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Editorial

The current issue of elni Review (2/2011) covers a variety of topics on international environmental law, including standardisation of environmental NGOs, conservation law and two country specific contributions from Brazil regarding access to environmental information and biotechnological inventions.

Special focus in this issue is placed on two different topics: Firstly on intellectual property rights on genetic resources. The second subject is devoted to access to environmental information and access to justice within the framework of the Aarhus Convention.

First of all, *Christoph Then and Ruth Tippe* examine the impact of biopatents on animal and plant breeding in their article "Patents on melon, broccoli and ham?". After shedding light on current German and European patent legislation they discuss the consequences of patents on conventional breeding regarding genetic resources and food production.

The second article "Biopatents in Brazil" by *Edson Paula de Souza* provides insights into current legislation on biotechnological inventions in Brazil. He explores the impact of limitation on patent protection for R&D.

Susette Biber-Klemm and *Michelangelo Temmerman* then provide us with an overview of Rights to Animal Genetic Resources by comparing the different legal frameworks for plant and animal breeding/genetic resources on national and international levels.

The two subsequent articles address different aspects of the Aarhus Convention:

Sandra Aline Nascimento da Nóbrega gives an overview of access to environmental information in Brazil (access to environmental information is one of the three pillars of the Aarhus Convention). She compares the Aarhus Convention with Brazilian legislation and discusses which regulations have been implemented in Brazilian law.

In her contribution *Eva Julia Lohse* asks whether there is unrestricted access to justice for environmental NGOs. She examines the judgement of the European Court of Justice (Case C-115/09) on the non-conformity of the German Environment Appeals Act with Directive 2003/35 and the Aarhus Convention.

Ralf Lottes's article analyses what civic society can expect from the Commission's proposal for a legislative review of the European standardisation policy. He concentrates on the standardisation of NGOs through the review of the EU framework for standardisation regarding environmental NGO participation on a national level.

Hendrik Schoukens' contribution on temporary na-ture and conservation law examines the adaptability of European nature conservation law for temporary nature, focusing on the situation in Belgium.

Finally, we cover recent developments in environmental law with three different contributions concentrating on intellectual property rights in terms of genetic resources.

The article by *Lisa Minkmar* provides insights from a biopatent case: the "Teff-Patent" (EP 1646287).

Subsequently; *Claudia Fricke* reviews the current debate on the revision of Directive 98/44/EC on the legal protection of biotechnological inventions.

Lastly, *Graham Dutfield* comments on the United Nations Special Rapporteur on the Right to Food and the interplay between traditional knowledge, intellectual property rights and the right to food.

Contributions for the next issue of the elni Review are very welcome. Please send contributions to the editors by mid-February 2012.

Claudia Fricke/Martin Führ
November 2011

Rule of Law for Nature

9-11th May 2012
in Oslo, Norway

The year 2012 marks a number of watershed points in international environmental affairs: The 40th anniversary of the adoption of the Stockholm Declaration, the 30th anniversary of the UN World Charter for Nature and the UN Convention on the Law of the Sea, the 25th anniversary of the Brundtland Report, and the 20th anniversary of both the Rio Declaration, Agenda 21, and the UNCED Conventions: the Framework Convention on Climate Change and the Convention on Biological Diversity.

This is an appropriate point in time for reflection on the legal status of nature, how environmental goods and services are valued and taken into account in decision-making, and the implications of the rule of law in this respect.

While the rule of law generally is used with regard to citizens' rights, this conference aims to explore the application of the rule of law to environmental protection, and its implications. How can the legal protection of the natural environment be strengthened? This also opens for reflections on the temporal and geographical extension of the rule of law.

The conference aims at analysing these basic issues of international and national environmental law and looking at new trends in this area of law.

For more information about participation, including registration forms, please visit:

http://www.jus.uio.no/forskning/omrader/naturressurs/arrangementer/2012/05-09-rule-of-law

Temporary nature: Is European nature conservation law ready for it?

Hendrik Schoukens

1 Introduction

In Western European countries like Belgium and the Netherlands several 10.000 hectares of land lie unused every year, awaiting their residential, infrastructural or industrial purpose. Usually it takes a number of years before the spatial designation of such areas is finally implemented. In the meantime these areas exert a strong attraction on certain rare pioneer species, such as Natterjack Toads and Common Terns, which are benefited by human dynamics. However, to avoid the judicial restrictions which could be attached to the presence of such protected species, landowners and developers try to keep nature off their sites, by for instance intensive mowing or regular ploughing. The concept of temporary nature marks a shift in thinking about nature conservation. Instead of preventing the development of a valuable habitat or breeding site from the very beginning, the decision could also be taken to temporarily allow nature to develop on these parcels of 'valuable' land.

