

Development of operational principles of any proposed EU no net loss initiative^{1,2}

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Introduction and approach³

To develop operational principles, agreeing the definition and scope of any EU initiative is a logical first step, which is the work of the Subgroup on scope and objectives. To assess the potential policy scope of the no net loss initiative, it is necessary to identify its added value, e.g. identifying and filling existing gaps in the EU legal protection of some biodiversity types/values against some types of pressures. It needs to be seen whether, depending on the type of gap, the type of pressure and the biodiversity value, the most appropriate operational principles can then be proposed, or whether a set of general principles can be applied across the board.

For example, the IFC Performance Standard 6⁴ sets the mitigation hierarchy as an overall priority principle, then classifies biodiversity into a number of different levels and sets different levels of requirements for each of these. Regarding offsets (the last step in the mitigation hierarchy), the Business and Biodiversity Offsets Programme (BBOP) Principles aim to be applicable to all biodiversity/types, with a particular focus on offsets.

It should at the same time be recognised that measuring and valuing biodiversity and ecosystem services is difficult and imprecise and that once some elements of biodiversity are destroyed, it is difficult if not impossible for them to be restored to their pre-destruction state. Any new proposed policy, aiming to protect and enhance biodiversity and ecosystem services, should thus strongly adhere to mitigation hierarchy, enforcing the recognition that developers and land-users should not be allowed to carry out an activity leading to a loss of biodiversity by simply paying for the damage caused. While compensation is possible, after appropriate avoidance, minimization, and restoration measures have been applied, it is questionable whether precise offsetting is achievable.

In many contexts (pressure vs. biodiversity value) the existing legal obligation with respect to biodiversity is higher than only 'no net loss', often there is an obligation of good quality, e.g. favourable conservation status, good ecological status etc. The NNL initiative must not undermine existing legislation and must in no way legitimise projects that would normally be rejected as a result of measures in existing environmental legislation. The No net loss

¹ The Netherlands stated that it "cannot recognise itself in this document and can therefore not subscribe it".

² The present document has been developed primarily with reference to the terrestrial environment, within the EU. Further consideration will need to be given to developing equivalent sets of operational principles one for application in the marine environment and another for application in the EU's Outermost Regions and Overseas Countries and Territories.

³ In general, the document does not indicate the positions of individual stakeholders. However, in some cases, where there was a particular need for clarity with regard to the positions taken on sensitive issues, the positions of individual stakeholders have been recorded. Euromines did not agree with this approach and would have preferred that the origin of text and the positions taken by the individual stakeholders be recorded on a more systematic basis.

⁴ http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/Sustainability+Framework+-+2006/Performance+Standards+and+Guidance+Notes/

initiative should in any case avoid weakening higher EU standards when they exist (see separate Scope and Objectives document), and should work to improve and/or complement implementation of existing laws. Any EU level NNL initiative would also need to take into account the social and cultural value of landscape in consideration. It should also ensure consideration of the reality of implementation of social and environmental measures across the different governance contexts across the EU (Subsidiarity Principle).

'Operational Principles' were considered by the subgroup to be a set of fundamental doctrines according to which EU NNL should be made to function, consistent with agreed EU goals⁵.

The BBOP principles, which members of the Working Group drew upon, inter-alia, during their discussion, are included for reference in Annex II.

