

## Compensatory measures for large scale projects in European nature conservation law: ~~a state-of-the-art~~ after the Briels case ~~and the Acheloos River case~~

### Abstract

The Wild Birds and Habitats Directives are the cornerstones of EU nature conservation law, aiming at the conservation of the Natura 2000 network, a network of protected sites under these directives, and the protection of species. The protection regime for these sites and species is not absolute: member states may, under certain conditions, allow plan or projects that can have an adverse impact on nature. In this case compensatory measures can play an important role on safeguarding the Natura 2000 network and ensuring the survival of the protected species.

This contribution analyses whether taking compensatory measures is always obligatory, and discusses the aim and the characteristics (i.e. the naturalness) of compensatory measures, in relation to other kinds of measures such as mitigation measures, (+) usual nature conservation measures, and former nature development measures, and to the assessment of the adverse impact caused by the plan or project and of the alternative solutions. These issues will be discussed in light of the text of the legislation, the guidance and practice of the European Commission, (legal) doctrine and the judgments of the Court of Justice in the Briels case and (to a lesser extent) the Acheloos River case.

Wild Birds Directive; Habitats Directive; Natura 2000; species protection; compensatory measures; mitigation; nature conservation; Briels case; Acheloos River case

### 1. Introduction

The Wild Birds and Habitats Directives<sup>1</sup> are the cornerstones of EU nature conservation law, aiming to achieve the conservation of the Natura 2000 network, a network of protected sites under these directives, and the protection of species. The protection regime for these sites and species is not absolute: Member States may, under certain conditions, allow plans or projects that can have an adverse impact on nature. In this case compensatory measures can play an important role in safeguarding the Natura 2000 network and ensuring the survival of the protected species. In this contribution we will discuss the obligations of the Member States under the Wild Birds and Habitats Directives to compensate for biodiversity loss within the framework of Article 6(4) of the Habitats Directive. This provision requires the Member States to take compensatory measures to ensure the coherence of Natura 2000 in cases where plans or projects causing negative impacts on a Natura 2000 site have been allowed because of overriding public interests. For a long time, there was no European case law regarding the

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<sup>1</sup> Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds, OJ L 20, 26.1.2010, p. 7; Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 59, 8.3.1996, p. 63; see M. Blin, 'Les directives oiseaux et habitats', 2009 *Revue Juridique de l'Environnement*, no. extra 1, pp. 115-119; N. De Sadeleer, 'Habitats Conservation in EC Law – From Nature Sanctuaries to Ecological Networks', 2005 *Yearbook of European Environmental Law* 5, pp. 215-252.

characteristics of compensatory measures, but in 2012 the *Acheloos River* case in Greece came before the Court of Justice<sup>2</sup> on a reference for a preliminary ruling, and in 2014 the issue arose again in the *Briels* case, a preliminary reference from the Netherlands<sup>3</sup>. Therefore we will focus on these two cases (*in particular on the Briels case*), which regard on the one hand to the relationship between compensation, mitigation, and conservation (usual nature conservation measures, nature development measures), and the assessment of alternative solutions, and on the other hand to the naturalness of compensation<sup>4</sup>.

## 2. Text of Article 6(4) of the Habitats Directive

The obligation relating to compensatory measures in Article 6(4) of the Habitats Directive<sup>5</sup> is formulated as follows: ‘If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.’

The provision aims at taking compensatory measures in case of damage to Natura 2000 sites when plans or projects have been allowed despite a negative assessment because of overriding public interests.

For the interpretation of the obligation relating to compensatory measures, besides the two mentioned judgments of the Court of Justice, there is a Commission Guidance document on Article 6(4)<sup>6</sup> that can be useful. However, it merely reflects the views of the Commission services only and is not of a binding nature. Nevertheless, it can be very helpful and we can be certain that the Court of Justice tends to look at such guidance documents.<sup>7</sup> Up until now the Commission has issued 20 opinions under Article 6(4)(2),<sup>8</sup> and although these opinions are difficult to evaluate for an outside observer, they at least provide an insight into how the

<sup>2</sup> Case 43/10, *Nomarchiaki Aftodioikisi Aitolokarnanias v Ipourgos Perivallontos*, [2012] ECLI:EU:C:2012:560.