Even though they are only temporarily available, these sites may constitute a useful addition to the existing permanent ecological infrastructure. Ecological research has demonstrated that temporary nature has a favourable net impact on the status of conservation of pioneer species[1], although this – logically – depends to some extent on an adequate area-oriented nature policy as well. In general it can be concluded that temporary nature has only ecological winners and no losers. The availability of a site during several years can attract lots of protected species. Assuming that a project developer wants to start the actual construction of the site concerned four years later, nature will have benefited from this area for four years. A number of ecological processes will have started to take place. These areas could constitute an important stepping stone between different and separated populations of protected pioneer species. The so-called 'late species' will draw little to no benefit, but will not suffer any negative effects either. The chance of late species ending up in a temporary nature is considered small.

From a legal point of view, however, temporary nature raises quite a number of questions. In time it will be necessary to proceed to the irrevocable removal of the nature, when the area is to be given its final designation as an industrial area, for example. At first sight this intervention could lead to a troublesome derogation and/or permit procedure precisely as a result of the (possible) presence of protected species and/or biotopes. Not surprisingly the removal of temporary nature is hindered by the restrictions which are present in nature conservation law. The large number of judicial uncertainties explains the lack of enthusiasm for the concept of temporary nature within port communities and companies. In the present contribution I will first highlight the results of the application of current nature conservation law on a situation of temporary nature conservation, building on earlier research.[2] In addition, some recent national case law with respect to temporary nature will be analysed. Also some general remarks on the adaptability of nature conservation law for temporary nature will be made. The focus will mainly lie on the Belgian (Flemish) situation, but, as temporary nature is already being applied in the Netherlands, reference will also be made to this practice, too. Given the fact that the applicable nature conservation law in both countries consists mainly in an implementation of the European Directives, the conclusions of this contribution can also serve as an example for other European countries.

2 The concept of temporary nature

Although temporary nature is a relatively new nature conservation concept, it has already been the subject of further ecological[3] and judicial research in the Netherlands and Belgium. In 2009 the first pilot projects were started in the port of Amsterdam.[4] Since then, several other pilot projects were conducted in the Netherlands.[5] In Belgium, temporary nature has already served as a compensation measure for the construction of a dock in the Port of Antwerp in 2005[6] and will be integrated in the draft version of the species protection program for the Port of Antwerp,

1 Bureau Stroming and L. Linnartz, Tijdelijke natuur en beschermde soorten: permanente winst. Een ecologische onderbouwing, 33-41 (2006).

2 This contribution is based on earlier judicial research and recent jurisprudence on this topic, which has been conducted in the Netherlands and Belgium. See inter alia: H. Woldendorp and C. Backes , Tijdelijke natuur – Advies over de juridische aspecten, 111p. (2006); H. Schoukens, A. Cliquet and P. De Smedt, *Tijdelijke Natuur. Overtreft de dynamiek van de natuur die van het natuurbehoudsrecht?,* Tijdschrift voor Milieurecht 23-55 (2010); H. Schoukens, A. Cliquet and P. De Smedt, The Compatibility of *"Temporary Nature" with European Nature Conservation Law*, EEELR 106-131 (2010); H. Woldendorp, *Dynamische natuur in een statische rechtsorde*, Milieu en Recht 134-143 (2010).

3 Bureau Stroming and L. Linnartz, supra footnote 1, 98.

4 More information can be found on the following website: http://www.innovatienetwerk.org/nl/bibliotheek/detail/1/1-1-5-N-38/.

5 More information on recent pilots in the Netherlands can be found on the following website: http://www.innovatienetwerk.org/nl/bibliotheek/detail/1/1-1-5-N-38/.

6 More in detail: H. Schoukens, A. Cliquet and P. De Smedt, The Compatibility of *"Temporary Nature"* with European Nature Conservation Law, EEELR 106-131 (2010), at 121.

which will probably enter into force in 2012. Several spatial execution plans for port areas explicitly allow the development of temporary nature at sites with a general industrial destination.[7]

In general the following two aspects seem crucial for temporary nature: the nature is temporary (in other words, essentially pioneer and early species); the area in which temporary nature is located is only temporarily available. Temporary nature primarily involves so-called 'dynamic' species and biotopes. In ecological terms these species are termed 'pioneer species' and 'early species'. They depend on the permanent availability of large areas with sparse vegetation for their survival. These are species that in most countries have a hard time establishing themselves due to the absence of natural dynamics. Although temporary nature can also offer a useful addition for 'later species' (e.g. bats), it tends to refer to pioneer and early species. Temporary nature is preferably limited to areas which do not have any protected status based on national or European nature conservation law. However, the exclusion of protected areas from the field of application of temporary nature would imply that it would be of limited use for port areas of reclamation areas, as significant parts of these areas are designated as a protected area on the basis of the Habitats and/or Birds Directive[8]. Therefore, the interaction between temporary nature and Natura 2000 will also be analysed hereafter.

