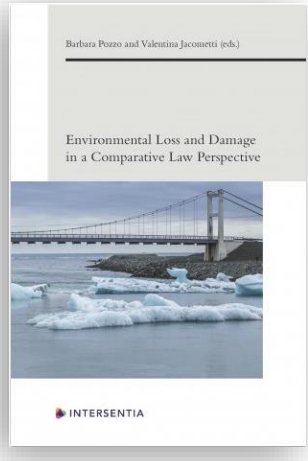

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NO NET LOSS AND FOREST OFFSETS IN THE FLEMISH REGION

A Cautionary Tale of How Not to Reconcile Science-Based Conservation Policies with Economic Interests and Vested Rights?

Hendrik Schoukens and Geert Van Hoorick

1. INTRODUCTION

Notwithstanding the widespread conservation efforts throughout recent decades, the world is currently witnessing an unprecedented decline of the remaining biodiversity, which some authors now equate to a "sixth extinction wave".[1] In spite of its progressive environmental legislation, such as the EU Habitats Directive (92/43/EEC)[2] and Birds Directive (2009/147/EC)[3] (the "Nature Directives"), the EU is no exception to the general rule of continuing biodiversity decline, with a major share of the EU's protected species and habitats currently under an unfavourable conservation status.[4] Even common or "ordinary" biodiversity is not faring better in many Member States,[5] whilst

1 *A. Barnosky et al.*, Has the Earth's sixth mass extinction already arrived?, Nature 2011 (473), pp. 51–57; *G. Ceballos et al.*, Accelerated modern human-induced species losses: entering the sixth mass extinction, Science Advances 2015 (1), e1400253, DOI: 10.1126/sciadv.1400253.

2 Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206/7 (hereinafter referred to as the Habitats Directive).

3 Council Directive 79/409/EEC on the conservation of wild birds, OJ 1979 L 103/1 (hereinafter referred to as the Birds Directive). The initial Birds Directive was codified in European Parliament and Council Directive 2009/147/EC on the conservation of wild birds, OJ 2010 L 20/7.

4 *European Environment Agency*, State of nature in the EU. Results from reporting under the nature directives 2007–2012, EEA Technical Report, No. 2/2015, 2015.

5 *S.O. Petrovan & B.R. Schmidt*, Volunteer Conservation Action Data Reveals Large-Scale and Long-Term Negative Population Trends of a Widespread Amphibian, the Common Toad (*Bufo bufo*), PLoS ONE 2016 (11/10), e0161943, DOI: 10.1371/journal.pone.0161943.

landscape fragmentation is continuing to unabatedly affect a large share of the EU's territory.[6] In 2010, the EU established the overarching objective of halting the loss of biodiversity and the degradation of ecosystem services by 2020, and of restoring 15 per cent of the degraded ecosystems wherever feasible.[7] In order to limit further loss and to achieve its progressive restoration pledges,[8] there is a broad consensus that further biodiversity loss needs to be avoided or, at the very minimum, compensated. The same year, the European Commission made a commitment to propose an initiative to ensure that there is no net loss (NNL) of ecosystems and their services (e.g. through compensation or offsetting schemes).[9] To that end, the Environment Council of Ministers explicitly stated in its conclusions of 21 June 2011 that "a common approach is needed for the implementation in the EU of the 'no net loss' principle", inviting the Commission to draw on the experience and specificities of each Member State.[10] It was further clarified that within this context, the NNL principle entails "that conservation/biodiversity losses in one geographically or otherwise defined area are balanced by a gain elsewhere, provided that this principle does not entail any impairment of existing biodiversity as protected by EU nature legislation."[11]

Although the European Commission has presented several studies on the further operationalisation of NNL[12] in recent years, no explicit set of binding EU rules currently exists to comprehensively address NNL outside the specific context of biodiversity, which is already explicitly protected under the EU Nature Directives, or, to a certain extent, the water bodies covered by the Water Framework Directive (2000/60/EC).[13] Nor has any other policy instrument been adopted to lay down a more comprehensive approach to NNL.

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6 *European Environment Agency*, Landscape fragmentation in the EU, 2011, Joint EEA FOEN Report, EEA Report, No. 2/2011, 2011.

7 *European Commission*, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Our life insurance, our natural capital: an EU biodiversity strategy to 2020, COM(2011) 244 final (hereinafter further referred to as the EU Biodiversity Strategy).

8 More extensively on this ecological restoration objective, see: *A Cliquet, K. Decleer & H. Schoukens*, Restoring nature in the EU: The only way is up?, in C.H. Born et al. (eds.), The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?, Routledge, 2015, pp. 265–284.

9 For more information on the European Commission's policy towards no net loss (NNL), see: http://ec.europa.eu/environment/nature/biodiversity/nnl/index_en.htm.

10 Council Conclusions, No. 11249/11, 21 June 2011, http://data.consilium.europa.eu/doc/document/ST-11249-2011-INIT/en/pdf.

11 Council Conclusions, No. 18374/11, 19 December 2011, footnote 12, http://data.consilium.europa.eu/doc/document/ST-18374-2011-INIT/en/pdf.

12 See for instance: *Institute for European Environmental Policy (IEEP), in collaboration with VU, IVM, Eftec and GHK*, Policy Options for an EU No Net Loss Initiative, 2014.

13 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ 2000 L 371/1 (further referred to as the Water Framework Directive).

So far, the closest the EU has come to introducing a more robust mitigation and offsetting scheme aimed at addressing general biodiversity loss was the 2014 revision of the Environmental Impact Assessment (EIA) Directive (2011/92/EU),[14] which as of 2017, explicitly requires authorities to consider measures to avoid, prevent, reduce and, if possible, offset significant effects on the environment when authorising projects are subject to a prior EIA.[15] Yet, while the revised EIA Directive explicitly referred to the EU's NNL commitments under the Convention on Biological Diversity as a source of inspiration,[16] it remains dubious at best to read into the new provisions a substantive duty to fully offset the damage to nature.[17]

The absence of a detailed regulatory framework at the EU level requiring compensation for the loss of "ordinary" biodiversity notwithstanding, the notion of biodiversity offsets for future damage to nature has generated much appeal in the business, government, finance and conservation sectors in recent decades.[18] Over the past two decades, achieving NNL through biodiversity offsetting has gradually turned into one of the overarching objectives of many conservation policies, at both the international and the domestic levels. Whereas biodiversity compensation actions have garnered a lot of attention in the specific context of protected areas, such as the Natura 2000 Network,[19] a shift in focus is noticeable, with many stakeholders expressing a wish that biodiversity offsets be directed towards the mitigation and compensation of habitat loss and other impacts on "normal" landscapes or "ordinary" biodiversity.[20] Member States like Germany, which introduced an Impact Mitigation Regulation back in 1976 under the Federal Conservation Act,

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14 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ 2011 L 26/1 (hereinafter referred to as the EIA Directive).

15 Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ 2014 L 124/1.

16 See for instance Recital 10 of the preamble to Directive 2014/52/EU.

17 See also: *H.T. Anker*, Simplifying EU environmental legislation – Reviewing the EIA Directive?, Journal for European Environmental & Planning Law 2014, pp. 338–339.

18 *R. Lapeyre et al.*, Biodiversity Offsets as Market-Based Instruments for Ecosystem Services? From Discourse to Practices, Ecosystem Services 2015, pp. 125–133.

19 Article 6(4) of the Habitats Directive stipulates that planning authorities need to require additional compensation measures when granting permits for large-scale projects which are eligible to qualify as "Imperative Reasons of Overriding Public Interest" (IROPI). See more extensively: *D. McGillivray*, Compensating Biodiversity Loss: The EU Commission's Approach to Compensation under Art 6 of the Habitats Directive, Journal of Environmental Law 2012, pp. 417–450.

20 *W. Wende et al.*, Introduction of a European Strategy on No Net Loss of Biodiversity, in W. Wende et al. (eds.), Biodiversity Offsets. European Perspectives on No Net Loss of Biodiversity and Ecosystem Services, Springer, 2017, pp. 5–6.

have extensive experience when it comes to mitigating and compensating for general biodiversity losses.[21]

The Business and Biodiversity Programme (BBOP) currently defines the concept of "biodiversity offset" as "measurable conservation outcomes resulting from actions designed to compensate for significant residual adverse biodiversity impacts arising from project development after appropriate prevention and mitigation measures have been taken."[22] While no fixed legal definition of the latter notion exists, conventional wisdom has accepted that biodiversity offsetting is to be applied in the context of the so-called mitigation hierarchy.[23] The overall goal of biodiversity offsetting is to achieve NNL or preferably a net gain of biodiversity in the field.[24] These gains are primarily to be achieved through the creation of new habitats or the restoration of damaged habitats.[25]

In recent years, however, more market-based approaches to biodiversity mitigation and offsetting have gained traction among politicians and business people.[26] Sophisticated economic regimes of biodiversity offsetting – such as habitat banking, bio-banking and wetland mitigation banking – have been implemented in countries such as the USA, Germany and Australia.[27] These banking approaches assume the creation of a regulated market in which credits from actions with beneficial biodiversity outcomes can be purchased to offset the debit from environmental damage.[28] When compared with *ad hoc*

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21 For an analysis of the German offsetting scheme, see: *M. Reese*, Habitat offset and banking – will it save our nature?, in C.H. Born et al. (eds.), The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?, Routledge, 2015, pp. 483–498.

22 *BBOP (Business and Biodiversity Offsets Programme)*, Standards on Biodiversity Offsets, Washington DC, 2012.

23 *K. ten Kate & M. Crowe*, Biodiversity Offsets: Policy Options for Governments. An Input Paper for the IUCN Technical Study Group on Biodiversity Offsets, Switzerland, 2014, p. 7.

24 *K. ten Kate et al.*, Biodiversity Offsets: Views, Experience, and the Business Case, IUCN, Insight Investment, 2014, p. 13.

25 Although contested by some, even the improved protection of existing habitats against future degradation, better known as "compensated or averted loss", is sometimes brought under the umbrella of NNL. See for instance the definition of "biodiversity offsets" used by Maron et al. in *M. Maron et al.*, Faustian bargains? Restoration realities in the context of biodiversity offset policies, Biological Conservation 2012, p. 142. Very critical in this respect is: *J.W. Bull et al.*, Biodiversity offsets in theory and practice, Oryx, 2013, pp. 369–380.

26 The European Commission has also issued several studies on the topic of "habitat banking". These studies can be consulted at the: http://ec.europa.eu/environment/enveco/taxation/index.htm#hab_bank.

