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Compensation in the European Union: Natura 2000 and Water Law

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Introduction

This comparative article is an introduction to seven articles and national reports on compensation and compensatory measures in the field of nature conservation and water law. The papers that will be compared and discussed in this introduction deal with compensation regimes in France (Natura 2000), written by Jessica Makowiak, in the Czech Republic (Natura 2000 and Water), written by Petra Humlickova, in Portugal (Natura 2000 and Water) written by Márcio Albuquerque Nobre,¹ in the Belgium/Flanders Region (Natura 2000) written by Hendrik Schoukens and An Cliquet, in the Netherlands (Natura 2000) written by Jacqueline Zijlmans and Hans Woldendorp, and on water law in the Netherlands by Willemijn van Doorn-Hoekveld and, of course, in the European regime (Natura 2000) as discussed by Geert Van Hoorick. Besides the papers that are part of this third part of the special issue of Utrecht Law Review also the paper by Peter De Smedt 'Towards a New Policy for Climate Adaptive Water Management in Flanders: the Concept of Signal Areas' relates strongly to the issue of compensation in water management.²

Compensation in water law and in nature compensation law are strongly interwoven, as many Natura 2000 sites are established in or in the vicinity of rivers, lakes, or the sea or are strongly dependent on sufficient and clean groundwater. It becomes clear from the case studies that are discussed in the papers and which were discussed during the conference that a great deal of case law refers to Natura 2000 sites that also fall under the regime of – for example – the Water Framework Directive. See, for example, the case studies discussed by Nobre concerning the Alqueva Dam Project and Lakeside City, by Makowiak on the Gironde and the Low Garonne, by Zijlmans and Woldendorp concerning the *IJburg*

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1 J. Makowiak, 'Compensation in Nature Conservation Law: The Case of France', 2014; P. Humlickova, 'Compensation in the Czech Republic', 2014; M. Albuquerque Nobre, 'Ecological Compensation in Portugal: Natura 2000 and Water Resources', 2014. These country reports can be found on the SSRN page of *Utrecht Law Review*: <http://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=1512143>.

2 G. Van Hoorick, 'Compensatory Measures in European Nature Conservation Law', 2014 *Utrecht Law Review* 10, no. 2, pp. 161-171; J.M.I.J. Zijlmans & H.E. Woldendorp, 'Compensation and Mitigation: Tinkering with Natura 2000 Protection Law', 2014 *Utrecht Law Review* 10, no. 2, pp. 172-193; H. Schoukens & A. Cliquet, 'Mitigation and Compensation under EU Nature Conservation Law in the Flemish Region: Beyond the Deadlock for Development Projects?', 2014 *Utrecht Law Review* 10, no. 2, pp. 194-215; W. van Doorn-Hoekveld, 'Compensation in Flood Risk Management with a Focus on Shifts in Compensation Regimes Regarding Prevention, Mitigation and Disaster Management', 2014 *Utrecht Law Review* 10, no. 2, pp. 216-238; P. De Smedt, 'Towards a New Policy for Climate Adaptive Water Management in Flanders: The Concept of Signal Areas', 2014 *Utrecht Law Review* 10, no. 2, pp. 107-125.

and *Westerschelde* cases and the important Greek *Acheloos* case on the diversion of the course of a river.³ Especially the good ecological status of waters as required in Article 4 of the Water Framework Directive makes this overlap between nature conservation and water management obvious.⁴ However, most papers in this section relate to compensation and Natura 2000 and they will be discussed and compared in more detail below (Section 3).

2. Different approaches towards compensation

Compensation may relate to financial compensation to compensate loss or damage and to factual measures that may compensate damage. Factual measures not only relate to measures that have to be taken because of expected negative effects that result from certain proposed developments or activities, which are mostly discussed in the papers on compensation and Natura 2000. Factual measures may also relate to measures often taken by governments to prevent damage or to comply with the requirements in, amongst others, the Water Framework Directive, the Floods Directive or national water legislation. For example: to improve flood safety it may be necessary to build dikes or to enlarge rivers to create more room for water. To improve the ecological status of waters it may be necessary to create nature-friendly river banks, or to build or adjust fish ladders. In cases where these measures harm the property of citizens, it may be appropriate to compensate this damage, by means of financial measures, or by taking compensatory measures. The paper by Willemijn van Doorn-Hoekveld takes this approach towards compensation as the main point for discussion when she describes the compensation regime in Dutch water law. Furthermore, the papers and country reports show that compensation in water and nature conservation law is often preceded by an environmental impact assessment (Márcio Albuquerque Nobre, Jessica Makowiak and Petra Humlickova) which points out where and what compensatory measures may be necessary to develop a certain project or plan within the requirements of the current legal framework. Finally, the papers by Nobre and Humlickova refer to the environmental liability regime as developed by the EU and as implemented in the Member States as a common regime for both water and nature conservation law. It is this difference between proactive, preventive or restorative governmental or private behaviour that explains the several approaches related to compensation in the papers in this section of the special issue.