3 The compatibility of temporary nature with European conservation law

Notwithstanding the positive ecological effects of temporary nature conservation, the final removal of it seems at first sight contradictory with the principles of nature conservation law. As nature conservation law is aimed at the sustainable conservation and development of ecosystems, it can be expected that the removal of the temporary nature will involve a high administrative burden. Such drawbacks could refrain developers from choosing for temporary nature. In this chapter some general comments about the margins which are present in the existing nature conservation law for temporary nature will be presented. The focus will mainly lie on European nature conservation law.

3.1 Species protection law

The possible presence of protected species such as the Natterjack Toad or the Common Tern in the areas available for temporary nature implies the application of a strict protection regime, which is contained in the Habitats[9] and Birds Directives,[10] as implemented in national and regional nature conservation law. As it is in principle forbidden to destroy protected species' habitats and/or to (significantly) disturb and kill specimens of it, there seems to be a fundamental conflict between temporary nature and the protection regime resulting from the species protection regime. However, this conclusion is not as straightforward it seems. For instance, mitigating measures could in some specific cases be able to ensure the 'continued ecological functionality' of breeding sites or resting places of protected species, thereby also ensuring compliance with the strict protection prescriptions (and not requiring derogations). The European Commission argued in its Guidance document on strict species protection that this approach could be – under certain conditions – reconcilable with the species protection provisions of the Habitats (and Birds) Directive.[11] Still this way out, no matter how tempting it may seem, will not offer a general solution for temporary nature, even not when it is applied on an area-wide scale (for instance in a port area). In most cases the removal of temporary nature will probably not be limited to a small intervention but rather imply the removal of the whole population (or at least of a significant part of it) which has settled on a temporary available terrain. As a consequence it will be hard to argue in such cases that the 'continued ecological functionality' of the breeding or resting sites concerned can be upheld. Besides, possible mitigating measures have to be clearly distinct from compensatory measures in the strict sense.[12] An approach in which the removal of temporary nature is compensated at area level (thus ensuring the maintenance of a population on the level of a port area) will therefore not be sufficient to avoid the application of the derogation regime in species protection law. Hence, such an approach will always have to be assessed in respect of the specific conditions of the existing derogation regime within the Species Protection Regulation.

The Habitats and Birds Directives set several preconditions which have to be met before granting a derogation of the basic protection regime.[13] In principle, obtaining a derogation is always feasible for the imperative reasons of overriding public interest (including those of a social or economic nature). Nonetheless it will not be an easy task to prove the existence of such an imperative reason of overriding public interest

7 This is for instance the case in the Regional Spatial Execution Plans for the ports of Antwerp and Ghent.

8 Directive 79/409/EEC on the Conservation of Wild Birds, [1979] OJ L 103/1, replaced by Directive 2009/147/EEC, (2010) OJ L 20.

9 Directive 92/43/EEC on the Conservation of natural habitats and wild fauna and flora, (1992) OJ L 206/7.

10 See Art. 5(1) Birds Directive and Art. 12(1) Habitats Directive.

11 European Commission, Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, 47-48 (2006). This guidance document can be consulted at: http://forum.europa.eu.int/Public/irc/env/species_protection/library?l=/commission_guidance/final-completepdf/_EN_1.0_&a=d.

12 European Commission, supra footnote 11, 48.

13 Art. 16(1) Habitats Directive; Art. 9(1) Birds Directive.

in each case of temporary nature, unless the temporary nature concerned can be directly linked to major building and/or port projects.

There remain two other useful grounds for derogation which can offer a solution for temporary nature.

The Dutch judicial research on temporary nature suggests that temporary nature should be qualified within the derogation possibility for the protection of wild flora and fauna and the conservation of natural habitats, which is present in Art. 16(1) of the Habitats Directive.[14] This reasoning is also upheld in the temporary nature policy concept of the Dutch minister competent for nature conservation[15] and in the first Dutch temporary nature projects. The approach is based on the conclusions of the above-mentioned ecological research, which indicate that temporary nature has positive effects for all species, even if it is removed after a while.[16] Yet, it is not clear whether this argumentation is sufficient to classify temporary nature within this ground for derogation. The European Commission, in turn, does not offer a lot of supplementary interpretation at this point in its Guidance on strict species protection. In a recent judgement the Court of Amsterdam accepted this reasoning with respect to a derogation that had been delivered on the base of the species protection regime for the use of temporary nature in the Port of Amsterdam.[17] This judgement is, to my knowledge, the first judicial decision where the compatibility of temporary nature with species protection law is accepted.

