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**TEMPORARY NATURE: A USEFUL TOOL FOR SUSTAINABLE COMPANIES?**

Nature conservation is a theme which is not easily connected with companies. Yet, also nature conservation can be a way for incorporation of sustainability into company decision-making. In port areas many companies are frequently confronted with the presence of lots of valuable nature values in their direct environment. It is in this context that the concept "temporary nature" appeared as a way to reconcile biodiversity objectives with the economic and spatial policy of companies. It is a relatively conservation concept that is mainly of practical relevance in highly dynamic areas. It more in particular concerns port and reclamation areas where raised construction sites, temporary sand depots and the like become temporarily available at regular intervals.

Temporary nature might offer a useful addition to the existing nature conservation policy. In most countries, large areas of land lie undeveloped during many years. Most companies would prefer to have these areas regularly ploughed or grazed, in order to not allow protected species to settle and/or protected biotopes to develop. The concept of temporary nature offers these companies – which are mostly situated in port or reclamation areas – another solution. Instead of preventing the development of nature in these areas from the beginning, they allow spontaneous development of nature. Even though they are only temporarily available, these areas could constitute a useful addition to the existing ecological areas, especially for pioneer species.

Companies will only opt for the concept of temporary nature if they are offered sufficient legal certainty. They must have the certainty that the (possible) presence of protected species will not hamper the final realisation of the destination of the area, for instance as an industrial area.

Although nature conservation law offers enough margins for temporary nature, the required derogations and permits might form quite an administrative burden for the companies concerned. In general, it must be that temporary nature conservation efforts are best conducted within management plan at area level.

This at least comprises the preparation of a plan outlining a framework for the biotopes, species and habitats that qualify for temporary natural values within a certain area, allowing the attainment of the good conservation for the species and habitats concerned. If national nature conservation law allows so, exemptions and/or deviations can in advance be provided for in this plan (if necessary, linked to compensating measures). For instance, this is the case for the Flemish species protection programme. Such a proactive approach can result in a considerable decrease of the administrative costs for the actors in question, as there is no longer any need for any additional deviation procedures.

Drafting an area-oriented planning framework will not be possible and/or useful in certain circumstances. In some case a plan-based approach will offer no practical outcome for temporary nature as the drawing of it will take too much time or will not be useful considering the small surface of the area concerned. To circumvent such drawbacks the developer could apply for a derogation in

advance– i.e. before the area concerned is made available for nature development – based on the regulations on species and biotope protection. If the derogation is not obtained in advance, one can still choose not to proceed with the development of temporary nature. Although it is subject to some legal criticism, this approach can offer the companies concerned a sufficient instrument for temporary nature. Recent Dutch case law seems to accept the legality of it.

Though it has been determined that working with temporary nature can be compatible with the existing nature conservation law, possible points of improvement exist. In principle, a *derogation* needs to be requested in each individual case, unless the derogation is integrated into a species protection programme. Appeal against the decision granting the derogation remains possible. An exemption, on the other hand, applies to all cases that fall under a category of cases for which exemption has been granted. No application needs to be filed and no separate decision needs to be taken. The advantage of an exemption in function of temporary nature is the absence of procedures. Thus, project developers know the score when they allow temporary nature to develop on their land. In the Netherlands the concept of "general derogation" (in Dutch "generieke ontheffing") seems to offer a more flexible way out for temporary nature. Such a derogation exempts all construction works which might interfere with the protected species when a management plan is present that is aimed at the attainment of the good conservation status. It is uncertain whether the Dutch programmatic approach is in line with the rather strict application of the Habitats and Birds Directive in the above mentioned case law of the Court of Justice. The Court of Justice also seems to reject a general derogation because derogations have to be limited to a specific case which offers no alternatives regarding the solution. The recent decision of the Court of Justice in the case C-241/08 seems to indicate that the exemption from assessment for works and developments provided for in programmes will not be such an easy option, especially in cases where temporary nature will interact with Natura 2000.

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

Biographical note

*Hendrik Schoukens obtained a Licentiate degree in Law with great distinction at the Catholic University of Leuven in 2005. He was a member of the team that represented the Catholic University of Leuven at the Philip C. Jessup International Law Moot Court Competition in Washington in 2004. In 2007 he received a Master's degree in Environmental Law with greatest distinction at Ghent University.*

*Since January 2006 he has worked as a lawyer at LDR. He focuses on files regarding nature conservation and files with a cross-sector approach. He has extensive expertise with regard to the effect of water, air, nature and landscape regulations in the spatial planning sector. The implementation of the complex project and planning EIA (environmental impact assessment)*

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