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Mitigation and Compensation under EU Nature Conservation Law in the Flemish Region: Beyond the Deadlock for Development Projects?

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1. Introduction

Until the beginning of the 21st century the observance of nature conservation law in the spatial planning context was not one of the main preoccupations of Flemish planning authorities and project developers. Despite there being strict rules on protection of some listed biotopes, such as marshlands and dunes, the application thereof in the context of spatial projects was only rarely enforced by the competent planning authorities.¹ This was no different with respect to the protection and conservation duties laid down by the Habitats² and Birds Directives.³ Also in this regard, the Flemish Region, which is, in the Belgian institutional framework, competent regarding nature conservation in its own territory, was clearly lagging behind. Although by 2002 around 10% of the Flemish Region had been designated as a Natura 2000 site, the absence of any strict assessment rules in the 1997 Flemish Nature Conservation Decree⁴ turned the ecological network into a 'paper tiger' for many years. This was starkly illustrated by the fact that a wide array of potential harmful activities could still continue unhindered, in the context of the designated Natura 2000 sites.

However, the 2002 landmark decision of the Belgian Council of State in the case concerning the construction of a new tidal dock in the Antwerp Port Area, called the '*Deurganckdok*', effectively put an end to this rather lenient and lax approach towards EU nature conservation law that had persisted for many years. As the construction of the tidal dock entailed the loss of part of a designated Natura 2000 site, the strict assessment requirements of Article 6(3) and (4) came into play. The suspension of the relevant zoning plan for not having sufficiently observed the strict requirements set out by Article 6(3) and (4) of the Habitats Directive, for the first time demonstrated the far-reaching restrictions that protected species and habitats might impose on spatial developments.⁵

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1 See more extensively: H. Schoukens et al., 'The Implementation of the Habitats Directive in Belgium (Flanders): back to the Origin of Species?', 2007 *JEEPL* 4, no. 2, pp. 127-138.

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

3 Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (Birds Directive), OJ L 103, 25.4.1979, p. 1, replaced by Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (hereafter 'Birds Directive'), OJ L 20, 26.1.2010, p. 7.

4 *Belgian Official Journal*, 10 October 1998.

5 Decision Belgian Council of State, case no. 109.563, 30 July 2002.

In ruling that due account needed to be taken of the potential effects that were to be caused by infrastructure projects on European protected sites, the Belgian Council of State's judgment of 30 July 2002 marked a crucial shift in attitude towards nature conservation law. Although the construction of the huge tidal dock could still be completed in the subsequent years, the Council's decision underscored that simply bypassing the statutory protection rules, provided by the Habitats and Birds Directives, might lead to cumbersome legal risks and delays. In addition, it became apparent that the tight enforcement scheme which is attached to European nature conservation law allows nature conservation organizations to institute legal proceedings whenever no due consideration has been given to the effects of the proposed infrastructure project on Natura 2000 sites, even in the absence of proper implementing rules.⁶ It therefore came as no surprise that this U-turn in national case law was greeted with strong scepticism by most business people and, to some extent, planning authorities. The carrying out of an appropriate (ecological) assessment, which had become obligatory in many instances by virtue of Article 36ter of the Nature Conservation Decree, was not only seen as an additional administrative burden by most project developers, it also significantly reduced planning authorities' leeway when issuing permits for development projects. Project developers, in turn, faced an increasingly cumbersome task in proving that activities presented no appreciable risk of harm to the Natura 2000 sites that were located in the vicinity of their project site.⁷ Accordingly, the 'coming of age' of EU nature conservation law in the Flemish Region, backed up by the modification of the Flemish Nature Conservation Decree in 2002,⁸ confronted project developers and planning authorities with an increasingly strict assessment regime and ponderous permit procedures. Recently, also the rules of strict species protection, which are not limited to the designated Natura 2000 sites, have come to the fore, again highlighting the increasingly tight margin for the issuance of permits for projects with possible effects on the breeding sites or resting places of protected species, such as the natterjack toad and the crested newt.⁹

Dissatisfied with the alleged rigidity of EU nature conservation law, project developers and planning authorities sought new ways to reconcile nature conservation with their more economically inspired spatial interests. Enter the more flexible reading of EU nature conservation law, which puts more emphasis on the possible positive outcomes for biodiversity that can be linked to infrastructure projects by providing the necessary mitigation and compensatory measures. Overall, it was hoped that a wider application of mitigation measures in the context of planning applications might allow a more balanced approach of the alleged strict requirements included in EU nature conservation law.

Whilst the Flemish Region is certainly not the only region or country in the EU where such novel approaches to mitigation and, to a lesser extent, compensation came into the spotlight, it has spawned a remarkably high amount of interesting case law in this respect. Indeed, many rulings tackle issues in connection with mitigation and compensation that are of immediate interest for other Member States striving to a better alignment between economic considerations and the strict requirements embodied by the Habitats and Birds Directives.¹⁰

This article will review the most important judicial decisions in relation to mitigation and compensatory measures in the Flemish Region. If relevant, reference will also be made to similar cases in other Member States, especially when they might have served as source of inspiration for some of the new mitigation practices which are being applied in the Flemish Region. By doing so, we will try to unravel the mystery of the exact confines of the discretion offered to the Member States by the Habitats

6 See more extensively: K. Lenaerts & J.A. Gutiérrez-Fons, 'The General System of EU Environmental Law Enforcement', 2011 *Yearbook of European Law* 30, no. 1, pp. 3-41.

7 See on the application of the precautionary principle in the context of Art. 6(3) of the Habitats Directive: Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (hereafter 'Waddenzee'), [2004] ECR I-7405, Paras. 41 and 43. See also: J. Verschuuren, 'Shellfish for fishermen or birds? Art. 6 of the Habitats Directive', 2005 *Journal of Environmental Law* 17, no. 2, pp. 265-283.

8 *Belgian Official Journal*, 31 August 2002.

9 In this respect, mention needs to be made of the Regulation of the Flemish Government of 15 May 2009, which codified and updated the then applicable rules on strict species protection in the Flemish Region. This Regulation was published in the *Belgian Official Journal* of 31 August 2009.

10 See in this regard: F.H. Kistenkas, 'Rethinking European Nature Conservation Legislation: Towards Sustainable Development', 2013 *JEEPL* 10, no. 1, pp. 72-84. See also: G. Wandersforde-Smith & N.S.J. Watts, 'Wildlife Conservation and Protected Areas: Politics, Procedure and the Performance of Failure under the EU Birds and Habitats Directive', 2014 *Journal of International Wildlife Law & Policy* 17, no. 1 (forthcoming).

and Birds Directives. Before going deeper into the national case law of the Belgian courts, the role of mitigation and compensatory measures in the Habitats and Birds Directives will be addressed on general grounds (Section 2). Thereafter, the recent case law and administrative decisions in the Flemish Region as regards mitigation measures will be reviewed (Section 3). In a third tier, the recent national case law regarding compensatory measures will be explored (Section 4). In this section, some new insights will be presented as regards some new administrative practices in the Flemish Region which seek to better align the EU nature conservation requirements with spatial aspirations. At the same time, it will be succinctly analysed whether the approaches that can be distilled from the recent case law in the Flemish Region are in line with the recent body of case law of the Court of Justice of the European Union (EU). The general conclusions and recommendations will be wrapped up in a final part (Section 5).

2. Setting the stage: mitigation and compensatory measures in a wider context

These past decades, mitigation and compensation have clearly come up as tools that allegedly allow better alignment between nature conservation law and planning law. Yet, as such, both concepts are not new. In fact, in most regulatory schemes, the adoption of mitigation and compensatory measures is a prerequisite in order to obtain a derogation and/or exemption for project development from the strict rules on species and habitat protection. Although the tendency towards mitigation and compensation, especially when connected to economic instruments such as ‘payments for ecosystem services’ and ‘habitat and mitigation banking’, is being greeted with strong scepticism by some, since it is seen as a slippery slope towards the privatisation of biodiversity,¹¹ they have become the leading discourse in environmental policy precisely because they are believed to present an escape route for the perceived rigidity of nature conservation law. By offering a better balance between economic and ecological considerations, mitigation and compensation have recently gained significant popularity amongst project developers and policy makers.

Given their close links, mitigation and compensation are easily mixed up. In general, mitigation measures are understood as measures that are aimed at minimizing or even cancelling the negative impact of a plan or project. By contrast, measures that restore, create or enhance an area of habitat or a species population in order to compensate for residual damage caused by a plan or project are commonly qualified as compensatory measures. The distinction between both sets of measures is often seen as a corollary of the so-called ‘mitigation hierarchy’, which lies at the heart of many protection requirements in nature conservation law and Environmental Impact Assessment (EIA) rules.¹²

The mitigation hierarchy basically outlines four different steps when assessing the damage incurred by biodiversity through project development. Project developers should first focus on measures capable of avoiding negative impacts on protected biodiversity from the outset, such as careful spatial or temporal placement of infrastructure or disturbance. These measures are often tagged ‘avoidance measures’. The next step requires the project developer to inquire whether measures can be adopted aimed at reducing or minimizing the expected negative impact of a plan or project. The third tier then involves so-called rehabilitation measures, which should remedy unavoidable residual damage or loss if possible through on-site restoration of habitats. If, after having taken all the above-mentioned measures, still some residual damage would have to be addressed, offsets measures or compensatory measures come into play. Here, a further distinction can be made between ‘restoration offsets’, which aim to rehabilitate or restore degraded habitat, and ‘averted loss offsets’, which aim to reduce or stop biodiversity loss in areas where this is predicted.¹³

The recent emergence of the concept of ‘biodiversity offsets’ is clearly reflected in the context of the mitigation hierarchy. According to the ‘Business and Biodiversity Programme’,¹⁴ ‘Biodiversity offsets

11 See, amongst others: C.T. Reid, ‘The Privatisation of Biodiversity? Possible New Approaches to Nature Conservation Law in the UK’, 2011 *Journal of Environmental Law* 23, no. 2, pp. 203-231.

12 See, for instance: European Commission, *Methodological guidance on the provisions of Article 6 (3) and (4) of the Habitats Directive 92/43/EEC* (Brussels, 2001), Section 2.6, 14. This Guidance can be consulted at <http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/natura_2000_assess_en.pdf> (accessed on 10 March 2014).

13 A clear overview of the mitigation hierarchy can be found on the following website: <<http://www.thebiodiversityconsultancy.com/mitigation-hierarchy/>> (accessed on 10 March 2014).