There is also a second option for derogation that looks plausible for temporary nature, especially in larger areas such as ports or reclamations areas. According to the Habitats and Birds Directives it is also possible to derogate from the strict species regime in order to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the capturing, picking or keeping of certain specimens of protected species in limited numbers, as specified by the competent national authorities.[18] Although at first sight this derogation clause does not appear to be explicitly aimed at spatial interventions with implications for the habitats of species, this clause can probably be used for temporary nature. Given the fact that the European Commission has already stressed in its Guidance document on strict species protection that management plans for large carnivores, including strictly limited harvesting of the population by hunting is a good example of the application of this derogation clause, it is not inconceivable that this will also be the case for a species protection program aimed at temporary nature. The European Commission noted that the implementation of this provision would involve some management, and that one way of making this happen would be through a species management/conservation plan. In the plan derogations could be provided for and they could be part of the regulation concerning the species population, without affecting the favourable conservation status.[19] This approach is backed by recent case law[20] and jurisprudence,[21] which underline that it has to be possible in any circumstances to grant derogations from the species protection regime when ecological research demonstrates that no ecological consequences are to be expected for the local population in question. One could apply a similar reasoning to temporary nature. The strict conditions, the selective basis and the limited extent of the removal of the breeding and resting places of the species which are confronted with temporary nature can be regulated in an area-linked species protection program. As such the program could guarantee the maintaining or obtaining of a good conservation status for the species in the area concerned.

3.2 Temporary nature and the environmental liability regime

The Environmental Liability Directive[22] aims at creating a common liability framework with a view to preventing and remedying damage to (amongst others) protected animals, plants and natural habitats. Regardless of its location, direct and/or indirect damage to species and natural habitats protected at Community level by the Habitats and/or Birds Directive, falls under the scope of this regime. The removal of temporary nature can in some cases be regarded as an "occupational activity" within the meaning of Art. 2 No. 7 of the Environmental Liability Directive, for instance when it is the consequence of an economic activity.[23]

When there is a certain conflict between temporary nature and the Environmental Liability regime, it does not imply that the removal of temporary nature will necessarily trigger the application of the prevention and remedial measures. In this respect, it is important to highlight the fact that only significant damage falls under the scope of the Environmental Liability Direc-

14 H. Woldendorp and C. Backes , supra footnote 2, at 46.

15 J. Reker and W. Braakhekke, Tijdelijke natuur, concept voor beleidslijn (2007). Consulted at: http://www.innovatienetwerk.org/nl/bibliotheek/rapporten/316/TijdelijkeNatuurconceptvooreenbeleidslijn.

16 H. Woldendorp and C. Backes , supra footnote 2, at 47.

17 Decision of the Court of Amsterdam, 31 May 2011 (not published).

18 See for instance Art. 16(1) e Habitats Directive.

19 European Commission, supra footnote 11, 57-58.

20 Case C-342/05, Commission v Finland (2007).

21 H. Woldendorp, Vogelbescherming: de wettekst als vogelverschrikker, Milieu en Recht (2008), at 78.

22 Directive 2004/35/EC of the European Parliament and the Council of 21 April 2004 on environmental liability with regard to prevention and remedying of environmental damage, (2004) OJ L 143/56.

23 Art. 2 No. 7 Environmental Liability Directive: "'Occupational activity' means any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character."

tive. Hence, only damage to protected species and natural habitats that has significant adverse effects on obtaining or maintaining the favourable conservation status of such habitats or species, falls under the application of this regime.[24] According to the Environmental Liability Directive, the significance of such effects is to be assessed with reference to the so-called baseline condition, taking into account the criteria set out in Annex I. The criteria set out in Annex I to the Environmental Liability Directive suggest that a static approach should not be adopted here. According to this annex, damage to species or habitats cannot be classified as significant damage if it has been established that *"they will recover within a short time and without intervention to either the baseline condition, or a condition which, solely by virtue of the dynamics of the species or habitat, leads to a result deemed equivalent or superior to the baseline condition"*. This exclusion could offer a more gentle way out for temporary nature. With reference to the above-mentioned ecological research, one could argue that the removal of temporary nature cannot be regarded as a significant effect. However, Annex I to the Environmental Liability Directive contains another useful ground for exclusion, which reads as follows: *"negative variations due to natural causes or resulting from intervention relating to the normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators, can not be classified as significant damage either"*. It therefore seems plausible that any interference between temporary nature and the liability scheme of the Environmental Liability Directive could be avoided by means of an area-oriented plan-based approach in which the removal of temporary nature takes place within the framework of clear conservation objectives.[25]

3.3 Temporary nature and the protection regime for protected areas (Natura 2000)

Although temporary nature will preferably be created outside the Natura 2000-Network, it cannot be excluded that in some cases it will come into contact with the protection regime for these areas. In Belgium for instance, large parts of port areas are included in the Natura 2000-Network, as a special protection area (SPA) or a special conservation area (SAC).