Possible Operational Principles

Principles related to Operational Governance

- Any EU NNL Initiative must comply with the established Subsidiarity, Proportionality and Precautionary Principles of the EU
- Some stakeholders thought that any EU NNL initiative must add value for EU biodiversity policy, including towards international commitments, whilst being in line with EU2020 targets for increasing employment, productivity and social cohesion (Industry). Other stakeholders thought that the primary aim should be biodiversity protection and enhancement, whilst jobs and growth could be a possible side benefit (Some NGOs).
- Any EU NNL Initiative must be based on the integration of participative local land-use planning, where land-use change fits in⁶. Any NNL initiative must ensure that any land-use activity is coherent with this plan, which must ensure first and foremost the avoidance of loss of or damage to ecosystems. This requires the systematic consideration of alternative options for achieving the objectives of the proposed activity. The final decision must include due consideration of the views of any concerned local communities and ecosystem integrity (see BBOP Principle 6). Some stakeholders thought that these views should be placed before costs (some NGOs), whilst others did not agree (some Industry representatives and a MS representative).
- Any EU NNL Initiative needs to be additional to and distinct from existing legislation. As such it cannot create an immediate link between destruction of biodiversity and a promise to offset (e.g rehabilitation, restoration, creation of habitat). If an activity is nevertheless accepted according to the land-use plan and existing legislation, then it could be considered how compensation is managed (publicly and transparently) and used for conservation of ecosystems (BBOP Principles 4 and 5).

⁵ A set of existing EU principles and Goals is included in Annex I for reference

⁶ Copa-Cogeca and ELO do not support statements in this paper requiring spatial planning for NNL.

- EU NNL is one consideration among several actions contributing to one target of the EU Biodiversity Strategy (target 2), which in turn is one target of six mutually reinforcing targets, which together contribute to the headline objective of the Biodiversity Strategy. Any EU NNL regime will necessarily be limited – it can only ever be one tool to complement others
- EU NNL should take into account *"existing experience as well as the specificities of each Member State, on the basis of in-depth discussions with Member States and stakeholders regarding the clear definition, scope, operating principles and management and support instruments in the context of the common implementation framework of the Strategy"*.
- Mechanisms for EU NNL must provide predictability and transparency for long-term (public or private) investment. Some stakeholders thought that any legal framework must allow public and private projects developers to plan costs and meet EU 2020 targets (some Industry representatives), whilst others did not agree that objectives should be related to EU 2020 (some NGOs).
- "Operational" Principles need to be applicable to public sector actors as well as private sector actors – including some combined principles of good business and principles of good public administration. Actors should be treated equitably.
- The EU NNL initiative should not entail any impairment of existing biodiversity as protected by EU nature legislation.
- It is vital that any EU NNL Initiative does not duplicate or interfere with EU law and policy on avoidance, minimization, restoration or rehabilitation.
- The willingness to compensate or offset residual damage should not justify a less careful consideration of alternative locations or designs of a development. Determination of appropriate and proportional mitigation measures and adjustments of the design of a project to minimise impacts should always precede any evaluation of the need for compensation and/or offsetting, although in reality such design and planning processes are often iterative (i.e. design of avoidance, mitigation and compensation measures happens to some extent simultaneously with each design informing adaptation of the others).
- It is important to ensure that decisions are taken in an equitable, transparent, participative way that makes use of scientific and traditional knowledge. Local communities, local and national governments, in partnership with local business, should as a priority develop regional and spatial and environmental plans with objectives.

Principles related specifically to Metrics

- There should be recognition of the difficulty of measuring ecosystems and ecosystem services with a very high degree of meaningful accuracy, although some developments of pragmatic and stable metrics has taken place in recent years. Some stakeholders thought the development of metrics was difficult by definition.

- There is no single best way to measure losses and gains: they can be expressed at different scales according to the issue considered. For example when considering impacts of land use or urban development, the metrics to consider are not necessarily the same as when considering residual impacts of linear infrastructure.
- Metrics to measure the change in biodiversity/ecosystems/ecosystem services should be fit for purpose (that is, as easily understood, easy to apply and cost effective as possible for a precise purpose, commensurate with the nature and significance of biodiversity affected, measured over the appropriate time period). Some stakeholders thought this should be done regardless of the costs.
- Gains and losses can be expressed at different scales (from generic habitat types through to specific intra-species genetic groupings). It is important to strike a balance between the need for simplicity and securing that NNL is achieved. The mandate is to ensure NNL. Some stakeholders thought that Net Gain should also be achieved where possible
- There is no consensus within the NNL WG on how flexibly metrics should be applied. One set of stakeholders thinks that the EU NNL Initiative should provide a framework to use the best adapted and proportional means and tools in order to ensure effective no net loss of biodiversity, ecosystems and their services. For example, with regard to offsets a layered approach with more sophisticated metrics for higher conservation value areas and simpler metrics for lower biodiversity values might prove fruitful. Another set of stakeholders thought that great care should be given to the definition of the value assigned to biodiversity elements (including also ecosystem functions, intrinsic value) and to their categorisation; that a layered approach should not lead to the social value of biodiversity being omitted from consideration. and that the same metrics should be applicable for higher values as well as for the wider countryside