14 BBOP is an international collaboration between companies, financial institutions, government agencies and civil society organizations.

are measurable conservation outcomes resulting from actions designed to compensate for residual adverse impacts arising from project development after appropriate prevention and mitigation measures have been taken. The goal of biodiversity offsets is to achieve no net loss and preferably a net gain of biodiversity on the ground with respect to species composition, habitat structure, ecosystem function and people's use and cultural values associated with biodiversity.¹⁵

In some cases a distinction is drawn, between compensation, which can also consist of financial payment for damage to the environment, on the one hand, and offsetting, which merely relates to activities counteracting ecological harm.¹⁶

As a result, we have ended up with a wide array of distinct types of measures, all aimed at reducing and/or offsetting the harmful impacts of plans or projects on biodiversity. This is not surprising, given the fact that national legislation often blurs the distinction between mitigation and compensation. In the United States, for instance, mitigation is used interchangeably with compensatory measures aimed at restoring degraded habitats of species.¹⁷ By contrast, in the context of the EU Habitats and Birds Directives, measures aimed at restoring degraded habitats in order to offset the loss of habitat caused by an infrastructure project, are mostly qualified as 'compensatory measures', whilst mitigation only consists of measures aimed at minimising harm. Still, as will be described later on, also in the context of Union law, the exact delimitation of the concept of mitigation measures remains a subject of debate.

In the remainder of this section we will address the specific role of mitigation and compensatory measures in the context of the Habitats and Birds Directives, since they constitute the main touchstones for reviewing national or regional approaches towards nature conservation in the EU.

2.1. Mitigation and compensation in the context of the Natura 2000 Network

The Natura 2000 Network is often cited as 'the cornerstone' of the Union's nature conservation policy. Its establishment was initiated by the Habitats Directive in 1992, which highlighted the need for a coherent European ecological network of Natura 2000 sites. These comprise Special Areas of Conservation (SACs) designated by Member States under the Habitats Directive and Special Protection Areas (SPAs) designated by Member States under the Birds Directive.¹⁸ In 2013, this ecological network approximately covered 18% of the Member States' territory and the number of sites included in the Natura 2000 Network is still increasing, especially in the new Eastern-European Member States.

As shown by the strict case law of the Court of Justice, Member States only enjoy a small margin of discretion when applying the ornithological criteria which are stipulated by the Birds Directive. In fact, economic considerations can play no role in the selection process, leaving the Member States to a large extent disempowered in this regard.¹⁹

Whilst the designation procedure for SACs has been fleshed out more elaborately by the Habitats Directive, it does not leave much room for flexibility either.²⁰ In its ruling in the case of *Stadt Papenburg*, the Court of Justice underlined that Article 4(2) of the Habitats Directive must be interpreted as not allowing a Member State to refuse to agree on grounds other than environmental protection to the inclusion of one or more sites enlisted as a Site of Community Importance (SCI).²¹

More information about it can be retrieved at the following website: <<http://bbop.forest-trends.org>> (accessed on 10 March 2014).

15 BBOP, *Business, Biodiversity, Offsets and BBOP. An Overview*, 2009, p. 4, available at <<http://bbop.forest-trends.org/guidelines/overview.pdf>> (accessed on 10 March 2014).

16 K. ten Kate et al., *Biodiversity offsets: Views, experience, and the business case* (IUCN, Gland, Switzerland and Cambridge, UK and Insight Investment, London, UK, 2004), p. 9. This report can be downloaded from the following website: <http://www.epa.gov/owow/wetlands/pdf/Biodiversity_Offsets_Report.pdf> (accessed on 10 March 2014).

17 Section 10(a)(2)(A) of the Endangered Species Act requires applicants, amongst others, to specify in their habitat conservation plans, what steps will be taken to 'minimize' and 'mitigate' the harmful effects of the proposed projects on protected endangered or threatened species.

18 Art. 3 of the Habitats Directive.

19 E.g. Case C-355/90, *Commission v Spain*, [1993] ECR I-4221, Paras. 26-27.

20 From the moment that a proposed site is adopted by the Commission as a 'Site of Community Importance' (SCI), the provisions of Art. 6(2), 6(3) and 6(4) of the Habitats Directive apply. However, Member States are not free to allow projects and/or plans before a proposed site has been included in the Union list of SCIs. In this respect, see: Case C-117/03, *Dragaggi and Others*, [2005] ECR I-167, Para. 29; Case 244/05, *Bund Naturschutz in Bayern eV and Others v Freistaat Bayern*, [2006] ECR I-08445, Para. 46.

21 Case 226/08, *Stadt Papenburg v Bundesrepublik Deutschland*, [2010] ECR I-00131, Para. 33.

The fact that economic considerations can play no vital role in the establishment of the Natura 2000 Network implies that, in some instances, economically valuable tracts of lands, such as port areas and other industrial estates, also have to be designated as a Natura 2000 site, at least when they qualify as most suitable sites according to the Habitats and Birds Directives. Yet this only partly helps to explain the recent quest for more flexibility in the framework of the Habitats and Birds Directives. In fact, the Court of Justice in its recent case law has also significantly narrowed down Member States' leeway in deciding whether or not a plan or project is reconcilable with the integrity of an existing Natura 2000 site. As a result, the Habitats Directive is often referred to as a prime example of rigid environmental law, which leaves relatively little room to balance environmental and economic considerations and, to a certain extent, even works as an obstacle to sustainable development.²² Although this view is not completely flawless, especially given the poor enforcement of Union nature conservation law in some cases and the relatively small number of planning projects that are definitively blocked by it, it is certainly true that the case law of the Court of Justice exhibits a restrictive reading of the Habitats Directive, leaving only a limited margin of discretion for Member States.

In its seminal *Waddenzee* ruling, the Court held that the carrying out of an appropriate assessment, which is required by Article 6(3) of the Habitats Directive, cannot be excluded but on the basis of objective information that the activity will have an effect on that site, meaning that the threshold for the carrying out of an appropriate assessment is very low. Still, such approach appears to be sensible, especially taking into account the prevention principle, since precise surveys and adequate information are key to allowing the competent authorities to decide upon the acceptability of a certain activity.²³ Yet, even more important is the Court's insistence on the strict observance of the precautionary principle in the second stage of the assessment procedure under Article 6(3) of the Habitats Directive. The Court finally held that only if there is no reasonable scientific doubt as to the absence of significant environmental effects the project concerned can go along.²⁴ In other words, whenever some doubts as regards the impact of a project subsist, the competent authority will have to refuse to authorise the activity at stake. This allegedly inflexible reading of the Habitats Directive was confirmed in the Court's more recent case law.²⁵

In this respect, the assessment procedure under the Habitats Directive clearly distinguishes itself from the, at first sight, similar procedural provisions under the 1985 EIA Directive.²⁶ Whilst the latter prescribes an environmental impact assessment of public or private projects, it does not, in contrast with Article 6(3) of the Habitats Directive, lay down substantive rules in relation to the balancing of the environmental effects and other effects, or prohibit the completion of projects which are likely to have negative effects on the environment.²⁷ The opposite holds true for the Habitats Directive. What is more, in its latest landmark ruling in the Irish case of *Sweetman*, the Court, again, reduced Member States' leeway when assessing the so-called significant effects of a project on a Natura 2000 site.²⁸ Here, the Court was particularly keen on countering the Irish competent authorities' view, which held that the project would have a locally significant negative impact on the site, but that such an impact would not adversely affect the integrity of the Natura 2000 site.

Taking into account the strict case law of the Court of Justice, often the only solution left to allow a plan or project to proceed is via a strictly regulated derogation provision, laid down in Article 6(4) of the Habitats Directive. This provision, however, only applies where there are no alternatives, where there are '*imperative reasons of overriding public interest*' for proceeding, and where compensatory measures are adopted (typically involving the designation of like-for-like replacement habitat). Under

22 See, for instance, Kistenkas, who argues that the EU rules on habitat conservation are interpreted too strictly by the Court of Justice in order to leave the necessary room for striking a fair balance between nature conservation and economic development. See Kistenkas, *supra* note 10.

23 *Waddenzee*, *supra* note 7, Paras. 41 and 43.

24 *Waddenzee*, *supra* note 7, Para. 59.

25 See, for instance: Case C 6/04, *Commission v United Kingdom*, [2005] ECR I-9017; Case C-239/04, *Commission v Portugal*, [2006] ECR I-10183, Para. 24; Case 404/09, *Commission v Spain*, [2011] not yet published, Para. 99.

26 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (hereafter 'EIA Directive'), OJ L 175, 5.7.1985, p. 40. The initial EIA Directive of 1985 and its three amendments have been codified in Directive 2011/92/EU of 13 December 2011, OJ L 26, 28.1.2012, p. 1.

27 Case C-420/11, *Leth*, [2013] not yet published, Para. 46.

28 Case C-258/11, *Peter Sweetman and Others v An Bord Pleanála* (hereafter '*Sweetman*'), [2013] not yet published, Paras. 43 and 49.

Article 6(4) of the Habitats Directive consent might be given to a project likely to have significant effects on a Natura 2000 site provided that the conditions referred to in this provision are cumulatively satisfied.

In many cases, however, it is impossible to meet the terms of this derogation, which explains the emergence of mitigation measures, aimed at averting the alleged rigidity of the described case law. In *Solvay* the Court of Justice held that an interest capable of justifying the implementation of such a plan or project, must be both ‘public’ and ‘overriding’, which means that it must be of such importance that it weighs up against the Habitats Directive’s objective of the conservation of natural habitats and wild fauna and flora. In principle, works intended for the location or expansion of an undertaking satisfy those conditions only in exceptional circumstances. This would only be the case where a project, although of a private character, in fact by its very nature, presents an overriding public interest and it has been shown that there are no alternative solutions.²⁹ At the same time, the Court of Justice still has to form an opinion on the specific role that mitigation measures can play in the application of the specific assessment rules under Article 6(3) of the Habitats Directive. Moreover, the Habitats Directive itself does not contain an explicit reference to ‘mitigation measures’, nor does it determine a strict mitigation hierarchy. The European Commission, in turn, has touched upon the concept of ‘mitigation measures’ only succinctly in its non-legally binding Guidance on Article 6 of the Habitats Directive.³⁰

As regards the quintessential delimitation of the notion of ‘mitigation measure’, the Commission noted in its 2000 Guidance on the management of Natura 2000 sites that such measures ‘are aimed at minimising or even cancelling the negative impact of a plan or project, during or after its completion.’³¹ It added that ‘mitigation measures are an integral part of the specifications of a plan or project’. Examples of such mitigation measures may cover the dates and the timetable of implementation (e.g. not operating a windmill during the breeding season of a particular bird species), the type of tools and operation to be carried out (dredging outside a site where a vulnerable habitat is present).