3. Compensation and Natura 2000

3.1. Introduction

The first idea that crosscuts the articles and the national reports on compensation and Natura 2000 is the strong influence of European law. In general, at the Member State level, in the states concerned there is no autonomous legal regime for compensation in the context of Natura 2000. While in some Member States there is no debate on the topic, in others, as in Belgium and the Netherlands, mitigation and compensation measures are recent concerns of the public authorities. There is even recent case law by the Belgian Council of State, which can be seen as a remarkable example of environmental judicial activism. In other countries, like the Czech Republic, compensatory measures are only looked at in the context of liability for environmental damage caused by existing activities. The transposition of the Habitats Directive, requiring compensatory measures, has not led to the emergence of a legal discussion and case law on compensation. In the Netherlands, for instance, although there is a great deal of literature on compensation, there is almost no experience with compensatory measures following Article 6(4) of the Habitats Directive.

In the absence of legal support, at the national level, as to the concept, requirements, conditions or limits of compensation measures, the States seem to rely heavily on the interpretation coming from

3 European Court of Justice, Judgment of 11 September 2012, in Case C-43/10.

4 P. De Smedt & H.F.M.W. van Rijswijk, 'Nature conservation and water management: one battle?', in *20 Years Habitats Directive*, Routledge-Earthscan, in press.

European institutions, namely the European Commission and European case law. Therefore, the main information sources are:

- the guidance document of the Commission on Article 6(4),⁵
- the opinions issued by the Commission,⁶
- the European case law of the Court of Justice (for instance, *Acheloos*⁷ is a cornerstone case which is referred to by several authors).

Also a pending case before the European Court of Justice will hopefully lead to some clarifications and the decision is anxiously awaited. The Administrative Law Division of the Dutch Council of State (*Afdeling bestuursrechtspraak van de Raad van State*, ABRvS) has submitted preliminary questions regarding a project for the enlargement of a motorway, causing an increase in the deposition of nitrogen on a nearby Natura 2000 site. The Dutch court wants to know if the development of a new surface area (having a similar scale) of the habitat type adversely affected by the project should be classified as a mitigating measure or as a compensatory measure.

3.2. The context: development based on mitigation and compensation measures

When a plan or a project of overriding public interest, for which there are no alternatives, is allowed, in spite of the significant effects on a site or species,⁸ compensatory measures are mandatory to ensure the coherence of Natura 2000.

This may be an important obstacle to the project development. Thus it is in the interest of the developer to apply, as much as possible, mitigating measures to overcome the two tests of necessity and to get around the strict obligation to adopt compensatory measures.

The first test of necessity is the ‘alternatives’ test: are there no other alternative solutions to carry out the plan or project without causing significant effects?

The second necessity test is the ‘public interest’ test: is the plan or project justified for imperative reasons of overriding public interest? Among developers as well as among some public authorities there is the generalized idea that whenever sufficient mitigation measures are adopted, almost every plan or project can be declared to be environmentally compatible and be approved. As reported by Hendrik Schoukens and An Cliquet, the Belgian Council of State has refused this perverse interpretation of mitigation as a cover-up for projects that would not fit the strict European requirements, and a strategy to bypass, from the outset, the requirement to carry out an appropriate assessment. However, project developers and planning authorities try to find new ways to reconcile nature conservation with the fulfilment of short-term economic interests. The inclusion of mitigation measures in an early planning stage as in ‘integrated planning’ promises to reconcile economic and ecological concerns. This is why mitigation measures are so popular.

The big question now is the distinction between mitigation and compensation measures. This distinction will be included in a law which is currently being prepared in France.

3.3. Distinction between mitigation and compensation measures

In Portugal the difference between mitigation and compensatory measures is not discussed and the approach to the distinction is quite conceptual.