<sup>3</sup> Case 521/12, *T.C. Briels and others v Minister van Infrastructuur en Milieu*, [2014] ECLI:EU:C:2014:330.

<sup>4</sup> See for an outline before the *Briels* case was judged G. Van Hoorick, ‘Compensatory Measures in European Nature Conservation Law’, 2014 *Utrecht Law Review* 10, n° 2, pp. 161 -171.

<sup>5</sup> See J. Bonichot, ‘L’article 6 de la directive habitats et la CJCE’, 2009 *Revue Juridique de l’Environnement*, no. extra 1, pp. 127-129.

<sup>6</sup> European Commission (2007), *Guidance document on Article 6(4) of the ‘Habitats Directive’ 92/43/EEC*, <[http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance\\_art6\\_4\\_en.pdf](http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf)> (last visited 23 March 2014).

<sup>7</sup> E.g. Case 182/10, *Solvay and Others*, [2012] ECLI:EU:C:2012:82, Para. 28.

<sup>8</sup> <[http://ec.europa.eu/environment/nature/natura2000/management/opinion\\_en.htm](http://ec.europa.eu/environment/nature/natura2000/management/opinion_en.htm)> (last visited 23 March 2014).

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compensation obligation is dealt with in practice.<sup>9</sup> There also exists some legal doctrine<sup>10</sup> about the topic, and in some Member States also national case law.<sup>11</sup>

### 3. Compensatory vs. mitigation measures – the *Briels* case

The term compensatory measures is not defined in the Habitats Directive. In the Guidance document<sup>12</sup> a distinction is made between mitigation measures (those measures which aim to minimize, or even cancel, the negative impacts on a site that are likely to arise as a result of the implementation of a plan or project) and compensatory measures (those measures which are independent of the project, including any associated mitigation measures, and 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). Let us give an example: if the plan or project is the construction of a motorway, an ecoduct or wildlife crossing to connect the populations of the negatively affected species amounts to ‘mitigation’, the creation of a new habitat for the affected species is ‘compensation’. The meaning of mitigation here is close to the definition used in the European doctrine:<sup>13</sup> minimization, such as limiting or reducing the degree, extent, magnitude or duration of adverse impacts, by scaling down, relocating or redesigning elements of a project. In the Commission’s opinions, for example, the following measures were regarded as mitigation measures: an extension of a bridge over a river to reduce the impact on alluvial forests,<sup>14</sup> noise barriers,<sup>15</sup> a 300-meter viaduct,<sup>16</sup> anti-collision barriers of 4 meters for bats,<sup>17</sup> the removal of temporary construction roads after completion,<sup>18</sup> collecting and relocating protected species (e.g. bulbs and reptiles),<sup>19</sup> prohibiting construction activities at night<sup>20</sup> or dredging activities during spawning times,<sup>21</sup> postponing the time frame for felling trees during the breeding season,<sup>22</sup> and speed limits for ships to reduce the intensity of their waves.<sup>23</sup> The measures which the Commission regarded as compensatory were in all cases the creation or restoration of the affected habitat types or species’ habitats. In contrast, , contrary to the European approach , ‘mitigation’ in the USA includes ‘compensation by replacement or substitution’<sup>24</sup>.

<sup>9</sup> See L. Krämer, ‘The European Commission’s Opinions under article 6(4) of the habitats directive’, 2009 *J. Env. L.* 21, no 1, pp. 59-85; D. McGillivray, ‘Biodiversity loss: the EU Commission’s approach to compensation under article 6 of the Habitats Directive’, 2012 *J. Env. L.* 24, pp. 417-450.

<sup>10</sup> E.g. F. Haumont, ‘L’application des mesures compensatoires prévues par Natura 2000’, 2009 *ERA Forum* 10, pp. 611-624; D. McGillivray, ‘Biodiversity loss: the EU Commission’s approach to compensation under article 6 of the Habitats Directive’, 2012 *J. Env. L.* 24, pp. 417-450.

<sup>11</sup> See e.g. H. Schoukens & A. Cliquet, ‘Mitigation and Compensation under EU Nature Conservation Law in the Flemish Region: Beyond the Deadlock for Development Projects?’, 2014 *Utrecht Law Review* 10, no. 2, pp. 194-215.