Also with respect to the concept of ‘compensatory measures’, the Habitats Directive itself does not offer many substantial clues. As such, the notion of ‘compensation’ is not defined in the Habitats Directive. Article 6(4) of the Habitats Directive rather succinctly states that in the context of the derogatory clause ‘Member States shall take all compensatory measures to ensure that the overall coherence of Natura 2000 is protected’. In legal literature, it is submitted that the compensation regime is, through the focus of the Habitats Directive on a coherent European ecological network, letting concepts such as ‘coherence’ and ‘conservation status’ prevail over tags, such as ‘natural’ and ‘authentic’.³²

Interestingly, the Court of Justice in a Greek case recently held that Article 6(4) of the Habitats Directive, interpreted in the light of the objective of sustainable development, in relation to sites which are part of the Natura 2000 network permits the conversion of a natural fluvial ecosystem into a largely manmade fluvial and lacustrine ecosystem provided that the conditions referred to in this provision of the Directive are satisfied.³³ Yet, at the same time, the Court states that the nature of the compensatory measures is predetermined by precise determination of the adverse impact of the project on the site concerned. Hence, opting for application of the derogation clause does not entail that the effect of the plan or project need not be precisely assessed.

In its 2000 Guidance on the managing of Natura 2000 sites and its subsequent 2007 Guidance on Article 6(4) of the Habitats Directive,³⁴ the European Commission expanded its succinct clarifications on the concept of ‘compensation measure’. In general, the Commission is of the opinion that compensatory

29 Case C-182/10, *Marie-Noëlle Solvay and Others v Région Wallonne*, [2012] not yet published, Paras. 75 and 76.

30 See also in this regard: D. McGillivray, ‘Mitigation, Compensation and Conservation: Screening for Appropriate Assessment under the EU Habitats Directive’, 2011 *JEEPL* 8, no. 4, p. 335.

31 European Commission, *Managing Natura 2000 Sites – The provisions of Article 6 of the ‘Habitats’ Directive 92/43/ECC* (Brussels, 2000), p. 37 (hereafter: ‘Guidance Article 6 Habitats Directive’). This Guidance can be consulted at: <http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf> (accessed on 10 March 2014).

32 D. McGillivray, ‘Compensating Biodiversity Loss: the EU Commission’s Approach to Compensation under Article 6 of the Habitats Directive’, 2012 *Journal of Environmental Law* 24, no. 3, p. 417.

33 Case C-43/10, *Nomarchiaki Aftodioikisi Aitolookarnanias and Others*, [2012] not yet published, Para. 138.

34 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* (Brussels, 2007), p. 30 (hereafter: ‘Guidance Article 6(4) Habitats Directive’). This Guidance can be consulted at: <http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/new_guidance_art6_4_en.pdf> (accessed on 10 March 2014).

measures can compromise the recreation of a habitat on a new or enlarged site, to be incorporated into Natura 2000, the improvement of a habitat on part of the site or on another Natura 2000 site, proportional to the loss due to the project and, in exceptional cases, proposing a new site under the Habitats Directive.³⁵

In addition, the European Commission also warned that compensation should be considered as ‘a last resort’, which needs to be limited to exceptional cases, which, in turn, also fulfil the other criteria enshrined in Article 6(4) of the Habitats Directive.³⁶ As regards the ‘overall coherence’, the European Commission in its 2007 Guidance underlines the prevalence of the functionality criterion over mere equivalent acreage.³⁷ However, in its opinions, issued under the second subparagraph of Article 6(4) of the Habitats Directive,³⁸ the Commission shows remarkable reluctance to apply the same degree of scrutiny as used in its own guidance documents. The European Commission itself puts forward that in delivering its opinions under the latter provision, it should check the balance between the ecological values affected and the invoked imperative reasons, and evaluate the compensatory measures.³⁹ Nonetheless, some scholars, such as Krämer, argue that none of the opinions of the European Commission would survive a ruling from the Court of Justice.⁴⁰ Also other authors, such as De Sadeleer and McGillivray, seem to believe that economic factors too often supersede a strict assessment of the intended compensatory measures.⁴¹

2.2. Mitigation and compensation in the context of the strict species protection regime

Besides its focus on site conservation, the Habitats Directive, similar to the Birds Directive,⁴² also contemplates strict species protection. For species such as the natterjack toad and the European hamster additional measures were required, specifically aimed at protecting the actual species itself and the most important parts of their habitats, being the breeding sites and resting places throughout the whole territory of the Member States. Such threatened species have been listed on Annex IV to the Habitats Directive, which comprises, in total, more than 900 plant and animal species of Union interest, in need of strict protection measures.

Article 12(1) of the Habitats Directive aims to encompass the most common direct threats for the animal species listed in Annex IV(a). Similarly to Section 9 of the U.S. Endangered Species Act,⁴³ Article 12(1) of the Habitats Directive unequivocally prohibits a wide array of harmful activities in relation to the protected species listed in Annex IV(a) to the Habitats Directive. The prohibited activities more specifically encompass all forms of deliberate capture or killing of specimens of these species in the wild, but also the deliberate disturbance thereof, particularly during the period of breeding, rearing, hibernation and migration. In a similar vein, Article 12(1)(d) of the Habitats Directive prohibits the deterioration or destruction of the species’ breeding sites or resting places.

Although the strict rules on species protection received relatively little attention during the first decade after the entry into force of the Habitats Directive, the subsequent stringent case law of the Court of Justice forced Member States to reconsider their lax stance in this respect. Not only did the Court underline its willingness to scrutinize the Member States’ implementation rules in this respect, as shown in the 2005 case of *Commission v UK*,⁴⁴ it also did not refrain from reviewing whether the Member States also ensured the concrete application and enforcement of these strict protection rules. For instance, in its

35 Guidance Article 6 Habitats Directive, supra note 31, p. 46.

36 Ibid., p. 44.

37 Guidance Article 6(4) Habitats Directive, supra note 34, p. 13.

38 The second subparagraph of Art. 6(4) of the Habitats Directive provides for a special treatment whenever the plan or project concerns a site hosting priority habitats and/or species and is likely to affect these priority habitats and/or species. The realisation of plans or projects likely to adversely affect these sites could be justified only if the invoked imperative reasons of overriding public interest concern human health and public safety or overriding beneficial consequences for the environment, or if, before granting approval to the plan or project, the Commission expresses an opinion on the initiative envisaged.

39 Guidance Article 6(4) Habitats Directive, supra note 34, p. 23.

40 L. Krämer, ‘The European Commission’s Opinions under Article 6(4) of the Habitats Directive’, 2009 *Journal of Environmental Law* 21, no. 1, pp. 83-84.

41 N. De Sadeleer, ‘Habitats Conservation in EC Law – From Nature Sanctuaries to Ecological Networks’, 2004 *Yearbook of European Environmental Law* 5, p. 249; McGillivray 2012, supra note 32, pp. 449-450.

42 See Arts. 5 and 9 of the Birds Directive.

43 7 U.S.C. § 136, 16 U.S.C. § 1531 et seq.

44 Case C-6/04, *Commission v UK*, [2005] ECR I-09017, Para. 79.

notable decision in the *Carretta carretta* case the Court condemned Greece for not having enacted the requisite measures to protect the beaches on the island of Zakynthos, which are intensively used by sea turtles as breeding sites.⁴⁵ The Court's ruling in the latter case proved not to be an isolated one.⁴⁶ Most notably, France was convicted by the Court in 2011 for not having taken sufficient measures to conserve and restore its declining population of the wild hamster in Alsace.⁴⁷ In the Court's view, France fell short of its obligation to establish repopulation areas, which cover a large part of the hamster's historical range and in which stricter rules on the development of maize crops and urbanization projects should be applied.

In light of the Court's strict stance on the Member States' obligations under Article 12(1) of the Habitats Directive, the focus soon shifted to the room that was left for mitigation and compensation. However, as was the case with Article 6 of the Habitats Directive, the strict rules on species protection do not contain an explicit reference towards mitigation measures as a way of alleviating the major impact they might have on development projects. Moreover, in contrast with Article 6(4) of the Habitats Directive, the derogatory clause does not mention the possibility of adopting compensatory measures in order to offset the damage inflicted on protected species either.

Hitherto, the Court of Justice has not had the opportunity to formulate its opinion on the recourse to mitigation and compensation in the context of Articles 12(1) and 16 of the Habitats Directive, although the Court implicitly took mitigation measures into account when ruling on a Spanish project for upgrading a country road to a highway, which would allegedly cut the already reduced habitat of the endangered Iberian lynx into two parts. In these proceedings, the European Commission apparently failed to convince the Court of the fact that an upgraded country road actually had a real impact on the habitat of the Iberian lynx and placed it in great danger of being struck by vehicles.⁴⁸ In the end, the Court seemed to be convinced of the effectiveness of the 'corrective measures' that had been adopted by the Spanish authorities, this also in the context of Article 12 of the Habitats Directive. Apart from the construction of animal fencing, these measures also consisted of measures to deter speeding, the provision of road signs, and the improvement of wildlife crossings, bridges and drainage.⁴⁹

In its 2007 Guidance on strict species protection, the European Commission in turn explicitly reasserted the role of mitigation and compensatory measures in the context of the strict protection regime.⁵⁰ In order to better align spatial protection with the strict protection rules put forward by Article 12(1)(d) of the Habitats Directive, the Commission considered the possibility of taking 'measures that ensure the continued ecological functionality of a breeding site/resting place' as a tool to bypass the application of the strict derogatory regime included in Article 16(1) of the Habitats Directive.

However, whenever such measures are not feasible, the Member States' competent authorities are obliged to review the proposed project in the context of the strict conditions set by the derogation clause enshrined in Article 16(1) of the Habitats Directive. This provision selects a limited number of potential interests which might, in certain conditions, be balanced against the biodiversity interests protected by the strict rules on species protection. Apart from checking whether the proposed project can be framed as one of the reasons given under Article 16(1)(a) to (e) of the Habitats Directive and ascertaining whether no other satisfactory alternatives are available, the impact of the derogation on the conservation status itself must be assessed. Ultimately, the evaluation of the impact of the derogation on the population, both at the level of 'natural range' and 'local population' needs to be reviewed. If there still is an expected negative net impact, the project could, in some circumstances, still go along if effective compensatory measures are capable of ensuring the offsetting of the detrimental effects of the proposed project development.⁵¹ Although compensatory measures are not mentioned in Article 16(1)

45 Case C-103/00, *Commission v Greece*, [2002] ECR I-01147, Para. 40.

46 Case C-518/04, *Commission v Greece*, [2006] ECR I-00042, Paras. 20-21.

47 Case C-383/09, *Commission v France*, [2011] ECR I-04869, Para. 39.

48 Case C-308/08, *Commission v Spain*, [2010] ECR I-04281, Paras. 52 and 58.

49 *Ibid*, Paras. 43-49.