It is interesting to note a certain degree of legal confusion in the use of certain terms: minimization and reduction are used interchangeably instead of mitigation; mitigation and compensation are normally used together, sometimes as an alternative, sometimes simultaneously.

5 European Commission, *Guidance document on Article 6(4) of the ‘Habitats Directive’ 92/43/EEC*, 2007, <http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf> (last visited 24 April 2014).

6 Under Art. 6(4) second paragraph of the Habitats Directive.

7 Supra note 3.

8 Arts. 6(4) and 16(1) of the Habitats Directive.

However, establishing a difference is essential to ensure that, as stressed by Geert Van Hoorick, the combination of a worse plan or project with strong compensatory measures will not outshine a better alternative plan or project combined with mitigation or weak compensatory measures.

As shown in the Belgian report, there are four steps in the ‘mitigation hierarchy’:

- First of all, ‘avoidance measures’ are those capable of avoiding negative impacts on protected biodiversity.
- Then, ‘mitigation measures’ are the ones adopted to reduce, minimize or even cancel the expected negative impact of a plan or project.
- Next, rehabilitation measures should remedy any unavoidable residual damage or loss, if possible through the on-site restoration of habitats.
- Finally, compensatory measures restore, create or enhance an area of habitat or a species population in order to compensate for residual damage. In Geert Van Hoorick’s paper the distinction is extensively illustrated by examples taken from opinions issued by the Commission.

Summing up, while mitigation measures are an integral part of the specifications of a plan or project (as explained by Jacqueline Zijlmans and Hans Woldendorp, ‘nature inclusive design’ means that the project is being built up with nature protection measures and implies that social, economic and nature protection objectives are integrated in the project), compensatory measures are independent of that plan or project. Besides, the obligation to compensate is a last resort, which must be confined to exceptional cases and can only be taken into account after fulfilling all the necessity tests.

In practice it is not so simple to distinguish between the various steps of the ‘mitigation hierarchy’ and even the Dutch Council of State⁹ has accepted that it would be possible to take into account the positive effects of an autonomous activity as a compensation measure for habitat loss, provided that, on balance, it was accepted that no significant adverse effects would occur. This ‘netting’ of the negative and positive effects of several activities can be either a great opportunity or a great threat, depending on the effectiveness of the measures in question.

3.4. Conditions of admissibility of compensation measures

Preserving the ‘overall coherence’ of the Network is the aim and, at the same time, the criterion of suitability concerning compensation measures. This means that the compensation should be appropriate to replace the functions of the damaged nature values.

The *functional* character of compensation has several implications regarding ‘when’, ‘where’ and ‘how’ to compensate.

When to compensate?

Compensation shall take place in good time and be operational before starting the project and before the damage becomes effective. If the continuity of the ecological processes must be ensured, then the intended result of the measures should be attained when the significant effects occur.

Still, this is not always possible because of the timescale. Whenever compensation is impossible for reasons of timescale (the case mentioned by Geert Van Hoorick is that of habitat ‘raised bogs’ which require more than one thousand years to develop), the alternative of refusing to grant permission for the project or, in other words, the so-called *zero option*, should be seriously considered.

Where to compensate?

For the European Commission, compensatory measures must be taken in the same biogeographical region. But ideally, according to Jacqueline Zijlmans and Hans Woldendorp, they should be taken in the vicinity of the Natura 2000 site.

⁹ ABRvS 21 July 2010, no. 200902644/1/R2; *Milieu en Recht* (annotated by J.M. Verschuuren), quoted by Zijlmans & Woldendorp, *supra* note 2.

It is also possible to take compensatory measures in the territory of other Member States, considering that what must be preserved is the overall coherence of the Natura 2000 network.

The question of ownership (who owns the place that is to be used for compensation?) is only relevant for purposes of ensuring the effective implementation of compensatory measures. Nevertheless, laying down the possible locations for the compensatory measures to show the compatibility of the proposed measures with existing land use plans seems to be an effective way to guarantee their implementation.

How to compensate?

There are two main questions to be addressed when discussing the possible forms of compensation: the first question is to know whether compensation can be financial or must be in kind.

Considering the functional character of the compensation regime, financial compensation should not be allowed.

