or in other ways *un-human* – as for example in AG Kokott’s typification of the wolf¹⁴⁸ – is difficult to escape where the proportionality calculus is used to balance between animal autonomy and human claims. In an approach that is more sensitive to animal alterity, instead, the focus lies not on which sorts of behaviour are ‘better’ or more proportionate but on the ways in which differences can be negotiated. What is central, in other words, is the encounter between species, the way in which the species communicate with each other, and the process of mutual adaptation.

An example of what this would look like is the interpretation of a ‘no satisfactory alternative’ test in Article 16 HD. This suggests that the disturbance or killing of protected species for any reason is only allowed where other alternatives are exhausted. As discussed above, the Court has not often taken this literally, typically limiting itself to remind national courts that they must check whether the Member State can indeed argue that alternatives that can protect the human needs adequately are unavailable.¹⁴⁹ In other words: the process of mutual adaptation between humans and wild animals remains conditional upon the former’s concerns being met.

Only seldomly can we trace an explicit engagement with other ways in which the tension between wild animals and human places can be mediated, and ways in which *both* species can learn to adapt to each other. A good example is AG Saugmandsgaard Øe’s take in *Finnish Wolves*, where he offers a more critical view of the human concerns that underpin the case: “it is not apparent from that order that the Agency carried out any detailed analysis of the practical difficulties in monitoring poaching that may have led it to conclude that a policy of stricter monitoring and penalisation, together with other preventive measures, was not a satisfactory option. Nor has the referring court specified whether the alternative solutions such as increasing the loans allocated for the supply of electric fences and implementation of more active policies to inform the local populations, were envisaged and rejected”.¹⁵⁰

¹⁴⁷ Rolston, ‘Treating Animals Naturally?’ 5 *Between the Species* (1989) 131; Kowalsky, ‘Animal Difference in the Age of Selfsame’ in: Bovenkerk & Keulartz (eds.), *Animals in Our Midst: The Challenges of Co-existing with Animals in the Anthropocene* (Springer 2021).

¹⁴⁸ Opinion of AG in Case C-88/19, *Romanian Wolves*.

¹⁴⁹ Case C-674/17, *Finnish Wolves* para. 48-52; Case C-88/19, *Romanian Wolves* para. 58.

¹⁵⁰ Opinion of AG in Case C-674/17, *Finnish Wolves* para. 73. The court is less explicit but thinks in this direction as well, see Case C-674/17, *Finnish Wolves* para. 48.

The approach of animal alterity focuses on exactly this: how behaviour of both species can be adapted so that they take account of each other. AG Kokott, in *French Hamsters* takes note of this, suggesting that “one could imagine, for example, a ban on deep ploughing in agriculture because it is likely to destroy its burrows”,¹⁵¹ and more generally suggesting that mutual adaptation can be a legal requirement: “the continuing ecological functionality of European hamster burrows can be ensured only if the surrounding agricultural land is used in a way that is favourable to the European hamster.”¹⁵² In another revealing example, Schoukens describes how the project renovating the Viennese University College of Teacher Education dealt with 50 hamsters found to have taken up residence on site: “to further this 50 million euro project, the executives hired a landscaping consultant who specialised in environmentally friendly design. This so-called ‘Hamster Commissioner’ ensured that the active hamster burrows are fenced off. The hamsters will be strategically ‘moved’ to more suitable habitats by, among other things, engaging in strategic lawn mowing. Although the process sounds painstaking, it did not slow down the construction phase. With some additional planning, the needs of both the common hamsters and the University College have been catered to”.¹⁵³

In the context of wolves, Kuijpers and others have highlighted that the key to reduction of human/wolf conflict lies in the restoration of natural ungulate populations and critical engagement with human behaviour in their encounters with wolves rather than in aversive conditioning or relocation of wolves.¹⁵⁴ This type of mediation and mutual adaptation “on a fine spatio-temporal scale”¹⁵⁵ understands territory as being co-owned and the engagement between species as something that must be negotiated through communication. Drenthen, for example, highlights how fences have become communicative devices in the interaction between wolves and humans, but also how the behaviour of farmers, sheep or wolves change due to the repeated nature of their encounters.¹⁵⁶ Seeing the interaction between wild animals and human places as one of non-oppositional difference, wherein the distinct alterity of wild animals is neither obscured nor defined, but instead replaced by a focus on the encounter between species is, in other words, about *sharing* places, not only in its physical but also its meta-physical sense. As Boonman-Benson and others has highlighted, this “implies an understanding of agency and subjectivity as emergent and as produced through learning in practice and through interactions between humans, wild animals, and the landscape.”¹⁵⁷ Key to this process of respect for non-oppositional difference is a third element of the alterity approach: our commitment to learn more about the animals.

(c) a commitment to learn

¹⁵¹ Opinion of AG in Case C-383/09, *French Hamsters* para. 46.

¹⁵² Opinion of AG in Case C-383/09, *French Hamsters* para. 63.