50 European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (Brussels, 2007), p. 88 (hereafter: 'Guidance document on strict species protection'). This Guidance can be consulted at <http://ec.europa.eu/environment/nature/conservation/species/guidance/index_en.htm> (accessed on 10 March 2014).

51 *Ibid*, p. 63.

of the Habitats Directive, and, as such, not obligatory, it underlines the better justification they might offer to the issuance of a derogation.⁵²

3. Mitigation in the context of Flemish nature conservation law: new ways to ease the burden?

So, what have we learned so far? In first instance, the foregoing analysis strikingly demonstrated that, since the entry into force of the Habitats Directive, spatial development projects that are located in the vicinity of a Natura 2000 site face strict scrutiny. Obviously, the same conclusion also applies to development projects that might interfere with strictly protected species, such as the natterjack toad. On the ground, mitigation and compensation turn out to be key tools for better balancing nature conservation law with economic interests. Not surprisingly, the Flemish competent authorities increasingly take recourse to mitigation and, to a lesser extent, compensation in order to reconcile economic aspirations with the strict requirements of nature conservation law. Not surprisingly, mitigation measures are often only considered in order to alleviate the administrative burden allegedly caused by the Habitats and Birds Directives.

The growing use of mitigation measures in order to bypass, for instance, the requirement set by Article 6(3) of the Habitats Directive to carry out an appropriate assessment, has not passed unnoticed in recent case law. In fact, it has been the subject of some poignant criticism by environmental NGOs, which often instituted legal proceedings to see their criticism confirmed by the Court. These NGOs often submit that a more flexible approach to mitigation might, in the long run, lead to a reduction of the level of environmental protection. It was feared that, ultimately, economic interests linked to spatial developments would always prevail, especially since mitigation measures are often not strictly enforced by planning authorities.

What makes a closer look at the Flemish Region especially worthwhile is the fact that, in the past five years, many of the legal questions pertaining to mitigation and compensation under the framework of the Habitats Directive have had to be considered by national courts. In the absence of clear guidance, so far, from the case law of the Court of Justice, the Belgian courts had to independently ponder the legality of such measures in the light of EU nature conservation law.

3.1. Mitigation measures in the screening stage: a means to bypass the duty to carry out an appropriate assessment?

Not surprisingly, the increased enforcement of the assessment procedure under Article 6(3) of the Habitats Directive, as implemented by Article 36*ter* of the Flemish Nature Conservation Decree, sparked strong resistance amongst project developers and planning authorities. In general, there is a great deal of dissatisfaction about the additional rules that need to be observed in the context of spatial planning and/or planning applications.

That many project developers still see the carrying out of an appropriate assessment as entailing additional administrative burdens, which might cause additional delay and make the project development more costly, may not come as a surprise. Indeed, many project developers are especially wary of the strict consequences that are attached to the outcome of such an assessment. As shown by the Court's ruling in the *Waddenzee* case, the margin of discretion of planning authorities when deciding on the acceptability of a project development in the context of a Natura 2000 site has been severely reduced, which is often seen as a major crackdown on the Member States' economic aspirations.⁵³ In recent years, the Belgian Council of State slowly but surely aligned its case law with the strict stance of the Court of Justice. Although the Council of State acknowledged that neither the Habitats Directive nor its implementation rules include any binding content for the appropriate assessment, the Council of State reiterated that it is not a merely formal process of examination. In fact, the Council held on several occasions that the appropriate assessment 'must allow a detailed analysis which satisfies the conservation objectives of the

⁵² Ibid.

⁵³ See, to this effect, Case C-304/05, *Commission v Italy*, [2007] ECR I-7495, Para. 69.

site in question, as set out in Article 6, particularly as regards the protection of natural habitats and priority species.⁵⁴

Thus many project developers have sought means to circumvent this strict assessment regime. In doing so, recourse was often made to the inclusion of mitigation measures in an early planning stage. It was contended that when mitigation measures were properly considered during the initial planning stage, there would no longer be a need for a fully-fledged appropriate assessment. This tendency is certainly not limited to the Flemish Region. Also in other countries, such as the UK and the Netherlands, a similar practice towards the screening stage appears to be trending.

One of the most notable cases revolving around this issue is a UK case. Here, the High Court recently had to assess whether mitigation measures could be taken into account in the first screening phase under Article 6(3) of the Habitats Directive.⁵⁵ The cases referred to revolved around a legal challenge of the Secretary of State's decision to grant a planning permission to construct 170 houses on a greenfield site, located at 1.5 kilometres of the Thames Basin Heath SPA. It was proposed that a so-called Suitable Alternative Natural Greenspace (SANG) would avoid any net effect of an increased local population on the SPA by providing alternative recreational space for new residents and existing residents. Although the Inspector advising the Secretary of State on the planning application thought that the alternative green space contemplated lacked the necessary proof and was therefore not likely to avoid significant effects on the SPA, the latter finally chose to issue the permit. In the end, the High Court rejected the legal challenge that had been introduced against it. More in particular, the Court took the view that, if certain features were to be incorporated into the project, there was no sensible reason why they should be ignored at the stage of the initial assessment stage merely because they were directed at combating the likely effects of the project on the SPA. In the Court's understanding, the Habitats Directive requires the proponent of a project to consider mitigation measures at the earliest possible stage.

Against the backdrop of the above-mentioned English case, which has been criticised by some legal scholars as running counter to Article 6(3) of the Habitats Directive,⁵⁶ one could expect the Flemish Region courts to also be more prone to adopting a flexible approach towards mitigation under Article 6(3) of the Habitats Directive. Yet recent case law seems to indicate that Belgian courts are, in general, more reluctant to allow mitigation measures in the screening stage under Article 6(3) of the Habitats Directive than their English counterparts.

In these past years, the Belgian Council of State has rendered several decisions in which it clearly rejected the use of mitigation measures during the screening stage. This tendency was first highlighted in a 2010 ruling, where the Council had to review the legality of a zoning plan aimed at refurbishing a castle park, located in the province of Antwerp. The park had been designated as an SAC in 2002, inter alia because of the presence of several protected bat species. Even so, the plan envisaged the reconstruction of an old access path, which would lead to the castle itself. The Flemish Nature and Forest Agency, which is competent to assess the possible effects of projects of Natura 2000 sites, had issued a positive opinion, in which it stressed that no lighting could be allowed on several parts along the access path. The observance of such mitigation measures should be capable of avoiding any significant disturbance of the present bat populations by the artificial lighting. The Council of State, however, finally ruled that the mitigation measures could not be taken into account as a ground to bypass the duty to carry out an appropriate assessment under Article 6(3) of the Habitats Directive. The mere fact that the Flemish Nature and Forest Agency had indicated that there was a need for further mitigation measures was apparently sufficient to convince the Council of State of the necessity of carrying out an additional assessment of the potential significant effects that the project was likely to cause.⁵⁷ This surely was not an isolated case. Also in its later case law the Belgian Council implicitly seemed to sanction recourses made to mitigation measures in an early planning stage. A more recent ruling of the Council of State is particularly noteworthy, since its factual background is similar to that of the above-mentioned 2011 ruling of the English High

54 See for instance: Belgian Council of State, case no. 206.911, 13 August 2010, *Gemeente Borsbeek*.

55 *Hart District Council v Secretary of State for Communities and Local Government, Luckmore Ltd and Barratt Homes Ltd*, [2008] EHC 1204 (hereafter '*Hart*'). More extensively on this case: McGillivray 2011, supra note 30, pp. 336-343.

56 McGillivray 2011, supra note 30, p. 342.

57 Belgian Council of State, case no. 209.330, 21 December 2010.

Court.⁵⁸ Here, the contested decision centred around the construction of new houses in the immediate surroundings of an SPA. Also in this context, there was a risk of significant disturbance due to increased recreation. Again, the Council of State rejected an approach by which mitigation measures would render the carrying out of an appropriate assessment superfluous.

Overall, the approach put forward by the UK High Court seems to be the most appealing one from the project developers' and planning authorities' point of view. Indeed, the flexible stance adopted by the UK High Court enables a further reduction of the administrative burden in the spatial planning context. Moreover, such an approach would not only be able to foster the early integration of biodiversity concerns into the planning process, ultimately it would also allow the project developers to save considerable time. As the Court stated in *Hart* 'As a matter of common sense, anything which encourages the proponents of plans and projects to incorporate mitigation measures at the earliest possible stage in the evolution of their plan or project is surely to be encouraged.'⁵⁹

Still, the stance of the UK High Court does not appear to be flawless. As such, it presupposes that no additional check-up is needed as regards the effectiveness of the proposed mitigation measures. However, often no sufficient guarantees exist to ensure the long-term enforcement of the mitigation measures. After a project has been completed, both planning authorities and project developers are, in many instances, no longer preoccupied with the strict observance of possible mitigation measures. Accordingly, there is a clear risk that many of the proposed mitigation measures are, in the end, merely used to bypass the obligation to carry out an appropriate assessment according to Article 6(3) of the Habitats Directive.⁶⁰ In this regard, it is noted that in most instances, planning conditions are based on the premise that the mitigation measures will deliver the desired outcome for biodiversity. Since in the absence of an appropriate assessment, no further investigation has been conducted in this regard, there often is a considerable risk that, in the end, the desired positive effects will not be produced.⁶¹

Whilst the Court of Justice has not yet been able to form an opinion on this matter, it can be expected that, in line with the described case law, it will be very reluctant to reassert the more flexible approach to mitigation described above. Since the Court of Justice is maintaining a steadfast strict application of the precautionary principle in the context of the screening stage under Article 6(3) of the Habitats Directive, it can be presumed that it would only allow the consideration of mitigation measures in this context whenever no further research is required into their effectiveness.

Moreover, the stringent reasoning applied by the Belgian Council of State is also confirmed by the content of the above-mentioned Guidances of the European Commission with respect to Article 6 of the Habitats Directive. Already in its 2001 Methodological Guidance document the European Commission held that the screening assessment should be carried out in the absence of any consideration of mitigation measures that form part of a project or plan and are designed to avoid or reduce the impact of a project or plan on a Natura 2000 site.⁶² As a matter of fact, this turns out to be the established view of the Commission since, in its 2010 Guidance on Natura 2000 and wind energy development, it again reiterated that the authorities should only consider mitigation measures whenever a fully-fledged appropriate assessment has been carried out.⁶³

In our view, the approach of the Belgian Council of State, whilst perhaps not being the most popular one amongst project developers and planning authorities, appears to be the preferable option in the face of the ongoing biodiversity crisis. In fact, the same rationale is shared by the Dutch Council of State, which also refuses to take into account the positive effects of mitigation measures in the screening stage under Article 6(3) of the Habitats Directive.⁶⁴ Although this view could easily be tagged as unnecessarily

58 Belgian Council of State, case no. 218.196, 27 February 2012.

59 *Hart*, supra note 55, Para. 61.

