

Alternative Ways to Support Private Land Conservation



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I. Introduction

The EU Biodiversity Strategy, as presented in the Communication from the European Commission “*Our life insurance, our natural capital: an EU biodiversity strategy to 2020*”, highlights the essential role of biodiversity for the provision of food, fresh water, clean air, shelter and medicine, for the mitigation of natural disasters, pests and diseases and for the regulation of the climate.¹ It also acknowledges that persistent pressure from human activities, in particular land cover change and land-use intensification, has resulted in dramatic ecosystem fragmentation and habitat loss. Currently, only 17 % of habitats and species and 11 % of key ecosystems protected under EU legislation are in a favourable state.²

The cornerstones for nature conservation in the EU are the Birds Directive³ and Habitats Directive⁴. They provide the legal basis for the designation of terrestrial and marine areas hosting habitat types and species of Community interest as “special areas of conservation” (SACs). Together these areas form Natura 2000, the largest coherent network of protected areas worldwide. In total, more than 18% of the land area of the EU member states has already been designated as Natura 2000.⁵ This surpasses the Convention on Biological Diversity’s (CBD) Aichi Biodiversity Target 11, which states: “By 2020, at least 17 % of terrestrial and inland water areas (...), especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscape and seascape.”⁶

The designation of Natura 2000 sites is primarily a public responsibility. Private stakeholders play an important role during and after site designation, and usually they are actively involved in the designation process, but they are rarely the driving force behind the site selection and delineation. Likewise, the proper management of Natura 2000 is a statutory duty of the member states. Art. 6.1 of the Habitats Directive foresees that for Natura 2000 sites, member states shall establish “the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or *contractual measures*”, which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites”. The regulation thus leaves room for private land conservation initiatives to contribute to the implementation of Natura 2000, but the specifics of this option are not further defined.

In the last two decades, EU member states have invested considerable resources in the designation and proper management of Natura 2000. Yet the level of the network’s effectiveness for achieving or preserving a favourable status of the habitats and species of Community interest is still highly variable.⁸ Moreover, the benefits of Natura 2000 have been outweighed by continued and growing pressure on biodiversity in the EU. Current rates of species extinction in the EU remain critically high. This is why

¹ Communication COM2011/244

² <http://www.eea.europa.eu/publications/eu-2010-biodiversity-baseline/>

³ Directive 92/43/EEC

⁴ Directive 79/409/EEC

⁵ EC 2013 Natura 2000 Barometer, <http://ec.europa.eu/environment/nature/natura2000/barometer/>

⁶ <https://www.cbd.int/sp/targets/>

⁷ emphasis added

⁸ McKenna et al. 2014 Literature Review, the ecological effectiveness of the Natura 2000 Network. ETC/BD report to the EEA.

regulatory measures need to be complemented by private initiatives to conserve nature and biodiversity. Without additional efforts, in particular from the private and civic sector, the objectives of the EU Biodiversity Strategy cannot be reached.

Private land conservation can contribute to the implementation of Natura 2000, but it can also act complementary to it and thus help protect biodiversity in the wider countryside.⁹ The last years have seen a rise of alternative approaches to land conservation both within the EU and outside of it.¹⁰ New instruments for private land conservation include cooperative mechanisms, various forms of voluntary agreements with landowners willing to conserve biodiversity values on their land, the creative use of property law and a systematic involvement of volunteers. The underlying premise of many of these initiatives is the acknowledgement that for properties in private ownership, regulation alone cannot achieve an optimal land use compatible with the conservation objectives. If fundamental questions of land ownership and land use interests are not addressed, conservation management practices cannot be successfully implemented. Firstly, this is because even the sharpest regulatory sword will become blunt over time, if it is repeatedly struck against the opposition of private landowners not supportive of the conservation objectives. Secondly, regulatory stipulations for conservation areas (such as legally binding management plans) may be able to limit the range of allowed land uses to those compatible with the conservation objectives, but they can rarely force landowners to actively carry out a certain land use against their will.

Private land conservation approaches thus have several advantages over regulatory approaches. They are better suited to solve questions pertaining to property and use rights. They are more cooperative in nature and can solve, if not avoid, conflicts of interests. They can tap into the huge but hitherto largely ignored pool of private landowners who are willing to conserve their land beyond what they are legally obliged to do. They can offer solutions to landowners who have refrained from proactive conservation measures on their land because they fear the regulatory consequences that an improved conservation status of habitats and species on their land may trigger. Private land conservation approaches provide incentives, not command-and-control solutions. They go beyond the least common denominator of minimum conservation standards, and incentivise landowners to do more.