<sup>12</sup> Guidance document, supra note 4, p. 10.

<sup>13</sup> K. Rundcrantz & E. Skärbäck, ‘Environmental compensation in planning: a review of five different countries with major emphasis on the German system’, 2003 *Eur. Env.* 13, no. 4, p. 206.

<sup>14</sup> Opinion in *Motorway A 49*.

<sup>15</sup> Opinion in *Peene*.

<sup>16</sup> Opinion in *TGV East*.

<sup>17</sup> Opinion in *Motorway A 20*.

<sup>18</sup> Opinion in *Motorway A 49*.

<sup>19</sup> Opinion in *Györ*.

<sup>20</sup> Opinion in *Motorway A 20*.

<sup>21</sup> Opinion in *River Elbe*.

<sup>22</sup> Opinion in *River Main*.

<sup>23</sup> Opinion in *River Elbe*.

<sup>24</sup> E.g. J.B. Zedler, ‘Ecological issues in wetland mitigation: an introduction to the forum’, 1996 *Ecological Applications* 6(1), pp. 33-37.

The clear distinction in the EU, which distinguishes mitigation from compensatory measures, is not only of academic value but necessary so as not to jeopardize a sound assessment of the adverse effects of the plan or project and of the alternative solutions, and not to circumvent the application of Article 6(4) in cases of a negative impact. Otherwise, combining an environmentally damaging plan or project with strong compensatory measures could supersede a less damaging alternative plan or project combined with weak compensatory measures, or could even be allowed without need to apply the derogation regime of Article 6(4). This cannot be the purpose of the Habitats Directive, because, as stated in the Guidance document,<sup>25</sup> it is widely acknowledged that it is highly unlikely that by taking compensatory measures the conservation status of the related habitats and species can be reinstated to the level they had before the damage by a plan or project. Mitigation measures, however, are an integral part of the specifications of a plan or project.<sup>26</sup>

Thus, compensatory measures should be considered only after having ascertained a negative impact on the integrity of a Natura 2000 site.<sup>27</sup> Specifically, the logic and rationale of the assessment process require that if a negative impact is foreseen then an evaluation of alternatives should be carried out as well as an appreciation of the importance of the plan or project in relation to the natural value of the site. Once it is decided that the plan or project should proceed, then it is appropriate to move on to a consideration of compensatory measures.<sup>28</sup>

In its judgment in the *Briels* case, the Court of Justice supports this vision. This case was brought to the Court by a request for a preliminary ruling from the Raad van State (Council of State) of the Netherlands.<sup>29</sup> The Raad van State wanted to know (⊕) if the phrase 'not adversely affect the integrity of the site' in Article 6(3) has to be interpreted as follows: when 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 that natural habitat type of equal or similar size is created within that site. In other words, the question is whether compensation measures may be taken into account when assessing the project.

The case was about the widening of the A2 motorway towards Eindhoven, which was assessed as being likely to have a negative impact on the Natura 2000 site Vlijmens Ven, Moerputten & Bossche Broek. This was designated for, in particular, the natural habitat type molinia meadows, which is a non-priority habitat type. The assessment concluded that the A2 motorway project would cause the drying out and acidification of molinia meadows (acidification due to nitrogen deposits). As a result of this assessment the Dutch government adopted hydrological measures in another molinia meadow within the proposed development area, which would then develop into a high-quality habitat. The question was whether these measures should be seen as mitigation, preventing the application of Article 6(4), or as compensation in the sense of Article 6(4). The project itself had meanwhile been completed.

<sup>25</sup> Guidance document, supra note 4, p. 17.

<sup>26</sup> Guidance document, supra note 4, p. 10.

<sup>27</sup> Case 182/10, *Solvay and others*, [2012] ECLI:EU:C:2012:82, Paras. 73 and 74; Case C-258/11, *Sweetman and others*, [2013] ECLI:EU:C:2013:220, Para. 35.