It goes without saying that a project developer and/or a company will not be tempted to create temporary nature on land which is eventually destined for industrial development if there is a risk that the land will be designated as part of the Natura 2000-Network. In its judgement of 23 March 2006 in Case 209/04, the Court of Justice clearly stresses that this obligation must be regarded as a dynamic process which does not end with the entry into force of the Birds Directive. According to the Court, it would be hardly compatible with the objective of effective bird protection if outstanding areas meant for the conservation of the species that are to be protected were not brought under protection merely because the outstanding nature of a site came to light only after transposition of the Birds Directive[26]. In that particular case the mere existence of three pairs of Common Snipe, six pairs of Northern Lapwings and eight pairs of Eurasian Curlews seemed to require the designation of the area concerned.[27] Although the Court of Justice made it clear that the designation process on the basis of the Habitats and Birds Directives must be regarded as a dynamic process, the mere presence of protected species that are listed in the relevant annexes to these Directives does not, as such, necessitate the designation of the area concerned. In a landmark case in 2005, the Belgian Council of State clearly emphasised that the Birds Directive must be interpreted as follows: an authority is not obliged to designate every site where birds are present that are listed in Annex I to the Birds Directive, only the most suitable in number and size.[28] A recent Dutch case also acknowledges the margin of discretion of the competent authority in this respect. In this case a Dutch non-governmental organization (NGO) asked the competent authority to designate a site in the Port of Rotterdam as a special protection area on the basis of the Birds Directive. The site consisted in a piece of undeveloped land on which a colony of protected Spoonbills had settled. Spoonbills are listed in Annex I to the Birds Directive. The NGO in question argued with referral to Art. 4 of the Birds Directive and the case law of the Court of Justice that the site concerned had wrongfully not been designated by the Dutch competent Minister.[29] The Dutch Council of State did not accept the reasoning based on the above mentioned judgement of 23 March 2006 of the Court of Justice. In this specific case the Council of State stressed that the five most suitable areas for the Spoonbill in the Netherlands had already been designated. Moreover, the site in question had only a limited surface and was not suitable for the long term survival of the species concerned (due to the presence of port activities). Although it remains to be seen whether the above mentioned case law will be con-

24 Art. 2(1) Environmental Liability Directive.

25 When adopting a plan-based approach, it may be preferable to apply the specific assessment regimes of Art. 6(3) and (4) of the Habitats Directive (if, for instance, the area in question, is located within the vicinity of an SPA and/or SAC) and/or Art. 9 and/or 16 of the Birds and Habitats Directives (if damage will be caused to European protected species). By doing that, further application is made of the ground for exclusion mentioned in Art. 2(1) of the Environmental Liability Directive.

26 Case 209/04, Commission v Austria (2006), par. 43.

27 Case 209/04, Commission v Austria (2006), par. 35.

28 Belgian Council of State, no. 147.047, 30 June 2005; see also: Belgian Council of State, no. 166.511, 10 January 2007.

29 Dutch Council of State, no. 200907172/1/R2, 21 July 2010, Milieu en Recht 238-241 (2011).

firmed by the Court of Justice, it can be upheld that, generally speaking, national or regional authorities will not easily be compelled to designate a temporary nature area as a part of the Natura 2000-Network. This will only be the case when the site concerned has a large surface, contains a large population of species listed in the Annexes to the Birds and Habitats Directive and is suitable for the long term presence of these species. In other words, it will have to be proved that the site is one of the most suitable areas for the species and/or habitats.

If the temporary nature is located within or in the vicinity of an *existing* SPA and/or SAC, it is evident that it will be harder to obtain a permit for the removal of the temporary nature. Such a situation can be expected in port areas, where it is not uncommon that large areas are designated as a part of the Natura 2000-Network. The assessment regime referred to in Art. 6(3) and (4) of the Habitats Directive will have to be applied. The national or regional authorities can only agree to any plan or activity which is subject to a prior permit and is likely to have a significant effect on the site after having ascertained that it will not adversely affect the integrity of the site concerned. This regime's safeguards are triggered by a likelihood of significant effect.[30] Although the removal of tempo-rary nature is, as such, not forbidden when it takes place within a Natura 2000-context, the application of the strict assessment regime of the Habitats Directive will urge the project developers concerned to more caution. To circumvent a strict application of this strict intervention regime, it is recommended to in-clude this as early as possible in the decision-making process. If the appropriate assessment with regard to the effects of the removal of the temporary nature is already carried out on plan level, for instance when drafting the species protection program at area level, this will prevent the project developer from being confronted with a heavy administrative burden at permit level. It can be presumed that if the necessary compensatory or mitigating measures are provided for on an area level, it will be easier to demonstrate that the removal of some temporary nature areas as such will not have to be regarded as a significant alteration of the habitats and/or species of the site concerned. However, the mere presence of a plan-based approach will in principle not exempt the developer from the obligation to carry out an appropriate assessment on project level. The Court of Justice rejected such an approach in its judgment of 4 March 2010.[31] Some-how, this strict case law of the Court of Justice seems to lower the administrative gains that can be expected from a plan-based approach to temporary nature. This is no surprise. In our earlier research we already con-cluded that the plan-based approach will lead to a smoother application of the assessment obligation on project level but not to an exemption from it.[32]