This is not to say that private land conservation should replace regulatory approaches. The legal framework of the Habitats and Birds Directives as well as complementary Community and national statutory conservation law still remains absolutely vital for nature conservation in the EU. Private land conservation represents just one of the tools available for stopping further biodiversity loss and restoring already damaged ecosystems. Only if cleverly combined with regulatory conservation law, it can provide a valuable contribution to the objectives of the EU Biodiversity Strategy.

⁹ Gordon et al. 2010 Modelling tradeoffs between public and private conservation policies. *Biological Conservation* doi.10.1016: 1-28.

¹⁰ Johnson 2014 An Open Field: Emerging Opportunities for a Global Private Land Conservation Movement. Lincoln Institute of Land Policy Working Paper; Cooke et al. 2012 Social context and the role of collaborative policy making for private land conservation, *Journal of environmental planning and management* 55.4: 469-485.

I.a Scope of the study

The potential of private land conservation has not yet been subject to a policy analysis on EU level. While various aspects of it, such as the funding mechanisms for nature conservation¹¹, conservation-friendly certification and labelling schemes¹², or stakeholder involvement in protected area management¹³ have been studied in detail, there has not yet been an attempt to provide a synopsis of private land conservation approaches in the EU or a gap analysis of the policy tools available to support their wider application.

This study aims at narrowing this knowledge gap. In the first chapter, it provides a brief theoretical overview of the mechanisms available to support private land conservation and proposes a typology of the various tools with regard to their fields of application. In the second chapter, it presents case studies of private land conservation from different EU member states. The third chapter compares the regulatory and fiscal framework for private land conservation in the US with that available in the EU. The final and fourth chapter concludes with recommendations for the further development of policy tools for private land conservation in the EU.

As its title suggests, this study sets out to investigate and present *alternative* ways to support private land conservation in the EU. This means that it dedicates comparatively little attention to “conventional” approaches, such as public subsidies for private land users (e.g. agri-environmental payment schemes), regulatory stipulations that limit the use of private land (e.g. species conservation law or environmental impact assessments) or participatory management planning processes for protected areas in private ownership. Again, this is not to say that these approaches are not valuable or should be neglected in favour of other tools. It is rather their widespread use that makes their analysis too big an endeavour for the scope of this study. Instead, this study focuses on the more “exotic”, but nevertheless promising tools for private land conservation. As will be shown, their exoticism is mostly owed to the fact that their application is not yet widely distributed in the EU, but does not mean that their underlying concepts are far-fetched. It is hoped that the case studies presented here will serve as role models that lead to a wider application of private land conservation policies in the EU.

Many of the concepts presented here are either fairly new in the European context or have been described using differing terminologies. It thus seems expedient to define key terms as they are used in this study.

I.a.i Land conservation

In the scope of this study, land conservation is understood as any activity that aims at regulating or directing the use of a piece of land for the sake of conserving habitats and species. While in principle, land conservation can also have the objective to protect abiotic natural resources (soils, waters, climate), ecosystem services and functions and cultural or aesthetic values, in this study the term refers to the

¹¹ Kettunen et al. 2011 Assessment of the Natura 2000 co-financing arrangements of the EU financing instrument. European Commission project 070307/2010/567338/ETU/F1 – final report. Institute for European Environmental Policy (IEEP).

¹² Gulbrandsen 2009 The emergence and effectiveness of the Marine Stewardship Council, *Marine Policy* 33.4: 654-660; Pattberg 2005 The Forest Stewardship Council: Risk and potential of private forest governance, *Journal of Environment & Development* 14.3: 356-374.

¹³ Ferranti et al. 2014 Shifting nature conservation approaches in Natura 2000 and the implications for the roles of stakeholders, *Journal of Environmental Planning and Management* 57.11: 1642-1657.

conservation of the species that live on a given piece of land and the communities they form. However, the objectives of land conservation listed above are not mutually exclusive, but rather interdependent.

I.a.ii Privately protected area (PPA)

As discussed in chapter II.c.i, there is no commonly accepted definition of privately protected areas. This study follows the IUCN (2003) definition for privately protected areas: “a land parcel of any size that is 1) predominantly managed for biodiversity conservation; 2) protected with or without formal government recognition; and 3) is owned or otherwise secured by individuals, communities, corporations or non-governmental organisations.”¹⁴ The third part of the definition is central in the context of this study. Privately protected areas are not simply publicly protected areas in private ownership. They are privately owned properties for which the initiative of land conservation came from the owners themselves and not from public authorities or statutory duties.