<sup>28</sup> Guidance document, supra note 4, p. 11; Opinion given by the Advocate General in Case 239/04, *Commission v Portuguese Republic*, Para. 35; In conformity therewith in Belgium the Raad van State (this is the highest administrative court in Belgium) (RvS 29 November 2011, no. 216.548, *vzw Natuurpunt Limburg and others*; RvS 29 March 2013, no. 223.083, *vzw Natuurpunt Limburg and others*, <[www.raadvst-consetat.be](http://www.raadvst-consetat.be)>) ruled that nature development measures (the creation of habitats by the expropriation of agricultural land) accompanying a motorway project could not be seen as mitigation measures to take away the negative effects of the plan or project, and therefore could not be taken into account in the appropriate assessment. These measures were clearly compensatory measures.

<sup>29</sup> Case 521/12, supra note 9; ABRvS 7 November 2012, 201110075/1/R4 en 20120185/1/R4.

Briels and others brought an action before the referring court against two ministerial orders approving the project. In their viewpoint the Minister could not lawfully adopt the orders for the A2 motorway project, given the negative implications of the widening of the A2 motorway for the Natura 2000 site in question. They argued that the development of new molinia meadows on the site, as provided for in the ministerial orders at issue in the main proceedings, could not be taken into account in determining whether the site's integrity was affected. They submitted that such a measure cannot be categorised as mitigation, a concept which is, moreover, non-existent in the Habitats Directive.

The Court rejected the view of the Dutch government and regarded the measures as being compensatory measures. The Court held that the application of the precautionary principle in the context of the implementation of Article 6(3) required the competent national authority to assess the implications of the project for the Natura 2000 site concerned in view of the site's conservation objectives and to take into account the protective measures, forming part of the project, that aimed to avoid or reduce any direct adverse effects upon the site, in order to ensure that it does not adversely affect the integrity of the site<sup>30</sup>. The Court clearly refers here to mitigation measures, however without expressly stating so.— The Court adds that protective measures provided for in a project which are aimed at compensating for the negative effects of the project on a Natura 2000 site cannot be taken into account in the assessment of the implications of the project provided for in Article 6(3)<sup>31</sup>. The Court's main reason for adopting this viewpoint is that the positive effects of the future creation of a new habitat are difficult to forecast and will be visible only several years into the future<sup>32</sup>. (3) As second reason for its viewpoint the Court points out that it —is seeking to avoid a situation where competent national authorities allow so-called 'mitigating' measures, which are in reality compensatory measures, in order to circumvent the specific procedures provided for in Article 6(3) and thereby authorise projects which adversely affect the integrity of the site concerned<sup>33</sup>. Authorisation for the project therefore needs to be given in accordance with the procedure for compensation measures, provided for in Article 6(4).

#### 4. Compensatory measures vs. usual nature conservation measures

It is obvious, as is stated in the Guidance document,<sup>34</sup> that compensatory measures should go beyond the normal or standard measures required for the protection and management of Natura 2000 sites. But because space is limited and 'naturalizing' agricultural or other intensively used land often meets strong opposition from farmers and other people, governments sometimes prefer to take qualitative compensation measures within existing Natura 2000 sites, thus enhancing their ecological value.

It is not always easy to determine in a real case what the normal or standard measures required for the protection and management of Natura 2000 sites are. (4) A clear criterion could be the conservation status of the related habitats and species in the Natura 2000 site where the compensatory measures are taken: in principle, as long as the conservation status of the related habitats and species in this site is not favourable, 'compensatory measures' in this site cannot be regarded as going beyond the normal or standard measures for the protection

<sup>30</sup> Case 521/12, supra note 9, Para. 28.

<sup>31</sup> Case 521/12, supra note 9, Para. 29.

<sup>32</sup> Case 521/12, supra note 9, Para. 32.

<sup>33</sup> Case 521/12, supra note 9, Para. 33.