4 Possible solutions for temporary nature within the existing legislation

In most cases, working with temporary nature will give rise to an additional administrative burden and legal risks. Within the framework of the existing nature conservation law it will be hard to argue that the removal of temporary nature be exempted from the strict protection regime for species protection. Usually this administrative burden manifests itself in the obtainment of an additional derogation and/or permit, which may be appealed against, for instance by environmental associations. The application of the derogation procedures will imply an important legal risk. The analysis above already showed that a plan-based temporary nature framework can offer some additional legal guarantees with regard to temporary nature without exempting it from all administrative burdens. In some cases the draft of an area-oriented plan will not be useful from a practical point of view, or will be considered administrative overkill, for instance in view of the limited space on the parcel of land concerned. The available Dutch research advises an approach that grants exemptions in a nature-free situation. Developers are granted exemptions for the removal of temporary nature before they offer space for temporary nature. Both suggested solutions have advantages and disadvantages. These will be listed below along with some recent case law regarding both options. It will also appear that – in some cases – a combination of both approaches is possible.

4.1 An area-oriented plan-based approach to temporary nature

Until recently Flemish nature conservation law, as in most other European countries, did not contain a useful tool for allowing a plan-based approach to species conservation, let alone to temporary nature. Despite a clear legal framework, the Belgian Council of State already accepted an area-based approach to temporary nature in a spatial execution plan for the Deurganckdock in 2007. [33]In this case the applicants claimed that the proposed temporary compensatory measures were not in accordance with Art. 6(4) of the Habitats Directive as they were of an *'uncertain nature'*. The Council of State was not convinced by this argument as the conditions under which these temporary compensatory measures could be altered were strictly defined. Ac-

30 Case C-127/02, Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij, (2004), paras. 56-57.

31 Case C-241/08, Commission v. France, (2010), par. 54.

32 H. Schoukens, A. Cliquet and P. De Smedt, The Compatibility of "Temporary Nature" with European Nature Conservation Law, EEELR 106-131 (2010),

33 Belgian Council of State 9 January 2007, no. 166.439.

cording to the Council of State these conditions sufficiently guaranteed that as soon as a temporary compensation area was withdrawn, another compensation area had to be designated. Within the newly Flemish Species Protection Regulation of 15 May 2009 the species protection program is undoubtedly the most suitable tool to deal with temporary nature, especially in port and mining areas.[34] A species protection program is a program aimed at obtaining a favourable status of conservation for one indigenous species or group of species in an area where the program is in effect.[35] It must be regarded as a cohesive collection of actions, based on an extensive scientific report.[36] Of great practical importance is the fact that species pro-tection programs can already contain derogations from the prohibitive clauses regarding species protection.[37] So, it is possible to grant derogations for temporary nature in the context of a species protection program. The framing of temporary nature in the context of a species protection program provides certain undeni-able benefits to the actors involved. It enables working with temporary nature on area level in a relatively flexible manner. The planning instrument seems fit for temporary nature in highly dynamic interconnected areas, such as port and/or mining areas, where the available space is appropriate for a robust ecological infrastructure in which temporary nature can be framed. The land qualifying for temporary nature is mapped in advance in the species protection program at hand. The derogations based on the species protec-tion law that are necessary for the development of the temporarily available land where protected species will/might settle, can already be provided in this spe-cies protection program. Thus the developers can obtain a greater degree of legal certainty, provided that the limits set out in the species protection program are respected.

Notwithstanding the fact that with the species protection program the Flemish Government explicitly had an instrument in mind that could cope with situations such as temporary nature in economically highly dynamic areas, certain boundary conditions, restrictions and disadvantages of this approach need to be pointed out. The drafting of a species protection program itself will always be an administrative burden for the landowners and project developers involved. Opting for a plan based approach only makes sense if the temporary nature is situated in relatively large, homogeneous and dynamic areas that can be regarded as functional ecological units for one or several types of habitats. In other circumstances it will be more beneficial for developers to opt for the normal derogation procedure (which is not linked to a species protection program). The species protection program also has to guarantee the presence of sufficient living space to preserve or restore the favourable status of conservation at all times in the future. To this end, the species protection program needs to provide the necessary compensatory and mitigating measures, for instance possibilities for refuge to nearby lands in the port area. Therefore, it will probably not be possible to grant a broadly formulated derogation for the removal of temporary nature in the species protection program. In addition, a monitoring system needs to be created to measure the evolution of the status of conservation of the target species.[38] The required level of detail may constitute an extra potential burden for temporary nature. It is clear that this will not always prove to be easy in an economically highly dynamic environment. In certain cases it will not be possible to tell much in advance whether a parcel of land will or will not be a viable choice for temporary nature. It seems preferable to include a revision clause within a well-defined framework, providing for the adjustment of the derogations granted to the economic developments, without detracting from the conservation objectives involved. It further remains to be seen whether in other countries nature conservation law contains sufficient analogue planning instruments which can be used for an area-based approach to temporary nature or – on a more general level – species conservation and protection.