27 For an overview of the distinct types of biodiversity banks, see: *G. Froger et al.*, Towards a Comparative and Critical Analysis of Biodiversity Banks, Ecosystem Services 2015, pp. 152–161.

28 For an overview, see: *M. Caroll et al.* (eds.), Conservation & Biodiversity Banking. A Guide to Setting Up and Running Biodiversity Credit Systems, 2008.

compensation implemented by permittees, market-based approaches to offsetting are believed to lead to more cost-effective nature conservation strategies, capable of offering both additional flexibility and less administrative burdens for project developers whilst generating more robust biodiversity gains.

It needs little consideration to understand that the concrete implementation of biodiversity offsets requires planning authorities to perform complex balancing exercises, in which vested property rights and land-use plans need to be aligned and balanced with emerging, science-based recovery policies. The region of Flanders represents an interesting case study to analyse the multitude of obstacles that need to be addressed in order to operationalise a performant compensation scheme.[29] The reasons therefore are twofold. Firstly, the need for proactive biodiversity compensation schemes in the Flemish region is beyond dispute. Flanders is one of the most densely populated regions of Europe, with around 470 inhabitants per square kilometre.[30] Nearly a quarter of the Flemish region is urbanised and about half of its surface is occupied by agriculture. By the same token, Flanders is often tagged as "one big city",[31] with growing residential areas and a patchwork of open space fragments in between.[32] In spite of recent policy efforts to halt further fragmentation, six hectares of "open space" in Flanders are still lost every day.[33]

Secondly, the environmental track record of the Flemish region is far from satisfactory, with the area managed in view of biodiversity targets confined to a mere 6 per cent of the total surface area, and the majority of the habitats and species listed in the EU Habitats Directive under an unfavourable conservation status.[34] A recent area of concern is the limited forest cover.

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29 See also: *V. Dupont et al.*, Belgium, in W. Wende et al. (eds.), Biodiversity Offsets. European Perspectives on No Net Loss of Biodiversity and Ecosystem Services, Springer, 2017, pp. 55–89.

30 *European Environment Agency*, Urban sprawl in Europe: the ignored challenge, 2006.

31 *V. Van Eetvelde & M. Antrop*, The significance of landscape relic zones in relation to soil conditions, settlement pattern and territories in Flanders, Landscape and Urban Planning 2005 (70), pp. 614–622.

32 *T. Verbeek & B. Tempels*, Measuring fragmentation of open space in urbanised Flanders: an evaluation of four methods, Revue belge de géographie 2016 (2), https://belgeo.revues.org/17164.

33 Elke dag verdwijnt 6 hectare open ruimte, DeRedactie.be, 28 July 2014.

34 For more information, see: https://www.inbo.be/nl/natuurindicator/de-staat-van-instand houding-van-de-habitattypen-van-de-habitatrichtlijn. For more background and analysis with respect to the policy causes behind this limited forest cover, see: *P. Van Gossum et al.*, Implementation failure of the forest expansion policy in Flanders (Northern Belgium) and the policy leaning potential, Forest Policy and Economics 2008, pp. 515–522; *P. Van Gossum et al.*, New environmental policy instruments to realise forest expansion in Flanders (northern Belgium): A base for smart regulation?, Land Use Policy 2009 (26), pp. 935–946.

In comparison with other EU Member States, only a relatively modest area of Flanders is covered by forests. Around 160,000 hectares are covered in trees, which represents 11 per cent of the total surface area. Most of these forests (70 per cent) are held in private hands. A significant portion of these forests (approximately 40 per cent) are moreover situated in areas that have not been allocated a green designation on the applicable land-use plans. In addition, while there exists a legal prohibition – called a "moratorium" – on deforestation since 1996, in combination with a compensation duty, the forest cover continues to decline at an average rate of 200 hectares every year.[35]

The recent Flemish experiences with biodiversity offsets for deforestation are indicative of the many critical analyses that have recently been published in the scientific literature.[36] Even so, recent attempts to overcome and remedy the many inherent flaws in the forest compensation rules – such as the adoption of a Forest Protection Map aimed at the protection of woodlands situated in housing zones and industrial estates – have not led to any substantial improvements, while the existing compensation mechanisms are not working effectively enough to outdo the ongoing impairments. Based upon a thorough analysis of the past Flemish experiences with the applicable forest compensation schemes over the past two decades, as well as new draft proposals for new legislation and recent case law developments, this chapter tries to draw some overarching conclusions as to the operationalisation of offsetting mechanisms targeting 'ordinary' biodiversity, which is not strictly protected under EU law. It is posited that the Flemish lessons can also be instructive for the operationalisation of offsetting schemes in other EU Member States.

2. THE GENESIS OF THE LEGAL FRAMEWORK ON FOREST OFFSETTING AND NATURE PROTECTION

In this preliminary section, a brief overview of the Flemish protection schemes and their recent evolutions is presented. The focus is on forest protection and offsetting. However, given the blatant lack of coherency when it comes to regulations aimed at nature protection, several mutually overlapping legal regimes apply to forests in the Flemish region and therefore need to be addressed in order to obtain a comprehensive overview of the applicable protection level for forests and woodlands in the Flemish region.

35 For an overview, see: *H. Schoukens et al.*, Handboek natuurbehoudsrecht, Kluwer, 2011, pp. 470–500.

36 See for instance: *M. Moreno-Mateos et al.*, The true loss caused by biodiversity offsets, Biological Conservation 2015, pp. 552–559; *M. Curran et al.*, Is there any empirical support for biodiversity offset policy?, Ecological Applications 2014, pp. 628–630.

2.1. THE STEEP ROAD TOWARDS A MORATORIUM ON DEFORESTATION

It would be unfair to state that forests were unprotected before the entry into force of the so-called Forest Decree (*Bosdecreet*) in 1990.[37] Indeed, from as early as 1946 onwards, activities leading to deforestation were made subject to a prior planning permit. However, given the lack of substantive criteria to be taken into account when considering such planning applications and the fact that in most instances the local municipalities were the competent planning authorities, limited protection resulted from these planning permit schemes. This was all about to change in 1990, when the Flemish Parliament decided to update the old rules on forest management and codified them in the Forest Decree.[38] In essence, this new piece of legislation aimed to protect forests, regardless of their location and/or ownership status.[39] The former element was important, given that from the 1970s onwards detailed land-use plans had been adopted – the so-called *gewestplannen*. Even when these land-use plans were located the majority of the most pristine forests in areas with a green designation – which meant that no other damaging activities were permissible, with the exception of forest and nature management – the remaining 40 per cent were still located in areas intended for industrial development, agricultural activities or housing zones pursuant to the applicable land-use plans.[40]

Against this bleak backdrop, the relevance of the newly passed forest protection rules became evident. Whereas the presence of forests on agricultural lands leaves limited options for logging and deforestation, this was obviously not the case for trees that are located on sites which have been assigned an industrial or housing development designation in the applicable zoning plans.[41] In time, the trees present on these lands might disappear in view of other economic considerations. Future building plans inevitably led to the shrinking of the forest cover in these areas.

That said, the definition of the notion of "forest" did not explicitly refer to the applicable land-use plans. The absence of such a reference to zoning plans is not without importance, seeing that it offers a general level of protection to all forests, irrespective of the applicable land-use destination. The mere presence of trees – alongside shrubs – was deemed sufficient to fall within

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37 Flemish Forest Decree of 13 June 1990, Belgian Official Gazette, 28 September 1990 (hereinafter referred to as the Flemish Forest Decree).

38 *Schoukens et al.*, *supra*, note 35 at pp. 476–488.

39 See Article 3 of the Forest Decree.

40 See: https://www.natuurpunt.be/pagina/beleidsdossier-zonevreemde-bossen.

41 The applicable land-use plans are used as binding yardsticks when individual planning permits are granted. In principle, no activities are permissible in green zones in the applicable zoning plans which compromise the green character of the site.

the scope of application of the Forest Decree.[42] The relatively open definition connotes a progressive application of the newly established protection schemes for endangered forests. Since no explicit threshold is applicable, meaning that even a collection of three trees alongside some shrubs can qualify as a forest, the protection offered by the Forest Decree appears even more impressive at first glance. It seemed to prioritise ecological considerations over applicable land-use and zoning plans, even when this might clash with the underlying economic interests. The substantive underpinnings of the Forest Decree allowed the competent planning authorities to apply more scrutiny, even when considering planning applications for relatively limited areas of forest cover. However, back in 1990, no explicit moratorium on deforestation was put forward in law, severely limiting the practical effect of the newly adopted protection schemes. The latter only happened in 1996, with the adoption of a new decree modifying the Forest Decree. In essence, the moratorium on deforestation entailed that as a general rule deforestation is to be considered a prohibited activity, with the exception of public utility works.[43]

Even though poorly applied on the ground during the first years, this scheme of protection rules stood out as one of the early examples of a clear-cut NNL instrument within the Flemish region. Judged by many as too stringent, however, in 1997 the Forest Decree was subsequently relaxed to authorise deforestation in restrictive circumstances and under strict conditions, requiring compensatory measures in order to maintain the forest cover in the Flemish region.[44] The permitting scheme, which was still founded on a general prohibition on deforestation, is now basically two-tiered.[45] If a purported case of deforestation takes place in industrial or urban zones (as defined by the relevant land-use plans), is linked to projects of general interest or is part of a nature management plan, the moratorium can be lifted through the issuance of a general planning permit. In other words, such actions are exempted from the application of the strict forest protection rules. In all other instances, deforestation is subject to a prior derogation by the Agency for Nature and Forests. Only after having obtained this prior exemption can an application for a general planning permit for deforestation be considered by the competent planning authority. Accordingly, woodlands that are "out-zoned", i.e. located outside the green zones designated on the relevant land-use plans, enjoy less protection than woodlands that are located inside designated green zones. This is another illustration of how nature protection rules are rendered subordinate to the applicable zoning plans, thereby avoiding potential conflicts

42 For more guidance in this regard, see the guidelines published on the site of the Agency for Nature and Forests: https://www.natuurenbos.be/definitiebos.

43 *Schoukens et al.*, *supra*, note 35 at p. 11.

44 Id. at pp. 476–479.

45 Flemish Forest Decree, Article 90bis(1).

between ecological assessments and future development scenarios. While the modified Forest Decree promulgated additional substantive criteria and prior consultation procedures to be taken into account when considering applications for planning permits, it still failed to get rid of the dichotomy between forest located in or outside "green zones" on the applicable land-use plans.

