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## Compensation and Mitigation: Tinkering with Natura 2000 Protection Law

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### 1. Introduction<sup>1</sup>

This article deals with the implementation in the Netherlands of the obligation under Article 6(4) Habitats Directive<sup>2</sup> to compensate nature values in Natura 2000 sites that are damaged or lost by a plan or project. This obligation is an ‘ultimum remedium’;<sup>3</sup> in other words, the last resort for the continuation of a plan or project ‘affecting the integrity of a Natura 2000 site’.

If the competent authority, on the basis of the conclusion of an appropriate assessment under Article 6(3) Habitats Directive, decides that a plan or project, in spite of mitigating measures, may adversely affect the nature values of a Natura 2000 site, the plan or project can only be carried out under the strict criteria of Article 6(4) Habitats Directive. These cumulative criteria imply that there is no alternative solution for the plan or project with less adverse effects for the Natura 2000 site, that the infringement can be justified for an imperative reason of overriding public interest and, provided the other two requirements are fulfilled, that the residual adverse effect will be adequately compensated.

Compliance with the three criteria is not an easy matter. It causes at least delays and extra costs. Sometimes the plan or project must even be abandoned.<sup>4</sup> Moreover, according to the jurisprudence of the highest administrative court in the Netherlands, the Council of State (Administrative Law Division) (*Afdeling bestuursrechtspraak van de Raad van State*, hereinafter abbreviated as Council of State or, in the notes, ABRvS<sup>5</sup>), the imperative reason should outbalance the interest of the protection of the Natura 2000 site.<sup>6</sup> The European Commission is of the same opinion.<sup>7</sup>

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1 Abbreviations of legal magazines as referred to in the notes: AB = *AB Rechtspraak Bestuursrecht*; BR = *Bouwrecht*; Jf = *Journal Flora en Fauna*; JM = *Jurisprudentie Milieurecht*; M&R = *Milieu & Recht*; TBR = *Tijdschrift voor Bouwrecht*; TOO = *Tijdschrift voor Omgevingsrecht en Omgevingsbeleid* (Flanders).

2 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora, OJ L 206, 22.7.1992, p. 7.

3 European Commission, *Guidance document on Article 6(4) of the ‘Habitats Directive’ 92/43/EEC, Clarification of the Concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence*, Opinion of the Commission, 2007/2012, p. 12.

4 H.E. Woldendorp, ‘Natuuri inclusief ontwerpen: een juridische Apenpuzzelboom’, *Jf* 2013, pp. 163-176, Para. 2.

5 The rulings of the ABRvS can be found on the following website: <<http://www.raadvanstate.nl/uitspraken.html>>.

6 ABRvS 16 July 2003, no. 200205582/1, M&R 2003/124 (note J.M. Verschuuren); AB 2003/326 (note Ch.W. Backes); BR 2004/83 (note A.A. Freriks and H. de Gier).

7 European Commission, *Managing Natura 2000 sites: The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC*, 2000, pp. 42-43.

An initiator of a plan or project strives to minimize the risks of its project. Therefore, it is in the interest of the initiator to apply, as much as possible, mitigating measures in order to avoid the application of the strict criteria of Article 6(4) Habitats Directive. Hence, it comes as no surprise that there is a search for ‘creative constructions.’<sup>8</sup> They have in common that mitigating measures play a vital role therein, since their positive effects are included in the appropriate assessment which precedes the application of the strict criteria of Article 6(4) Habitats Directive. The key question is what makes a mitigating measure under Article 6(3) Habitats Directive different from a compensatory measure falling under Article 6(4) Habitats Directive? This subject has been extensively debated, since opinions are divided. The Council of State has submitted several prejudicial questions to the Court of Justice of the European Union (hereinafter: Court of Justice or, in the notes, CJEU) concerning the differences between mitigating measures and compensatory measures.<sup>9</sup> The answers of the Court of Justice are anxiously awaited, since the realization of many infrastructural projects as well as other building projects depends thereon.

### 1.1. Layout

Since the obligation to compensate the residual adverse effects on Natura 2000 sites cannot be viewed separately from the duty to take mitigating measures with the aim to avoid those effects, this article will first pay attention to mitigating measures (Section 2), in particular to the objectives of mitigating measures (Subsection 2.1), the requirement of an inextricable link between the mitigating measures and the project (Subsection 2.2) and, finally, the character of mitigating measures as a result obligation (Subsection 2.3). Then the ‘creative constructions’ that are presented under the flag of mitigating measures will be discussed, namely ‘balancing of effects,’ ‘nature inclusive design’ (at the project level) and two types of ‘integrated planning,’ the area-based approach and the programmatic approach (Subsections 2.4-2.7). Section 3 deals with compensatory measures. The objective of compensatory measures will be discussed (Subsection 3.1), as well as the requirements of the functionality (Subsection 3.2), sustainability (Subsection 3.3) and timeliness (Subsection 3.4) of those measures, the responsibility for the taking of compensatory measures (Subsection 3.5), the guarantee of the implementation and monitoring of compensatory measures (Subsection 3.6), the choice between different compensatory measures (Subsection 3.7) and, finally, the location of the compensatory measures (Subsection 3.8). Section 4 contains conclusions and observations.

## 2. Mitigating measures

### 2.1. The objective of mitigating measures

Mitigating measures have the objective to reduce (‘soften’) or even eliminate the adverse effects that a plan or project in the light of the conclusions of the appropriate assessment on the basis of Article 6(3) Habitats Directive may have on the protected habitat types and (habitats of) species in a Natura 2000 site. Mitigating measures are not relevant for the question whether an appropriate assessment of the possible significant effects of a plan or project is required.<sup>10</sup> In the appropriate assessment, however, the positive effects of mitigating measures may be included.<sup>11</sup>

<sup>8</sup> See Section 2.4-2.7.

<sup>9</sup> ABRvS 9 November 2012 (discussed in Section 2.2 hereafter).

<sup>10</sup> ABRvS 7 May 2008, no. 200604924/1, *JM* 2008/75 (note H. van der Meijden); ABRvS 13 August 2008, no. 200706814/1, *JM* 2008, 128 (note P. Jong); ABRvS 22 October 2008, nos. 200706044/1 and 200706194/1, *AB* 2008/363 (note Ch.W. Backes); *BR* 2009/27 (note H.E. Woldendorp); *JM* 2008/139 (note J.M.I.J. Zijlmans); ABRvS 11 April 2012, no. 201010477/1/R1, *Kluwer Omgevingsrecht* 2013/18485; ABRvS 9 March 2012, no. 201112117/2/R1, *BR* 2012/102 (note H.E. Woldendorp); ABRvS 18 July 2012, no. 201011214/1/R4, *BR* 2012/166 (note H.E. Woldendorp); ABRvS 16 December 2009, no. 200900916/1/R2, *BR* 201/42 (note H.E. Woldendorp).

<sup>11</sup> ABRvS 7 May 2008, no. 200604924/1, *Gemeentestem* 2008/97 (note S.D.P. Kole); *JM* 2008/75 (note J.M.I.J. Zijlmans and S. Pieters); ABRvS 21 July 2010, no. 200902644/1/R2; *M&R* (note J.M. Verschuuren); *BR* 2010/153 (note H.E. Woldendorp); *JM* 2010/98 (note J.M.I.J. Zijlmans); *M&R* 2011/160 (note J.M. Verschuuren); ABRvS 7 December 2011, nos. 201011757/1/R1 and 201012728/1/R1, *BR* 2012/26 (note H.E. Woldendorp); *JM* 2012/22 (note J.M.I.J. Zijlmans); ABRvS 14 December 2011, no. 201009630/1/R2, *BR* 2012/44 (note H.E. Woldendorp); *JM* 2012/11 (note J.M.I.J. Zijlmans); ABRvS 18 July 2012, no. 201011214/1/R4, *BR* 2012/166 (note H.E. Woldendorp).

## 2.2. Mitigating measures are inextricably linked to the plan or project

Mitigating measures imply modifications of the plan or project and must be distinguished from alternative solutions for the (objective of the) plan or project. Alternative solutions are assessed in the context of Article 6(4) Habitats Directive in the follow-up to a negative appropriate assessment.

In the Netherlands almost all plans and projects include mitigating measures. In general they are sufficient to conclude that the plan or project will not adversely affect the integrity of the Natura 2000 site and can thus be authorized without the application of the strict conditions of Article 6(4) Habitats Directive.

An example of a frequent mitigating measure is the implementation of the plan or project outside the breeding periods of protected species. The Council of State has ruled, for instance, that the adverse effects of the deepening of a shipping channel were not significant in view of the site's conservation objectives, taking into account the conditions relating to the period in which the spreading of dredged material was allowed.<sup>12</sup>

Until recently, the Council of State has been generous in this context. A famous case concerned the plan for a large-scale building project in IJburg, close to Amsterdam (hereafter: the *IJburg* case).<sup>13</sup> This project would destroy mussel beds serving as a foraging site for different protected bird species. These mussel beds would be replaced by other mussel beds at a different location within the planning area. The Council of State considered this protection measure as an integral part of the plan and classified the measure as a mitigating measure. In the appropriate assessment the positive effects of the measure could be taken into account.<sup>14</sup> Some authors have commented critically on this ruling. They are of the opinion that the measures were meant to compensate the significant adverse effects of a loss of habitat for protected bird species. In contrast, other authors have welcomed the ruling as a pragmatic approach that was justified because the plan did not affect the integrity of the Natura 2000 site as a whole,<sup>15</sup> since the ecological functionality of the site for the protected bird species foraging on mussel beds at the site was still guaranteed.

The ruling in the *IJburg* case was the overture to frequent creative applications of the concept of mitigating measures, usually presented as 'integrated planning' or 'nature inclusive design'.