¹⁵³ Schoukens, ‘Common Hamsters in and Outside the City: Some Reflections on Urban Biodiversity, Species Recovery and the EU Habitats Directive’ 19 *Journal for European Environmental & Planning Law* (2022) 193.

¹⁵⁴ Kuijper, Churski, Trouwborst, Heurich, Smit, Kerley & Cromsigt, ‘Keep the wolf from the door: How to conserve wolves in Europe’s human-dominated landscapes?’ 235 *Biological Conservation* (2019) 102.

¹⁵⁵ Kuijper et al, op. cit. *supra* note 157, 106.

¹⁵⁶ Drenthen, ‘Coexisting with Wolves in Cultural Landscapes: Fences as Communicative Devices’, in: Bovenkerk & Keulartz (eds.), *Animals in Our Midst: The Challenges of Co-existing with Animals in the Anthropocene* (Springer 2021). See also the work by Maan Barua on the material and infrastructural understandings of animal life: Barua, ‘Infrastructure and non-human life: a wider ontology’ 45 *Progress in Human Geography* (2021) 1467.

¹⁵⁷ Boonman-Benson, Driessen & Turnhout, ‘Managing wild minds: From control by numbers to a multinatural approach in wild boar management in the Veluwe, the Netherlands’ 44 *Transactions of the Institute of British Geographers* (2019) 2.

As will be clear by now, the alterity approach finds its justification and much of its application in the assumption that we know very little about wild animals and their Umwelten.¹⁵⁸ As we learn more about certain species, we can refine our understanding of their world and their alterity, and with it the sophistication of our ability to legally ‘read’ them will grow. This understanding is less relevant for determining who they ‘are’, as our understanding will never be coherent and complete – we cannot know without being – and more in understanding how the process of mutual adaptation and mutual respect can take place on the ground.

In the meantime, however, the legal system and the Habitats Directive are faced with questions on the appropriate interaction between wild animals and human places where the role of uncertainty is discussed. The previous sections have highlighted certain core elements – the ecological functionality of breeding sites, the respect for difference – that can structure this interaction while remaining sensitive to animal alterity. A final piece in that approach is a commitment to learn more about ‘them’ and enrich our understanding of how to organise the places we share, how, in other words, we can be more attentive to them.¹⁵⁹

In legal terms, this learning process can be (and has been) articulated in two ways. A first is in the reliance on scientific research in describing animal autonomy and the process of mutual adaptation between wild animals and human beings. In some cases, the Court uses our *lack of knowledge* to let Member States take drastic measures: “it cannot be ruled out that killing one individual in a pack [...] may prevent or reduce that damage by making wolves more wary of humans”.¹⁶⁰ In most cases, however, the Court turns this logic upside down and demands rigorous scientific engagement before exceptions on the protection of the Habitats Directive can be accepted. An example from *Finnish Wolves* is the demand that “rigorous scientific data” is produced, “including comparative data”¹⁶¹ in order to understand whether the killing of wolves would lead to a reduction in poaching. The same requirement of scientific and technical data is repeated throughout most of the case law – whether in testing the satisfactory nature of the available alternatives,¹⁶² in assessing population dynamics¹⁶³ the conservation status of a species,¹⁶⁴ or the likelihood of public policy concerns warranting a derogation under Article 16 HD.¹⁶⁵

Given that *French Hamsters* was an infringement procedure, we can trace in both AG Kokott’s Opinion and the Court’s assessment what this reliance on scientific data might entail before national courts asked to settle disputes on the Habitats Directive. Kokott, for example, offers a detailed engagement with the French cultivation strategy and its effect on hamster populations, suggesting a change in crop ratio and that “other measures, such as herbal field boundaries or leaving cereal strips unharvested”¹⁶⁶ would be more suited for the hamster. The Court likewise references scientific findings in its

¹⁵⁸ Johnson, ‘We don’t really know anything, do we? Open questions in sensory biology’ 15 BMC Biology (2017) 2.

¹⁵⁹ See also Lindahl, op. cit, *supra* note 86, 313.

¹⁶⁰ Case C-342/05, *Commission v Finland* ECLI:EU:C:2007:341, para. 42; Opinion of AG in Case C-674/17, *Finnish Wolves* para. 69.

¹⁶¹ Case C-674/17, *Finnish Wolves* para. 45.

¹⁶² Case C-674/17, *Finnish Wolves* para. 51; Opinion of AG in Case C-674/17, *Finnish Wolves* para. 45; Case C-88/19, *Romanian Wolves* para. 58.

¹⁶³ Case C-674/17, *Finnish Wolves*, para. 71; Opinion of AG in Case C-674/17, *Finnish Wolves* para. 106; Case C-88/19, *Romanian Wolves* para. 58.

¹⁶⁴ Case C-674/17, *Finnish Wolves* para. 67.

¹⁶⁵ Opinion of AG in Case C-88/19, *Romanian Wolves* para. 58.