<sup>34</sup> Guidance document, supra note 4, p. 10.

and management of Natura 2000 sites, and the Member State should have the burden of proving the opposite.<sup>35</sup>

#### 5. Compensation beforehand; compensation vs. nature development measures and habitat banking

In practice there is a need for a more comprehensive and proactive approach towards compensation, in which negative assessments of several (succeeding or territorially close) plans and projects in a certain region (e.g. a seaport) and also the relevant compensatory measures are bundled together and handled early on during the planning phase. But questions arise as to whether the Wild Birds and Habitats Directives can deal with this need for flexibility and whether this approach could possibly endanger the Natura 2000 network. In the Guidance document it is mentioned several times<sup>36</sup> that a case-by-case approach is appropriate, but by using the word ‘plan’, Article 6(3) of the Habitats Directive provides some room for a comprehensive approach: several (succeeding or territorially close) projects can be included in one plan (e.g. for the development of a seaport). The Guidance document states that best efforts should be made to assure compensation is in place beforehand<sup>37</sup> (i.e. before the damage to Natura 2000 is caused), thus not prohibiting a proactive approach, and in recent opinions<sup>38</sup> the Commission has considered it necessary that the compensatory measures are completed before the damaging activities begin. But there seem to be limits as to how long beforehand the compensation should be in place. Given the link with the damage that will be caused, the appropriate assessment, and the strict requirement that compensation should ensure the coherence of the Natura 2000 network, it seems that there is only limited room for prior nature development measures to be regarded as compensatory measures under Article 6(4) of the Habitats Directive. This also applies to habitat banking,<sup>39</sup> as the Guidance document<sup>40</sup> considers it as being rarely useful in the framework of compensation. This does not have to discourage Member States from proactively taking nature development measures or setting up habitat banking schemes for Natura 2000 sites. In practice these measures can enhance the conservation status of the related habitat and species, and by doing so, make them less vulnerable to damage, i.e. thereby requiring a higher damage level to qualify the effect of the plan or project as significant within the meaning of Article 6(3) of the Habitats Directive.

<sup>35</sup> In Belgium there was a case before the Raad van State (RvS 30 July 2002, no. 109.563, *Apers and others*, <[www.raadvst-consetat.be](http://www.raadvst-consetat.be)>) in which it was determined that nature development measures at a proposed site of Community interest under the Habitats Directive could not be seen as compensatory measures in the sense of Article 6(4) of the Habitats Directive for the destruction of a special protection area under the Birds Directive because of overriding public interests, given that the Habitats Directive itself obliges the Member States to ensure a sound management of these sites. This judgment gave rise to some critical remarks in legal doctrine (H. Schoukens et al., *Handboek natuurbehoudsrecht*, 2011, p. 226) because, as mentioned, the Habitats Directive and the Guidance document do not exclude such compensatory measures as such. Assuming that it was not evident that in the Belgian case the compensatory measures did go beyond the normal or standard measures required for the protection and management of Natura 2000 sites, the judgement of the Raad van State can be seen as being correct.

<sup>36</sup> E.g. Guidance document, supra note 4, pp. 17 and 19.

<sup>37</sup> Guidance document, supra note 4, p. 13.

<sup>38</sup> E.g. opinion in *Granadilla and Motorway A 20*.

<sup>39</sup> G. Van Hoorick, ‘Innovative legal instruments for ecological restoration’, in I. Boone et al. (eds.), *Liber Amicorum Hubert Bocken. Dare la luce*, 2009, pp. 483-488. Two studies commissioned by the Commission have been made on this topic: REMEDE, *Compensation in the form of Habitat Banking. Short Case Study Report*, 2008, <<http://www.envliability.eu/docs/D12CaseStudies/D12CaseStudies.html>> (last visited 23 March 2014); EFTEC, IEEP et. al, *The use of market-based instruments for biodiversity protection – The case of habitat banking – Summary Report*, 2010, <<http://www.ieep.eu/work-areas/biodiversity/2010/02/the-use-of-market-based-instruments-for-biodiversity-protection-the-case-of-habitat-banking>> (last visited 23 March 2014).

<sup>40</sup> Guidance document, supra note 4, p. 16.

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In light of the above discussed requirements –for compensatory measures, the nature development measures or the newly developed habitats in the habitat banking system have to be operational a considerable time before the plan or project affecting Natura 2000 is put in place; only under these circumstances can the result of these measures legally play a role in the appropriate assessment.