Other examples of mitigating measures in the jurisprudence of the Council of State are the creation of a large artificial mound, with a shallow part behind it, that balanced the significant adverse effects of a wind turbine park<sup>16</sup> and the creation of a flooding refuge place as part of a project for the creation of a sand depot outside a Natura 2000 site.<sup>17</sup>

In all those rulings the key question is whether the protection measures were inextricably linked with the objectives and design of the plan or project. If yes, it is allowed to take those mitigating measures into account in the appropriate assessment. This is decided on a case-by-case basis. In the first instance, the initiator decides on the objectives and the design of the project.<sup>18</sup> However, if there is no direct link between the different parts of a plan or a project, the Council of State will identify those parts as separate plans or projects. Moreover, the timely implementation as well as the successful results of the measures must be guaranteed, being a 'result obligation'.<sup>19</sup>

The Belgian Council of State took a different approach in its ruling of 29 March 2013<sup>20</sup> concerning the realization of a bypass around the villages of Houthalen and Hechteren. This plan aimed to keep traffic outside the village centres and to improve safety and reduce traffic noise. The bypass was designed as an alternative to an improved short cut through the village centres. However, the alternative of the bypass had the disadvantage that it went through the linking zone between several Natura 2000 sites. For this reason the bypass was combined with a nature development programme.

12 ABRvS 24 August 2011, no. 201000106/1/M2, BR 2011/175 (note H.E. Woldendorp).

13 ABRvS 21 July 2010, no. 200902644/1/R2, M&R 2010/19 (note J.M. Verschuuren); BR 2010/6.

14 ABRvS 21 July 2010, no. 200902644/1/R2, M&R 2010/19 (note J.M. Verschuuren); BR 2010/6.

15 H.E. Woldendorp, 'Eén zwaluw ... een doorbraak voor gebiedsontwikkeling in Natura 2000-gebieden', BR 2010/3.

16 ABRvS 8 February 2012, no. 201100875/1/R2, JM 2012/53 (note J.M.I.J. Zijlmans and S. van Velsen).

17 Chairman of the ABRvS 9 February 2010, no. 201001293/1/R2, BR 2010/93 (note H.E. Woldendorp).

18 Chairman of the ABRvS 31 August 2009, no. 200902644/2/R2, M&R 2010/19 (note J.M. Verschuuren).

19 J.M. Verschuuren, M&R 2010/19.

20 ABRvS (B) 29 March 2013, no. 223.083, no. A.200.513/X-14.736, <<http://www.raadvst-consetat.be/arr.php?nr=223083>>.

The central question in this case was whether the positive effects of the nature development programme could be regarded as mitigating measures and could thus be included in the appropriate assessment under Article 6(3) Habitats Directive or whether they had to be considered as compensatory measures under Article 6(4) Habitats Directive.<sup>21</sup>

The following circumstances were relevant. The project would have significant effects on the habitats in the Natura 2000 sites that already had an unfavourable conservation status. The measures included the modification of the project so that the effects for the Natura 2000 sites were minimized. However, those mitigating measures were not enough to avoid significant adverse effects. The competent authority declared that the nature development programme was not designed to neutralize the effects of the project, but would be implemented with the aim being to attain a favourable conservation status for the sites and to strengthen the linking zone and was thus an autonomous development. The positive results of the programme had been taken into account in the appropriate assessment, since the favourable conservation status was the reference point for judging the effects of the project.

Remarkably, the effects were related to the linking zone between the Natura 2000 sites that was not a part of those sites. According to the Belgian Council of State the linking zone was part of the natural characteristics of the Natura 2000 sites. So the effects of the plan on the linking zone required an appropriate assessment (external effects). Since the mitigating measures did not prevent the adverse effects, the Council of State concluded that the Natura 2000 site was adversely affected and compensatory measures were required. We would like to point out that the nature development programme was not meant to compensate the adverse effects since it was meant as an autonomous development that was not linked to the project. So we are of the opinion that the competent authority would do well to relabel the nature development programme as a compensatory measure, if it wants to continue the project, otherwise the effect of the project is not compensated in the end.

So far, the Belgian Council of State seems to be more critical than the Dutch Council of State. Probably the Dutch Council of State would have considered the nature development programme in the Flemish case as a mitigating measure, an objective of the project or an autonomous development, provided that the implementation of the measure is guaranteed, as well as the ecological functionality of the Natura 2000 sites. In such a case the effects of the measures are taken into account in the appropriate assessment. The positive effects of mitigating measures or plan objectives are balanced directly against the negative effects of the plan. The positive effects of an autonomous development, however, are not directly balanced, but are only taken into account as far as they improve the conservation status of the site, thus leading to the conclusion that the negative effects of the plan or project are not significant.

Conversely, in the *IJburg* case the Belgian Council of State would probably classify the construction of new mussel beds to replace, at a different location, existing mussel beds that will be lost as a result of the building project as a compensatory measure. However, conclusions are very dependent on the circumstances.

In its ruling of 7 November 2012<sup>22</sup> the Dutch Council of State submitted prejudicial questions to the Court of Justice. This case concerns the enlargement of the A2 motorway, causing an increase in nitrogen deposits at a nearby Natura 2000 site. This site had been designated for the protection of nitrogen-sensitive habitat types. It results from the appropriate assessment that possible significant adverse effects for one of those habitat types could not be avoided. The competent authority was of the opinion that an improvement to the hydrological situation elsewhere in the site would result in an increase of the surface of this habitat type as well as improving its quality at the level of the Natura 2000 site as a whole. The conclusion of the appropriate assessment was that the project would not adversely affect the site's conservation objectives and could be authorised. The habitat type at the affected location was already in an unfavourable condition because of the close vicinity of the motorway. The Council of State asked the Court of Justice whether the significant adverse effects for the habitat type at one location in the Natura 2000 site must be classified as affecting the integrity of the site, although measures are taken at other

21 Further discussed in H.E. Woldendorp, "Trivial Pursuit" in het natuurbeschermingsrecht, Mitigerende maatregel, compenserende maatregel, autonome ontwikkeling of projectdoelstelling?, *TOO* 2013/2.

22 ABRvS 7 November 2012, nos. 201110075/1/R3 and 201201853/1/R4, *BR* 2013/26 (note H.E. Woldendorp); *JM* 2012/156 (note J.M.I.J. Zijlmans); *AB* 2013/38 (note R.H.W. Frins).

locations in the site with a positive balance for the habitat type in the Natura 2000 site as a whole. Within the context of the appropriate assessment it would then not be allowed to balance the negative effects of the project, on the one hand, and the positive effects of the nature protection measures, on the other.

The Council of State requested the Court to combine the *A2* case with the already pending *Sweetman* case.<sup>23</sup> The Court, however, did not comply with this request. In the *Sweetman* case the Court concluded that ‘a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose protection was the objective justifying the designation of the site in the list of sites of Community importance, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.’

In our view, the Court’s ruling in the *Sweetman* case does not give an answer to the crucial question in the *A2* case. It can be argued that in the event of a loss of habitat, the integrity of the Natura 2000 site is, as a rule, affected. One may however also argue that this is not the case, provided that in the plan or project adequate measures are included that restore the ecological functionality (integrity) of the site for the protected (habitats of) species or habitat types. This can be dependent on the location of the habitat within the Natura 2000 site and must be assessed on a case-by-case basis.

After the completion of this article the Conclusion of the Advocate General<sup>24</sup> in the *A2* case was made public. She concluded that a loss of habitat has to be considered separately, not taking into account the positive effects of nature protection measures at a different location in the Natura 2000 site. Since the natural characteristics of the site are affected, Article 6(4) Habitats Directive must be applied. In the opinion of the Advocate General the protection measures are compensatory measures instead of mitigating measures. We were informed that the European Commission was divided on this point. Policy makers at the European Commission stressed that the integrity of the site was not affected.<sup>25</sup> They are concerned about political and public support for the Birds and Habitats Directives if practical solutions such as nature inclusive design and integrated planning, which also contribute to the realization of the conservation objectives of the Natura 2000 network, are not allowed. The advantages of integrated planning are also stressed in a publication by the European Commission.<sup>26</sup> Lawyers at the European Commission, however, have stressed the need for a strict interpretation of the Directives and their view was expressed in the position of the European Commission in the *A2* case.

### 2.3. Mitigating measures are a result obligation

The taking of mitigating measures is a result obligation. In other words, the implementation of those measures has to be ensured and the anticipated results must be realised. Usually, mitigating measures are specified in the application for a licence and are attached as conditions for the granting of the licence. In this way, a legal obligation is created to take the measures. If the initiator does not take the measures himself, he must ensure that the measures will be taken by others. In that case the competent authority for licensing the project has to control whether the measures are sufficiently guaranteed, for example on a contractual basis.<sup>27</sup>

Since mitigating measures should inextricably be linked to the project, the initiator, in most cases, will take those measures himself. If not, this might be an indication that the measures are not mitigating measures but compensatory measures. This can be different at the plan level or project level. Mitigating measures can inextricably be part of the plan (integrated planning), but not of a separate project as part of the plan. Examples of integrated planning in the Netherlands are the ‘Space for Rivers’ (*Ruimte voor de*

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23 Case C-258/11. Further discussed by J.M.I.J. Zijlmans, *JM* 2012/156.

24 Conclusion AG Sharpston, Case C-521/12, *Briels e.a.*; Discussed by J.M.I.J. Zijlmans in: ‘Mitigerende of Compenserende maatregelen?’, *JFf* 2014/4.

25 We refer to speeches delivered by Mr. François Kremer of the European Commission on a number of occasions.

26 European Commission, *The implementation of the Birds and Habitats Directives in estuaries and coastal zones, with particular attention to port development and dredging*, January 2011.

27 Juridische adviesgroep Natura 2000 (JAN!), *Verrekenen van effecten*, 6 May 2010.

*Rivier*) plan and the Programmatic Approach to Nitrogen Deposits (*Programmatistische Aanpak Stikstof, PAS*) that is under preparation. If necessary, the mitigating measures must be specified in the rural plan.<sup>28</sup>

Legal, financial as well as practical obstacles interfering with the realization of the mitigating measures must be avoided, on the one hand, while the feasibility of those measures should be sufficiently guaranteed on the other hand as well. Next, it should be proven in advance that there is a sufficient guarantee that the measures will produce the expected results. In case of doubt, additional measures should be kept in reserve since the taking of successful mitigating measures is a result obligation. The monitoring and evaluation of the implementation of the measures and their results are required.<sup>29</sup>

In its ruling of 30 October 2013<sup>30</sup> the Council of State was critical about the appropriate assessment for the granting of a licence for the construction and use of two power stations on the Maasvlakte in Rotterdam, in the neighbourhood of Natura 2000 sites. Several nitrogen-sensitive habitat types had an unfavourable conservation status. The power stations would cause permanent higher deposits on the sites. The management plans contain protection measures whose implementation is sufficiently guaranteed. Because the measures would also be implemented without the realization of the power stations and are thus not (directly) related to the projects, they cannot be considered as mitigating or compensatory measures. They must be classified as autonomous developments. In as far as they lead to an improvement of the conservation status, they can be taken into account in the appropriate assessment. The effects of the projects and the measures in this case were not comparable on a one to one basis, since the measures were not aimed at a reduction in the nitrogen deposits on the Natura 2000 sites.