Turning to the question of forest compensation, the following set of rules applies. If deforestation is allowed in accordance with the above-mentioned regulations, it must in principle be compensated for by the owner of the permit.[46] Compensation may take place *in kind*, by paying an amount of money to a compensation fund, or by a combination of both.[47] Since 2014, the deforestation of areas larger than three hectares must be fully compensated *in kind*. Only in limited circumstances – such as the deforestation needed for the implementation of site-specific objectives for Natura 2000 sites or in a context of spontaneous reforestation – is no compensation required.

The Forest Decree lays down a set of specific rules regarding the determination of adequate offsets. Likewise, additional regulation promulgates specific rules with regard to the exact implementation of the forest offsets. Interestingly, it establishes standardised offset ratios based on the ecological value of the woodland that will be destroyed through the project development.[48] The decree itself sets minimum ratios starting at 1:1, i.e. an area at least equivalent to the deforested area.[49] This ratio increases to 1:3 if the clearing approval involves a forest that contributes to the conservation objectives of a special area of conservation under the EU Habitats Directive.[50] The Regulations include a table listing the different ratios applicable to each forest type. The total area in square metres that must be reforested/afforested is then multiplied by a certain figure in order to obtain the full price.[51] Currently, this figure is €3.56 per square metre and it increases to €10.68 if the clearing approval involves a forest that contributes to the conservation objectives of a special area of conservation (SAC) under the EU Habitats Directive.

The forest compensation, whether in the form of on-the-ground offsets or monetary payments into the fund, must involve the reforestation/afforestation of unforested land (except in rare circumstances) in certain green and public areas within applicable zoning plans. In principle, the payment of monetary

46 Flemish Forest Decree, Article 90bis(2).

47 Flemish Forest Decree, Article 90bis(4).

48 *Belgian Court of Auditors (Rekenhof)*, Ontbossing en compensatie. UItvoering van de compensatieplicht bij ontbossing en werking van het Bossencompensatirfonds, Verslag van het Rekenhof aan het Vlaams Parlement, 2016, p. 38.

49 Flemish Forest Decree, Article 90bis(4), subpara. 2.

50 Flemish Forest Decree, Article 90bis(1), subpara. 3.

51 Flemish Regulation of 16 February 2001 relating to forest compensation and deforestation derogation, Belgian Official Gazette, 23 March 2001 (hereinafter referred to as the Flemish Forest Regulation), Article 5.

forest compensation has to be made within four months of the issuance of the permit.

2.2. A NEW, GREENER HORIZON WITH THE ADOPTION OF THE *RUIMTELIJK STRUCTUURPLAN VLAANDEREN* BACK IN … 1997

As previously mentioned, the poor articulation between the general rules on planning law and forest protection gave way to inadequate protection on the ground. During the 1990s, a case was made for the better integration of nature and forest protection into the applicable planning instruments, both at the strategic (*structuurplannen*) as well as the executive (*ruimtelijk uitvoeringsplannen*) level. The adoption of the so-called Flemish Spatial Structure Plan (*Ruimtelijk Structuurplan Vlaanderen*) in 1997 was a milestone in terms of spatial planning management. It laid down the leading principles for spatial planning in Flanders based on a projection of the desired spatial structure of the Flemish region.[52] In terms of biodiversity protection, it set some ambitious policy targets, including the creation of a Flemish Ecological Network (*Vlaams Ecologisch Netwerk*) of 125,000 hectares, which is to constitute a coherent, interconnected ecological network of large nature areas in which nature conservation and/or restoration is to be the primary management objective. Many forests were included in this ecological network, which, however, was never fully designated, and ultimately ended up protecting only approximately 92,000 hectares.[53] This network of core areas, which was subsequently codified in the Flemish Nature Conservation Decree of 21 October 1997,[54] was to be supported by 150,000 hectares of nature areas with mixed functions (*natuurverwevingsgebieden*) and an undefined number of interconnecting corridor areas (*natuurverbindingsgebieden*) as well. These pledges were never really translated into extensive protection areas on the ground.

In order to reverse the landscape fragmentation, the Flemish government pledged through the Flemish Spatial Structure Plan to designate 38,000 hectares of additional "green" zones and 10,000 hectares of additional forest areas on the land-use plans by 2007. However, as will be established in the subsequent part of this chapter, turning these commitments into concrete action and results on the ground proved to be more troublesome than initially expected.

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52 Decision of the Flemish Government of 23 September 1997, Official Gazette, 21 March 1998. The Flemish Spatial Structure Plan has been revised on several occasions. See more at: https://rsv.ruimtevlaanderen.be/RSV/Informatie/Over-het-RSV/Downloads.

53 https://www.inbo.be/nl/natuurindicator/oppervlakte-afgebakend-ven.

54 Flemish Nature Conservation Decree of 21 October 1997, Belgian Official Gazette, 10 January 1998 (hereinafter referred to as the Flemish Nature Conservation Decree).

2.3. OTHER PROTECTION REGIMES RELEVANT FOR FORESTS AND WOODLANDS

In addition to the general protection rules linked to woodlands, several types of biotope enjoy additional protection in the Flemish region. In a similar fashion to the Forest Decree, the 1998 Flemish Biotope Regulation now differentiates between two sets of protection schemes. Its Article 7 assigns strict protection to certain types of threatened biotopes in the Flemish region, such as swamps, semi-natural grasslands and dune habitats.[55] In limited cases, a derogation from this ban, which applies to the entire territory of the Flemish region and thus is in principle not subject to the applicable zoning plans, can be issued by the Agency for Nature and Forests. To a certain extent, forests may also benefit from these specific rules on biotope protection, for instance in the case of forest swamps. Even when located in future housing zones, such woodlands enjoy the protection offered by the 1998 Biotope Regulation.

Along similar lines, the Flemish Nature Conservation Decree also includes a set of so-called "horizontal protection instruments", loosely inspired by the German *Eingriffsregelung*.[56] The instruments aim to avoid or mitigate net losses in the context of "ordinary biodiversity" without overly impeding spatial developments. In many instances, these general protection instruments are also applicable in the context of forests. First, there is the generic due diligence obligation contained in Article 14 of the Nature Conservation Decree (*natuurzorgplicht*), which sets forth a duty of care towards nature that has to be observed by everyone who carries out certain activities liable to damage biodiversity. It is not explicitly linked to planning permitting schemes and is permanently applicable, implying that it is also of use whenever small-scale interventions in forests are conducted without there being any consideration for valuable nature. Whereas the duty of care is to be cumulatively applied with tailor-made protection schemes for specific biotopes, their added value is most prominent in cases of potential destruction of "ordinary nature", which does not harbour habitats or species that are explicitly listed on the annexes to the Flemish nature conservation regulations.

Alongside the general duty of care, a more comprehensive mitigation clause, to be applied in the context of planning permitting schemes, was established by Article 16 of the Nature Conservation Decree. To be more

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55 Regulation of the Flemish Government of 23 July 1998 laying down detailed rules for the implementation of the Decree of 21 October 1997 concerning nature conservation and the natural environment, Belgian Official Gazette, 10 September 1998 (hereinafter referred to as the 1998 Biotope Regulation).

56 Articles 13–18 of the German Federal Nature Protection Act. See more extensively: *P. Fischer-Huftle*, 35 Jahre Eingriffsregelung – eine Bilanz, Natur und Recht 2011, pp. 753–758.

precise, the latter provision imposes the obligation on permit-issuing agencies to guarantee that the activities they authorise cause no 'avoidable damage' to biodiversity (*natuurtoets*). Yet the concept of "avoidable damage" is not restrictively defined, which implies that the clause can in principle be used to avoid or mitigate encroachments upon biodiversity both in the context of strictly protected biodiversity, such as Natura 2000 sites, and in the context of so-called "ordinary" biodiversity.[57] Accordingly, forests are also included in its scope. Recent case law developments have exposed the importance of this provision for the protection of forests located in sites which have been assigned for industrial development.[58] It is important to highlight that, in theory, no *de minimis* threshold applies, which again underlines the broad scope of Article 16.[59] Moreover, various decisions of the Belgian administrative courts have revealed that the mitigation rule also applies when the specific rules on forest compensation have been applied.[60]

2.4. THE INCREASING RELEVANCE OF NATURA 2000 FOR FORESTS

The well-known "first pillar" of the EU Habitats Directive requires the EU Member States to conserve and protect the Natura 2000 sites that have been designated on their respective territories. A significant number of forest habitats are listed in Annex I to the Habitats Directive, implying that the Member States are required to designate a sufficient number of Natura 2000 sites in this regard. Many of the most ecologically valuable forests in Flanders are included in the Natura 2000 Network. When adequately enforced, Article 6(3) and (4) of the Habitats Directive evidently play an essential role in averting further net losses in the context of the national sites that have been included in the Natura 2000 Network. Although these specific conservation duties do not necessarily put a general ban on inherent harmful interventions in nature, such as deforestation,[61] their exclusive ecological focus considerably affects the leeway for planning authorities when issuing permits for potential harmful development in the context of a Natura 2000 site.[62] Evidently, such beneficial effects should therefore also materialise within the Flemish context. Yet the

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57 More extensively, see: *H. Schoukens*, Natuurbescherming buiten de lijntjes. De natuurtoets als imperfect antwoord op de biodiversiteitscrisis binnen Vlaanderen, Tijdschrift voor Omgevingsrecht en Omgevingsbeleid 2014, pp. 355–357.

58 Belgian Council of State, case no. 189.901, 27 January 2009.

59 *Schoukens*, *supra*, note 57 at pp. 355–356.

60 Id. at pp. 357 et seq.

61 CJEU, Case C-2/10, Azienda Agro-Zootecnica Franchini Sarl, ECLI:EU:C:2011:502, para. 46.

62 See also: *P. Scott*, Appropriate Assessment: A Paper Tiger?, in G. Jones QC (ed.), The Habitats Directive – A Developer's Obstacle Course, Hart, 2012, p. 103.

long-lasting absence of strict assessment rules in the 1997 Flemish Nature Conservation Decree[63] effectively turned the ecological network into a "paper tiger" for more than a decade, which also left many valuable forests virtually unprotected.[64]

Apart from general regulations on nature-friendly forestry and agriculture, no specific provisions aimed at avoiding significant effects in the context of Natura 2000 were effectively enforced throughout the 1990s.[65] This loophole has severely undermined the effectiveness of the forest protection regime in the specific context of Natura 2000 sites in the Flemish Region for years. The 2002 landmark decision of the Belgian Council of State in a case concerning the construction of a new tidal dock (*Deurganckdock*) in the Antwerp port area served as a turning point.[66] Pressured by pending infringement proceedings, the Flemish Parliament decided to modify the Flemish Nature Conservation Decree in 2002[67] by including a strict assessment duty for plans and projects liable to damage Natura 2000 sites, among other things.