#### 6. Biological integrity vs. man-made nature – the *Acheloos River* case

The Guidance document stresses the importance of the biological integrity of Natura 2000. Compensatory measures under the Habitats Directive must be established according to the characteristics of the biological integrity of the site that is likely to be lost or damaged, and according to the likely significant negative effects that would remain after mitigation. Biological integrity can be defined as all those factors that contribute to the maintenance of the ecosystem including structural and functional assets. In the framework of the Habitats Directive, the biological integrity of a site is linked to the conservation objectives for which the site was designated as part of the Natura 2000 network.<sup>41</sup> Once the biological integrity likely to be damaged and the actual extent of the damage have been identified, the measures in the compensation programme must specifically address those effects, so that the elements of integrity contributing to the overall coherence of the Natura 2000 network are preserved for the long term.<sup>42</sup> The area selected for compensation must have – or must be able to develop – the specific features attached to the ecological structure and functions, and required by the habitats and species populations. This relates to qualitative aspects like the uniqueness of the assets impaired and it requires that consideration be given to local ecological conditions.<sup>43</sup> ~~(5)~~ In recent cases<sup>44</sup> submitted for a Commission opinion it seems that Germany has delivered detailed explanations, per habitat type, also quantitatively, of the proposed compensatory measures.

In 2012 the case of the *Acheloos River* in Greece was brought before the Court of Justice<sup>45</sup> on a reference for a preliminary ruling (as a result of no less than 14 questions by the Greek Council of State). The controversial Acheloos diversion scheme is more than 80 years old and is a huge project, altering the course of the Acheloos River and making it flow into the Aegean instead of the Ionian Sea. The river has its source in the Pindus mountains, it flows through Natura 2000 sites and has a delta that has considerable nature conservation value. Despite actions by environmental groups, numerous judgments annulling Government decisions by the Greek Council of State and ~~(6)~~ even a **discontinuation of the allocation of EU Structural Funds for the project ~~ban~~ in the 1990s by the EU Commission**, parts of the project, consisting of the construction of hydro-electric dams and associated reservoirs and tunnels, have already been completed in the last couple of decades, –destroying many landscapes around the river and leading to a dramatic drop in the water supply by the river in the delta. The river water is being diverted to the Thessaly plains **for drinking water supply and** mainly to irrigate maize and cotton crops.<sup>46</sup>

<sup>41</sup> Guidance document, supra note 4, p. 15.

<sup>42</sup> Guidance document, supra note 4, p. 16.

<sup>43</sup> See Guidance document, supra note 4, p. 18.

<sup>44</sup> E.g. opinions in *Karlsruhe Airport*, *Lübeck Airport*, etc.

<sup>45</sup> Case 43/10, supra note 8; See P. De Smedt, 'Heikele toepassingsvragen bij de Kaderrichtlijn Water, in relatie tot de Habitatrichtlijn, naar aanleiding van een omstreden Griekse rivieromleiding' (annotation Case 43/10), 2013 *Tijdschrift voor Milieurecht* 2, pp.153-169; H. Schoukens, 'Omlegging Griekse rivier: de mythe van "groene" infrastructuurprojecten', 2013 *Tijdschrift voor omgevingsrecht en omgevingsbeleid*, no. 1, pp. 67-69.

<sup>46</sup> <<http://www.balcanicaucasos.org/eng/Regions-and-countries/Greece/Greece-fight-for-the-soul-of-the-Achelous-River-128205>> (last visited 23 March 2014).

