

Compensatory measures in European nature conservation law after the *Briels* case

Geert Van Hoorick, lecturer to the Department for European, Public and International Law of the Law Faculty, Research Director on Conservation Law of the Centre for Environmental and Energy Law of the Ghent University, Doctor of Law, Professor, composer (Belgium), geert.vanhoorick@ugent.be

The Birds and Habitats Directives¹ 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. Article 6(4) of the Habitats Directive 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. In 2014 the *Briels* case² was judged by the Court of Justice of the EU on a reference for a preliminary ruling. We will discuss this case about the relationship between compensation, mitigation, and conservation (nature development measures), and the assessment of alternative solutions³. For the interpretation of the obligation relating to compensatory measures we will, besides to the case-law, also refer to a Guidance document of the Commission on Article 6(4)⁴.

The term compensatory measures is not defined in the Habitats Directive. In the Guidance document⁵ 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 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: 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. By the way, contrary to the European doctrine, in the USA 'mitigation' includes 'compensation by replacement or substitution'.

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

¹ 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.

² Case 521/12, *T.C. Briels and others v Minister van Infrastructuur en Milieu*, [2014] ECLI:EU:C:2014:330.

³ 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.

⁴ 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> (last visited 23 March 2014).

⁵ Guidance document, *supra* note 4, p. 10.

environmentally bad plan or project with strong compensatory measures could supersede a better 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,⁶ 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.⁷

In the 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. 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.

The case is about the widening of the A2 motorway towards Eindhoven, which has a negative impact on a Natura 2000 site designated for, in particular, the natural habitat type molinia meadows. The assessment concluded that the A2 motorway project would cause the drying out and acidification of molinia meadows. In accordance with the viewpoint in the assessment the Dutch government lessened the environmental impact by hydrological measures in another molinia meadow in the planning area, which would then develop into a high-quality habitat. The question is whether these measures can be seen as mitigation, preventing the application of Article 6(4), or as compensation in the sense of Article 6(4). By the way, the project has meanwhile been completed. Briels and others brought an action against the two ministerial orders before the referring court. They argue that the development of new molinia meadows on the site, as provided for by the ministerial orders at issue in the main proceedings, could not be taken into account in determining whether the site's integrity was affected.

The Court rejects the view of the Dutch government and regards the measures as compensatory measures. The Court held that the application of the precautionary principle in the context of the implementation of Article 6(3) requires the competent national authority to assess the implications of the project for the concerned Natura 2000 site in view of the site's conservation objectives and taking into account the protective measures forming part of that project and aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site⁸. The Court clearly refers hereby to mitigation measures, however without using the word. 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)⁹. As main reason for this viewpoint the Court mentions that the positive effects of a future creation of a new habitat are difficult to forecast and will be visible only several years into the future¹⁰. As second reason for this viewpoint the Court points out that the effectiveness of the mitigation measures is intended to avoid a situation where competent national authorities allow so-called 'mitigating' measures, which are in reality compensatory measures, in order to circumvent the

⁶ Guidance document, *supra* note 4, p. 17.

⁷ Guidance document, *supra* note 4, p. 10.

⁸ Case 521/12, *supra* note 9, Para. 28.

⁹ Case 521/12, *supra* note 9, Para. 29.

¹⁰ Case 521/12, *supra* note 9, Para. 32.

specific procedures provided for in Article 6(3) and authorise projects which adversely affect the integrity of the site concerned¹¹. Authorisation for the project therefore needs to be given in accordance with the procedure for compensation measures, provided for in Article 6(4).

Conclusion: in the *Briels* case the Court points out that compensatory measures differ from mitigation, or nature development measures. By doing so compensatory measures have an added ecological value and do not jeopardize an appropriate assessment of alternative solutions, neither are they means to circumvent an appropriate assessment of the project's negative impacts.

¹¹ Case 521/12, *supra* note 9, Para. 33.