According to Article 36-ter, §4 of the Flemish Nature Conservation Decree, which now closely resembles Article 6(3) of the Habitats Directive, the competent authorities must not agree to any plan or project which, according to the appropriate assessment, is likely to have a significant effect on a Natura 2000 site.[68] By virtue of Article 36-ter, §5 of the Flemish Nature Conservation Decree, which serves as the counterpart of Article 6(4) of the Habitats Directive, plans or projects can still go ahead in spite of a negative assessment, provided that there is no alternative solution, that they are necessary for imperative reasons of overriding public interest (IROPI) and that all compensatory measures necessary to ensure the overall coherence of the Natura 2000 Network are taken. In recent case law, the application of these protection clauses has proven to be a valuable fall-back instrument for forests located in Natura 2000 sites.[69]

It should come as no surprise that the restoration of forest habitats – for instance through the additional afforestation of sites – is often mentioned as

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63 Belgian Official Gazette, 10 October 1998.

64 *H. Schoukens et al.*, The Implementation of the Habitats Directive in Belgium (Flanders): back to the Origin of Species?, Journal for European and Environmental Planning Law 2007, pp. 127–128.

65 Id. at pp. 129–131.

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

67 Belgian Official Gazette, 31 August 2002.

68 More extensively on Article 6(4) of the Habitats Directive, see: *R. Clutten & I. Tafur*, Are Imperative Reasons Imperilling the Habitats Directive? An Assessment of Article 6(4) and the IROPI Exception, in: Jones QC (ed.), The Habitats Directive – A Developer's Obstacle Course, Hart, 2012, pp. 167 et seq.

69 See for instance this recent ruling related to a zone inside a Natura 2000 site, to be dedicated to future recovery actions: Belgian Council of State, case no. 242.577, 9 October 2018.

an explicit conservation action in the draft versions of the site-specific Natura 2000 management plans that are promulgated by the competent authorities. In some instances, however, the restoration of certain habitat types, such as heather or grasslands, might necessitate the conversion of less ecologically valuable coniferous forests into more desirable target habitats. Since 2014, the Flemish region has stepped up its efforts to operationalise its management actions in view of the established site-specific conservation objectives. This also helps to explain why a Flemish conservation organisation such as Natuurpunt vzw can be identified tagged as the largest deforester in the Flemish region.[70] However, in sharp contrast with other cases of deforestation, such actions do not lead to a net loss in terms of naturally managed areas if they are replaced by more valuable habitats.[71] As a result, such actions are to be treated differently when compared to deforestation aimed at the construction of buildings.

3. ANALYSIS OF THE CONTINUED NET LOSS: WHY IS THE FLEMISH REGION STILL LOSING FOREST COVER?

Even though the above-mentioned legislation is far from perfect, it could still serve as a useful instrument to contain forest loss. However, precisely the contrary has happened. In spite of the current moratorium on deforestation, Flanders is still losing more forests on average. Although in 2006 the forest cover in Flanders increased on average by 200 hectares, the Flemish Region is nevertheless losing 230 hectares of forest cover on a net basis every year. These numbers are based on the so-called *Bosmonitor*, published by the NGO BOS+ in 2015.[72] The same figures indicate that the area that is being afforested amounts to 130 hectares per year, whereas the yearly loss of forest cover amounts to 200–300 hectares every year. Even though these numbers remain contested and challengeable, due to an apparent lack of sound and scientifically validated data, among other reasons,[73] they still display a manifest gap between the ambitious policy pledges with respect to reforestation and the reality on the ground.[74]

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70 For a nuanced analysis of this statement, see: https://www.bondbeterleefmilieu.be/artikel/factcheck-natuurpunt-de-grootste-ontbosser-van-het-land.

71 See: Elke dag een voetbalveld aan bos gekapt in Vlaanderen, VRTNWS, 11 April 2019.

72 See: https://www.bosplus.be/l/library/download/urn:uuid:5af61876-c8f6-49f3-a736-127075396f31/bosbarometer+2015_bos%2B_def.pdf?format=&ext=.pdf.

73 See the Forest Monitor (*Boswijzer*) accessible at the website of the Agency for Nature and Forests: https://www.natuurenbos.be/beleid-wetgeving/natuurbeheer/wat-de-boswijzer.

74 For more background on the mismatch between the numbers used by environmental NGOs and the competent agencies, see: https://hseworld.wolterskluwer.be/nl/nieuws/milieu/bosbarometer-versus-boswijzer/.

As recently as spring 2019, both the competent Minister for the Environment and a political opposition party released new figures on deforestation. Both parties agreed that during the past five years, 1,200 hectares of forest had been destroyed, of which 536 hectares had been directly compensated by private developers and property owners. Depending on whether consideration is given to the multiplier to be taken into account when carrying out offsets, or alternatively the actual surface area of the woodland destroyed, the compensation ratio is 72 per cent or 82 per cent.[75] Yet these numbers do not reflect the effectiveness of the restoration actions on the ground, since they often take years to fully materialise, as well as the cases in which no compensation duty applies (see *infra*, section 3.5).

When set against surrounding regions and countries of a comparable size, the Flemish region continues to stand out as a well-developed region that nevertheless continues to falter in the operationalisation of an effective forest protection and recovery policy.[76] This was further highlighted in 2016, when the draft Forest Map (*Boskaart*) failed to be adopted. This map designated all of the ecologically valuable forests located outside the nature and forest zones as included in the applicable zoning plans. It took into account certain criteria, such as the ecological value of each site and the surface it covers. Deforestation was to become exceptional in these areas, only justifiable when necessary for reasons of public interest. The owners of such lands were still entitled to partial financial compensation, up to 80 per cent of the economic value of their private lands. However, after major protests on the part of the affected property owners and project developers, the Flemish Minister-President quickly decided to withdraw the map in September 2017. This was done in the midst of a public consultation on the context of the Forest Map, since it was assumed that the map had been drawn up in an inaccurate and careless manner. Among other problems, the provisional version of the Forest Map included several parcels of land where in fact no woodlands were present.[77] Restricting property rights for the preservation of a couple of trees was the framing that prevailed in the media, which explains the limited political support it enjoyed at the end of the day.[78] Since then, no follow-up for the zoning map has been adopted. The threat of future restrictions led to a rush of planning permits for "out-zoned" forests, thereby ironically speeding up the loss of forests.[79]

Below, the authors present the principal causes for the continued net loss and try to analyse why the Flemish region is still to be regarded as a

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75 See *supra*, note 71.

76 *Dupont et al.*, *supra*, note 20 at pp. 74–78.

77 More extensively, see: Ban lifted on building in newly protected woodlands, FlandersToday, 22 May 2017.

78 See: Bouwgrond afgepakt voor paar bomen, Het Laatste Nieuws, 17 May 2017.

79 Vrees voor massale aanvraag tot kappen, De Morgen, 22 May 2017.

net deforester. Due to the limited space available for this analysis, the discussion focuses only on the primary issues to be addressed, leaving other valuable elements open for future research.

3.1. THE POOR ARTICULATION BETWEEN FOREST PROTECTION AND URBAN AND SPATIAL PLANNING LAW

A first element of concern is related to the lack of proper integration between the Forest Decree and the rules on land-use planning. As has been demonstrated above, the concrete application of the deforestation moratorium is contingent on the precise location of the forests. Trees growing on a site which has not been accorded a green designation on the applicable land-use plans are *de facto* outlawed. This glaring mismatch between spatial planning and nature protection has been the subject of continued criticism in the literature, especially since the quality of the applicable land-use plans often leaves a lot to be desired.[80] Many of the applicable land-use plans date from the 1980s and were not subject to a prior strategic environmental assessment. In other words, economic interests often prevailed when designating housing and industrial zones, which was the primary reason behind the "out-zoning" of many forests. Therefore, no precedence was given to the ecological characteristics of the sites concerned, at least not when this information appeared to be at odds with the prevailing economic views on certain location. For instance, an isolated forest located at the edge of an industrial estate was very likely to be included in an industrial expansion zone on the applicable zoning plans. Seeing that at the time the societal impact of environmental NGOs was rather limited and access to justice in environmental cases in these years remained rather exceptional for NGOs, not many "guardians" were available to stand up for the provision of additional protection for forests, even when located close to housing zones or industrial estates. As a result, the out-zoning of the forests almost happened overnight, without much opposition.

This "chilling effect" was exacerbated by the inclusion of so-called "spatial exemption" clauses in the Nature Conservation Decree, further aimed at limiting the property restrictions tied to conservation schemes. Pursuant to these clauses, nature protection schemes need to be interpreted so as to not stand in the way of project developments that are in line with the established land-use plans.[81] This is yet another reassertion of the prioritisation of the often – from an environmental point of view – flawed zoning plans over ecological considerations.

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80 *G. Van Hoorick*, Juridische aspecten van het natuurbehoud en de landschapszorg, Intersentia, 2000, pp. 281–345.

81 *Schoukens*, *supra*, note 57.

Of course, the subordination of forest protection to planning law is partly mitigated by the wording of the Forest Decree itself, as well as the application of other instruments, such as the above-mentioned Article 16 of the Nature Conservation Decree. For instance, in a 2009 landmark ruling, the Belgian Council of State had to consider development options in the context of a site which had been designated as an "industrial estate" on the applicable land-use plans, yet harboured a valuable patch of forest habitat. According to the developer, Article 16 could not be interpreted so as to limit his future development options, especially since he had complied with the specific rules on forest offsetting. However, the Council of State reasserted the applicability of Article 16 of the Flemish Nature Conservation Decree to biodiversity located in industrial zones.[82] By doing so, the Council of State effectively underlined the importance of assessing the impact of project developments on ordinary biodiversity, even when located outside protected areas.[83] Possibly, it opted for an outcome which was not in line with the original intentions of the drafters of the Nature Conservation Decree.

Even so, the practical effect of this progressive case law remains limited at best. Article 16 of the Nature Conservation Decree cannot be cited as an effective mitigation rule for the protection of forests that are out-zoned pursuant to old land-use plans. It is too vaguely and loosely formulated to halt further losses. For instance, it does not map out the substantive criteria to be taken into account when considering whether nature can be destroyed or not. It even does not contain an explicit balancing clause. To give but one example of its inherent shortcomings, pursuant to other case law developments, Article 16 of the Nature Conservation Decree is not applicable to "unavoidable damage" to nature. According to the Council of State, the notion of "avoidable damage" cannot be interpreted in such a way that a permit is refused with reference to the unavoidable impacts on the environment caused by the project.[84] Add to that the limited enforcement of such protection tools by local municipalities and it becomes clear that forests located outside protected sites are *de facto* "outlawed". Neither the relatively inadequate forest compensation mechanisms, nor the imperfect mitigation rules included in the Nature Conservation Decree were able to effectively prevent further net losses.