¹⁶⁶ Opinion of AG in Case C-383/09, *French Hamsters* para. 77-79.

assessment of France's protection strategies.¹⁶⁷ It also highlights that French legislation offered a possibility of a ministerial exemption for new urbanisation projects even where the effect of such projects on the hamster population and habitat were unclear or problematic. The absence of a rigorous scientific procedure governing the granting of such exemptions, including its effect on the hamster population, was considered a violation of Article 12 HD.¹⁶⁸

The second example of the commitment to learn in the Habitats Directive lies in the use of the precautionary principle, which gives substance to the claim that we know very little about wild animals: it translates our lack of knowledge into concrete constraints on human behaviour that preserves the future potential of (and for) animal autonomy. In *Finnish Wolves* the Court makes use of the precautionary principle – which is enshrined in Article 191 TFEU – to highlight that where “there remains uncertainty as to whether or not a derogation [of Article 12 HD] will be detrimental to the maintenance or restoration of populations of an endangered species at a favourable conservation status, the Member State must refrain from granting or implementing that derogation”.¹⁶⁹ This logic can be extended to include not just situations of scientific uncertainty but also situations typified by a very basic lack of scientific understanding, as seems to be the suggestion of AG Saugmandsgaard Øe where he suggests that the precautionary principle is implicit in *any* assessment of FCS.¹⁷⁰

The use of the precautionary principle to manage our lack of understanding of wild animals is not without problems. Its use in other areas of EU law, such as chemical regulation or food safety, has sparked a wide-ranging discussion on the definition and assessment of scientific uncertainty and the tension between competing epistemic frameworks in their regulation.¹⁷¹ Arguably, however, it could be well-suited where our lack of understanding is not seen as a problem to be overcome but a constitutive feature of a legal framework that articulates what animal alterity is.

In this second approach to legally describe animal autonomy, which focuses on their alterity, then, what is demanded is a radical shedding of our anthropocentric gaze in order to allow for the recognition of animal meaning in the legal system. It is a perspective which understands our world as a place *shared* with animals, alongside whom we co-create meaning.

4. Conclusion

This article started with the story of Max, a child whose wildness situates him outside the civilised places but whose human nature nevertheless ties him to those places. This paradox – how can we ever appreciate the wildness within us if we situate it elsewhere both physically and meta-physically – has animated the discussion in this article. In it, I have tried to tease out some of the assumptions and assertions underpinning the Habitats Directive and the Court's case law in cases where wild animals find themselves in human places. While such encounters might constitute exceptional cases for now, the past years has seen a rapid increase in such encounters – partially due to the destruction of the habitats of protected species, the effects of climate change, intensive farming and urban expansion, and partially because of the success of conservation policies. Both of these processes are

¹⁶⁷ Case C-383/09, *French Hamsters* para. 28-29.

¹⁶⁸ Case C-383/09, *French Hamsters* para. 34.

¹⁶⁹ Case C-674/17, *Finnish Wolves* para. 66; Joined Cases C-473/19 and C-474/19, *Föreningen Skydda Skogen* para. 38.

¹⁷⁰ Opinion of AG in Case C-674/17, *Finnish Wolves* para. 63.

¹⁷¹ See e.g. Weimer, *Risk Regulation in the Internal Market: Lessons from Agricultural Biotechnology* (OUP 2019).

likely to accelerate in the coming decades and require a more rigorous re-assessment of how wild spaces and human places intersect.

This article does not suggest that the boundary between wild spaces and human places is meaningless. Its very construction is, to a large extent, premised on the need to protect the habitat of wild animals from the imposition of the anthropocentric gaze and human meaning. However, this article suggests that that boundary between wild spaces and public places blinds us to what the wild *is* and could *be*. The construction of the wild as a 'space' that is typified, above all, by our deliberate *absence* – physically, ecologically but also intellectually – has robbed it of its *own* meaning.

It is in the incursion of wild animals within 'our' human places that this tension has become clear, as it requires the legal system to create new legal categories of meaning for those wild animals. In dealing with these situations, I have argued that two very different accounts exist that try to describe wild animals. Both can be seen as progressive in so far as they approach the animal as having certain legal claims that are innate, that are not attributed by us but expressed by *themselves*.

The first approach, termed animobility, understands animal movement as a proxy for agency (as EU law does with humans). As we saw, however, the focus on movement means that the animobility approach struggles to overcome the boundary between wild spaces and human places, given that the focus on mobility invariably reifies that very same boundary. In other words, the animobility approach continues to see the wild as a 'space', as a site where animals should be allowed to be 'themselves' – a notion of 'self' that is primarily understood in negative terms as being 'without us' rather than as a positive expression of their autonomy.

The second approach discussed in this article focuses on animal alterity – their fundamental otherness – but does not reduce this to its non-humanness. Instead, it suggests that the (interpretation of the) Habitats Directive should be sensitive to, respect, and willing to learn from, what the world looks like for a wolf or a hamster. Such an approach takes seriously animal autonomy by, ultimately, appreciating that the wild is a 'place' as well: full of meaning, relationships, tensions and symbols, even if – or especially when – we don't understand these fully. Arguably, this is the approach that would allow EU law – like Max – to take its own wild side seriously: not as an exception to the normal state, but as an irreducible part of it.