However, according to the Council of State the appropriate assessment is incomplete in a number of ways. In the first place, it is not clear whether the measures are taken only once or permanently. That means that it is not certain whether they comply with the requirement of the sustainability of the measures. In the second place, it has not been demonstrated that the measures outweigh the increase in nitrogen deposits caused by the power stations, taking into account the present, already too high, nitrogen deposits, the unfavourable conservation status and the improvement objective. Neither has it been demonstrated that the nitrogen-sensitive habitat types are not, in conflict with the provision in Article 6(2) Habitats Directive, at risk of deterioration and whether the conservation objectives can still be realized in the long term.

#### 2.4. Balancing of effects

The balancing of effects means, briefly, that a project with adverse effects for a Natura 2000 site is licensed because another licence is withdrawn, so that, on balance, no significant adverse effects occur.<sup>31</sup> For example, the increase in nitrogen deposits caused by a cattle farm can be balanced by the reduction in nitrogen deposits as a result of the withdrawal of one or several licences for (an) other cattle farm(s). The granting and withdrawal of licences must be directly linked<sup>32</sup> and the balancing is only allowed as far as the same habitats of species or habitat types in the same Natura 2000 site are concerned or, depending on the specific circumstances, even the same location thereof in the Natura 2000 site.

Although these licences relate to different activities, the balancing takes place within the framework of the same project. As an inextricable part of the project it is a mitigating measure. By withdrawing the licence(s), the competent authority ensures that the activities that were once licensed can no longer take place so that the adverse effects then cease.

28 ABRV 7 September 2011, no. 200907076/1/R3, BR 2011/189 (note H.E. Woldendorp).

29 European Commission, *Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC, Clarification of the Concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence*, Opinion of the Commission, 2007/2012, p. 6.

30 ABRvS 30 October 2013, nos. 201203812/1/R2 and 201203820/1/R2, JM 2013/11 (note J.M.I.J. Zijlmans).

31 H.E. Woldendorp, 'Natuurinclusief ontwerpen, saldering en habitatbanking: meer dan modeverschijnselen?', *Jff* 2010/165, p. 203-215; A. de Groot, 'Salderen in N2000?', *Jff* 2008/19.

32 ABRvS 21 September 2011, AB 2011/323 (note R.H.W. Frins); see also ABRvS 16 March 2011, no. 200909282/1/R2, TBR 2011/84 (note R.H.W. Frins); ABRvS 29 June 2011, no. 200908730/1/R2, *Kluwer Omgevingsrecht* 2011/11931; ABRvS 7 September 2011, no. 201003301/1/R2, BR 2001/183 (note R.H.W. Frins); ABRvS 26 June 2013, no. 201010326/1/A4, BR 2013/23 (note H.E. Woldendorp); ABRvS 22 May 2013, no. 201107526/1/T1/A4, BR 2013/105 (note H.E. Woldendorp); Chairman of the ABRvS 30 March 2012, no. 201113345/2/R3, BR 2012/157 (note H.E. Woldendorp); ABRvS 18 September 2013, no. 201107526/1/A4, BR 2013/142; ABRvS 22 May 2013, BR 2013/105 (note H.E. Woldendorp).

The case law of the Council of State shows that the room for balancing is rather restricted, although there are quite a number of successful examples in the jurisprudence.

It is not allowed to balance effects between different Natura 2000 sites<sup>33</sup> or between different types of habitats or species within the same Natura 2000 site. The reason for this is that all protected habitat types and species have different conservation objectives, each contributing to the coherence of the Natura 2000 network.<sup>34</sup> It is not always possible to balance the deterioration of the same habitat type or the habitat of a species at one location with the improvement of that habitat at another location, even if both are situated within the same site. This depends on the specific circumstances, such as the conservation status of the habitat or species concerned and the consequences of the damage for the realization of the maintenance objectives for those habitat types or species.

Finally, it is important to observe that, for the application of Article 6(3) and 6(4) Habitats Directive, the balancing of effects is based on the licensed situation and not on the *de facto* situation. In the context of the application of Article 6(2) Habitats Directive, however, the *de facto* situation is relevant. A *de facto* deterioration of the habitats of the Natura 2000 site is not allowed.

### 2.5. 'Nature inclusive design'<sup>35</sup>

'Nature inclusive design' means that the objectives of the plan or project include nature protection measures. In other words, 'nature inclusive design' implies that social, economic and nature conservation objectives are integrated in one project.<sup>36</sup> There should be sufficient coherence between those objectives. In the appropriate assessment all positive and negative parts of the plan or project are taken into account and are balanced.

The Council of State is critical as to whether different activities together form one plan or project.<sup>37</sup> In this context, the inextricable cohesion and the character of the planned activities are decisive. In practice, this means that only in case one objective of the plan or project cannot be realized without the other will the activities form one plan or project. This also means that it is not allowed to realize the plan or project if the implementation differs significantly from the plan or project description, because, for example, the nature protection measures are abandoned in the end.

The aimed objective of 'nature inclusive design' is that significant effects of the project for a Natura 2000 site can be excluded, so that the application of the strict criteria of Article 6(4) Habitats Directive can be avoided and the plan or project can be authorised on the basis of Article 6(4) Habitats Directive. If, however, the appropriate assessment proves that the 'nature inclusive' designed plan or project will cause adverse effects for the integrity of the Natura 2000 site, it is only allowed to authorise the plan or project in accordance with the strict criteria of Article 6(4) Habitats Directive.

In practice, it is not always easy to distinguish 'nature inclusive design' from mitigating measures. However, this does not matter for the application of Article 6(3), since in both cases the positive and negative effects in an appropriate assessment can be balanced on the level of the plan or project as a whole. If the conclusion is that the plan or project will not adversely affect the integrity of the Natura 2000 site concerned, it can be authorised without having to apply Article 6(4).

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33 ABRvS 4 April 2012, no. 201003331/1/A4, BR 2012/100 (note H.E. Woldendorp); Chairman of the ABRvS 27 January 2012, no. 201110808/4/R3, BR 2012/46 (note H.E. Woldendorp).

34 H.E. Woldendorp, "Trivial Pursuit" in het natuurbeschermingsrecht, Mitigerende maatregel, compenserende maatregel, autonome ontwikkeling of projectdoelstelling?, TOO 2013/2, Para. 3.3.

35 H.E. Woldendorp, 'Natuurinclusief ontwerpen, saldering en habitatbanking: meer dan modeverschijnselen?', JfF 2010/165, pp. 203-215; H.E. Woldendorp, 'Natuurinclusief ontwerpen: een juridische Apenpuzzelboom', JfF 2013, pp. 163-176.

36 See on 'nature inclusive design': H.E. Woldendorp, 'Natuurinclusief ontwerpen, saldering en habitatbanking: meer dan modeverschijnselen?', JfF 2010/165, pp. 203-215; H.E. Woldendorp, "Trivial Pursuit" in het natuurbeschermingsrecht, Mitigerende maatregel, compenserende maatregel, autonome ontwikkeling of projectdoelstelling?, TOO 2013/2; H.E. Woldendorp, 'Natuurinclusief ontwerpen: een juridische Apenpuzzelboom', JfF 2013, pp. 163-176; ABRvS 7 November 2012, nos. 201110075/1/R4, 201201853/1/R4, BR 2013/26 (note H.E. Woldendorp); JM 2012/156 (note J.M.I.J. Zijlmans); AB 2013/38 (note R.H.W. Frins).

37 ABRvS 16 December 2009, no. 200900916/1/R2, BR 2001/42 (note H.E. Woldendorp); ABRvS 24 August 2011, nos. 200900425/1/R2 and 200902744/1/R2, M&R 2011/192 (note J.M. Verschuuren); BR 2011/174 (note H.E. Woldendorp).

An example of ‘nature inclusive design’ is sand supply, as part of the gas extraction project in the Wadden Sea, with the aim of preventing the project causing significant adverse effects.<sup>38</sup> This example proves that the difference with mitigating measures is often paper-thin.

Another example is the already discussed *IJburg* case.<sup>39</sup>

The ‘Kustzone Polderwijk’ land use plan provided for the creation of beaches and an island with recreational provisions.<sup>40</sup> The nature protection measures included the realization of an area in which underwater vegetation could develop as food supply for birds. The Council of State was of the opinion that the competent authority was allowed to take the positive effects of the measure into account in the appropriate assessment.

Within the context of the plan on behalf of the Westerschelde Container Terminal (WCT) a discussion took place on the legal qualifications of the nature measures concerned. Initially, the appropriate assessment concluded that the plan would adversely affect the integrity of the site since a habitat of more than 100 ha ‘outer-dike’ nature values would be lost. Compensatory measures consisted mainly of ‘inner-dike’ nature values. The Council of State, however, accepted those compensatory measures since they would restore the functionality of the Natura 2000 site for birds. Their implementation was sufficiently guaranteed. In contrast, the other conditions of Article 6(4) Habitats Directive were not fulfilled. The competent authority had not demonstrated an imperative reason of overriding public interest. Although a great deal of research had been carried out, this was mainly concerning the question whether the project would be economically profitable. It was not proven which social problem the WCT would solve. Moreover, the competent authority had not demonstrated that another solution with less damaging effects on the Natura 2000 site was not possible. The Council of State also required that the importance of the project would outweigh the importance of the protection of the Natura 2000 site in its present form, which was not demonstrated either.

In the new appropriate assessment the competent authority then worked towards a conclusion that the project would not cause adverse effects for the integrity of the site. Taking into account the characteristics of the damaged habitat – which was not of high quality and without any possibility for amelioration – the loss of more than 100 ha habitats was no longer considered as a significant effect. Contrary to the conclusions of the previous appropriate assessment, the effects for the dunes were qualified as significant. To solve this problem, the possibilities for ‘nature inclusive design’ were considered. In the context of the plan a nature development programme was developed in order to improve the conservation status of the dunes. This measure was classified as a mitigating measure. Another mitigating measure, that provoked less discussion, comprised the reduction of the size of the terminal so that part of the dunes would be saved. The plan has not yet been adopted since the initiator and the competent authority have been reluctant to decide whether the nature development programme could be qualified as a mitigating measure.