This being the case, the increased importance of the Natura 2000 Network is capable of partly mitigating the flawed articulation between forest protection and planning law. Pursuant to the case law of the Court of Justice of the European Union (CJEU), economic consideration cannot prevail over ecological criteria when assessing the suitability of a site in terms

82 Belgian Council of State, case no. 189.901, 27 January 2009.

83 Belgian Council of State, case no. 227.106, 14 April 2014; Belgian Council of State, case no. 204.673, 3 June 2010.

84 Belgian Council of State, case no. 165.664, 7 December 2006.

of Natura 2000 designation purposes.[85] This has led to the inclusion of some "out-zoned" forests in Natura 2000 sites, adding to their further legal protection.[86] However, given that Member States are not required to designate all patches of listed habitats on their land, yet are allowed to prioritise the most endangered and/or valuable ones, economic considerations can implicitly play a role.

Thus, by referring to the limited ecological potential of certain forests, which might be linked to past degradation, Member States can still indirectly exclude forests from Natura 2000 protection.[87] This has also materialised in the Flemish region, leaving many valuable forest habitats undesignated in terms of Natura 2000 protection. This, in turn, explains the recent surge in the number of contested cases in which "out-zoned" forests are destroyed in view of economic developments. Placing all hope on the "greening" of the existing land-use plans (i.e. issuing new zoning plans which assign a green destination to the forest habitats) might be futile, seeing that the revision of such plans takes years and might lead to additional compensation claims (*planschade*) from landowners who see their property drop in economic value. For now, it simply does not represent a top political priority. In many instances, the local municipalities will be the competent planning authorities. At present, the latter lack sufficient financial backing to carry out such a major policy shift. Local governments are financed in view of the population numbers and not in light of the ecological importance of the sites they harbour. Only when additional financial support is offered by the Flemish government for forest restoration will local authorities be proved willing to further green the applicable land-use plans, which might further bolster the protection of "out-zoned" forests and unprotected forest habitats that possibly qualify for Natura 2000 protection.

3.2. THE MITIGATION HIERARCHY IN THEORY AND IN PRACTICE: THE COMPLEXITY OF SAYING NO

The so-called mitigation hierarchy is frequently cited as the self-evident backbone of every effective NNL policy.[88] The mitigation sequence basically

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85 See for instance: CJEU, Case C-371/98, The Queen v. Secretary of State for the Environment, Transport and the Regions', ex parte First Corporate Shipping Ltd, ECLI:EU:C:2000:600, para. 24.

86 For more information on the natural habitats present in the Flemish Natura 2000 sites: https://www.natura2000.vlaanderen.be/.

87 See in this regard: *H. Schoukens & H. Woldendorp*, Site selection and designation under the Habitats and Birds Directive: a Sisyphean task?, in C.H. Born et al. (eds.), The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?, Routledge, 2015, pp. 42–44.

88 *K. ten Kate & J. Pilgrim*, Biodiversity Offsets technical study paper, IUCN Technical Study Group on Biodiversity Offsets, 2014, p. 11.

boils down to a sequence of different steps when assessing the damage incurred to biodiversity through project developments. Project developers should therefore first focus on measures capable of avoiding negative impacts on protected biodiversity from the outset, such as careful spatial or temporal placement of infrastructure or disturbances. The next step requires the project developer to inquire whether measures can be adopted aimed at reducing or minimising the expected negative impact of a plan or project. The third tier then involves so-called rehabilitation measures, which should remedy unavoidable residual damage or loss, if possible through the on-site restoration of habitats. If, after having taken all the above-mentioned measures, some residual damage still has to be addressed, offset measures or compensatory measures come into play.[89] To put it bluntly, offsets are only to be used as a so-called "last resort", if all other steps of the mitigation hierarchy have been observed.[90]

As could already have been inferred from the analysis above, the current legal regimes in the Flemish region for forest and nature protection do not comprehensively reflect this mitigation hierarchy. By providing a relatively strict moratorium on deforestation in forests located in green zones in the applicable land-use plans, the prevention principle is at least partially acknowledged. However, generally speaking, the above-discussed rules do not explicitly mandate the competent agency authorities to blatantly refuse authorisations for unsustainable projects that might lead to massive environmental degradation. Substantive criteria are not detailed in the legislation, opening the door for continued discretion and deference. Admittedly, an overly rigid application of the mitigation hierarchy might ultimately compromise the legitimacy of nature legislation itself, as if every single step of the mitigation hierarchy is to be taken to its ultimate extent, this might imply that no projects are to be carried out at all. Not every single plantation or intensively managed forest is worth rescuing; the focus should be placed on those forests that are important from an ecological point of view. Putting extensive efforts into saving plantation forests appears to be futile, if other cases of deforestation are not properly addressed. Moreover, a stringent application of the mitigation hierarchy also clashes with the paradigm of continued economic growth. Simply accepting a no-development scenario as a realistic alternative would urge authorities to reconsider their traditional view on economic growth. In itself that might represent an interesting side-effect of the latter provision. However, it should come as no surprise that such an outcome would require a paradigm shift in the heads of the permit issuing agencies. As of today, such systemic movement towards a

89 For a clear overview of the mitigation hierarchy, as currently understood: http://www.thebiodiversityconsultancy.com/mitigation-hierarchy/.

90 *Ten Kate & Pilgrim*, *supra*, note 88 at p. 11.

complete standstill of deforestation actions would require substantive political backing, which is still lacking.

With this being said, the available case law illustrates that even within the confines of Article 16, limited room remains available for advocating for a strict application of the mitigation hierarchy. This is irrespective of whether more scrutiny might be justified by the presence of ecologically valuable forest habitats on the ground. To give but one poignant illustration, in a 2010 ruling on the construction of a road cutting through a site which harboured several patches of ecologically valuable grasslands, the Council of State further clarified that Article 16 of the Flemish Nature Conservation Decree does not include a prohibition on declining permit applications for projects that inherently cause further damage to biodiversity. In the latter case, though, the project developer had included a compensation scheme in its permit application, which might perhaps help to explain the more liberal interpretation by the Council of State.[91] Yet at the same time, most of the compensation actions involved in the latter case consisted of qualitative restoration actions in the remaining grassland area, whereas a substantial part of the quantitative loss of grassland was not compensated at all.[92] It is hard not to see in this ruling a further weakening of the legal teeth of Article 16 of the Nature Conservation Decree.

In addition, the numbers related to the concrete application of forest compensation illustrate that limited attention is paid to prevention. In fact, a 2016 report of the Belgian Court of Auditors (*Rekenhof*) revealed that in the preceding years, more than 80 per cent of all applications for a derogation with a view to deforestation were granted.[93]

The latter findings should come as no major surprise, given the relatively poorly developed substantive framework when it comes to assessing application for nature destruction. Furthermore, in the Flemish region, agencies and permitting authorities typically use the existing compensation schemes to say "yes" to destructive logging proposals.[94] In other words, permitting forest loss remains the default option, which is further justified by the presence of the forest offset scheme. The glaring lack of substantive criteria to be taken into account when balancing the preservation of forests against other interests certainly leads to a further death by discretion.

However, seeing that the application of the existing offsetting schemes is far from perfect, as is demonstrated below (*infra*, section 3.4), the refusal to give precedence to prevention additionally compromises the future of forests in Flanders. This is because many planning authorities are adamant when it

91 Belgian Council of State, case no. 209.868, 20 December 2010.

92 *Schoukens*, *supra*, note 57 at pp. 358–360.

93 *Rekenhof, supra*, note 48 at pp. 20 and 32.

94 More generally speaking, see: *M.C. Wood*, Nature's Trust. Environmental Law for a New Ecological Age, Cambridge University Press, 2014, p. 60.

comes to prioritising economic developments over conservation considerations. If anything, offsetting should never be the departure point when old-growth forests are threatened by project developments. The literature holds that while biodiversity loss might be acceptable in some cases, especially when it relates to non-endangered habitats or species, using offset schemes as a tool to encroach upon old-growth and vulnerable habitats only leads to further losses.[95] The political farce surrounding the adoption of a Forest Map (*Boskaart*) aimed at protecting additional forests, underscores the limited political will to reinforce the preventative approach, even for valuable old-growth forests, which are relatively difficult to restore.

Again, countless examples can be given to further underpin the latter statements. The simple fact that in recent years a Flemish transport company, Essers, has received two permits for the deforestation of two forests – one old-growth forest located in an industrial zone and one ecologically valuable forest located inside a Natura 2000 site – poignantly illustrates the continued deference when it comes to reasserting the mitigation hierarchy against the backdrop of endangered forests. In both instances, reference was made to future forest compensation actions, alongside the urgent economic necessity to build on the site, as the principal argument to authorise the interventions. As is demonstrated further below, the Belgian Council of State ultimately quashed the permit for the deforestation located in a Natura 2000 site. However, as to the first application, the deforestation still went ahead. Ironically, the site itself is currently being used as a parking lot, which sheds a different light on the motivation that was added to the permit application.[96] Of course, these cases are to be treated as mere anecdotal evidence. Yet, seeing that in both instances there was massive public outcry and protest, they also indicate the persistent refusal to fully apply the preventative approach in the context of a valuable old-growth forest.

As such, such interim finds should not come as a major surprise. What is more, outside the context of forests, there exists a clear tendency to use offsets as a principal precursor of economic development, even in the context of protected areas, such as Natura 2000 sites. Recently, though, both the CJEU and the Belgian Council of State have consistently rejected such more liberal approaches to offsetting.[97] The most notorious example was offered by the *Orleans* decision of the CJEU, which rejected an approach whereby nature restoration actions could be used as a means to avoid the application of the

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95 See for instance: *Wende*, *supra*, note 20 at p. 6; *M. Curran et al.*, Is there any empirical support for biodiversity offset policy?, Ecological Applications 2014, pp. 628630.

96 *B. De Somviele*, Essers maakt parking van waardevol bos, Apache.be, 2 January 2019.