4.2 Case-by-case approach to temporary nature (derogation in advance outside a plan-based approach)

A large part of the legal risks linked to following one or several derogation procedures during the final spatial development of a parcel of land containing temporary nature can be countered by a plan based-approach. However, drafting an area-oriented planning framework will not be possible and/or useful in certain circumstances. To circumvent further drawbacks the developer could apply in advance – i.e. before the area concerned is made available for nature development – for a derogation based on the regulations on species and biotope protection. If the derogation is not obtained in advance, one can still choose not to proceed with the development of temporary nature. The development of one or more parcels of land as temporary nature areas will only take place if the application for a derogation has been granted. The company or project developer concerned will have to address the competent authority and point out that, until the moment they start realising the project (i.e. the realisation of the destination), they are planning to provide space on the parcel of land in question for the

34 Report to the Flemish Government, p. 50.

35 Art. 1, 11° Flemish Species Protection Regulation.

36 Art. 25 Flemish Species Protection Regulation.

37 Section 2, sub-sections 1 – 4, Flemish Species Protection Regulation.

38 Art. 26, first paragraph, 10° Flemish Species Protection Regulation.

development of temporary nature. By applying for a derogation in advance, they ask the competent authority's consent for the removal of this temporary nature (including protected species and vegetation that will appear on the land) upon starting the execution of the project before actually starting to develop nature elsewhere.

In the Netherlands, for the time being, this solution is opted for in order to make working with temporary nature more attractive. The creation of a policy line for temporary nature that currently highlights this derogation track is on the way. In this respect a few pilot projects on temporary nature have been created. On 19 February 2009 the Amsterdam Port Authority filed a formal request with the Minister competent for Nature Conservation for an 'in advance'-derogation for temporary nature.[39] The request was made with a view to getting non-used lands in the port area of Amsterdam (with a destination of an industrial area) ready for construction. On 15 July 2009 the Minister of Nature granted a derogation based on Art. 75(5) and (6) of the Dutch Law on Flora and Fauna for most of protected species concerned.[40]

Although granting derogation in advance, before starting the development of temporary nature, seems like a tempting general solution for landowners and building promoters because of the legal certainty, some legal objections do seem possible, especially when this occurs outside a framework which ensures the good conservation status of the species and habitats concerned. A major objection is that in a so-called 'nature-free situation' it will sometimes prove to be troublesome to estimate which species will settle on a specific parcel of land.[41] In some cases it will be possible to make a good estimation of the species that will settle at a specific location. But in the end the risk remains that species other than those initially considered will do so as well. This will especially be the case for locations where little or no monitoring and/or inventoried data exists. In the Dutch pilot projects this posed no insurmountable problem as enough monitoring material was present. In other situations such a conclusion will not be that easy to attain. In that case, an alternative would be to apply for a derogation for all protected species, but this seems to hinder an *in concreto* assessment, which is needed according to the European law. The European Commission clearly underlined *the in concreto* character of the derogation regime of Art. 16(1) of the Habitat Directive in its Guideline on strict species protection[42].

In general it can be upheld that it will remain very difficult to judge the concrete impact of the removal of temporary nature on certain species five, ten or twenty years in advance, especially when it is not yet clear which species will be settling over the course of the years. Also, it cannot be excluded, that the status of conservation of a specific species on a local or above-local level will deteriorate within a few years after a prior derogation has been granted, taking away the justification for the granting of the prior derogation. Some of this criticism has been rejected by the Court of Amsterdam in a decision of 31 May 2011.[43] The above-mentioned derogation which had been granted at the Amsterdam Port Authority had been contested by a NGO. The NGO argued that no derogation in advance could be given for temporary nature but that a derogation could only be granted when the realisation of the final destination of the area concerned took place, i.e. after (and not before) the nature development had occurred. Also the NGO was of the opinion that the derogation could not be granted for protecting wild fauna and flora when a conservation duty was not even included in the derogation. The Court however accepted the ecological benefits of temporary nature stating that by granting derogation in advance the settlement of the species itself was made possible. This would not be the case when no derogation in advance was granted. The legal certainty obtained by the Port Authority could not be considered as a mere 'economic interest'. Moreover, there was no need to link a conservation duty to the derogation, as the development of temporary nature implies a spontaneous development. The ecological research presented by the NGO to disprove the ecological benefits of temporary nature was not accepted by the Court either. Although in my opinion not all legal arguments 'against' temporary nature have been invoked in this procedure and an appeal is still possible, this decision will undoubtedly give a boost to the Dutch policy on temporary nature.