## 2.6. Integrated planning (area-oriented approach)<sup>41</sup>

Integrated planning is ‘nature inclusive design’ at the plan level. All activities and developments in (the vicinity of) a site, including ecological measures, are integrated in one plan. The positive and negative effects of the different parts of the plan are balanced at the plan level. If the balance turns out to be positive the plan is adopted. The different parts of the plan must be inextricably linked to each other. This is often not the case in, for example, most ‘normal’ land use plans. The European Commission advocates integrated planning. Because all relevant activities and interests are inextricably linked and balanced, there is a greater possibility that nature protection measures are implemented, which is the Achilles’ heel of most plans and projects.<sup>42</sup>

38 ABRvS 29 August 2007, no. 200606028/1, *M&R* 2007/116 (note J.M. Verschuuren and A.G.A. Nijmeijer); *Gemeentestem* 2007/151 (note S.D.P. Kole).

39 ABRvS 21 July 2010, no. 200902644/1/R2, *BR* 2010/153 (note H.E. Woldendorp).

40 ABRvS 29 April 2009, no. 200800948/1, *M&R* 2009/70 (note M.K. de Bruin).

41 See on ‘integrated planning’ H.E. Woldendorp, ‘Waar is de gek die de normen heeft vastgesteld?; Het gebiedsgerichte natuurbeschermingsbeleid in het perspectief van een geïntegreerde gebiedsgerichte aanpak (1) en (2)’, *BR* 2009/6, pp. 481-496 and pp. 541-554.

42 European Commission, *The implementation of the Birds and Habitats Directives in estuaries and coastal zones, with particular attention to port development and dredging*, January 2011.

It is often difficult to label correctly the different constructions which have been drawn up in practice to avoid the application of Article 6(4) Habitats Directive.

We can mention several examples of integrated planning in the Netherlands. The Space for Rivers plan has the dual objective of 'security' (protection against high water) and 'nature' (more natural habitats directly influenced by rivers) combined in an intelligent symbiosis. The Development Plan for the River Scheldt (*Ontwikkelingsschets*)<sup>43</sup> has the triple objective of 'economy' (access to the port of Antwerp for the biggest ships), 'security' (protection against floods) and 'nature' (restoration of a more natural situation in the estuary).

The project to deepen the shipping channel in the Scheldt is an excellent illustration of the subject. The negative conclusion of the appropriate assessment of the first deepening was a reason for taking compensatory measures. After the deepening had been realized, there were serious problems with the implementation of the proposed compensatory measures. Those measures aimed at the creation of outer-dike habitats, since those habitats had largely disappeared in the course of the 20<sup>th</sup> century. The most effective measure is the permanent inundation of polders, thereby restoring the influence of the tide (*ontpoldering*). However, because of the dramatic floods in 1953, it was generally believed that in case of *ontpoldering* flood protection was under threat. Also the loss of valuable farmland was criticised. Moreover, the inhabitants of the region did not benefit from the deepening that took place on behalf of the port of Antwerp. Instead of outer-dike measures, inner-dike measures were proposed. However, those measures did not meet the requirement of ecological functionality. The European Commission started an infringement procedure which came to an end when the Netherlands, 10 years later, proposed a package of different measures that was finally acceptable for the European Commission. This history repeated itself with the second deepening of the shipping channel. Again *ontpoldering* was proposed and agreed upon in a detailed Treaty between Flanders and the Netherlands that was ratified by the Flemish as well as the Dutch Parliament.<sup>44</sup> In this Treaty the location, surface and the time for implementation were exactly specified. Again there was a great deal of resistance against *ontpoldering*. The Government finally decided not to implement the nature protection measures as specified in the Treaty, although the deepening of the shipping channel had already been carried out. Moreover, Flanders had already expropriated a Flemish polder on behalf of the *ontpoldering*. Emotions in Flanders were running high because the relationship between the Netherlands and Flanders has been sensitive since the 16<sup>th</sup> century. Moreover, there is rivalry between the competitive ports of Antwerp and Rotterdam. In order to retain its internationally competitive position, the port of Antwerp depends on Dutch measures to deepen the Scheldt.

The present Government – put under pressure by the European Commission – finally decided to implement the *ontpoldering* after all. Socially and politically the battle is not yet over, however. The opponents of *ontpoldering* will fight to the end to prevent this.

There was a lot of discussion about the legal qualification of the nature protection measures in relation to the second deepening. The second deepening was part of the so-called *Ontwikkelingsschets*, an example of the integrated planning of economic and infrastructural developments, safety measures and nature conservation measures. Although it was generally assumed that *ontpoldering* was a compensatory measure, the conclusion of the appropriate assessment was that the deepening would not adversely affect the integrity of the Natura 2000 site. This was quite a surprising conclusion, which was probably due to the fact that the conservation status of the site was already quite unfavourable as a result of previous deepening and the considerable reductions of the outer dike habitats that had already been turned into farmland a long time ago. So in this situation it is difficult to provide proof of further deterioration.

Moreover, in the appropriate assessment the positive effects of several mitigating measures and autonomous developments were taken into account. Improving the strategy for dumping dredged material was partly a mitigating measure and partly an autonomous development (a protection measure taken independently of the deepening). *Ontpoldering* was also presented as an autonomous development (protection measure), with the aim of improving the conservation status of the site. Since this measure

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43 <<http://www.vnsc.eu/uploads/2012/01/ontwikkelingsschets-2010.pdf>> (last visited 24 April 2014).

44 <<https://zoek.officielebekendmakingen.nl/trb-2005-310.html>> (last visited 24 April 2014).

was not related to the second deepening, it could not be characterized as a mitigating or compensatory measure.

The (Chairman of the) Council of State was of the opinion, however, that even a deterioration of only 0.7% of the surface of the protected habitat type could affect the integrity of the site, taking into account its very unfavourable conservation status.<sup>45</sup> Since the nature protection organisation withdrew the case, there was no final decision in this case.

Flanders also offers a very interesting example of integrated planning in the region in and around the port of Antwerp. The strategic plan for the region provides a vision of the developments that will take place in this region up until 2030. This plan, that is worked out in legally binding spatial plans for different parts of the region, combines a 1000 ha port extension with measures that must guarantee a favourable conservation status for the habitat types in the Natura 2000 sites along the River Scheldt. One of the striking elements of the plan is the disappearance of the village of Doel, which has already existed since the Middle Ages, as well two other small villages. Much discussed were also the consequences for agriculture in the region, because agriculture was made more or less subordinate to measures on behalf of Natura 2000.

The strategic plan comprises mitigating measures that aim at reducing the effects of the port extension on the Natura 2000 sites. Apart from those measures, other nature development measures will be taken. According to the Flemish Government those measures will be taken in any case, regardless of the port extension, so they must be qualified as an autonomous development. The measures will result in a favourable conservation status for the Natura 2000 sites, even taking account of the port extension. For this reason the port extension can be authorised, since it will not adversely affect the integrity of the Natura 2000 site. Because the nature measures are not inextricably linked to the port extension, they cannot be qualified as mitigating measures or compensatory measures. The positive and negative effects of parts of the plan cannot thus be directly balanced in this plan.

The monitoring and evaluation of the implementation and the results of the measures are part of the plan. If the results are insufficient in practice, additional measures are to be taken, since the realization of the favourable conservation status is a result obligation. Moreover, the measures must be taken before port development activities take place.

According to the opponents of the plan, nature protection measures must be classified as compensatory measures. Each part of the plan must be assessed separately. Because some parts of the plan cause significant effects, such as the loss of 20 ha of habitat in the Natura 2000 site, they were of the opinion that Article 6(4) Habitats Directive had to be applied.

The main discussion is again whether all effects may be assessed at the level of the plan as a whole or must be assessed at the level of the separate projects that are included in the plan. The Belgian Council of State,<sup>46</sup> however, could not yet give its final opinion on integrated planning. It concluded that the plan offered insufficient guarantees for taking the nature protection measures before the port development would take place. The Belgian Council of State is very strict in this, since the habitats have an unfavourable conservation status and conservation objectives aim at improvement. So the negative effects of a project cannot easily be accepted.

Looking at the conclusion of the Advocate General in the *A2* case, we think that integrated planning, as advocated by the Flemish authorities, is not allowed within the context of Article 6(3) Habitats Directive. She is of the opinion that the Court should answer the prejudicial questions submitted by the Dutch Council of State as follows:

- ‘1. Where the existing area of a protected natural habitat type within a Natura 2000 site is affected by a project which provides for the creation of a new (equal or greater) area of the same natural habitat type elsewhere within the same site, the integrity of the site itself

45 Chairman ABRvS no. 200806565/3/R1, 200903364/2/R1, 200903365/2/R1, 200903367/2/R1, 00903368/2/R, *JM* 2009/102 (note J.M.I.J. Zijlmans); *BR* 2009/163 (note H.E. Woldendorp); *M&R* 2009/185 (note J.M. Verschuuren).

46 ABRvS (B) 3 December 2013, no. 225.676; H. Schoukens & H.E. Woldendorp, ‘Juridische moeilijkheden bij proactieve natuurontwikkeling: een laatste strohalm voor het polderdorpje Doel?’, *TOO* 2014/2, pp. 97-118; P. de Smedt, ‘Antwerpse havenuitbreiding op losse schroeven’, *2014 Juristenkrant*, no. 283, pp. 4-5.

