

COMPENSATORY MEASURES IN EUROPEAN NATURE CONSERVATION LAW

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OVERVIEW

1. Introduction

2. Compensatory measures < NATURA 2000: Art. 6 (4) Habitats Directive (compensatory measures) and < SPECIES PROTECTION: Art. 16(1) Habitats Directive (maintaining a favourable conservation status)

3. Obligatory, aim and characteristics ? Relation to mitigation, usual nature conservation measures, and former nature development measures, and to the assessment of the adverse impact and of alternative solutions ?

4. Conclusion

NATURA 2000: PROTECTION REGIME

- Art. 6 (2) HD: prohibition of deterioration of natural habitats and significant disturbance of species in Natura 2000
- Art. 6 (3) HD: appropriate assessment of a plan or project likely to have a significant adverse effect
- Art. 6 (4) HD:
 - No adverse effect: YES;
 - Adverse effect: NO, except:
 - 1. absence of alternative solutions
 - 2. imperative reasons of overriding public interest, including those of a social or economic nature
 - 3. compensatory measures

NATURA 2000: PROTECTION REGIME

- Text of art. 6 (4) para 1 HD: “*The Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.*”
- Guidance document Commission’s services
- 20 Commission’s opinions under art. 6(4) para 2
- Case-law Court of Justice: Acheloos case 2012 + Briels case 2014
- Doctrine and national case-law

COMPENSATION VS. MITIGATION

- Mitigation is not mentioned in article 6 (3) or (4) HD
- Guidance + Opinions + (most) Doctrine: clear distinction
 - Mitigation: to minimize adverse effects (e.g. ecoduct) – Compensation: to offset adverse effects (e.g. creating new habitat)
 - Mitigation is part of a plan or project and of an alternative solution
 - Compensation: after appropriate assessment
 - Rationale: not to jeopardize a sound assessment
- New case-law: CJEU 15 May 2014, case 521/12, Briels, request Raad van State Netherlands



COMPENSATION VS. MITIGATION

- New case-law: CJEU 15 May 2014, case 521/12, Briels, request Raad van State Netherlands
 - Widening of motorway A2 → drying out and acidification of molinia meadows, acidification due to nitrogen deposits (7 ha, ...)
 - Lessening the environmental impact by hydrological measures in another molinia meadow in the planning area, that would then develop = mitigation ?
 - Project is meanwhile finished
 - Court's rulings:
 - Precautionary principle
 - Creating new habitat = compensation, not mitigation (uncertainty whether the habitat will develop ?)
 - Assessment may not be circumvented by calling it mitigation and including it in the project
 - Assessment is necessary to define compensation measures



COMPENSATION: ADDITIONAL, AIM, IN-KIND, SIMULTANEOUS, FEASIBLE

- Guidance + Opinions + Doctrine:
 - Compensation goes beyond the normal and standard measures required for Natura 2000 (but how to determine ?)
 - Ensure the overall coherence of Natura 2000: on-site (biogeographical region), in-kind (e.g. wet heathland by wet heathland), ... (if less quality → overcompensation) (importance of protecting potential Natura 2000 sites !)
 - Operational once the damage is effective (if not → overcompensation)
 - Long-term ensured (legally, financially, ...)
 - Compensation costs are part of the plan or project

COMPENSATION: QUALITATIVE AND QUANTITATIVE, COMPENSATION RATIOS

- Doctrine:
 - ‘No net-loss of biodiversity’ → also quantitative if parts of Natura 2000 are lost due to other land-use
 - Compensation outside Natura 2000 → obligation to designate the site as part of Natura 2000
- Guidance and Opinions: implicitly, no strong check (or: outside person ...)
 - But in practice (Opinions) compensation ratios between 1:1 till 1:12 (Germany: very detailed)

COMPENSATION BEFOREHAND ?

- Doctrine: need for more comprehensive and proactive approach towards compensation (“plan” → some room)
- Guidance and Opinions:
 - Case by case-approach (< link with the damage)
 - Compensation must be in place before the damage
 - Habitat banking rarely useful
- Recent case-law: case 521/12
- Geert Van Hoorick: FORMER nature development measures (already operational, but independent from plan or project) → the appropriate assessment turns positive → no compensatory measures have to be taken because one does not get into art. 6 (4) HD

BIOLOGICAL INTEGRITY VS. MAN-MADE NATURE

- Guidance, Opinions, Doctrine:
- Need for biological integrity → ensure the coherence of Natura 2000
- Case-law case 43/10 Acheloos river in Greece
 - Deviating the river from Ionian to Aegean sea for irrigation and drinking water purposes and hydro-electric dams
 - Landscape damage, dramatic drop in the water supply in delta (Natura 2000)
 - Only partly finished
 - Court's rulings:
 - Huge effect of the plan or project has to be taken into account to determine the compensatory measures
 - Compensation can be the conversion of a natural fluvial ecosystem into a largely man-made ecosystem (if the coherence of Natura 2000 is ensured) (!) (contradictio in terminis ?)



SPECIES PROTECTION: PROTECTION REGIME

- Art. 12 (1) HD: prohibition of deterioration of breeding site or resting place of annex IV (a) species
- Art. 13 (1) HD: prohibition of destruction of plants of annex IV (b) species
- Art. 16 (1) HD: derogation possible, if:
 - 1. no satisfactory alternative
 - 2. mentioned imperative reasons
 - 3. maintenance of the concerned species' populations

SPECIES PROTECTION: PROTECTION REGIME

- Text of art. 16 (1) HD: “ *... that the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range.*”
- Guidance document species protection Commission’s services
- Doctrine and national case-law

COMPENSATION

- Compensation is not mentioned in article 16 (1) HD
- Guidance + Doctrine:
 - Most characteristics of compensatory measures (different from mitigation, in-kind, simultaneous, independent from assessment, ...) are also valid here
 - Guidance: compensation vs. 'CEF measures'
 - Geert Van Hoorick: Compensatory measures beforehand or former nature development measures can enhance the conservation status, making it unnecessary to compensate but without falling outside art. 16 (1) HD

CONCLUSIONS

- Obligation to compensate under art. 6 (4) HD is strong and has added ecological value
- Recent case-law in the Court's Briels judgment clearly distinguishes mitigation and compensation
- The passage about man-made nature in the Court's Acheloos judgment is a passing fad ?
- Under art. 16 (1) HD there is the obligation to maintain the species in a favourable conservation status; compensatory measures are one way to obtain this (= different from art. 6 (4) HD)
- Further reading: my article in Utrecht Law Review, 2014, pp. 161-171:
“Compensatory Measures in European Nature conservation Law”
<https://www.utrechtlawreview.org/index.php/ulr/article/view/URN%3ANBN%3ANL%3AUI%3A10-1-115820>