60 J. de Nooij et al., 'Relating the Ecological and Legal Frameworks for Nature Conservation in Europe', 2008 *Journal of International Wildlife Law & Policy* 11, no. 1, p. 69; McGillivray 2011, supra note 30, p. 349.

61 McGillivray 2011, supra note 30, p. 349.

62 European Commission 2001, supra note 12, p. 14.

63 European Commission, *EU Guidance on wind energy development in accordance with the EU nature legislation* (Brussels, 2010), p. 64. This Guidance can be consulted at: <http://ec.europa.eu/environment/nature/natura2000/management/docs/Wind_farms.pdf> (accessed on 10 March 2014).

64 See, to this effect: Dutch Council of State, case no. 200604924/1, 22 October 2008; Dutch Council of State, case no. 2010011214/1/R4, 18 July 2012.

formalistic, the vulnerable nature of many of the protected habitats and species, especially in the face of the ever-increasing fragmentation of the landscape, scarcely diminishes the need for a precise and meticulous assessment of the potential positive effects which are to be attached to the mitigation measures. The least one could expect in such circumstances is that proponents of planning projects make the effort to study and predict the potential negative impact it might have on biodiversity.

3.2. *Mitigation measures and the precautionary principle: towards adaptive licensing?*

Up until now we focused on the more formal and procedural aspects related to the application of the assessment rules under Article 6(3) of the Habitats Directive. Yet, also when project developers effectively decide to carry out an appropriate assessment, they need to take into account some strict substantive rules. Indeed, the steadfast strict application of the precautionary principle, as put forward by the Court of Justice in the *Waddenzee* case,⁶⁵ is capable of significantly hampering the development prospects in the immediate surroundings of Natura 2000 sites. In a recent case, the Court of Justice again underlined that Article 6(3) of the Habitats Directive precluded development consent being given to a project which is likely to have a significant effect on the relevant SPA, in the absence of information or of reliable and updated data concerning the birds in the area.⁶⁶ Also the Belgian Council of State repeatedly underlined that an appropriate assessment must be able to offer 'precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed work'.⁶⁷

Since the proponent of a project carries the burden of proof to ensure the absence of significant effects, passing the so-called 'absence of reasonable doubt' threshold is often deemed quite troublesome. Even more worrying, at least from the project developer's point of view, is the fact that the Belgian Council of State has clearly shown more openness to legal challenges in which the accuracy of an appropriate assessment is questioned. Although declaring an appropriate assessment void is still rather exceptional for the Council of State, it has seemed less reluctant to do so in recent years, especially when manifest errors and gaps in the assessment can be easily detected. Most strikingly the Council of State did so in a 2011 case, in which it quashed a planning permission for the construction of a gas pipeline in the South-West of Flanders since the appropriate assessment contained too many errors. The fact that these errors were also acknowledged by the advisory authorities during the planning procedure, made the negligence only more apparent.⁶⁸

It is clear that balancing the strict reading of the precautionary principle and economic development is, in many instance, far from simple. One way to deal with the lasting uncertainties as regards, for instance, the impact of wind farms on wildlife is through the inclusion of strict monitoring mechanisms at permit level. In many instances, monitoring is only a voluntary obligation for the operators of wind farms, which moreover is not strictly enforced by the competent authorities. However, if linked to a risk management strategy, it might present itself as a useful tool to adequately minimize the effects of wind turbines on local bird and bat populations. Such a strategy is very similar to the adaptive management approach, which is increasingly used in the context of resource management. Although there are several definitions of adaptive management, it is generally described as a structured, iterative process of robust decision making in the face of uncertainty, with an aim to reducing uncertainty over time via system monitoring.⁶⁹ In 2007 this approach found its first application in the Netherlands, where, due to the strict enforcement of Article 6(3) and (4) of the Habitats Directive in the context of spatial developments, a general need existed for additional leverage. The so-called 'adaptive licensing approach' (in Dutch: '*hand-aan-de-kraan-benadering*') entails that for projects of which the effects can be effectively monitored, a permit can be granted, if it can be ensured that the activity can be stopped whenever significant effects might still arise. In other words, notwithstanding lasting uncertainties, a project or plan could still obtain a permit under Article 6(3) of the Habitats Directive whenever the permit conditions impose a strict monitoring and, in addition, it is made obligatory to stop the operation of the activity whenever significant

65 *Waddenzee*, supra note 7, Para. 61.

66 Case C-43/10, *Nomarchiaki Aftodioikisi Aitolokarnanias and Others*, [2012] not yet published, Para. 116.

67 Belgian Council of State, case no. 206.911, 13 August 2010.

68 Belgian Council of State, case no. 211.533, 24 February 2011.

69 See, amongst others, C.S. Holling, *Adaptive Environmental Assessment and Management*, 2005, p. 377.

effects are detected. In fact, one could qualify this Dutch administrative practice as a qualification of the adaptive management approach to the concrete level of a permitting process.

This approach was applied for the first time in a case concerning a gas drilling project in the *Waddenzee*. Although during the appropriate assessment no absolute certainty had been reached about the absence of significant effects, the project at issue, in the end, still obtained a permit by referral to this approach. In the conditions attached to the permit continuing monitoring had been made compulsory. Additionally, it was provided that, whenever soil subsidence or other effects might occur, entailing significant risks to the Natura 2000 site, the gas exploration had to be temporarily halted, or, if deemed necessary, completely stopped.

Interestingly, the Dutch Council of State accepted the legality of this approach. In its 2007 ruling it upheld the validity of the gas drilling permit. More in particular, it held that the mere fact that the specific features and possible effect of the expected soil subsidence cannot be precisely predicted beforehand could not constitute a definitive reason to refuse the issuance of a building permit. In the Council's view, the mere existence of some remaining uncertainty as regards the expected effects of the project did not necessarily warrant an outright refusal of the permit application, especially taking into account the compulsory monitoring and the strict operations conditions that were to apply. By doing so, the Dutch Council of State appeared willing to take into consideration the long duration of the proposed operation (more than 20 years) and accepted the adaptive licensing approach as an effective tool to prevent adverse effects from taking place.⁷⁰

This practice has not passed unnoticed in the Flemish Region. In fact, a more flexible approach towards licensing in a Natura 2000 context had already been implicitly reasserted by the Belgian Council of State in its 2005 ruling on the legality of a permit for the construction of an offshore wind farm. Here, the Council held that the contested permit for the wind farm, despite there being lasting uncertainties about its effects on the marine wildlife, was still in accordance with Article 6(3) of the Habitats Directive. It did so by referring to the permanent monitoring scheme that had been provided for in the permit.⁷¹ Thus, it was not surprising that the first explicit application of the adaptive licensing approach took place in the context of wind farm development. Interestingly, reference to the approach had been made in a recent Guidance, promulgated by the Flemish Institute for Forest and Nature Research.⁷² However, the new approach was also applied on the ground. In respect of a highly contested permit application for the construction of 3 windmills in the Port of Antwerp, the Antwerp Provincial Authority ultimately gave green light to the operation of wind farm installations, which were located in the vicinity of a Natura 2000 site. Taking into account that no definitive information on the specific migration routes of birds and bats was available, it was finally decided that these residual effects on birds populations needed to be monitored and the results of the ongoing monitoring could warrant the shutting down of the operation during, for instance, the breeding season of the birds and bats or during migration.⁷³ Again the detected uncertainties did not lead to an outright refusal of the permit application. However, an administrative appeal has been launched against this permit, so it remains unsure whether the Flemish Government would also be willing to adopt this approach on a broader scale.

Be this as it may, it still remains questionable whether the adaptive licensing approach is fully in line with the strict case law of the Court of Justice. At first sight, the Commission seems to leave some leeway in its 2010 Guidance document on wind farm development and Natura 2000. In its section on mitigation, it quoted the temporary halting or shutting down of the operation of a windmill as a possible mitigation measure under Article 6(3) of the Habitats Directive. In addition, it also underlined the fact that such mitigation measures need to be implemented and monitored. As such, the European Commission appears to acknowledge the link between mitigation and monitoring. Whilst perhaps not explicitly reasserting the possibility of adaptive licensing, it did, at least, not explicitly take position against it.⁷⁴ It is interesting

70 Dutch Council of State, case no. 200606028/1, 29 August 2007.

71 Belgian Council of State, case no. 147.047, 30 June 2005.

72 J. Everaer et al., *Risico's voor vogels en vleermuizen bij geplande windturbines in Vlaanderen. Dynamisch beslissingsondersteunend instrument*, 2011, pp. 32-33.

73 Provincial Authority of Antwerp, Decision of 13 January 2010.

74 European Commission 2010, supra note 63, p. 83.

to note that Advocate General Kokott, in her Opinion in the *Waddenzee* case, also indicated that she is not completely averse to accepting new techniques in order to avoid disproportionate effects linked to an overly strict application of the precautionary principle. Not only did she state that the necessary certitude that needs to be attained according to Article 6(3) of the Habitats Directive cannot be construed as meaning absolute certainty since this is almost impossible to attain, she also underlined that mitigating measures can also be of relevance in order to avoid an all too harsh application of the precautionary principle.⁷⁵ Precisely where scientific uncertainty remains, it is possible to gain further knowledge of the adverse effects by means of associated scientific observation and to manage implementation of the plan or project accordingly.⁷⁶

Until now, however, the Court of Justice has not presented an explicit opinion on the legality of the approach described above. In contrast with a typical management approach, which uses the best available knowledge to generate a risk-averse strategy and is then changed as new information modifies the best guess, adaptive management does not shy away from identifying the uncertainties but, instead, also focuses on establishing methodologies to test hypotheses concerning those uncertainties.⁷⁷ Yet it remains unsure whether the aforementioned approach might offer a long-term solution to the cumbersome application of nature conservation law to planning projects and industrial activities. Obviously, there are some drawbacks attached to a widespread application of it. For instance, there is the risk that adaptive licensing could well be fostering a *fait accompli* approach by competent authorities. Indeed, planning authorities might be inclined to use the adaptive licensing approach as a means to cover up big loopholes and gaps in ecological surveys. In some cases, it will be tempting for planning authorities to postpone the exact determination of effects to a later stage, whilst, in the meantime, allowing the construction of the projects. In the end, biodiversity could be at the losing side here. These objections probably also help explain why both the Belgian and the Dutch Council of State are still quite reluctant in accepting an all too broad application of the adaptive licensing approach. For instance, in 2010 the Belgian Council of State, in a case concerning the Airport of Antwerp, ruled that since the obligation to monitor and provide for additional mitigation measures had not been drafted in a unequivocal way, the zoning plan was in contradiction with Article 6(3) of the Habitats Directive.⁷⁸ Also the Dutch Council of State, whilst still explicitly accepting the principle of adaptive licensing on general grounds, refused to apply it in two subsequent cases in which the conditions attached to the permit were deemed insufficiently precise to exclude the possibility of adverse significant effects during the duration of the monitoring.⁷⁹

3.3. Mitigation measures under Article 6(3) of the Habitats Directive: a safe way to avoid Article 6(4) of the Habitats Directive?