5 General conclusions

Temporary nature might offer a useful addition to the existing nature conservation policy. In most Western European countries, large areas of land lie undeveloped during many years. The present analysis showed that although nature conservation law offers enough margins for temporary nature, the required derogations and permits might form quite an administrative burden for the companies concerned. Therefore it is concluded that temporary nature conservation efforts are best conducted within management plans at area

39 See: http://www.innovatienetwerk.org/nl/bibliotheek/nieuws/377/Februari2009HavenAmterdamvraagtontheffingaan.html.

40 The text of this derogation may be consulted at: http://www.innovatienetwerk.org/nl/bibliotheek/nieuws/375/Juli2009EerstetheffingTijdelijkNatuur.html.

41 This objection is probably less relevant for biotopes because, based on the characteristics of an area, normally a good estimation can be made of which biotopes might develop there.

42 Guidance Species Protection, 61-62.

43 Decision of the Court of Amsterdam, 31 May 2011 (not published).

level. If national or regional nature conservation law allows so, exemptions and/or deviations can in advance be provided for in this plan (if necessary, linked to compensating measures). In some cases a plan-based approach will offer no practical outcome for temporary nature as the drawing of it will take too much time or will not be useful considering the small surface of the area concerned. To circumvent such drawbacks the developer could apply for a derogation in advance – i.e. before the area concerned is made available for nature development – based on the regulations on species and biotope protection. If the derogation is not obtained in advance, one can still choose not to proceed with the development of temporary nature. Although it is subject to some legal criticism, this approach can offer the companies concerned a sufficient instrument for temporary nature.

Though it has been determined that working with temporary nature can be compatible with the existing nature conservation law, possible points of improvement have already been pointed out. In principle, a derogation needs to be requested in each individual case, unless the derogation is integrated into a species protection program. An exemption, on the other hand, applies to all cases that fall under a category of cases for which exemption has been granted. No application needs to be filed and no separate decision needs to be taken.[44] The advantage of an exemption in function of temporary nature is the absence of procedures. Thus, project developers *"know the score"* when they allow temporary nature to develop on their land.[45] In the Netherlands the concept of 'general derogation' (in Dutch: 'generieke ontheffing') seems to offer a more flexible way out for temporary nature. Such a derogation exempts all construction works which might interfere with the protected species when a management plan is present that is aimed at the attainment of the good conservation status. Other authors seem to suggest that temporary nature should be exempted when it is conducted in accordance with a 'code of conduct' (in Dutch: 'gedragscode') specially aimed at temporary nature.[46] For the authority concerned, a positive effect of such a code of conduct would be that the authority would not have to provide separate derogations for temporary nature time and time again. For the initiator, a large part of the procedural burden would be avoided. Yet, it remains to be seen whether general exemptions for temporary nature seems reconcilable with the Habitats and Birds Directive. The Dutch practice of issuing general derogations seems to go further than the derogation possibilities within the 'Flemish' species protection program where no general derogations seem possible. It is uncertain whether the Dutch approach is in line with the rather strict application of the Habitats and Birds Directive in the above mentioned case law of the Court of Justice. The Court of Justice also seems to reject a general derogation because derogations have to be limited to a specific case which offers no alternatives regarding the solution.[47] The recent decision of the Court of Justice in the Case C-241/08 seems to indicate that the exemption from assessment for works and developments provided for in programs will not be such an easy option, especially in cases where temporary nature will interact with Natura 2000.

The recent Dutch and Flemish initiatives with respect to temporary nature illustrate that the concept of temporary nature can be a good example of how nature conservation policy can take advantage of urban developments. It can be hoped that more practical examples in other countries will lead to a more established practice with respect to temporary nature and a clearer view of the compatibility with European nature conservation law. Temporary nature will, in any event, serve as a good test case for the margins for flexibility in European nature conservation law.

44 H. Woldendorp and C. Backes, supra footnote 2, 33.

45 H.E. Woldendorp, Dynamische natuur in een statische rechtsorde, Milieu en Recht 134-143 (2009), at 137.

46 J. Reker and W. Braakhekke, see supra footnote 15, 13.

47 Case 247/85, Commission v. Belgium (1987).

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sofia

The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.
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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

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The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

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elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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