I.a.iii Private land conservation

For the purpose of this study, private land conservation is hence defined as a voluntary activity carried out by individuals, communities, corporations or non-governmental organisations with the aim to protect a piece of land and its habitats and species from harm or to restore the natural properties of a piece of land to their former condition. The opposite of private land conservation is mandatory land conservation by public authorities. Private land conservation includes the protection of nature and biodiversity on a property which is already in private ownership as well as the private acquisition of a property or of use rights for conservation purposes. As it excludes properties in public ownership, it does not refer to lobbying campaigns by private individuals or organisations to conserve public land.

Private land conservation however can refer to various activities along the entire “conservation process”, from producing baseline data on a property’s natural values to proposing and negotiating its designation as protected area with the competent authorities, planning and implementing conservation measures, and carrying out oversight, monitoring and evaluation of the privately protected area.

¹⁴ IUCN 2005 Private Protected Areas, Parks Magazine 15.2.

II. Typology of the toolbox for private land conservation

The need for private land conservation as part of an overall biodiversity conservation strategy has been widely recognised in recent years. But what are the public policy mechanisms available for incentivising private land conservation? An incentive mechanism can be defined as any type of instrument that is designed to encourage a change in behaviour. In this case, it is behaviour (induced or voluntary) that is associated with the conservation of species and habitats on private land. An incentive mechanism for private land conservation is thus any policy, programme, institution or economic instrument that motivates landowners to conserve and/or restore native species and habitat/ecosystem functions on their land.¹⁵ Such behaviour may either be influenced through disincentives that discourage harmful activities or through incentives that encourage desired behaviour.

The body of literature on the taxonomy of environmental policy tools is vast.¹⁶ There is a wide array of incentive mechanisms currently in use to achieve private land conservation, either directly or indirectly.¹⁷ Although this section describes individual incentive mechanisms, in reality many conservation policies employ several incentive measures together in order to attain their objectives. In addition, some of the policy tools overlap in their features. Incentive mechanisms can thus be ordered pursuant to a number of categories, e.g. the type of motivation the incentive appeals to (economic, moral/ethical, social), the degree to which participation in the measure is voluntary, the role of government takes, the field of application, the type of institution employing the incentive, the type of the land-management targeted etc.

Moreover, the same policy tool can be classified in different ways, depending on the perspective. For example, a statutory conservation area designation of a private property can be labelled as a regulatory tool, as a financial disincentive (because of restrictions of the allowed land uses and potential fines for non-compliance with the stipulations), or as a prerequisite for environmental subsidies. Any incentive typology for private land conservation must hence remain arbitrary to a certain degree.

The typology of incentive mechanisms I propose for this study focuses on positive incentives for voluntary behavioural changes of private landowners. This means that incentives addressing the inherent motivations of landowners to conserve their land are at the forefront. Motivations of landowners to conserve their property can be manifold, ranging from emotional place attachment to personal history, general environmental ethics and values, the feeling of social responsibility, and financial considerations. Interestingly, studies have shown that financial motivations often rank at the bottom of the list of reasons for private land conservation.¹⁸ Nevertheless, financial incentives play an important role in the framework of this study, as they can be easily influenced through public policy.

¹⁵ Casey et al. 2006 *Incentives for Biodiversity Conservation: An Ecological and Economic Assessment*. Washington DC: Defenders of Wildlife.

¹⁶ E.g. U.S. Congress, Office of Technology Assessment 1995 *Environmental Policy Tools: A User's Guide*, OTA-ENV-634. Washington DC: U.S. Government Printing Office.

¹⁷ Kamal et al. 2015 *Conservation on private land: a review of global strategies with a proposed classification system*. *Journal of Environmental Planning and Management* 58.4: 576–597.

¹⁸ Farmer et al. 2011 *Motivations Influencing the Adoption of Conservation Easements*. *Conservation Biology* 25.4: 827–834; Martín-López et al. 2007 *The non-economic motives behind the willingness to pay for biodiversity conservation*, *Biological Conservation* 139.1: 76–82.