- must be regarded as being adversely affected within the meaning of Article 6(3) (Habitats Directive). Consequently, the project may not be approved in the context of that provision.
2. In those circumstances, the creation of the new area may be regarded as a compensatory measure within the meaning of Article 6(4) Habitats Directive, provided that it is specifically linked to the project in question and would not otherwise have been implemented in the context of the ordinary management of the site as required by Article 6(1) or (2). Where that is so, the project may be carried out provided that all the conditions and requirements laid down in Article 6(4) are fulfilled or observed.<sup>47</sup>

We have no reason to suppose that the Court will not follow the Advocate General on this point. In that case, the statement of the Flemish Government that the nature protection measures must be qualified as an autonomous development would not appear to be very favourable for the port development. Since the nature protection measures are not linked to the project to extend the port, the conclusion of the appropriate assessment is that the project will adversely affect the integrity of the site. Article 6(4) Habitats Directive must then be applied. Compensatory measures must have an inextricable link with the project. As for the port extension, this is not the case. So there still remains an obligation to compensate the effects of the project, apart from the measures that are already considered. Those measures cannot be taken into account as compensatory measures, since the Flemish Government has declared that the measures are already required because of the unfavourable conservation status of the Natura 2000 site.

### 2.7. Integrated planning (programmatic approach)

At this moment the Programmatic Approach to Nitrogen Deposits (*Programmatiese Aanpak Stikstof*, PAS) is being prepared.<sup>47</sup> This national plan aims at tackling the problem of overburdened nitrogen-sensitive habitats in Natura 2000 sites in combination with the problems this causes for other interests, such as economic development and infrastructural or other building projects. In our country this issue is often referred to as ‘the Netherlands under lock and key’ (*Nederland op slot*). The measures in the PAS aim at a reduction of the nitrogen deposits, on the one hand, so that the conservation objectives of the sites concerned can be reached in the foreseeable future; on the other hand, the measures create room for new economic and spatial activities, the so-called ‘room for development’ (in Dutch: *ontwikkelingsruimte*).

The Nature Protection Act 1998<sup>48</sup> (*Natuurbeschermingswet 1998*, Nbw 1998) contains the legal basis for the PAS.<sup>49</sup> The measures in the PAS comprehend both measures for the reduction of nitrogen deposits on nitrogen-sensitive habitats in (nearly all) Natura 2000 sites as well as measures reducing the sensitivity of these habitats for remaining excess deposits of nitrogen. Other measures are, for instance, management measures, such as the mowing of grass, the elimination of vegetation and the improvement of the hydrological situation to combat drought. These measures do not contribute to a reduction in nitrogen deposits as such.

The objective of the PAS is not only the realization of the conservation objectives for nitrogen-sensitive habitats, but also the creation of room for new projects causing nitrogen deposits. This is done by reserving part of the reduction of nitrogen deposits and subsequently allocating this ‘room’ to projects causing nitrogen deposits. In this way, these projects can be licensed, because – as a result of the measures in the PAS – the conservation status of nitrogen-sensitive habitats will improve in the end, notwithstanding the fact that, for the time being, the level of nitrogen deposits remains (much) too high.

In this context, attention is paid to the realization of the conservation objectives for each type of habitat in the long term. However, in the short term at least a start should be made with the realization of those objectives. The bottom line is that no deterioration of a habitat may occur, since this would contravene Article 6(2) Habitats Directive. Since the actual nitrogen deposits on Natura 2000 sites are much too high and the measures to reduce these deposits cannot stop this, the ‘other measures’ in the PAS are necessary for the implementation of Article 6(2).

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47 L. Boerema, ‘Het stikstofdoolhof: Wat als de PAS omvalt?’, *Jff*, 2014 pp. 3-16.

48 *Staatsblad (Official Journal)* 1998, 403; last amendment *Staatsblad* 2013, 412.

49 Arts. 19kg-19km Nbw 1998.

It is only possible to reserve room for development in a Natura 2000 site if an appropriate assessment of the PAS as a whole, and separately for each individual Natura 2000 site included in the programme, shows that allocating room for economic development to certain projects does not cause any deterioration of nitrogen-sensitive habitats in the Natura 2000 site. The PAS foresees a registration system for the allocation of room for (economic) development in order to avoid more room being allocated than is available or that room is allocated twice. Next, there will be extensive monitoring of the implementation of the PAS measures, the realized reduction of the nitrogen deposits and the development of the conservation status of nitrogen-sensitive habitats.

In fact, the PAS introduces a kind of habitat banking. For all nitrogen-sensitive habitat types in each Natura 2000 site it is decided how much room for development (the licensing of new projects) is available. To a certain category of plans and projects room is allocated in any event. Those plans and projects will be on a priority list. For other projects room is allocated as long as stocks last.

The PAS raises many difficult questions concerning its validity within the framework of the Birds and Habitats Directives. The Advisory Department of the Council of State (*Afdeling advisering van de Raad van State*) has determined, however, that the system of the PAS as such is not in conflict with the Birds and Habitats Directives. The validity of the PAS depends on the technical elaboration, as well as the formulation and implementation of the measures.<sup>50</sup>

The PAS is a very complicated programme, so it is not surprising that its adoption has been largely delayed. In fact, it is even questionable whether the PAS will be adopted at all. There are still a lot of problems to be solved and these are partially of a legal character. Problems exist with the technical information system relating to all nitrogen deposits that are caused by actual and future activities, with the quality of the programme of measures for each individual Natura 2000 site that, according to the ecological assessment, is still insufficient and with the financing and implementation of the measures.

For this article it is particularly interesting whether the measures to reduce nitrogen deposits and the other measures in the PAS are to be categorised as mitigating or as compensatory measures. The Council of State has formulated the question as follows: 'In the light of the system of Article 6 Habitats Directive the question raised is whether this "balancing" of effects has the character of mitigation (the prevention of damage) or compensation (for the damage caused). Only the effects of mitigation may be taken into account in the appropriate assessment.'

The ministers responsible for the PAS are of the opinion that the PAS measures are mitigating measures or objectives of the plan. At the plan level the measures are inextricably linked with the economic activities concerned. Both the improvement of the conservation status of the nitrogen-sensitive habitats and the realization of room for economic activities and infrastructural developments are objectives of the PAS. The ministers observed that it is difficult to make a distinction between mitigating measures and the objectives of the plan (or protection measures and appropriate measures implementing Article 6(1) and 6(2) Habitats Directive). However, this is not relevant since the main issue is that the measures are not to be classified as compensatory measures so that the positive and negative effects can be taken into account in the appropriate assessment for each nitrogen-sensitive habitat in each Natura 2000 site, as well as for the PAS as a whole. In the case of compensatory measures, the positive effects cannot be taken into account in the appropriate assessment.

In its advice on the provisional PAS, the Council of State agreed with the reasoning of the ministers and observed in this context that

'(...) the PAS acknowledges that the measures enabling the allocation of room for economic development to new projects, are usually not measures which, like in the context of the actual granting of licences without the PAS, can be linked to a specific plan or project. The PAS, however, foresees an explicit and direct interconnection between the package of measures and the room for development used at the plan or project level: without this package of measures there is no room for (economic) development and without this room for development there can be no granting of licences under the PAS. The PAS adopts the position that the measures

50 Afdeling advisering van de Raad van State, *Voorlichting over de Programmatische Aanpak Stikstof*, 11 April 2012, no. W15.12.0046/IV.

must prevent projects which can be granted, taking into account the room for development, from causing adverse effects for the nitrogen-sensitive habitats. The Council of State supports the view that these measures can be taken into account in the appropriate assessment. In this context, it considers it important that the effects of the source-based measures for each Natura 2000 site have been calculated and that the room for development in a site is derived from the expected reduction of nitrogen deposits at that site. Consideration is given to the type of measures in the Natura 2000 site which are needed to guarantee that, while making use of the room for economic development, the nature quality is maintained.<sup>51</sup>

The Council of State did however deliver a shot across the bows with the remark that the answers of the Court of Justice to the prejudicial questions in the *A2* case may lead to different conclusions. If the Court follows the conclusion of the Advocate General in this case, the system of the PAS probably cannot be maintained.

An interesting point is the classification of the 'other measures' not causing a reduction in nitrogen deposits on nitrogen-sensitive habitats as measures mitigating the increase in nitrogen deposits due to the authorisation of projects. The positive and negative effects cannot be balanced on a one to one basis. In the appropriate assessment for the PAS the positive and negative effects are taken into account together. The basic reasoning is that the Habitats Directive does not focus on the level of nitrogen deposits as such, but on the conservation status of nitrogen-sensitive habitats and habitat types whose status is also dependent on other circumstances. The 'other measures' can improve these other circumstances and for that reason their positive effect on the conservation status of the habitats can be taken into account. The Council of State supports this view. It is interesting to note that the Council of State has also accepted so-called end-of-pipe measures, discarding nitrogen deposits by removing vegetation and mowing as mitigating measures without requiring source-focused measures for reducing nitrogen deposits.<sup>52</sup>

An interesting and important practical legal problem concerns the situation of individual projects. On the level of a project, the general measures resulting in room for development with respect to a Natura 2000 site are not directly related to that particular project. Room for economic development is created, for example, by motor vehicles becoming cleaner because of measures at the EU level. The reasoning of the ministers is that at the level of the PAS there are autonomous developments that will take place with certainty. Other general measures, such as legislation requiring a reduction in emissions of intensive animal farming, are also classified as autonomous developments, or as mitigating measures, as long as they can be considered as more stringent, additional protection measures, particularly on behalf of the PAS. Many site-specific measures, such as, for example, the raising of the groundwater level, are classified as plan objectives or as autonomous developments or mitigating measures.

The PAS cannot be implemented if the appropriate assessment at the plan level must be repeated at the project level and the same requirements must be fulfilled; in particular the requirement of an inextricable link between the project and the measures. The Council of State formulates this issue as follows:

'Mitigating measures should be implemented and have effects before the negative effects of a project, for which these measures are taken, occur. The programmatic approach breaks the direct link between the measures to be taken and the project for which room for development is needed. This implies that within the programmatic approach it is not possible to establish per project which measures are needed and are to be deployed to mitigate the effects of that project, whereas Article 6(3) Habitats Directive requires that, based upon the appropriate assessment, it should be ascertained that the integrity of the Natura 2000 sites is not adversely affected. (...) The core of a programmatic approach is that by implementing the measures in the programme, room is created for new developments, provided that the implementation of the programme as a whole will produce positive results. In this case it is assessed whether the measures to be taken

51 Advies Raad van State, *Kamerstukken II* 2012/13, 33 669, no. 4.

52 ABRvS 24 August 2011, nos. 200900425/1 and 200902744/1, *BR* 2011/174 (note H.E. Woldendorp); *M&R* 2011/192 (note J.M. Verschuuren).

have such an impact that after using the room for development and after the expiry the PAS' period of validity, the nature quality is maintained and the restoration thereof is taking place or is not impossible.<sup>53</sup>

For an individual project an appropriate assessment is still required. However, as far as nitrogen deposits are concerned (other effects can also be significant), the project can be authorised with reference to the PAS. This programme offers sufficient guarantees so that no significant effects or a deterioration of the nitrogen-sensitive habitats in any Natura 2000 site will occur and also makes a sufficient contribution to the realization of the conservation objectives of the site in the long term.