97 See for a more extensive analysis: *H. Schoukens*, Proactive habitat restoration and the avoidance of adverse effects on protected areas: Development project review in Europe after Orleans, Journal of International Wildlife Law & Policy 2017, pp. 125–154.

derogation schemes in the context of harbour expansion plans in Natura 2000 sites.[98] A similar rationale urged the Belgian Council of State to reject forest compensatory measures to be used as mitigation within the context of an appropriate assessment needed for a road construction project in the province of Limburg with an impact on forests located in Natura 2000 sites.[99] Instead of presenting forest offsets as a "licence to trash", recent case law developments – at least in the context of protected forests – seem to correct this flawed compensation narrative.

However, unfortunately this approach has not led to a conclusive and meaningful shift in the general permitting policies. In this context, compensation is often still treated as the easy route for permit approval, with only a limited number of applications being rejected. In late 2019, it was revealed that nearly all applications for deforestation that were filed during 2018 were granted, which once again underlines the difficulty of saying "no" and applying the mitigation hierarchy in a more rigid manner.[100] It also underlines that the permitting schemes – aimed at legalising biodiversity losses – are still seen as the primary objective of the application of environmental rules. At a very minimum, a delicate balancing exercise is to be carried out when logging ecologically valuable losses, and future offsetting measures – even when an application is made with very progressive compensation actions – should never be treated as a general facilitator for unsustainable project development, especially taking into account the many flaws inherent in the current Flemish compensation schemes that are identified below (*see infra*, section 3.4).

3.3. THE LIMITED MATERIAL SCOPE OF THE COMPENSATION SCHEME: NOT ALL LOSSES ARE COMPENSATED

When relying upon a compensation scheme, it evidently remains crucial to ensure that its scope is sufficiently wide. However, as was already partly highlighted above, the material scope of the Flemish compensation schemes for forest loss does not fully encompass all actions liable to destroy forest habitats. This explains why 23 per cent of the losses of forest cover are not compensated. Over a period of five years (2014–2019), an area of 268 hectares of deforestation did not require additional compensation. Not all exemptions are detrimental against the backdrop of conservation interests, though. As explained above, the exemption for deforestation in the context of ecological restoration action is certainly sensible, provided that the decisions are always

98 CJEU, Case C-387/15, Orleans, ECLI:EU:C:2016:583, paras. 36–38. See also: CJEU, Case C-521/12, Briels, ECLI:EU:C:2014:330, paras. 28–35.

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

100 See more extensively: *Schoukens*, *supra*, note 97.

based upon sound science. It can safely be assumed that this is mostly the case, since the exemption is confined to instances in which the deforestation is mandatory in view of the applicable conservation targets for Natura 2000 sites.

However, the other exemption clauses are subject to greater criticism. For instance, it remains contested whether the deforestation of spontaneously afforested woodlands that are less than 22 years old should not give rise to compensation duties. Along similar lines, one might also contest the exemption for social considerations, which explains why no offsets are required in habitation or housing zones whenever the purported deforestation does not surpass the threshold of 0.5 hectares. While one might submit that private property owners often might lack the necessary time and skills to opt for compensation in nature, this is not necessarily the case for the financial or in lieu payments that equally remain eligible in such instances. As long as the scope of the compensation duty does not encompass these cases of deforestation, the risk of enduring or accumulated net losses remains a very likely option. Accordingly, additional scrutiny appears to be warranted when crafting exemptions to a general compensation duty.

3.4. FINANCIAL COMPENSATION AS THE DEFAULT OPTION: THE "POLLUTER PAYS" PRINCIPLE?

In general, three approaches to biodiversity offsetting are currently present within the framework of conservation policies, namely permittee-led or *ad hoc* payments to a compensation fund[101] ("in lieu fees") and compensation through habitat banking.[102] None of these three approaches to biodiversity offsetting is flawless. For one, permittee-led compensations are often case specific and thus allow for a more precise (like-for-like) offsetting of biodiversity losses. Yet since they are third-party-led, they are often characterised by a relatively high number of failures, due to the lack of expertise and the absence of long-term protection commitments, among other factors.[103] At the other end of the spectrum, it has been stated that conservation banks might lead to more comprehensive and effective nature biodiversity offsets. At the same time, such an approach is associated with a clear risk of the further commodification of biodiversity.[104] In addition, the existence of conservation banking requires sufficient regulatory

101 *Froger et al.*, *supra*, note 27 at p. 153.
102 *Ten Kate & Pilgrim*, *supra*, note 88 at p. 25.
103 Id.
104 *C. Bonneuil*, Tell me where you come from, I will tell you who you are: A genealogy of biodiversity offsetting mechanisms in a historical context, Biodiversity Conservation 2015 (192), pp. 488–489.

capacity, which might be particularly difficult to achieve in times of budgetary restraint.[105]

As could already be deduced from the analysis above, biodiversity offsets have primarily been implemented within the Flemish region through so-called permittee-led offsetting schemes until the beginning of the 21st Century. Even so, within the context of the Forest Decree, a specific forest compensation fund (*boscompensatiefonds*) has been operational since 2002. As stated above, project developers are permitted to comply with their offsetting obligations by transferring payments to a fund. Until 2014, in 78 per cent of all cases deforesters opted for compensation through payments to the compensation fund. In 2014, the Decree was modified so that payments to the forest compensation fund are now only permissible if the deforestation does not concern more than three hectares. The money in the compensation fund is to be used to create easily accessible forests near cities, for urban nature and to achieve the conservation objectives of Natura 2000.[106]

Be that as it may, the performance of the Flemish compensation fund is rather poor. As stated above, the Flemish region is still to be regarded as a "net deforester", which is partly caused by the many delays and obstacles that are encountered when attempting to make use of the money in the fund.[107] Other studies also revealed that funds have been "piled up" by the Agency for Nature and Forests but have not been used to purchase new lands in order to compensate for the deforested zones in a timely manner.[108] In 2016, this finding caused a major stir in the public debate, with the competent Minister being forced to explain why less money is spent than is reimbursed on a yearly basis in the fund. Moreover, it was disclosed that between the creation of the fund and 2014, approximately 637 hectares of land had been purchased in order to be afforested over time. Since in total 2,340 hectares needed to be offset, the fund has therefore only been able to realise 27 per cent of the required offsets.[109] The 2016 Report issued by the Belgian Court of Auditors concluded that as more than half of the available funds have already been used to purchase lands, the compensation fund is not likely to achieve its NNL objectives, let alone achieve future gains.[110]

The reasons for this manifest underperformance of the compensation fund are manifold. For a considerable time, ensuring the timely implementation of the money that was collected through the fund did not appear to be a political top priority. Moreover, the monetary payments to the compensation fund were

105 *Ten Kate & Pilgrim*, *supra*, note 88 at p. 25.
106 *Rekenhof*, *supra*, note 48 at p. 46.
107 Id. at pp. 45–58.
108 *D. Anseeuw*, Compensatieplicht: de mol in het Vlaamse natuur-, milieu- en landbouwbeleid, Oikos 2016, p. 17.
109 *Rekenhof*, *supra*, note 48 at pp. 47–48.
110 Id.

not framed as a "last resort option" but rather the starting position, relieving the project developers from their primary responsibility of avoiding deforestation in the first place. Factors such as the elevated price of land, the relatively high pressure on open space within the Flemish region and the additional budgetary checks that are included in the compensation fund scheme help to explain the current implementation failures.[111] There is also an important imbalance between the price that had to be paid by a deforester to destroy one hectare of forest – approximately €20,000 – and the financial means required to purchase one hectare of land to serve as an offset zone – on average €60,000. The current underpinnings of the forest compensation fund thus seem to underestimate the sums required to create effective biodiversity offsets for the authorised deforestations.[112] These observations prompted the Flemish government in 2017 to increase the compensation fee, which is now set at €3.56 per hectare. Yet this represents only a modest step forward in view of the important challenges ahead. Even after the recent revision, it can be stated that the true cost of biodiversity offsetting is not fully reflected in the applicable compensation fees, which raises the question whether this is in line with the "polluter pays" principle, which is still to be regarded as a core principle of EU environmental law. Needless to say, the latter findings make a strong case for a stricter application of the preventative approach regarding forest offsets in the Flemish Region, which no longer presupposes that a substantive majority of all applications for deforestation are authorised.[113]

3.5. ADDITIONALITY, TIME GAPS AND INTERIM LOSSES: HOW CAN DEGRADING BASELINES BE AVOIDED?

If one is aiming to achieve NNL or, in some instances, even net gains[114] through the use of biodiversity offsetting, the key question is against which counterfactual baselines these losses or gains are to be measured.[115] Only biodiversity benefits that are additional to a baseline scenario count as valid offsets.[116] In this respect, to what extent the proposed biodiversity offsets are additional when measured against the existing nature conservation policies and competing sources of funding will need to be assessed.[117]

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111 Id. at pp. 50–51.

112 *Anseeuw*, *supra*, note 108 at p. 17.

113 Id. at p. 19.

114 See on this topic: *J.W. Bull & S. Brownlie*, The transition from No Net Loss to a Net Gain of biodiversity is far from trivial, Oryx, 2017, pp. 53–59.

115 *Ten Kate & Pilgrim*, *supra*, note 88 at pp. 19–20.

116 *M. Maron et al.*, Conservation: stop misuse of biodiversity offsets, Nature 2015 (523), p. 401.

117 *F. Quétier, B. Regnery & H. Levrel*, No net loss of biodiversity or paper offsets? A critical review of the French no net loss policy, Environmental Science & Policy 2014 (38), p. 126.

Ensuring additionality is evidently also crucial in the context of forest compensation. In this regard, four additional observations are in order when it comes to the Flemish practice of forest offsetting.