Adaptive licensing or management, even if deemed compatible with Article 6(3) of the Habitats Directive, is hardly a one-size-fits-all solution. In some cases, even an appropriate monitoring protocol cannot mitigate the potential effects of a project development on a Natura 2000 site. In this hypothesis, it should be checked whether other possible mitigation measures are still an option. If this is not the case, it must be checked whether the project development could still fit the requirement included in the derogation clause included in Article 6(4) of the Habitats Directive.

This provision allows economic and social considerations to still justify an encroachment of a Natura 2000 site and was specifically construed in order to counter the strict earlier view of the Court of Justice in this regard.⁸⁰ Still, the Flemish planning authorities were not particularly keen on applying the derogation clause to major infrastructure projects. Keeping in mind the many difficulties encountered whilst applying the derogation clause in the context of the construction of the *Deurganckdok* in the Port of Antwerp, the impression had emerged that the application of Article 6(4) of the Habitats Directive would easily give rise to additional scrutiny and legal uncertainty. As a consequence, it became a steadfast

75 Opinion of Advocate General Kokott, Case C-127/02, *Waddenzee*, supra note 7, Para. 106.

76 Ibid, Para. 108.

77 See <http://www.resalliance.org/index.php/adaptive_management> (accessed on 12 March 2014).

78 Belgian Council of State, case no. 206.911, 13 August 2010, *Gemeente Borsbeek*.

79 Dutch Council of State, case no. 20060755, 27 February 2008.

80 Case C-57/89, *Commission v Germany*, [1991] ECR I-883.

strategy to try to avoid, as much as possible, the application of Article 6(4) of the Habitats Directive by opting for a more flexible approach towards mitigation.

In order to obtain more flexibility, a wider interpretation of the concept 'mitigation' was advocated. In fact, it was submitted that also measures that were principally aimed at habitat restoration and creation, in order to offset the affected habitats, should still be qualified as 'mitigation'. It was believed that, whenever the creation of some extra patches of habitat could be integrated in the project or plan at stake, there was no further need to apply the derogation scheme under Article 6(4) of the Habitats Directive. This, in turn, begged the question whether such additional measures could still be seen as mitigation measures *sensu strictu* and, therefore, gave due regard to the strict requirements included in Article 6(3) of the Habitats Directive. The legal soundness of such approach stayed *in limbo* for some years, causing a great deal of legal uncertainty amongst project developers and planning authorities. Still the legal uncertainty surrounding it did not prevent some Flemish planning authorities from opting for this approach.

In the context of the legal proceedings that were instituted against the construction of a new bypass in the province of Limburg, the so-called 'North-South connection' (in Dutch: '*noord-zuidverbinding*') this issue came up for the first time. The lawsuit centred around the zoning plan for a proposed highway, which should enable better traffic management in the province of Limburg. Since the approved route would cut through several protected sites, due regard had to be taken of the requirements included in the Habitats Directive. The reconciliation of the bypass with EU nature conservation law turned out to be one of the key challenges. In order to avoid that the conservation and maintenance of the affected Natura 2000 sites were jeopardised by the construction of the road, the zoning plan provided for the establishment of a corridor zone, located several kilometres away from the affected Natura 2000 sites. This corridor, together with the construction of ecoducts and fences, was believed to be able to offset the encroachment of the SPAs and SACs by the construction of the road. The alleged positive effects linked to the provided nature restoration and conservation measures were deemed sufficient as a means to offset the negative effects linked to the construction and operation of the bypass. As a result, the zoning plan could be approved under Article 6(3) of the Habitats Directive, whereby the nature development programme was qualified as a 'mitigation measure'.

However, the zoning plan did not remain uncontested. Several environmental NGOs were of the opinion that the alternative of a tunnel should have been opted for. Not surprisingly, the legal proceedings that were instituted before the Council of State centred on the qualification as 'mitigation measure' of the nature restoration and conservation measures that were included in the nature development programme. Basically, the opponents put forward that the proposed measures had to be qualified as 'compensatory measures', within the meaning of Article 6(4) of the Habitats Directive. In their view, the Flemish Government had erred in law by adopting the zoning plan under Article 6(3) of the Habitats Directive. The Belgian Council of State confirmed the reasoning of the environmental NGOs. Whilst it acknowledged that the construction of ecoducts and fences could still be seen as a 'mitigation measure' under Article 6(3) of the Habitats Directive, it rejected the view that the proposed restoration and conservation measure could also be qualified as such. In this regard, the Court noted that measures that were aimed at offsetting destroyed tracts of habitats are to be considered compensatory measures and could therefore only be taken into consideration when application is sought of the derogatory scheme provided for by Article 6(4) of the Habitats Directive. Accordingly, the Council of State suspended the zoning plan in the beginning of 2011.⁸¹ On the same grounds, the Council finally quashed the zoning plan in March 2013.⁸²

The strict rulings of the Council of State were greeted with strong scepticism by some politicians since, in their view, the Council of State's rigid stance seemed to block better integration of nature conservation considerations in spatial planning. In the meantime, it was suggested that by means of legal validation the further completion of the road project could still be safeguarded. However, from a legal point of view, the outcome of these proceedings was less questionable. In fact, in Flemish legal literature it had already been stated that measures that are primarily aimed at offsetting damage that had been inflicted

81 Belgian Council of State, case no. 216.548, 29 November 2011.

82 Belgian Council of State, case no. 223.083, 29 March 2013.

on a Natura 2000 site, should be qualified as compensation instead of mitigation measures.⁸³ From this perspective, it is clear that the Council of State basically only limited itself to applying the same rationale to the contested bypass route. Yet, this legal riddle continued to haunt the minds of many practitioners, who felt that blocking this more flexible approach to Article 6(3) of the Habitats Directive ultimately jeopardised the goal of sustainable development in the context of EU environmental law. By sticking to its sacrosanct principle, the Council of State seemed to offer the opponents of nature conservation law additional arguments.

Apart from the political impact of these rulings, which touch upon the legitimacy issues surrounding EU nature conservation law, it remains valuable to take a look at the legal soundness of the Council's *rationale*. The Council of State did not explicitly consider the further hints that were given by the European Commission in its 2000 Guidance on the management of Natura 2000 sites in either of its decisions. In this Guidance, the European Commission tried to draw a clear distinction between so-called mitigation measures *sensu strictu*, on the one hand, and compensatory measures, on the other hand. It was noted that while mitigation measures are an integral part of the specifications of a plan or project, compensatory measures *sensu strictu* are independent of the project (including any associated mitigation measures). Under the Commission's view, these measures are intended to offset the negative effects of the plan or project so that the overall ecological coherence of the Natura 2000 Network is maintained.⁸⁴

The functional link between the bypass road and the nature development programme was not explicitly addressed by the Council of State in its provisional ruling. It merely focused on the nature of the measures themselves and concluded that the creation of new nature areas aimed at connecting the fragmented heathlands should clearly have been addressed under Article 6(4) of the Habitats Directive. In its ruling in the annulment proceedings the Council did not leave this issue completely unaddressed, although it did not explicitly link it to the aforementioned functionality criterion. In fact, it maintained that the fact that the areas where the nature creation and restoration would take place were located several kilometres away from the affected Natura 2000 site, further underlined the fact that the measures should be qualified as compensatory measures, which were destined to offset the damage that would have been inflicted by the new road on the Natura 2000 sites. In the Council's view, the creation of wildlife corridors and nature areas outside the immediate surroundings of the affected zones, constituted clear proof of the fact that the measures were not part of the specifications of the plan.

The case law considered has further tied the hands of the Flemish planning authorities in cases where project developments are inevitably prone to cause significant residual effects. As a matter of fact, the Belgian Council of State looks eager to downplay the widely held belief that, whenever sufficient mitigation measures are considered, almost each appropriate assessment can reach the conclusion that there is no risk of significant effects. As such, the strict interpretation of the notion of 'mitigation' by the Belgian Council of State appears contrary to that of the Dutch Council of State. By stating that the creation of no less than 132 ha of mussel beds could qualify as mitigation measure for the construction of a housing zone in the IJmeer,⁸⁵ the Dutch Council of State clearly opted for a more flexible stance on the issue of mitigation. However, in the absence of a ruling of the Court of Justice on the matter, it still remains uncertain which view will eventually prevail.

Interestingly, the Dutch Council of State, when faced with a newly contested mitigation case, decided to refer the matter to the Court of Justice. The Council asked the Court of Justice whether the phrase 'not adversely affect the integrity of the site' in Article 6(3) of the Habitats Directive is to be interpreted as meaning that where the project adversely affects the area of a protected natural habitat type within the site, the integrity of the site is not adversely affected if in the framework of the project an area of this natural habitat type of equal or similar size is created within that site.⁸⁶ Depending on the outcome of these proceedings, the Belgian Council of State might need to alter its approach towards mitigation

83 See for instance: H. Schoukens et al., *Handboek Natuurbehoudsrecht*, 2011, p. 214.

84 Guidance Article 6 Habitats Directive, *supra* note 31, p. 37.

85 Dutch Council of State, case no. 200902644/2/R2, 31 August 2009. See more extensively: H. Woldendorp, 'Eén zwaluw... Een doorbraak voor gebiedsontwikkeling in Natura 2000-gebieden', 2010 *Bouwrecht*, pp. 14-24.

86 See the pending Case C-521/12, *T.C. Briels e.a. v Minister van Infrastructuur en Milieu*.

under Article 6(3) of the Habitats Directive. Without pre-empting the Court of Justice's final ruling, it is not unlikely that the rigid position of the Belgian Council of State will prove to be the more resilient one, since it appears to be more in line with the traditional restrictive interpretation given to Article 6(3) by the Court of Justice. Yet, on the other hand, the Court of Justice might be prone to allow a more flexible stance towards the assessment requirements enshrined in Article 6(3) of the Habitats Directive, thereby possibly taking the wind out of the sails of the opponents of the Habitats Directive.