### 3. Compensatory measures<sup>54</sup>

#### 3.1. The objective of compensatory measures

The purpose of the compensation obligation, following Article 6(4) Habitats Directive, is to compensate the (residual) adverse effects of a project on a Natura 2000 site, so that the overall coherence of the Natura 2000 network is maintained.<sup>55</sup> Examples of compensatory measures are the creation of a new habitat or the improvement of the quality of habitats in another part of the site or in another Natura 2000 site.<sup>56</sup>

Contrary to mitigating measures, compensatory measures do not form part of the objective of the project. However, like mitigating measures, and unlike autonomous developments, they must be linked to the project. The project cannot be licensed if the damaging effects cannot adequately be compensated. This is a result obligation.

Since, as already explained, the obligation to compensate is a last resort, it is not allowed to take those measures into account in the appropriate assessment.<sup>57</sup> Moreover, following Article 6(4) Habitats Directive, two prior conditions have to be met. There should not be an alternative solution with less damaging effects for realizing the objective of the project and the project has to be justified by an imperative reason of overriding public interest. Even if adequate compensatory measures will be taken, these two conditions must first be met.

Although there is a great deal of literature on the duty to compensate, there is hardly any experience with compensatory measures following Article 6(4) Habitats Directive. Plans and projects are mostly licensed within the framework of Article 6(3) Habitats Directive. The application of Article 6(4) Habitats Directive can be avoided in nearly all (legal) cases.

The Netherlands mainly has experience with *national* compensatory requirements, particularly within the context of the so-called *Ecologische Hoofdstructuur* (EHS) (the national network of protected sites and corridors) and species' protection. Various evaluation reports<sup>58</sup> demonstrate, however, that this experience is not very positive. Because of practical problems the implementation of compensatory measures is generally complicated and only partly or not at all met. The results are often disappointing or are not safeguarded, sustainable results.

53 Advies Raad van State, *Kamerstukken II 2012/13*, 33 669, no. 4.

54 H.E. Woldendorp, *Teksten en toelichting Wetgeving natuurbescherming, natuurbeschermingsaspecten van ruimtelijke ingrepen*, 2011, Chapter 8; H.E. Woldendorp, 'Natuurcompensatie volgens de Habitatrichtlijn (1); het juridische kader', *JFf 2007/129*; H.E. Woldendorp, 'Natuurcompensatie volgens de Habitatrichtlijn (2); Praktische ervaringen', *JFf 2008/73* (with literature list).

55 European Commission, *Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC, Clarification of the Concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence*, Opinion of the Commission, 2007/2012, Para. 1.4.3.

56 European Commission, *Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC*, 2000, pp. 45-46.

57 Conclusions AG 26 October 2006, Case C-239/04, *Commission v Portugal*, [2006] ECR I-10183; comp. ruling ABRvS 24 November 2004, no. 200304566/1, *M&R 2005/22* (note J.M. Verschuuren); *AB 2004/440* (note J. Struiksmā); *JM 2005/20* (note H. Van der Meijden).

58 Algemene Rekenkamer, *Bescherming van natuurgebieden*, 2007, *Kamerstukken II 2006/07*, 31 074, no. 2; D. Gjaltema & M.A.J. Burgering, *De uitvoering van het compensatiebeginsel*, VROM-Inspectie, May 2006; J.J.C. Gijsen et al., *Natuurcompensatie, hoe werkt het in de praktijk?*, Alterra, Research Instituut voor de Groene Ruimte, Werkdocument 2003/13, 2003; Zuidelijke Rekenkamer, *Kwaliteit van natuurcompensatie provincies Limburg/Brabant*, 2009.

### 3.2. Functional compensation

Compensatory measures are additional measures. This means that the measures should be additional to the measures which must already be taken to meet the requirements of the Birds and Habitats Directives.<sup>59</sup> The new nature values should replace the functions of the damaged nature values so that the coherence of the Natura 2000 network is safeguarded.<sup>60</sup> The conservation objectives are the reference point. Although the directives and the Nbw 1998 do not specify anything in this context, the functional character of the compensatory measures implies that financial compensation is not allowed. In very exceptional cases the measures may concern other habitat types or species if the national conservation status of the damaged habitat type is favourable and the compensatory measures concern nature values with an unfavourable conservation status, especially when the Member State concerned has, in the context of Natura 2000, a special responsibility for those nature values.

The measures compensating the adverse effects of the project for the extension of the port of Rotterdam (the 'Mainport Rotterdam' project; the 'Tweede Maasvlakte' project<sup>61</sup>) did not replace the damaged habitat types and the habitats of species on a one to one basis. The surface of the compensating sea reserve is, however, 10 times the surface of the lost sea surface. The European Commission did not object.<sup>62</sup>

The Westerschelde Container Terminal project (the WCT project)<sup>63</sup> is another example in this context. The loss of outer-dike habitats of species and habitat types was (partly) compensated by the creation of inner-dike sites. The other two conditions of Article 6(4) Habitats Directive were not met, so that the plan, in spite of adequate compensation, could not be approved. It has not resulted a new plan up to now. It seems that the WCT project is one of the few projects in the Netherlands which has so far failed concerning the provisions of Article 6 Habitats Directive.

Another consequence of the requirement of functional compensation is that the surface area of the replacing nature should be larger than the surface area of the damaged nature. The reason for this is that the damaged functions cannot, in general, be replaced immediately. The compensatory nature does not, in the beginning, have the same quality as the damaged nature values. Moreover, for various reasons, the risk exists that the compensatory measures will not be successful at the end of the day.<sup>64</sup> It is often difficult to ascertain exactly the damaging effects of a project, so that it is also difficult to calculate the type and surface area of the compensatory measures needed.

### 3.3. Sustainable compensation

Since the obligation to take compensatory measures is a result obligation, it must be guaranteed that the compensatory measures will indeed be taken and provide the required results.

Moreover, the compensatory measures must be sustainable.<sup>65</sup> This means that the substituting nature values should also fall under the regime of Article 6 Habitats Directive.<sup>66</sup> For this reason the site must be designated as a Natura 2000 site. To our knowledge, this has not happened so far in the Netherlands.<sup>67</sup>

Furthermore, the necessary management and protection measures should be taken to maintain, also for the long term, the quality of the substituting nature values.

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59 European Commission, *Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC, Clarification of the Concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence*, Opinion of the Commission, 2007/2012, Para. 1.4.3.

60 *Ibid.*, Para. 1.4.2

61 ABRvS 26 January 2005, no. 200307350/1 (*Project Mainportontwikkeling Rotterdam*), M&R 2005/60 (note J.M. Verschuuren).

62 European Commission, *Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC*, 2000, Para. 5.4.3.

63 ABRvS 16 July 2003, no. 200205582/1, M&R 2003/124 (note J.M. Verschuuren). AB 2003/326 (note Ch.W. Backes); BR 2004/83 (note A.A. Freriks and H. de Gier).

64 European Commission, *Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC, Clarification of the Concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence*, Opinion of the Commission, 2007/2012, Para. 1.4.3.

65 *Ibid.*

66 CJEU 23 March 2006, Case C-209/04, *Commission v Austria*, [2006] ECR I-2755.

67 European Commission, *Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC, Clarification of the Concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence*, Opinion of the Commission, 2007/2012, Para. 1.4.3.

Again, the Council of State is very strict in requiring sufficient guarantees for the realisation of the expected results.<sup>68</sup> Since the result must be sustainable, the implementation of compensatory measures should be monitored and evaluated.

Sustainable compensatory measures also set conditions for the instruments used. The Court of Justice is of the opinion that voluntary management agreements do not offer sufficient guarantees that the required measures will be implemented.<sup>69</sup> Such agreements are generally temporary and can be terminated unilaterally. Since the initiator of a project is usually not the person or body who actually takes (or can take) the compensatory measures, an agreement is required to ensure that those measures are taken. Such agreements have to be concluded in advance, because the competent licence-granting authority must be able to check whether the required certainty already exists at that moment in time. Without such an agreement it is not allowed, following Article 6(4) Habitats Directive, to realize the project.

### 3.4. *Timely compensation*

Compensatory measures have to be taken in good time,<sup>70</sup> which means before the project or plan is commenced. This condition is a consequence of the requirement of the functionality of compensatory measures, which implies that the continuity of the ecological processes must be ensured.<sup>71</sup>

The intended result of the compensatory measures should be realised at the time when the significant effects occur. If, for instance, a salamander pool is damaged, a substituting pool should be available before the old pool is damaged so that it can take over its function in good time and the conservation of the local population of the species is ensured. Even then one may doubt whether a population can be transferred to another place. If it is already the habitat of another population, one must realize that the food supply is probably limited.

In exceptional cases it is possible to prove that simultaneity is not required to safeguard the contribution of the substituting area to the coherence of the Natura 2000 network.<sup>72</sup> In such cases, however, it must be taken into consideration that there is a risk that the expected result will not be achieved.

The Nbw 1998 specifies that the competent authority must, beforehand, enable the initiator to propose compensatory measures.<sup>73</sup> The proposal must also specify the way in which the measures will be taken and within which timescale.<sup>74</sup>

Eventually, it is possible to compensate in phases. In such a case, the next phase of the project can only be realized after having fulfilled the requirements (like functionality and timeliness) for compensation in the previous phase.

In practice, the timely implementation of the compensatory measures is the Achilles' heel of Article 6(4) Habitats Directive, because it is often not possible to wait with the realization of a project until the intended results of these measures are achieved. We are of the opinion that this requires strict checking, also because compensation is the last resort to obtain a licence. In that case the Natura 2000 network may incur lasting damage.

### 3.5. *Compensation in advance: 'habitat banking'*

Habitat banking (or habitat reservation) means that at a very early stage measures are taken for the realization of nature values that could serve as compensation on behalf of future projects. Those nature

68 See Section 2.6.

69 Case C-166/97, *Commission v France*, M&R 1999/63 (note J.H. Jans); AB 1999/274 (note Ch.W. Backes). Case C-96/98, *Commission v France*, ECR I-1697.