Nevertheless, in Portugal a questionable application of financial compensatory measures is reported: in the authorization to build wind power plants in Natura 2000 sites, the developer is required to contribute financially to a public fund for the protection of wolves, which is somehow surprising, considering that the wolf is certainly not the most affected species.

Some authors (Hendrik Schoukens and An Cliquet) stress that there is a difference between compensation measures, which also can consist of financial payments for damage to the environment, and offsetting measures, which merely relate to activities to counteract ecological harm.

In any case it is clear that the developer is responsible for the compensatory measures and, according to the polluter pays principle, it has to bear the costs. In the case of public plans or projects, it is the government which has to pay compensation. However, even if the costs of compensation measures are high they shall not be taken into account in the final decision, since they are part of the overall cost of the project. If the cost is too high the developer should find an alternative.

The second question concerns the quantitative or qualitative nature of the compensation measures.

According to the no net loss principle, the surface area of the *replacing nature* (Jacqueline Zijlmans and Hans Woldendorp) should be bigger than the surface area of the damaged nature. For compensation measures taken outside the Natura 2000 network the site where the measures are being taken should be given the status of a Natura 2000 site. Granting legal status to new areas and protecting them, or extending already designated Natura 2000 sites are thus compensatory solutions of a quantitative nature.

But in practice, space is limited and in cases where there are simply not enough parcels of land available for compensation, requiring a ratio of 1:1 or above (cases of 1:12 have been reported) can be unrealistic.

In that case, complementary qualitative compensation measures, such as the biological improvement of existing sites, may be conceivable. In this case, restoration or enhancement efforts at existing sites are admissible provided that there is a proven added value of the proposed improvement measures. The European Commission, in its 2000 *Guidance on the management of Natura 2000 sites*, does not completely exclude the use of improvement measures but underlines that measures required for the 'normal' implementation of the Habitats or Birds Directive cannot be considered compensatory for a damaging project.

The problem of finding land for compensation measures and the complexity and timescale required to 'recreate' nature from scratch may somehow be overcome by compensation taken *in advance*. Habitat banking (or habitat reservation) is a strategy adopted 'for the realization of nature values that could serve as compensation on behalf of future [and unknown] projects' (Jacqueline Zijlmans and Hans Woldendorp).

In France a 'compensation market' has been emerging since 2008. The *Caisse de Depots et Consignations*, a public banking institution, acquires land to carry out compensatory measures. Some authors consider that habitat banking can be 'a slippery slope towards the privatisation of biodiversity' (Hendrik Schoukens and An Cliquet).

3.5. Conclusion: uncertainties concerning compensatory measures

Knowing that the purpose of compensatory measures is to replace the damaged natural functions, developers and planners must prove in advance that the measures are appropriate and sufficient to produce the intended necessary results or, in other words, to restore, create or enhance biodiversity. This requires the use of the best scientific knowledge available to prove the long-term effectiveness of the measures, as well as their reasonable guarantee of success.

The solution to ensure that the results are attained in an uncertainty context is the inclusion of strict monitoring mechanisms at permit level.¹⁰ Furthermore, *adaptive management* also contributes to the same objective. *Adaptive management* is a 'structured, interactive process of robust decision making in the face of uncertainty, with an aim of reducing uncertainty over time via system monitoring'.¹¹

But relying too much on monitoring may entail risks: monitoring difficulties due to a lack of resources are reported in France and Portugal. Besides, large infrastructure linear projects have complex monitoring specificities.

And we must not forget that in some cases, as reported by Márcio Albuquerque Nobre, the compensatory measures themselves may involve new environmental impacts. Controlling these unexpected environmental impacts is particularly important after the European Court's *blessing of man-made nature* in the *Acheloos* case. ¶

10 See also the contribution of Beijen et al. on the diversity of monitoring functions and the related monitoring systems in this issue. B.A. Beijen et al., 'The Importance of Monitoring for the Effectiveness of Environmental Directives. A Comparison of Monitoring Obligations in European Environmental Directives', 2014 *Utrecht Law Review* 10, no. 2, pp. 126-135.

11 C.S. Holling, *Adaptive Environmental Assessment and Management*, 2005, p. 377, quoted by Schoukens & Cliquet, *supra* note 2. For adaptive water management see A.M. Keessen & H.F.M.W. van Rijswijk, 'Adaptation to Climate Change in European Water Law and Policy', 2012 *Utrecht Law Review* 8, no. 3, pp. 38-50.