Principles related to Avoidance

- Decisions taken at the outset of the planning process in relation to issues such as the physical location and timing of interventions or a proper consideration of alternatives can help to avoid impacts on biodiversity.⁷
- A set of stakeholders considered that the EU NNL Initiative should not result in new obstacles to economic activity (i.e. it should not be a simple extension of the existing protected areas network) (Industry). This is not to say that EU NNL could not create *any* obstacles to *any* economic activity. Most stakeholders agreed that economic interests should be considered in a proportional way. Economic activity should not

⁷ Friends of the Earth Europe and CEEWeb requested that the following statement be made in relation to this paragraph:- "If, despite this and further mitigation measures, an impact on protected or threatened species or habitats is to be expected, there should be an assessment whether the public interest in going ahead with the project overrides the interests of conserving the concerned occurrence of these species or habitats (cf. Convention on the Conservation of European Wildlife and Natural Habitats as well as the Convention on Migratory Species)."

create additional loss of biodiversity and common ground should be sought for both sets of interests.

- Avoiding harm is first based on better implementation and compliance with existing legal obligations
- Avoidance of harm is tackled while planning the use of land and space, while assessing potential future impacts of plans, programmes, projects and land use activities. Better coherence and integration of biodiversity targets with planning (at different levels and scales) is needed
- In order to create a level playing field, some stakeholders thought there should be no sectoral exceptions on assessing and avoiding harm to biodiversity and ecosystems. Others disagreed and thought that for agriculture, CAP already integrates biodiversity policy so there should be no further requirement to apply NNL (Copa-Cogeca)

Principles related to Minimisation, Restoration/Rehabilitation

- It is vital that any EU NNL initiative does not duplicate or interfere with the minimisation, restoration/rehabilitation aspects of existing legislation.
- Determination of appropriate and proportional minimisation, restoration/rehabilitation measures and adjustments of the design of a project, plan or activity to minimise impacts should, in principle, precede any evaluation of the need for compensation and/or offsetting. Although in practice such design and planning processes before approval are often iterative (i.e. design of avoidance, mitigation and compensation measures happens to some extent simultaneously with each design informing adaptation of the others), the willingness of the proponent to compensate should not affect the authority's judgement of what is to be considered appropriate minimisation, restoration/rehabilitation.
- Several of the principles related to Avoidance also apply to minimisation, restoration/rehabilitation and vice-versa.

Principles related to Compensation

- It is vital that any EU NNL initiative anchors compensation/offsetting into a strict and systematic mitigation hierarchy. Some stakeholders think that EU NNL should focus primarily on compensating for residual impacts, as this is the main legislative gap, whilst some NGOs see a strong priority for avoidance because they consider that there are gaps in implementation of existing legislation.
- Some stakeholders thought that an EU NNL initiative should, for lower biodiversity values, allow for some trade-offs, e.g., trading-up, reasonable offsetting of conservation outcomes at some distance from the residual impacts, and temporary degradation in exchange for long-term, sustainable, net gains, in specific cases where it makes sense. There are two components to determining NNL by balancing loss and gain:
 - o the type of biodiversity affected: international best practice allows 'trade ups' (see Glossary document)