70 ABRvS 26 January 2005, no. 200307350/1, BR 2005/894 (note A.G.A. Nijmeijer and M.A.A. Soppe), JM 2005/40 (note H. van der Meijden).

71 European Commission, *Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC, Clarification of the Concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence*, Opinion of the Commission, 2007/2012, p. 21.

72 Art. 19h(4) Nbw 1998.

73 Art. 19h(2) Nbw 1998.

74 Art. 19h(3) Nbw 1998.

values are saved as ‘credits’ in a bank. The initiator of a plan or project is allowed to abstain from compensatory measures if it pays for the withdrawal of credits from the bank.

Habitat banking is about the realization of nature values on behalf of ‘unknown projects’. If the project requiring compensation is already specifically known, the realization of nature values on behalf of this project is merely ‘normal’ compensation, since this must in principle take place in advance, before the project is realized.

Habitat banking has particular advantages if a considerable reserve of nature values can be realized with a once-only investment that can be withdrawn in a flexible way when needed.<sup>75</sup> Separate compensation for each project is usually complicated and time-consuming, if it is at all possible.

Habitat banking originates from the United States where it boomed. In the EU habitat banking is, as far as we know, only applied to fulfil national compensation obligations, for example in Germany.<sup>76</sup>

Habitat banking is not yet applied within the context of Natura 2000. For several reasons the idea of habitat banking is not feasible and practicable at the moment. In the first place, a large market of the supply and demand of nature values is required. At the moment the supply as well as the demand is negligible since, at least in the Netherlands, hardly any plan or project arrives at a stage in which compensation is needed to meet the requirements of Article 6(4) of the Habitats Directive. This would imply that the unavoidable loss of Natura 2000 values is acceptable.

As mentioned earlier, compensation is, however, the ‘ultimum remedium’ stage. In most cases adequate mitigating measures are available.

In the second place, the strict enforcement of the obligation to compensate is a prerequisite for habitat banking. If such enforcement does not take place, there is no demand for nature values that are stored in a bank. In such circumstances cheaper and more pragmatic solutions are conceivable so that there is no stimulus for the withdrawal of nature credits from the bank. Moreover, nature inclusive design, described in Section 2.5, is a cheaper and more pragmatic solution.

In the third place, the requirements for compensation are very strict. First, all the other requirements of Article 6(3) and 6(4) Habitats Directive are to be met, in the right order, before compensation is acceptable as such. The requirement of ecological functionality is very difficult to meet.

The European Commission believes that the idea of habitat banking is not in line with the Habitats Directive, although the instrument as such is interesting.<sup>77</sup> It is more in favour of the realization of nature values by way of early compensation within the context of integrated planning.<sup>78</sup> Accordingly, we conclude that in the EU the idea of habitat banking is not very realistic at this moment in time. Despite all the recent attention for this instrument, we think it is merely a passing phenomenon rather than an instrument that is ready to be implemented in practice.

### 3.6. The responsibility for taking compensatory measures

The initiator is responsible for taking compensatory measures. In accordance with the ‘polluter pays’ principle, it also bears the costs of those measures. Compliance with the obligation to compensate, however, is not very often within its power, because it depends mostly on others, like the owner of a suitable compensation area. It will then first have to conclude an agreement with the owner to make sure that the compensatory measures will/can indeed be taken.<sup>79</sup>

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75 A good overview of all the (dis)advantages of habitat banking can be found in the report of the Workshop Habitat banking in the EU, organized by the European Commission, on 11 November 2009, <[http://seh-cc.org/Habitat\\_Banking\\_in\\_the\\_EU.pdf](http://seh-cc.org/Habitat_Banking_in_the_EU.pdf)> (last visited 24 April 2014).

76 J. Vader et al., *Natuurcompensatie over de grens; Een analyse van natuurcompensatie in het buitenland*, 2007, <<https://www.wageningenur.nl/en/Publication-details.htm?publicationId=publication-way-333537323537>> (last visited 28 April 2014).

77 European Commission, *The economics of ecosystems & biodiversity; An interim report*, 2008, <[http://ec.europa.eu/environment/nature/biodiversity/economics/index\\_en.htm](http://ec.europa.eu/environment/nature/biodiversity/economics/index_en.htm)> (last visited 24 April 2014). See for an overview of other quotations: G. Duke, *The relevance of habitat banking to EU-Policies*, *The Environment Bank Ltd.*, <<http://www.environmentbank.com/docs/HabitatBankingEUPolicy-final.pdf>> (last visited 24 April 2014).

78 European Commission, *Guidance document on Article 6(4) of the ‘Habitats Directive’ 92/43/EEC, Clarification of the Concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence*, Opinion of the Commission, 2007/2012, p. 16.

79 Comp. annotation J.M. Verschuuren in ruling ABRvS, no. 200205582/1, *M&R* 2003/124.

Compensatory measures can also be realized by the Government, which often has more possibilities and powers than the initiator. The involvement of the Government is not so surprising because one of the prior conditions of Article 6(4) Habitats Directive is that the project is justified by an imperative reason of overriding public interest. The Government also benefits from the realization of the project. In that context, the Government must however operate in line with the market and ensure that the initiator does not receive unjustified state aid.<sup>80</sup>

### 3.7. Ensuring the implementation and monitoring of compensatory measures

#### 3.7.1. Ensuring implementation

The implementation of compensatory measures can be done in different ways. As mentioned earlier, compensatory measures are to be attached as conditions to the licence following Article 19d Nbw 1998.<sup>81</sup> The licence holder is not allowed to make use of the licence without the implementation of the compensatory measures. The competent authority must decide, prior to the licence being granted, whether there are no financial, legal or practical obstacles, due to which the implementation and result of the compensatory measures cannot be guaranteed.<sup>82</sup> In this context there are several issues to be taken into account such as: Are there problems with the purchase of the required land?<sup>83</sup> Is it burdened by a lease agreement? Is there no social resistance?

In order to guarantee the implementation of the compensatory measures their location has to be laid down in (legally enforceable) land use plans.<sup>84</sup> The initiative for the realisation of a land use plan has to come from the initiator. It is not allowed that a land use plan requires the taking of measures with the aim being to realize certain land use. An in-between variant developed in practice is that the realisation of certain land use is linked to the condition that nature protection measures are taken first. Rural plans which are not legally binding are not sufficient to ensure the implementation of the necessary compensatory measures.<sup>85</sup>

#### 3.7.2. Ensuring monitoring

As in the case of mitigating measures,<sup>86</sup> it must be proven that the compensatory measures will have the required result. This necessitates the monitoring of the execution of the measures and an evaluation of the results achieved, as well as, if necessary, the taking of complementary measures. Usually, a licence on the basis of Article 19d Nbw 1998 contains a monitoring condition.

### 3.8. Choice between compensatory measures

The compensatory measures should be feasible, both technically and financially. They have to be chosen based upon the best available scientific knowledge.<sup>87</sup> If there is a choice, the most efficient compensatory measures with the greatest prospect for success should, as a general rule, be chosen.<sup>88</sup> This is a consequence of the 'result obligation' character of the obligation to take compensatory measures.<sup>89</sup> In this context, the

80 European Commission, *Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC*, 2000, Para. 5.4.4.

81 Art. 19h(1) Nbw 1998.

82 ABRvS 26 January 2005, no. 200307350/1, *M&R* 2005/60 (note J.M. Verschuuren); *BR* 2005/96 (note A.G.A. Nijmeijer); H.E. Woldendorp, 'De Afdeling bestuursrechtspraak over natuurbescherming', *BR* 2007, p. 739.

83 Chairman of the ABRvS 24 July 2009, no. 200900425/2/R2, *M&R* 2009/96 (note J.M. Verschuuren); *BR* 2009/165 (note H.E. Woldendorp).

84 ABRvS 13 November 2002, no. 200200050/1, *M&R* 2003/16 (note J.M. Verschuuren); *Gemeentestem* 2003/5 (note J.M.H.F. Teunissen); ABRvS 16 July 2003, no. 200205582/1, *M&R* 2003/124 (note J.M. Verschuuren); *AB* 2003/326 (note Ch.W. Backes); *BR* 2004/83 (note A.A. Freriks and H. de Gier); ABRvS 19 November 2003, no. 200205327/1, *Gemeentestem* 2004/160 (note J.M.H.F. Teunissen); ABRvS 11 April 2004, no. 200301673/1, *Gemeentestem* 2004/193 (note J.M.H.F. Teunissen).

85 ABRvS 4 November 2009, no. 200900671/1, *BR* 2010/26 (note H.E. Woldendorp); *AB* 2010/114 (note A.A.J. de Gier); *Gemeentestem* 2011/67 (note S.D.P. Kole).

86 ABRvS 14 December 2011, no. 201009630/1/R2, *BR* 20112/44 (note H.E. Woldendorp).

87 European Commission, *Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC, Clarification of the Concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence*, Opinion of the Commission, 2007/2012, p. 6; comp. *Kamerstukken II* 2006/06, 29 043, questions 29, 38, 39.

88 European Commission, *Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC, Clarification of the Concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence*, Opinion of the Commission, 2007/2012, p. 16.

89 *Ibid.*, p. 6.

European Commission has pointed out<sup>90</sup> that the measures for which no reasonable guarantee of success can be given may not be taken into consideration.

While choosing compensatory measures the initiator should also take account of EU directives or regulations other than the Birds and Habitats Directives. As mentioned above, a marine reserve was created to compensate the adverse effects of the extension of the harbour of Rotterdam. Since this could harm the position of fishermen from other EU Member States, the provisions of Regulation 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fishery resources under the Common Fisheries Policy had to be observed as well.<sup>91</sup> This regulation allows fishery restrictions in order to protect marine ecosystems, provided that the measures are not discriminatory. Moreover, the European Commission as well as the relevant Member States should be consulted.<sup>92</sup>

### **3.9. Location of compensatory measures**

The Birds and Habitats Directives do not require that compensatory measures are taken within the Natura 2000 site itself. These measures can also be taken outside the affected Natura 2000 site, provided that the ecological functionality of the Natura 2000 network is restored.<sup>93</sup> The requirement of ecological functionality implies that compensatory measures have to be taken within or in the vicinity of the Natura 2000 site. Compensatory measures within the Natura 2000 site may include an improvement to or an extension of the habitats of species or habitat types. The designation of a compensation area as a Natura 2000 site or an extension of an already designated Natura 2000 site is also possible. The compensation area must be designated as a Natura 2000 site and thus has to be protected in accordance with Article 6(4) Habitats Directive. A prerequisite for the designation of a new Natura 2000 site is that the site meets the criteria for the selection and the designation of Natura 2000 sites (one of the best areas for the species or habitat type in the Netherlands; sufficient quality; minimum surface). Designating a Natura 2000 site in development – on the basis of not yet existing, potential nature values – is not possible, because such a site does not yet meet the criterion of ecological functionality.