3.4. Mitigation measures as a means to avoid the application of the derogation regime under Article 16 of the Habitats Directive

The difficult delimitation between mitigation measures *sensu strictu* and compensatory measures is not limited to Article 6(3) of the Habitats Directive. With some delay, the issue also popped up in the Flemish Region in the context of the strict rules on species protection, which were partly modified (upgraded) and codified in the 2009 Species Protection Regulation.⁸⁷ This latest trend is not surprising since the strict protection rules, included under Article 12(1) of the Habitats Directive, serve the protection of individual animals and leave little room for a *de minimis* threshold.⁸⁸ Hence there appears to be even less margin to bargain in comparison with the application of Article 6(3) of the Habitats Directive. Indeed, not only activities and works that could cause significant effects, in terms of the long-term conservation status of the species, are principally precluded by virtue of Article 12(1) of the Habitats Directive. Even small-scale spatial interventions that could impair the breeding site of only a few individuals of a protected species might require an additional review under the strict rules on species protection.

Some Member States have tried to downplay the significance of the strict rules on species protection, especially in order to safeguard their spatial planning policy from external interferences. Yet these efforts have proved to be unsuccessful up until now, at least from a legal point of view. Indeed, in the meantime, the Court had clarified that the requirement of 'intent', as included in Article 12(1)(b) of the Habitats Directive, also encompassed situations where the disturbance of protected species was only perceived as a mere side-effect of an activity.⁸⁹ In respect of Article 12(1)(d) of the Habitats Directive, which included a prohibition to deteriorate breeding sites or resting places, the Court subsequently held that by not limiting the latter provision to deliberate acts, the European legislator had by no means violated the proportionality principle but merely wanted to highlight the increased protection regime that is attached to the breeding sites of the species listed in Annex IV of the Habitats Directive.⁹⁰

In the Flemish Region the opposition between spatial project developments and species protection recently became even more apparent due to some strict court rulings upholding the view that planning authorities needed to consider the impacts of the spatial projects provided for in zoning plans. For instance, in 2013 the Belgian Council of State quashed a zoning plan for the extension of a sports complex since no due regard had been given to the impact of the recreational activities on the nest of a protected and threatened forest ant species.⁹¹ Only a few months later, the same court quashed a derogation that had been granted to the military authorities to cut a line of trees, which constituted the habitat of some protected bat species. The Council finally held that no satisfactory evidence had been produced to substantiate the need to cut all the trees. In the end, only few trees were affected by fungi, which urged the competent authorities to motivate why they wanted to cut the whole tree line.⁹²

Obviously, mitigation again entered the scene as problem solver. As was the case with the application of Article 6(3) of the Habitats Directive, project developers and planning authorities tried to include as many measures as possible under the tag of 'mitigation'. In the end, the creation of new habitat close to an affected breeding site, was seen as a good example of mitigation and thus able to bypass a (potentially) troublesome application of the derogation clause enshrined in Article 16(1) of the Habitats Directive. The

87 *Belgian Official Journal*, 13 August 2009.

88 See more extensively: C. George QC & D. Graham, 'After Morge, where are we now? The meaning of 'Disturbance' in the Habitats Directive', in G. Jones QC (ed.), *The Habitats Directive – A Developer's Obstacle Course*, 2012, pp. 43-74.

89 Case C-221/04, *Commission v Spain*, [2006] ECR I-04515, Paras. 72-74.

90 Case C-98/03, *Commission v Germany*, [2006] ECR I-00053, Para. 55.

91 Belgian Council of State, case no. 222.543, 18 February 2013.

92 Belgian Council of State, case no. 223.119, 5 April 2013.

European Commission also seems to acknowledge this in its 2007 Guidance document on strict species protection by submitting that mitigation can go beyond the traditional avoidance measures and, in some instances, also include actions that actively improve or manage a certain breeding site or resting place so that it does not – at any time – suffer from reduced or lost functionality.⁹³ In the Commission's view, such measures could involve e.g. 'enlarging the site or creating new habitats in, or in direct functional relation to, a breeding site or resting place, as a counterweight to the potential loss of parts or functions of the site. The ecological functionality of such measures for the species in question would of course have to be clearly demonstrated'.⁹⁴ As a consequence, not every spatial intervention which interfered with protected species was capable of triggering the application of the derogation clause.

The specific articulation between mitigation and compensation recently came up in an administrative ruling on the validity of a building permit for the demolition of an old farm house, which hosted a significant population of barn swallows each year. The conversion of the farm house would imply the destruction of the mud nests, which were used every year by a population of barn swallows. Given the threatened status of the barn swallow in the Flemish Region, the proposed development works attracted the attention of several environmental NGOs, which feared that the swallows would lose one of their few roosting sites in the area. However, the proponent of the project development was of the opinion that the impact on the swallows' habitat could effectively be mitigated through the establishment of some artificial nests on the newly constructed farm house. In his view, there was no clear need to review whether the proposed development works were compatible with the conditions set out by the derogation clauses in the Species Protection Regulation.

Ultimately, the Provincial Authority of Western Flanders, decided to adhere to the NGO's position.⁹⁵ It quashed the building permit as it believed that the creation of artificial nests on the newly rebuilt farm house did not prevent the proposed activities from violating the protection rules included in the Species Protection Regulation. More in particular, it was held that, regardless of the ecological soundness of the proposed mitigation measures, they still imply that the protected nests were to be taken away in first instance. As such, the supposedly rigid view of the Provincial Authority evinces the rigid nature of the strict rules on species protection. Nonetheless, the Provincial Authority's view is not so distant from the content of the aforementioned guidelines of the European Commission in this respect. Although the European Commission evoked a somewhat broader approach towards mitigation in its 2007 Guidance document, also comprising measures that were able to uphold the ecological functionality of the affected breeding sites, it still put clear limits on the use of mitigation measures. Aware of the negative implications for biodiversity that an all too broad application of the concept of 'mitigation measures' could cause, the European Commission clarified that measures aimed at maintaining the ecological functionality are only feasible when an activity can affect parts of a breeding site or resting place. This means that they cannot serve as 'compensatory measures', which imply the deterioration or destruction of a breeding site or nesting place. In that case, the ecological functionality of the site is not preserved and, as a result, a derogation needs to be obtained under Article 16(1) of the Habitats Directive.⁹⁶

In this view, the establishment of new roosting sites cannot be qualified as a 'mitigation measure', since, at the same time, the existing nests on the old farm house are to be taken away. Only when it could be immediately ascertained that the new nesting sites are effectively capable of attracting the swallow population, these measures could be seen as measures upholding the ecological functionality of a nesting site. Yet, in the end, such a scenario would imply that it can be established that the new nests are effectively used by the swallows before the actual demolition of the old farm house would take place. In the situation at hand, the project developer maintained that it simply had to be assumed that the barn swallows would use the artificial nests upon their yearly return to Belgium. The Provincial Authority refused to accept this premise, taking into consideration that swallows are known to be particularly sensitive to changes in their long-established roosting sites. As a result, there was no guarantee that the swallows would still

93 Guidance document on strict species protection, supra note 50, p. 47.

94 Ibid, p. 48.

95 Decision Provincial Authority of Western Flanders, 4 July 2013, case no. 38014/262/B/2013/111.

96 Guidance document on strict species protection, supra note 50, p. 48.

return to the converted farm buildings and use the artificial nests, and it needed to be checked whether a derogation could be issued for the proposed activities.

Although to our knowledge no judicial rulings have been rendered by Belgian courts on the possible use of mitigation in the context of the strict rules on species protection, a wider application of the Provincial Authority's view will lead to enhanced scrutiny in the context of development projects. Interestingly, the Dutch competent authorities issued a formal Guidance document,⁹⁷ in which it was held that no derogation was needed for construction works, even when such works implied the destruction of breeding sites, whenever new habitats were created to offset such harm. Yet, in the end, on similar grounds as the ones presented above, the Dutch Council of State refused to confirm this view.⁹⁸

4. Compensatory measures under Flemish nature conservation law: an inevitable evil?

Given the strict stance of the Belgian courts on mitigation, project developers and planning authorities increasingly had to make recourse to the derogatory clauses included in the Habitats and Birds Directives. This was especially the case for some major infrastructure projects, such as the construction of the *Deurganckdok* and the extension of the Port of Seabrugues. Since the adoption of compensatory measures is one of the three main preconditions that needs to be complied with whenever application of derogatory clauses is sought, this topic also had to be tackled in some of the legal battles and proceedings surrounding large infrastructure projects. Again, project developers tried to make a case for a more flexible approach towards compensation, whereas NGOs often advocated strict application of the criteria for compensation.

4.1. On the material scope of Article 6(4) of the Habitats Directive: what about the declassification of a Natura 2000 site?

It was a well-established view that Member States are required to apply the strict derogation clause included in Article 6(4) of the Habitats Directive whenever they want to issue permits for construction works that might significantly impair a Natura 2000 site. The extension of a port area within the boundaries of an existing Natura 2000 site is a classic example. However, in a specific Belgian case focussing on the extension of the Port of Seabrugues, the question arose whether the decision to declassify a certain Natura 2000 site in itself needed to be made subject to the application of the derogatory regime included in Article 6(4) of the Habitats Directive. This is an issue which most certainly might be of particular relevance for other Member States.

The contested decision of the Flemish Government dated from July 2000 and involved both the declassification of one Natura 2000 site, and the extension of the Port of Seabrugues. It also provided the classification of another 'compensation area', in order to offset for the reduction of the former site. Still, formally speaking, this decision had not been made explicitly subject to the requirements included in Article 6(4) of the Habitats Directive. Also no EIA had been adopted prior to the 2000 decision. Not surprisingly, in their argumentation before the Council of State, some opponents of the port extension submitted that the Flemish Government had erred by not making the decision to declassify a Natura 2000 site subject to an ecological assessment, as prescribed by the Habitats, Birds and EIA Directives.

In spite of the applicants' argumentation, the Council of State finally confirmed the view of the Flemish Government in its 2001 ruling.⁹⁹ On both counts, the Council ruled that, since the decision to delist the Natura 2000 site did not amount to a 'project', as defined by the EIA Directive,¹⁰⁰ it was not required to comply with the procedural requirements included in both the Habitats and EIA Directives. As such, the Council did acknowledge the need to comply with the specific assessment rules during the

97 This Guidance document can be consulted at: <http://florafaunawet.stowa.nl/Publicaties/Aangepaste_beoordeling_ontheffing_ruimtelijke_ingrepen.aspx?pid=84> (accessed on 10 March 2014).