First, it needs to be noted that no general baseline exists in the Flemish region against which the so-called additionality of forest offsets can be measured. Indeed, whereas a multitude of commitments and pledges exist when it comes to forest recovery, no operational baseline scenario is used in order to ensure that the compensation measures and actions go beyond the existing commitments and thus avoid so-called "double dipping". From a practical point of view, one might submit that every compensated forest is to be applauded. However, if the goal is to avoid degrading baselines or, alternatively, net gains, a more comprehensive approach is needed in this regard. As of today, however, the only context in which measurable baselines are present is Natura 2000. In this respect, another striking example of the importance of ambitious recovery baselines and targets was offered by a recent ruling of the Belgian Council of State. The case revolved around the ecological impact of a road bypass (*Noordzuidverbinding*). When assessing the planning permit, the Council of State posited that if progressive restoration objectives are applicable to a Natura 2000 site, the loss of even 0.17 hectares of actual woodland habitats or, as the case may be, of potential habitats for bird species, is to be regarded as significant in terms of Article 6(3) of the Habitats Directive.[118] Accordingly, Flemish judges are increasingly inclined to use the applicable conservation objectives as baseline when assessing the significance of interventions in forests habitats that are designated as Natura 2000 site. Outside the context of the stringent Natura 2000 legislation, such a rigid stance would probably have been very unlikely. Admittedly, the recent jurisprudential shift could easily be dismissed as an example of regulatory creep. Yet such a stance would miss the very point about degrading baselines. The jurisprudence that has recently emerged does give proper weight to the restoration baseline that is to be implemented in the context of woodlands located inside Natura 2000 sites. It moreover appears pivotal to avoid further reference loss. Yet, once again, the importance of this case law is not to be overstated, seeing as many local municipalities do not bother to consult such jurisprudence. Even more so, these cases, in the context of which the Agency for Nature and Forests has often also consented to the destruction of woodlands, further underlines the current negligence at the level of the competent agencies when scrutinising the drafted environmental reports. At best, they check whether no manifest errors are made. Regardless of the motivations underlying this refusal, recent administrative practices still highlight that many competent agencies grapple to understand the importance of avoiding baseline losses. This manifest mismatch needs to be addressed in the context of future legislative proposals,

118 Belgian Council of State, case no. 238.181, 12 September 2017.

with an additional focus on peer-reviewed data on the available forest cover in the Flemish region. The lack of such data remains an important obstacle for performing an offsetting approach.

A second observation relates to the use of compensation ratios in the context of forest offsets, which is certainly to be welcomed against the backdrop of reference losses. As illustrated above, explicit compensation ratios apply in the context of forest offsets in the Flemish region. They start from 1:1 at a minimum for mixed forests, comprised of 20–80 per cent native deciduous trees. This ratio increases to 1:3 if a woodland is removed that is important for achieving the conservation objectives in a Natura 2000 site.[119] While these progressive ratios appear impressive at first sight, the available data underscore that they do not succeed in stemming ongoing losses, let alone achieve net gains in biodiversity. Taking into account the progressive compensation ratios that are sometimes used within the context of Article 6(4) of the Habitats Directive, derogations in other countries (up to 1:7)[120] and the time lags to be faced when implementing woodland compensation zones, a reconsideration of these ratios should still be envisaged.

The so-called risk of "death by a thousand cuts" should be singled out as a penultimate remark in the context of forest offsetting. A recurring element when discussing and analysing the effectiveness of biodiversity offsets is the extent to which they are able to encompass diffuse losses accumulated over time. In recent years, the "death by a thousand cuts" syndrome has gained popularity in environmental discourse, especially when pointing to the accumulation of smaller, insignificant and diffuse impacts, which is believed to be one of the greatest concerns for our remaining biodiversity. Indeed, the most damaging environmental effects often result not from the direct effects of a discrete action, but from the combination and accumulation of the individually minor effects of multiple actions over time (cumulative effects).[121] It is obvious that in highly urbanised and fragmented regions, such as the Flemish region, a particular focus on cumulative effects is instrumental to reversing the ongoing levels of fragmentation. Furthermore, EU environmental law places particular emphasis on the avoidance of cumulative effects, especially when caused by harmful project developments which are subject to a prior appropriate assessment and/or strategic environmental assessment (SEA) or EIA.[122]

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119 Flemish Forest Decree, Article 90bis(4).

120 See for instance: *European Commission*, Opinion delivered at the request of Germany pursuant to Art. 6(4) subpara. 2 of the Habitats Directive, concerning the deepening and widening of the ship fairway of the river Main at the sections Wipfeld, Garstadt and Swcheinfurt (Bavaria, Germany), C(2013) 1871 final, p. 4.

121 *J.T. Dale*, Death by a Thousand Cuts: Incorporating Cumulative Effects in Australia's Environment Protection and Biodiversity Conservation Act, Pacific Rim Law and Policy 2011, pp. 150 et seq.

122 For instance, pursuant to Annex IV(4)(e) of the EIA Directive, an EIA needs to assess "the accumulation of effects with other existing and/or approved projects, taking into account any

The recent reports regarding forest protection in Flanders have showcased cases of creeping deforestation, in which the accumulation of a sequence of small-scale intervention ultimately leads to significant effects in the remaining woodlands. The case of the Forest of Kluisbergen (*Kluisbergen bos*) is revelatory. Once this woodland was a robust complex of forest habitats. After decades of fragmentation, the forest now harbours dozens of villas and can no longer be qualified as a resilient woodland.[123]

Another important observation relates to the location of the purported offset zones. In order to guarantee the additionality of the offsets in terms of ecological benefits, they are to be located in sites which are closely connected with other core nature areas. In recent times, the majority of in lieu payments that were collected in the compensation fund have been used to create large-scale woodlands and forests close to medium-sized cities. However, additional rules are instrumental to ensure that the implementation of offsets is further aligned with global recovery strategies. An additional caution is warranted in view of the continued loss of open space – at a pace of six hectares every year – in a highly urbanised area such as Flanders. As noted above, the offset actions need to be carried out in certain green and public areas in the applicable zoning plans. As such, this appears to make sense. However, in order to effectively augment the amount of biodiversity, priority should be given to afforestation in "grey areas" instead of focusing on the few remaining open spaces in the Flemish region.[124] Even so, following this line of argument, agricultural areas would remain bereft of additional biodiversity. Taking into account the limited ecological performance of current agricultural practices, which primarily focus on short-term profits, creating room for additional woodlands in agricultural lands should not be completely ruled out as a sensible future policy direction. That said, in order to afforest agricultural land other pieces of legislation also need to be observed, which – at present – effectively function as additional obstacles for swift compensation. For instance, pursuant to Article 35bis(5) of the Federal Field Code, afforesting agricultural lands has been made subject to prior authorisation by local municipalities, which opens up room for local politicians to hinder afforestation. Moreover, consistent efforts to review the Tenure Law, so as to explicitly authorise the termination of tenure by the landowner for reasons of afforestation, have been consistently rejected by the political majority in the federal parliament.[125]

existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources".

123 See on this topic: https://www.knack.be/nieuws/belgie/komen-er-huizen-in-kluisbos-of-niet/video-iwatch-768675.html.

124 *Anseeuw*, *supra*, note 108 at p. 17.

125 *Van Gossum et al.*, *supra*, note 34 at pp. 518 and 519.

3.6. FALTERING ENFORCEMENT: WHO IS CONTROLLING THE ENFORCER AND AVOIDS FURTHER ABUSES?

An final element to be considered is the lack of the proper enforcement of offset actions. This is a well-known deficiency of many biodiversity offsets.[126] Against the backdrop of the persistent doubts concerning the effectiveness of offsets, especially in the context of old-growth habitats[127] and the recurring implementation deficits, strict monitoring and enforcement are key features of any effective NNL policy. In theory, strict monitoring requirements in the context of biodiversity offsets should already have been operational within the Flemish region, given the existing obligations imposed by the Habitats Directive on the one hand and the recently amended EIA Directive on the other hand.[128] However, it is not surprising to note that an important enforcement gap exists, as was also noted in the 2016 Report of the Belgian Court of Auditors.[129]

It is important to note that the current legislation puts forward certain requirements in respect of the further implementation of the offset actions, as was detailed above. The forest compensation *in natura* has to be carried out within two years. This can either be realised on land owned by the project developer or that of some third party. If the offsets are not implemented in a timely manner, the permit holder will be liable for criminal sanctions. Non-compliance with permit conditions is to be treated as an environmental criminal offence. Last but not least, the offset site must be maintained as forest for a minimum of 25 years.[130] In other words, there is no explicit requirement as such to conserve and manage the newly created forests until maturity.

In addition, there is also a large gap between theory and practice. Of course, the failure to effectively enforce nature conservation legislation is a well-known fact of life even when certain actions might constitute a criminal offence. Nature inspection has been granted a limited budget, which entails that on-site inspections are the exception rather than the rule. This finding also perfectly ties in with outcomes of the 2016 REFIT fitness check of the EU Nature Directives.[131] The fact that poor enforcement was also prone to affect strictly protected woodlands that were included in Natura 2000 sites still represented a

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126 *Ten Kate & Pilgrim*, *supra*, note 88, at p. 25.

127 On offsets for old-growth habitats more extensively, see: *M. Moreno-Mateos et al.*, Structural and functional loss in restored wetlands ecosystems, PLOS Biol. 2012 (10), e1001247.

128 With the recent revision of the EIA Directive in 2014, this directive now also contains a clear-cut monitoring obligation. See *inter alia* Article 8bis(1)(b) of the recently revised EIA Directive.

129 *Rekenhof*, *supra*, note 48.

130 Flemish Forest Regulation, Article 4(3).

131 *European Commission*, Commission Staff Working Document – Fitness Check of the EU Nature Legislation (Birds and Habitats Directive), SWD(2016) 4725 final, 2016, available at: http://ec.europa.eu/environment/nature/legislation/fitness_check/index_en.htm.

major wake-up call in the Flemish context. Yet this is precisely what happened in what is to be regarded as one of the most mediatised nature conservation cases in the Flemish region of recent decades. Indeed, one of the most noteworthy illustrations of the poor enforcement of biodiversity offsets within the Flemish region was offered by the recent controversy surrounding the second expansion of a transport company (Essers) in a designated Natura 2000 site. In 2009, the Belgian company had been authorised to conduct a first extension of an industrial estate within an adjacent Natura 2000 site, which would lead to the destruction of 1.7 hectares of woodland habitats. Yet this was permitted on the condition that an adjacent zone of 10 hectares bordering the extended industrial site was to be developed as a more resilient and ecologically valuable woodland and heather restoration zone. In addition, the planning permit stipulated that this expansion had to be the final one, since the adjacent Natura 2000 site was already subject to an unfavourable conservation status and further fragmentation would compromise the already degraded baseline.[132] Nevertheless, the bulk of the restoration measures, which, moreover, were not framed as compensation within the context of Article 6(4) of the Habitats Directive, were not properly implemented. No trees were planted, nor was the heather restoration plan ever initiated.[133] In spite of the manifest non-observance of the compensation duties included in the permit conditions, the competent authorities declined to institute criminal proceedings against the permit holder. Most remarkably, the implementation deficit was subsequently used as an implicit argument to authorise a second expansion of the undertaking by another 10 hectares, precisely in the area (the "compensation zone") which ought to have been restored to a birch and oak woodland pursuant to the previous planning permit.