The search for a location for compensatory measures should not be reduced to locations that the initiator has at his disposal. The ownership situation, although it is important for the implementation of compensatory measures in practice, is not really relevant. Only ecological considerations are relevant in this context.

Compensatory measures in other Member States are possible in theory, since the requirement for compensation is the protection (restoration) of the overall coherence of the Natura 2000 network which, as such, is not bound by national borders between Member States. The European Commission is of the opinion that compensatory measures must be taken in the same biogeographical region.<sup>94</sup> However, there are many practical problems here.

## **4. Conclusions and final observations**

In our contribution we have focussed on a question which is becoming increasingly important in practice: under which circumstances can the obligation to take compensatory measures under Article 6(4) Habitats Directive be avoided by mitigating or other measures in the context of Article 6(3) Habitats Directive? The positive effects of such nature protection measures can be taken into account in the appropriate assessment and can be balanced against the negative effects of other parts of the plan or project.

The Dutch Council of State provides more leeway for creative solutions than many had expected. The Belgian Council of State looks at such solutions more critically. Practice and science now stand at a crossroads: must we continue to follow the path of a more tolerant interpretation or return to a strict

<sup>90</sup> Ibid., p. 16.

<sup>91</sup> OJ L 358, 31.12.2002, pp. 59-80.

<sup>92</sup> ABRvS 26 January 2005, no. 200307350/1, M&R 2005/60 (note J.M. Verschuuren); BR 2005/96 (note A.G.A. Nijmeijer); H.E. Woldendorp, 'Natuurcompensatie volgens de Habitatrichtlijn (1); het juridische kader', *JfF* 2007/129, p. 739.

<sup>93</sup> European Commission, *Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats Directive' 92/43/EEC*, 2000, p. 38.

<sup>94</sup> European Commission, *Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC, Clarification of the Concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence*, Opinion of the Commission, 2007/2012, p. 17.

interpretation of the Habitats Directive? In searching for reliable guidance, the Dutch Council of State has submitted preliminary questions to the Court of Justice. Until the Court of Justice has answered those questions, not much can be said with certainty about the leeway for solving practical problems within the context of Article 6(3) Habitats Directive. Particularly in Member States like the Netherlands many species and habitat types have an unfavourable conservation status. This means that problems like the ones related to high nitrogen deposits can hardly be solved at the level of the individual project or plan. Obviously, the ruling of the Court of Justice in the *A2* case is awaited impatiently.

The labelling of the creative solutions described is difficult, though important. It can be decisive for the realization of a plan or project. Most important is that the measures taken are not qualified as compensatory measures. To a certain extent, several options can be elaborated in the same case, depending on their prospect for success. However, the choice of an option is not only dependent on the desired outcome.

The first option is that nature measures form an inextricable part of the objectives of a plan or project.

The taking of mitigating measures is the second option. The positive effects of mitigating measures can be taken into account in the appropriate assessment. The objectives of the mitigating measures must be inextricably linked to the plan or project. If they are presented as autonomous measures, the effects are expressed in the conservation status of the Natura 2000 site, which is the reference point for the conservation objectives and for the appropriate assessment.

The third option is to take advantage of autonomous developments, mostly in the context of integrated planning. Autonomous nature protection measures aim at improving the conservation status of a Natura 2000 site, for example by reducing nitrogen deposits or by improving the site's management. If there is no doubt that the measures will result in an improvement to the conservation status of the site, the conclusion of the appropriate assessment could be that the negative effects of the project are no longer as significant as they would be in case the conservation status of the site would be unfavourable. We consider this to be a good approach, but in most cases the effects are not enough to improve the conservation status and do not occur in good time.

Nature inclusive design and integrated planning have the advantage that the positive effects of nature protection measures can be directly balanced against the negative effects of other parts of the plan or project. These solutions can generate a 'win-win situation', provided that a balance can be reached between the interests of Natura 2000, on the one hand, and the other interests on the other hand, in conformity with Article 2(3) Habitats Directive. However, we would like to highlight the risk that many of those measures are already needed for the improvement of the unfavourable conservation status of many species and habitats in our country. The positive results of nature protection measures are partly allocated to new infrastructure and other building projects or economic development. As a result it will be even more difficult to realize the favourable conservation status of those species and habitats, which is a result obligation under the Birds and Habitats Directives. On the other hand, such a 'reward' will raise public and political support for taking and financing nature measures, which can be very difficult in normal circumstances.

The realization of a favourable conservation status is a legal result obligation that must be realised within a reasonable period. However, the lack of a clear deadline is a weak point in the Habitats Directive. In the Netherlands, there is too often a tendency to 'forget' or postpone this obligation, with the argument that in a time of economic crisis other problems must first be solved. For example, in the PAS the ultimate goals are not formulated in clear and concrete terms. A deadline is not mentioned in any case. This makes it difficult to see whether the proposed measures are sufficient and can be taken in good time or even whether it will be feasible to realise the objectives. In the absence of such information, it is difficult to conclude whether a reduction of nitrogen deposits can be reserved for economic development.

At the project level, we are happy and feel somehow relieved that the Council of State, in its ruling of 30 October 2013,<sup>95</sup> came to the conclusion that the results of nature protection measures must be

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95 ABRvS 30 October 2013, nos. 201203812/1/R2 and 201203820/1/R2, *JM* 2013/11 (note J.M.I.J. Zijlmans).

sustainable and guaranteed in case nitrogen deposits resulting from an authorised plan or project are permanent.

Experiences in the Netherlands prove that integrated planning requires significant efforts, since many stakeholders and authorities are involved and many assessments are required. Moreover, a lot of 'politics' can be involved in balancing interests and finding a mix that is acceptable to all stakeholders. On the other hand, finding a solution in the interest of one stakeholder can result in the situation where, at the end of the day, it will accept measures which are not in its interest.

If there are sufficient guarantees that the implementation of the nature protection measures will not be discussed again at a later stage or even 'forgotten', we think that this solution could make such measures possible while they are not possible if one tries to implement them in isolation. Since integrated planning is difficult and time-consuming, this approach is only recommended in the case of serious problems that cannot be solved separately.

An important legal as well as practical question concerns the conditions under which the conclusions of the appropriate assessment at the plan level can be applied to individual projects that are part of the plan. At the project level there is not always an inextricable link between the project and the nature measures, contrary to the link which, in general, exists between projects and nature measures at the plan level. Of course it is not allowed to avoid the application of Article 6(4) Habitats Directive for a project that is just included in the plan on paper. On the other hand, the cohesion between the different parts of the plan is put at risk if for each part of the plan the inextricable link between the project and the measures has to be assessed individually. Since there is an inextricable link between the different parts of the plan, the negative conclusion of the appropriate assessment for an individual project can have consequences for the plan as a whole.

This difficult question needs a more extensive study. For the moment, we are of the opinion that the conclusion of the appropriate assessment at the plan level for inextricably linked projects that are parts of the plan must be taken into account in the procedure for the authorisation of those projects. If the projects and nature measures are not inextricably linked at the plan level, the nature measures must be considered as autonomous developments.

The other solutions are less ambitious than integrated planning and mainly play a role at the local level within the context of the plan or project. Mitigating measures modify the plan or project in order to reduce any adverse effects. Nature protection measures can also be part of the objectives of the plan or project. In that case the objective has to be specified (planning, phasing, expected results) and the contribution of the measures to the realization of the objective must be clearly demonstrated and significant. Moreover, the measures must be inextricably linked to the other objectives of the plan or project. In practice, the solution of nature inclusive planning or the balancing of effects give rise to a great deal of 'tinkering' and even a 'manipulation' of the pluses and minuses of the different elements of projects or plans. These solutions also delay the final realisation of the site's conservation objectives and it is not always clear whether this is still feasible in the end. After taking the obvious measures that are usually the easiest to realise, new measures that are still necessary can be very difficult or even absent. Another disadvantage is their local scale, which often makes them sub-optimal and vulnerable for Natura 2000 in the long term. These solutions are not sustainable but have the advantage of a stronger guarantee that nature protection measures are implemented. Fortunately, the Dutch Council of State and the Belgian Council of State have developed a good sense that solutions must be ecologically functional and sustainable in the long term as well as feasible and successful, as is illustrated by the jurisprudence in the *Port of Rotterdam* case and the *Port of Antwerp* case. In our opinion a strategy aiming at blocking economic and spatial developments, appealing to a strict interpretation of the Birds and Habitats Directives, is itself vulnerable and not sustainable, since such developments will take place in most cases and such a strategy erodes public and political support for nature protection.

In this respect, we are very curious to know the results of the monitoring and evaluation of the implementation of nature measures in the context of creative solutions in practice and their results for Natura 2000 in the long term. Moreover, we would like to obtain a better picture of whether those measures, after all, could be detrimental to the realization of the conservation objectives for Natura 2000 sites because no other nature protection measures remain.

Looking at the conclusion of the Advocate General in the *A2* case, we fear that the Court of Justice will strictly interpret the requirements of the Habitats Directive, which would imply that many ‘creative solutions’ will no longer be allowed. In the end this can lead to a decline in public and political support for the Birds and Habitats Directives and greater pressure by the Member States to amend these Directives.<sup>96</sup> ¶

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<sup>96</sup> Via the REFIT programme of the European Commission (REFIT = Regulatory Fitness and Performance Programme). This programme systematically reviews EU legislation in order to see if its aims are being met efficiently and effectively and also includes the Birds and Habitats Directives. Its approach is considered more or less ‘outdated’ in comparison to more recent Directives of the framework type.