- the 'amount' of biodiversity affected: as it is impossible to count every single microbe, plant and animal, metrics for calculating loss-gain usually use surrogates for the overall amount of biodiversity being lost (or gained). Surrogates do not measure every component, so trade-offs will inevitably be built in. Some NGOs disagreed that there should be trade-offs and thought that it should be recognised that offsets are not precise.
- Mechanisms for EU NNL should only support an extension of the existing protected areas network in exceptional cases where this leads to, or is linked with, a clear improvement on the ground, following achievement of core aspects of compensation such as 'like for like or better' and 'ecological additionality' on the ground. Some stakeholders thought that additional and extended protected areas per se should not qualify as compensation measures, whilst others thought that the option of incorporating offsets into protection schemes should be left open in order to ensure that positive biodiversity outcomes are secured over the long-term.
- Biodiversity offsets are a tool for the implementation of the Polluters Pays Principle – it is the damaging person or organisation which must carry the cost and liability for compensation. Governments, end users and industry have a shared interest in compensating for residual impacts of their lawful activities.
- Biodiversity offsets cannot be a "primary" policy tool to be implemented in all cases. Compensation can be implemented through different mechanisms. Some stakeholders considered that offsets could constitute a way to implement compensation and be an element of flexibility in the achievement of certain binding conservation objectives on a larger geographical scale such as FCS or NNL (as in art 6 of the Habitats Directive). Others thought flexibility should not be introduced in reaching binding objectives⁸.

For an effective design of a biodiversity offset scheme, five main conditions need to be fulfilled

1. Making sure that the mitigation hierarchy is applied
 2. Making sure that all legal obligations are fulfilled e.g. assessments, permits etc. (no by-passing, link to ecological additionality).
 3. Making sure that there is an effective gain for biodiversity that is equal or superior to the residual damage – control and enforcement
 4. Making sure that there are clear and transparent rules for assessing ecological equivalency and sizing compensation measures
 5. Establishing a framework providing clear legally binding rules (and therefore legal security) that apply when and if such a mechanism is used
- For a scheme to be effective in the long term, legal, institutional and financial mechanisms are needed, as well as, monitoring, enforcement and adaptive management.

⁸ This position was supported by Birdlife/EEB, IUCN, CeeWeb, Friends of the Earth. It was not supported by Euromines.

- The current stringent compensation system prescribed in Articles 6(3) and (4) of the Habitats Directive must not be affected by the EU NNL initiative. It must be maintained and compliance within Natura 2000 sites should continue (see Scope and Objectives paper).
- Compensation must also remain open to scaling up or down, if changing circumstances or knowledge mean that practical realisation of the mitigation hierarchy unavoidably falls short of, or significantly exceeds, what was planned⁹.

⁹ COPA COGECA, ELO and Eurelectric state that "care should be taken to ensure that such an "iterative management" on "scaling up and down" does not result in substantial changes of requirements as defined in permits."

Annex I: Definition of general principles and existing principles to build EU NNL principles on

Any EU No Net Loss Initiative is constrained by some pre-existing principles of the EU:

Principles of the Convention on Biological Diversity

Principles in the CBD include:

In the Preamble. *“where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat”*,

And Article 3. *“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”*

Principles expressed as final causes or goals include conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. By 2020, the restoration of at least 15% of degraded ecosystems.

Principles of the EU

E.g., the rule of law: every action taken by the EU is founded on treaties that have been approved voluntarily and democratically by all EU member countries.

Subsidiarity Principle

The Union does not take action unless it is more effective than action taken at national, regional or local level (Article 5 of the Treaty on European Union)

Proportionality Principle

The involvement of the institutions must be limited to what is necessary to achieve the objectives of the Treaties (Article 5 of the Treaty on European Union)

Precautionary Principle

Where there are threats of serious or irreversible damage, lack of scientific knowledge shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. Where action is deemed necessary, measures based in the precautionary principle should be, *inter alia*:

- *proportional* to the chosen level of protection,
- *non-discriminatory* in their application,
- *consistent* with similar measures already taken,
- *based on an analysis of the potential benefits and costs* of action or lack of action,
- *subject to review*, in the light of new scientific data, and

- *capable of assigning responsibility for producing the scientific evidence necessary for a more comprehensive risk assessment.*

EU2020 Targets

E.g., Smart, Sustainable and Inclusive Growth: high levels of employment, productivity and social cohesion: boost growth and jobs.