(7) In the legal proceedings the question arose whether the government measures leading to the partial diversion of the Acheloos river for water supply and electricity generation purposes was in conformity with i.a. the EU Water Framework Directive<sup>47</sup> and Habitats Directive. Although the Court's judgment allowed the Greek Council of State to uphold their cessation of the project, which seems now to be definitely abandoned by Greek government<sup>48</sup>, its interpretation of Article 6(4) of the Habitats Directive can give rise to some comments. Not controversial is that ~~The Court of Justice~~ acknowledged that the supply of drinking water, one of the reasons that Greece relied upon for justifying the project, can be seen as an imperative reason of overriding public interest relating to human health in the sense of Article 6(4) of the Habitats Directive. ~~But the Court, also and~~ viewed irrigation as being an imperative reason of overriding public interest though not related to human health, ~~and moreover, The Court~~ stated that, in general, irrigation could be considered to be related to beneficial consequences of primary importance for the environment.<sup>49</sup> However, this must be seriously doubted if-, as in this case, it is for the cultivation of maize and cotton. Particularly interesting for this contribution, ~~however,~~ is the Court's judgment in relation to the compensatory measures adopted. On the one hand, the Court stated that the extent of the diversion of water and the scale of the works involved in that diversion are factors that must be taken into account in order to identify with precision the adverse impact of the project on the site concerned and, therefore, to determine the nature of the necessary compensatory measures required to ensure the protection of the coherence of Natura 2000.<sup>50</sup> Thus it seems that in this case huge compensatory measures would have had to be taken. On the other hand, the Court ruled that the compensation obligation laid down in Article 6(4), interpreted in the light of the objective of sustainable development,<sup>51</sup> as enshrined in Article 6 TFEU, permits, in relation to sites which are part of the Nature 2000 network, the conversion of a natural fluvial ecosystem into a largely man-made fluvial and lacustrine ecosystem provided that the conditions are met to ensure the protection of the overall coherence of Natura 2000.<sup>52</sup> With this last statement, i.e. that a natural ecosystem may be compensated by a man-made ecosystem,<sup>(8)</sup> the Court did not really adhere to the requirements for biological integrity and ecological functionality in the Guidance document, ~~and has slipped from its usual requirement that Member States should implement high environmental standards.~~ The question even arises whether it is a *contradictio in terminis* that conversing natural ecosystems in man-made ecosystems one can ensure a long-term protection of the coherence of Natura 2000. and Certainly, in contrast to the Court's view, this is not the purpose of sustainable development<sup>53</sup> (perhaps except for saline deserts when there is no longer a more natural

<sup>47</sup> Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1.

<sup>48</sup> <http://www.wwf.gr/en/component/joomblog/post/an-ancient-myth-turned-into-a-modern-victory-for-nature> (last visited 1 June 2015).

<sup>49</sup> Case 43/10, supra note 8 Para. 125.

<sup>50</sup> Case 43/10, supra note 8, Para. 132.

<sup>51</sup> Sustainable development is only ensured when both intergenerational (environmental protection) and intragenerational (fair economic and social development) equity is ensured and equally considered through the decision-making (V. Barral, 'Sustainable development in international law: nature and operation of an evolutive legal norm', 2012 *EJIL* 23, pp. 380-381).

<sup>52</sup> Case 43/10, supra note 8, Para. 139.

<sup>53</sup> Compensatory habitat creation can probably be used in some wetlands and intertidal environments, but the prospects for success in many terrestrial situations are far less certain (R. Morris et al., 'The Creation of Compensatory Habitat – Can it Secure Sustainable Development?', 2006 *J Nat Conserv* 14, p. 106).

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alternative<sup>54</sup>). But avoiding and minimizing human encroachment upon natural ecosystems certainly is.<sup>55</sup>

## 7. Conclusions

The obligation to take compensatory measures under Article 6(4) of the Habitats Directive, as interpreted by the Court of Justice and by the Commission's guidance and practice appears to create –a strong legal duty for the Member States. Compensatory measures differ from mitigation, former nature development, and usual nature conservation measures. Recent case law of the Court in the *Briels* case supports this view. By doing so, the Court emphasises that compensatory measures have an added ecological value. They do not jeopardize an appropriate assessment of alternative solutions, nor are they means to circumvent an appropriate assessment of the project's negative impacts. Recent case law of the Court in the *Acheloos River* case, however, allows too much room for the creation of man-made ecosystems as compensatory habitats. We hope that the ~~relevant~~ passage of the judgement is a passing fad and that the Court continues to contribute to a sound interpretation of European nature conservation legislation.

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<sup>54</sup> See D.A. Jones et al., 'Sabah Al-Ahmad Sea City Kuwait: development of a sustainable man-made coastal ecosystem in a saline desert', 2012 *Aquatic Ecosystem Health & Management* 15, no. 1, pp. 84-92.

<sup>55</sup> See also H. Schoukens, 'Omlegging Griekse rivier: de mythe van 'groene' infrastructuurprojecten', 2013 *Tijdschrift voor omgevingsrecht en omgevingsbeleid*, no. 1, pp. 67-69.