98 See, amongst others, Dutch Council of State, case no. 201104545/T/T1/A3, 15 February 2012.

99 Decision Belgian Council of State, case no. 97.221, 28 June 2001.

100 Art. 1(2) of the EIA Directive defines the notion of project as follows: 'the execution of construction works or of other installations or schemes' and 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'.

course of the subsequent planning procedures for the construction of the planned docks; yet it did not deem observance of these rules necessary in the context of the decision to declassify the Natura 2000 site. Since then, the specific assessment procedures, as laid down by the Habitats and EIA Directives, have only come into play in the subsequent stage of the planning process.

At first sight, the Council's view might appear questionable. Whilst it can be maintained that a decision to declassify a Natura 2000 site does not in itself amount to a 'project', as defined in the case law of the Court of Justice,¹⁰¹ it would, in the end, be illogical and nonsensical to grant Member States additional flexibility in this respect when strict scrutiny still needs to be applied in the subsequent planning stages.

Yet it would be incorrect to read the Council's decision in such a manner. Ultimately, the Belgian Council of State merely assessed to what extent the assessment procedures included in the Habitats and EIA Directives could be applicable to a decision to declassify a Natura 2000 site. It did not explicitly express its view on the compatibility of the contested decision with the specific rules on declassification, as contained in the Habitats and Birds Directives. Moreover, on second reading, the Council's view does not differ that much from the *rationale* put forward by the Court of Justice in its earlier case law. Already in its decision in the aforementioned case of *Lappel Bank*, the Court noted that, whilst Article 6(3) and (4) of the Habitats Directive established a procedure enabling the Member States to adopt, for imperative reasons of overriding public interest and subject to certain conditions, a plan or a project adversely affecting an SPA and so made it possible to go back on a decision classifying such an area by reducing its extent, it nevertheless did not make any amendments regarding the initial stage of classification of an area as an SPA referred to in Article 4(1) and (2) of the Birds Directive.¹⁰² Subsequently, Advocate General Kokott reaffirmed this position in her Opinion in the case of *Commission v Portugal*.¹⁰³ However, in the ruling in the latter case the Court of Justice clearly indicates the limited room for declassification that is left under Article 4 of the Birds Directive. At the end of the day, the Court rejected Portugal's attempt to reduce an SPA merely on economic grounds.¹⁰⁴ The same strict *rationale* is reflected in Article 9 of the Habitats Directive, which only explicitly allows the declassification of an SAC where this is warranted by natural developments.

In its 2005 Note on the Updating of the Natura 2000 Standard Data Forms and Database the European Commission even goes one step further by highlighting that a declassification, in the framework of Article 9 of the Habitats Directive, can only be allowed for cases of 'natural' developments, which could not reasonably be avoided or prevented by applying the necessary conservation measures under Article 6 of the Habitats Directive.¹⁰⁵

This is not to say that Member States would lose all margin of discretion as regards declassification decisions. For instance, in her recent Opinion in a reference for a preliminary ruling in an Italian case, Advocate General Kokott held that declassification is warranted in some, albeit very constrained, circumstances.¹⁰⁶ Whilst stressing the Member States' obligations under Article 6(2), (3) and (4) of the Habitats Directive, even comprising the duty to restore a degraded site in some cases, she did not completely rule out the possibility of declassifying a site whenever economic developments prevented the site from being capable of making its contribution to the conservation of the natural habitats listed in the annexes to the Habitats Directive or to the setting up of the Natura 2000 network.¹⁰⁷

That said, it remains highly doubtful whether the 2000 declassification decision by the Flemish Government would have passed the strict scrutiny put forward by the Birds and Habitats Directives. At first sight, the reduction of the Natura 2000 site appeared to be exclusively based on economic interests, since it was framed in the context of the extension of the Port of Seabrugues. In the end, the Council of

101 In its ruling in *Waddenzee* the Court pointed out that the definition of 'project' in the second indent of Art. 1(2) of the EIA Directive is relevant to defining the concept of 'plan' or 'project' as provided by the Habitats Directive. See *Waddenzee*, supra note 7, Paras. 26 and 27.

102 Case C-44/95, *Regina v Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds*, [1996] ECR I- I-03805, Para. 39.

103 Opinion of Advocate General Kokott, Case C-191/05, *Commission v Portugal*, [2006] ECR I-6855, Para. 10.

104 Case C-191/05, *Commission v Portugal*, [2006] ECR I-6853, Paras. 9-16.

105 European Commission, *Updating of the Natura 2000 Standard Data Forms and Database* (Brussels, 2005), p. 6.

106 Opinion of Advocate General Kokott delivered on 20 June 2013, Case C301/12, *Cascina Tre Pini s.s. v Ministero dell'Ambiente e della Tutela del Territorio e del Mare and Others*, Paras. 32-55.

107 *Ibid*, Para. 50.

State chose the easy way out by limiting itself to addressing the argumentation presented by the applicants rather than reviewing the decision's validity in light of other grounds, which it could raise *proprio motu*.

4.2. Compensation in an existing Natura 2000 site: an easy way out?

Often it is held that compensation comprises the recreation of comparable habitats or the designation of a new Natura 2000 site to offset the habitats that are impaired by project developments. Yet, in some instances, habitats cannot be easily 'recreated' from scratch, as is the case with certain forest habitat types. Moreover, in some cases there are simply not enough parcels of land available for compensation. In sum, compensation by creating new habitats often faces considerable bottlenecks. In such cases, planning authorities often prefer the establishment of improvement and preservation measures in *existing* Natura 2000 sites as compensatory measure. In the framework of the Habitats and Birds Directives, such practices enhance the risk of 'double dipping,' since Member States are, in such cases, capable of re-using the measures they are already required to take under the Habitats and Birds Directives as compensatory measures under Article 6(4) of the Habitats Directive.

In the Flemish Region, the Council of State had to form an opinion on this specific matter, since the Flemish Government included the designation of an SPA on a location that had already been proposed as an SCI as a compensation measure for the construction of the *Deurganckdok* in the Port of Antwerp. As indicated above, the Belgian Council of State finally rejected this approach in its 2002 ruling. It more specifically held that the Flemish Government had already committed itself to adopting improvement measures in this site by selecting it as a proposed SCI.¹⁰⁸

Although, as stated in the introduction to this article, the works for the construction of the *Deurganckdok* could still proceed given the subsequent legal validation of the permits by the Flemish Parliament, this case law urged the planning authorities to reconsider their lenient approach to compensation under Article 6(4) of the Habitats Directive.

Although, at the time, the Belgian Council of State had to face strong criticism for blocking one of the largest infrastructure projects in the Flemish Region based on a requirement of EU nature conservation law, its view is not contradictory to the content of the guidelines of the European Commission in this respect. Indeed, already in its 2000 Guidance on the management of Natura 2000 sites, the Commission underlined that '[m]easures required for the "normal" implementation of the "Habitats" or "Birds" Directive cannot be considered compensatory for a damaging project. For example, the implementation of a management plan or the proposal/designation of a new area, already inventoried as of Community importance, constitute "normal measures" for a Member State.'¹⁰⁹ Also in the European Commission's view, compensatory measures should be additional to proper implementation.

In practice, this position could cause additional bottlenecks, since it will sometimes be impossible or simply too costly to purchase large tracts of vacant land in order to recreate affected habitats. In order to avoid such blocking scenarios the European Commission does not completely exclude the use of improvement measures in the context of Article 6(4) of the Habitats Directive. As a matter of fact, despite its clear stance as regards 'double dipping,' the European Commission explicitly approves of compensatory measures which include restoration or enhancement efforts in existing sites. Yet it will remain crucial to clearly review the added value of the proposed improvement measures, in comparison to the conservation measures the Member States are already required to take as part of their normal implementation effort.

5. Concluding remarks: from Nemesis to Opportunity?

The protection rules included in the Habitats and Birds Directives arguably are not the most popular set of Union rules amongst Member States. As shown by the stringent body of case law of the Court of Justice, this regulatory framework is, whenever applied strictly, capable of forcing Member States to reconsider their planning policies in terms of their impact on protected species or habitats. Arguably,

108 Decision Belgian Council of State, 30 July 2002, case no. 109.563.

109 Guidance Article 6 Habitats Directive, *supra* note 31, p. 45; Guidance Article 6(4) Habitats Directive, *supra* note 34, p. 10.

most politicians are not keen on revising planning policies based on arguments linked to the presence of protected habitats or species on a given site. Politicians offering the prospect of economic growth win more votes than politicians who let long-term environmental concerns prevail over short-term economic benefits. As a consequence, the protection and assessment obligations enshrined in the Habitats and Birds Directives have become the nemesis of many decision makers and project developers. However, in the wake of earlier U.S. experiences in this respect, the concepts of ‘mitigation’ and ‘compensation’ have emerged as novel tools in the context of EU nature conservation law, allegedly better equipped to align spatial policies with the conservation and protection of protected habitats and species.

Despite the obvious importance of both tools, as instrument for better aligning economic and biodiversity interests, Member States are still left adrift as regards the specific delimitation of the two concepts. Not surprisingly, many national planning authorities opted for a broad interpretation of the concept of ‘mitigation’, since this would allow many project developers to circumvent the strict confines of the derogation clauses, included inter alia in Article 6(4) and 16(1) of the Habitats Directives. The planning and permitting practices in the Flemish Region, as described above, starkly illustrate these trends. As shown by this analysis, the recent case law of the national courts in the Flemish Region as regards nature conservation law mainly focusses on interpretation issues, all connected with the blurry distinction between mitigation and compensation. It is to be expected that similar questions as regards the precise articulation between the Habitats and Birds Directives and mitigation will continue to pop up in other Member States.

In contrast to its earlier cautious approach towards nature conservation law, the Belgian Council of State seems to have adopted a more active role in nature conservation cases. In its recent rulings it no longer shies away from letting nature conservation prevail over policy preferences favouring development. In anticipation of the first rulings of the Court of Justice in this regard, national courts of other Member States could follow the examples as offered by the recent case law of the Belgian Council of State. Whilst sometimes criticised for adopting an all too strict stance on the notion of ‘mitigation’, and thereby pushing many project developments to the strict confines of the derogatory clauses, the Belgian Council of State seems surprisingly keen on letting nature conservation interests prevail when interpreting the Habitats and Birds Directives. In fact, many of the described rulings effectively highlight the Council’s reluctance towards approaches which appear to undermine the strict assessment rules stipulated by the Habitats and Birds Directives. In the end, this might prove to be the most enduring and sensible approach, especially taking into account the deplorable state of many of the European habitats and species in the Flemish Region. After all, it was only due to the strict rulings of the Belgian Council of State that project developers were willing to take into consideration EU nature conservation law in the first place. Strict judicial activism as the ultimate saviour of EU’s biodiversity? Only the future will tell. ¶