When finally authorising the second expansion in 2016, the Flemish government maintained that the expansion zone contained no actual habitat features and in view of the conservation objectives that had been adopted in the meantime, its further restoration was no longer deemed relevant.[134] However, no explicit attention has been paid to the cumulative effects arising from the new degradation and the non-compliance with the previous offset commitments. EU environmental law contains a clear-cut duty to remedy infringements of EU law.[135] Member States are moreover in principle barred from deriving

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132 All these conditions have also been translated into the regional spatial execution plan of 2009. See: *Flemish Government*, Regional Spatial Execution Plan for the Transport Company H. Essers, 2009.

133 This was even explicitly recognised by the minister competent for nature conservation as a response to a parliamentary question. See: *H. Schoukens*, Wie doet Essers wat?, De Standaard, 19 January 2016.

134 *Flemish Government*, Regional Spatial Execution Plan for the Expansion of the Transport Company H. Essers, 2016.

135 CJEU, Case C-348/15, Stadt Wiener Neustadt, ECLI:EU:C:2016:882, paras. 48–47; CJEU, Case C-201/02, Wells [2004] ECR I-723, para. 68.

advantages from their own non-compliance with their protection duties under Article 6(2) and (3) of the Habitats Directive.[136] At a very minimum, the second expansion of the industrial site should have been subject to the application of the derogation procedure given the cumulative amount of habitat loss – which amounted to no less than 15 hectares in total over a 10-year period – that was validated through the successive authorisation procedures.[137]

It is obvious that this one case cannot be deemed indicative of the apparent deficiencies of the entire enforcement policy with respect to biodiversity offsets. Even so, the case clearly resonated in wider Flemish society, even before the final decision had been taken on the second expansion.[138] Against the backdrop of the ensuing public debate and the recent case law developments before the CJEU regarding Article 6(2) of the Habitats Directive, which is to be regarded as a generally applicable and enforceable non-regression clause,[139] one might at least have expected the Flemish region to act in a more reluctant manner and explicitly reassess the previous non-compliance elements. However, instead of reinforcing the earlier compensation commitments – which had a binding nature – the Flemish government showed remarkable leniency towards the project developer. Time and money were spent to argue that new offsets were to replace the forest to be destroyed, whereas no further attention was paid to the existing commitments. Accordingly, the case can rightly be quoted as yet another illustration of the lack of proper enforcement of mitigation and compensation duties.

Ultimately the Belgian Council of State decided to quash the planning decisions and permits for their failure to abide the conservation duties set out by Article 6(3) of the Habitats Directive in two decisions, one in 2017 and another one in 2018.[140] Yet, rather ironically, the transport company recently reached a deal with one of the NGOs that had initiated legal proceedings (Natuurpunt vzw) on the development of another site. Despite the new location of the expansion no longer being situated in Natura 2000 sites, it will still lead to the deforestation of an "out-zoned" forest.[141] This is simply another illustration of how nature is always on the losing side, even after having won in courtroom. Similarly it also exposes the ambivalent position in which environmental NGOs find themselves.

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136 CJEU, Case C-301/12, Cascina Tre Pini s.s., ECLI:EU:C:2014:214, para. 50.

137 See more extensively: *H. Schoukens*, Schauvliege en de truc voor ontbossing, DeRedactie.be, 18 September 2015.

138 See for instance: Deprez geeft niet toe aan Schauvliege: "Verwijder anders de gemaakte beloftes met tipp-ex", De Morgen, 23 September 2015.

139 See more extensively: *H. Schoukens*, Non-Regression Clauses in Times of Ecological Restoration Law: Article 6(2) of the EU Habitats Directive as an usual ally to restore Natura 2000?, Utrecht Law Review 2017, pp. 124–155.

140 See for the final annulment decision: Belgian Council of State, case no. 241.048, 20 March 2018.

141 We hebben onze lessen getrokken uit het Essers-bos, De Tijd, 19 March 2019.

Understandably, these groups do not want to be perceived as "zealots" as Wood puts it,[142] which explains their willingness to broker deals even when – in this case less valuable – nature will be destroyed.

Be that as it may, the outcome of the latter case is exceptional to the extent that it saw an environmental NGO successfully enforcing earlier compensation commitments. Yet it merely represents the proverbial tip of the iceberg. The 2016 Report of the Belgian Court of Auditors revealed that a positive outcome of the compensation actions is only realised in 68 per cent of the cases in which project-led compensation is applied.[143] Additional manpower will be needed in order to enable the proper monitoring of all the existing compensation pledges.

4. DISCUSSION AND OUTLOOK

If this analysis of the Flemish approach to NNL has made one thing clear, it is that biodiversity offsets are not to be presented as a panacea for all ills. Although biodiversity offsetting is often repeated ad nauseam among entrepreneurs and policy makers, a wide-spread application of biodiversity offsetting tools is certainly not innocent, especially given the poor outcome of restoration measures in the context of NNL approaches so far. It should therefore not be used as a recurrent replacement for stricter preservation efforts, especially since it is prone to be misused by permit issuing authorities with a pro-development bias. Against this backdrop, biodiversity offsetting is increasingly to be identified as both the cause and symptom of the current failures of the existing nature conservation laws.[144] This is no different in the Flemish region. Of course, one might submit that the plight of the woodlands in Flanders should not be overstated, seeing that the largest deforestation takes place in the interests of nature recovery, namely in view of the implementation and realisation of the site-specific conservation objectives. In comparison with the forest losses elsewhere in the world, especially in the Amazon and Congo basins, the continued net loss of forest cover in the Flemish region might seem trivial. In addition, in other surrounding countries, forest cover has also been shrinking in recent years. More importantly, though, the reasons explaining the continued failure to reverse the negative trend in terms of forest cover in the Flemish region are universal. Ultimately, the loss of forest cover is but one indication

142 *Wood*, *supra*, note 94 at p. 115.
143 *Rekenhof*, *supra*, note 48.
144 *Moreno-Mateos et al.*, *supra*, note 36 at pp. 557–558.

of a wider trend, i.e. the ongoing decline of natural elements within the Flemish region.

This legal analysis of the Flemish forest offsetting regime serves as a cautionary tale for the many legal, policy-related and societal hurdles to be overcome when implementing compensation policies at the national level. Although the patchwork of different protection and offsetting schemes in the Flemish legislation appears impressive at first glance, its concrete application and enforcement fall short in view of the level of ambition set by the EU biodiversity strategy to 2020. At best, some compelling cases have recently emerged in which proactive offsetting strategies have been tested. Even so, the failure to take into account the social implications of these actions, combined with a blatant disregard for the mitigation hierarchy, ultimately led to their eventual demise after legal courtroom action.

In order to stop continued degradation and forest loss and, if possible, to achieve net gains of biodiversity, a shift towards a stricter authorisation policy will be inevitable, even if this would clash with the prevailing attitude towards green growth (which assumes that ecological restoration can be reconciled with continued economic development). Moreover, agencies and authorities will need to move beyond deference and discretion and take up their role as genuine trustees of common goods, such as woodlands.[145] This might sound simplistic, yet it should certainly not be treated as a truism. The legislation needs to clearly stipulate the substantive yardsticks to be taken into account when considering biodiversity offsets, with a clear observance of the mitigation hierarchy. Only if applied in such a strict context, with the provision of additional monitoring, biodiversity offsets might eventually stall the ongoing loss and create net gains. The usage of conservation banking, especially when applied within the context of the loss of "ordinary" biodiversity, might lead to less interim losses seeing that the available credits represent additional nature or woodlands that have already materialised on the ground.

However, given that there has also been a recent effort to strengthen the authorisation scheme for ecologically valuable woodlands that are located outside the designated green areas on the applicable zoning plans that failed to get adopted, little hope exists that we might soon witness a shift towards more coherent and cohesive biodiversity offsetting in Flanders.[146] Ironically, one of the main reasons the new draft proposal for the enhanced protection of

145 See in this regard: *Wood*, *supra*, note 94 at pp. 188–207.

146 For a concise analysis of the latest proposals, see: Vlaamse Regering heft nieuwe regeling klaar voor bescherming kwetsbare bossen, Knack, 14 December 2018, https://www.knack.be/nieuws/belgie/vlaamse-regering-heeft-nieuwe-regeling-klaar-voor-bescherming-kwetsbare-bossen/article-belga-1406807.html.

out-zoned forest was not adopted in 2019 was linked to the fact that it might need a prior SEA in order to get the go-ahead. While this could easily be framed as yet another example of administrative overkill, it might still help the authorities to set the scientific data straight before moving forward with new protection schemes. Such a scenario is to be preferred over rushing the adoption of another imperfect map of "out-zoned" forest, paving the way for additional legal challenges.

Beyond the specific Flemish context, this analysis puts forward the following general lessons in this regard.

First, there exists a clear need for a proactive integration of biodiversity conservation interests in the existing land-use planning schemes. The lack of the timely integration of offsetting policies in strategic planning frameworks explains the significant time lags that occur when implementing forest compensations. A more strategic approach to offsetting might eventually lead to robust nature core areas, where the recovery targets are more easily met and their implementation is faced with less delay. Instead of being *ad hoc* and reactive, a more timely integration allows offsets to be proactive and resilient.

Second, the so-called mitigation hierarchy should be properly reflected within the existing regulatory framework regarding biodiversity offsets, while sufficient attention needs to be paid to the topic of cumulative effects. The absence of this might lead to a situation in which exemptions are too easily granted by local municipalities and regional agencies, as has been the case in Flanders during recent decades. While one might provide additional leverage for biodiversity offsetting in the context of "ordinary" nature, it should never be treated as the default option.

Third, offsetting policies need to be based upon comprehensive ecological science, which requires a government to hold that some valuable woodlands are irreplaceable and thus non-offsetable. Sound monitoring programmes should ensure that offsets do not exacerbate ongoing losses. In order to facilitate the introduction of stricter protection regimes, sufficient attention should be paid to sound scientific underpinnings.

Fourth, the compensation ratios used need to be sufficiently ambitious to attain the applicable NNL (or even net-gains) rationale. The topic of collateral losses ("death by a thousand cuts") needs to be taken into consideration in this regard. While payments to a compensation fund and/or conservation banks might be recommended in some instances, one at least needs to ensure that such fees reflect the true cost of afforesting new lands. If not, offsetting policies will merely lead to more biodiversity losses, as was illustrated by the Flemish case study.

Fifth, the impact of future forest protection rules on vested property rights is to be fully acknowledged. Financial compensation schemes need to be put into place for the affected landowners, which will eventually also diminish the societal resistance to a more stringent protection of forests, even when located in previously designated housing zones. It is crucial that such financial compensation schemes are easily accessible and provide a short-term solution to the property value loss resulting from tighter protection rules.