EU2020 Targets:

(including)

1. Employment
2. R&D
3. Climate change / energy
greenhouse gas emissions 20% lower than 1990
20% of energy from renewables
4. Education
5. Poverty / social exclusion
at least 20 million fewer people in or at risk of poverty and social exclusion

EU Flagship Principles

(including)

A Resource-Efficient Europe : a resource-efficient, low-carbon economy to achieve sustainable growth: political visibility and support: certainty for investment: clear justification and evidence of value added.

Strategic Biodiversity Principles

Halting the loss of biodiversity and the degradation of ecosystem services in the EU by 2020, and restoring them in so far as feasible, while stepping up the EU contribution to averting global biodiversity loss: focussing on biodiversity as a whole and ecosystems services: within but also beyond protected areas: establishing Green Infrastructure: supported by the results of ecosystem mapping and assessment of the state of ecosystems and their services

Proposed Target and Associated Actions

- Improve knowledge about ecosystems and their services in the EU
- Establish priorities for restoration and promote the use of Green Infrastructure
- Ensure no net loss of biodiversity and ecosystem services

Annex II: BBOP Principles

BBOP Principles on Biodiversity Offsets¹⁰

Biodiversity offsets are 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. The goal of biodiversity offsets is to achieve no net loss and preferably a net gain of biodiversity on the ground with respect to species composition, habitat structure, ecosystem function and people's use and cultural values associated with biodiversity.

These principles establish a framework for designing and implementing biodiversity offsets and verifying their success. Biodiversity offsets should be designed to comply with all relevant national and international law, and planned and implemented in accordance with the Convention on Biological Diversity and its ecosystem approach, as articulated in National Biodiversity Strategies and Action Plans.

1. Adherence to the mitigation hierarchy: A biodiversity offset is a commitment to compensate for significant residual adverse impacts on biodiversity identified after appropriate avoidance, minimization and on-site rehabilitation measures have been taken according to the mitigation hierarchy.

2. Limits to what can be offset: There are situations where residual impacts cannot be fully compensated for by a biodiversity offset because of the irreplaceability or vulnerability of the biodiversity affected.

3. Landscape Context: A biodiversity offset should be designed and implemented in a landscape context to achieve the expected measurable conservation outcomes taking into account available information on the full range of biological, social and cultural values of biodiversity and supporting an ecosystem approach.

4. No net loss: A biodiversity offset should be designed and implemented to achieve *in situ*, measurable conservation outcomes that can reasonably be expected to result in no net loss and preferably a net gain of biodiversity.

5. Additional conservation outcomes: A biodiversity offset should achieve conservation outcomes above and beyond results that would have occurred if the offset had not taken place. Offset design and implementation should avoid displacing activities harmful to biodiversity to other locations.

6. Stakeholder participation: In areas affected by the project and by the biodiversity offset, the effective participation of stakeholders should be ensured in decision-making about biodiversity offsets, including their evaluation, selection, design, implementation and monitoring.

7. Equity: A biodiversity offset should be designed and implemented in an equitable manner, which means the sharing among stakeholders of the rights and responsibilities, risks and rewards associated with a project and offset in a fair and balanced way, respecting

¹⁰ To learn more about the Business and Biodiversity Offsets Programme (BBOP), see: <http://bbop.forest-trends.org/>

legal and customary arrangements. Special consideration should be given to respecting both internationally and nationally recognised rights of indigenous peoples and local communities.

8. Long-term outcomes: The design and implementation of a biodiversity offset should be based on an adaptive management approach, incorporating monitoring and evaluation, with the objective of securing outcomes that last at least as long as the project's impacts and preferably in perpetuity.

9. Transparency: The design and implementation of a biodiversity offset, and communication of its results to the public, should be undertaken in a transparent and timely manner.

10. Science and traditional knowledge: The design and implementation of a biodiversity offset should be a documented process informed by sound science, including an appropriate consideration of traditional knowledge.