Incentive-based policies can provide a positive stimulus encouraging beneficial activities for species and their habitats or negative inducements (e.g., taxes, fees, etc.) to discourage activities harmful to species or their habitats. Positive incentives come in the form of landowner payments, risk reduction or the creation of private market opportunities. The following image gives a broad overview of the incentive mechanisms for private land conservation, ordering them into three groups: financial incentives, social and ethical incentives and other incentives (including legal tools). It shows that many mechanisms can be attributed to two or more of these groups. This needs to be kept in mind when looking at the typology used in this chapter.

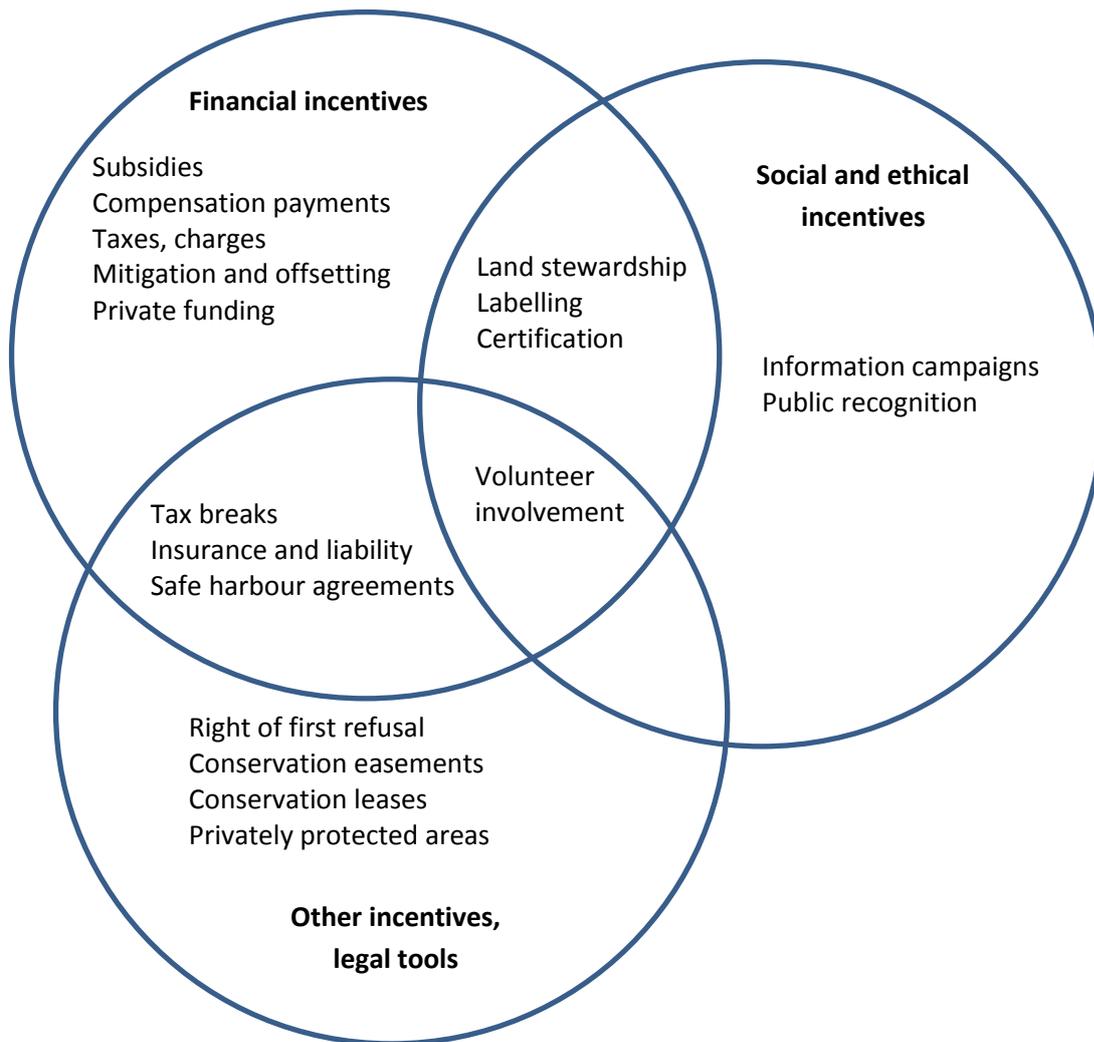


Image 1 - A map of incentives for private land conservation

II.a Financial incentives

Positive incentives in the form of subsidies or tax breaks and negative incentives in the form of taxes, charges and fees can be attached to environmentally beneficial or damaging activities. This puts a price on these activities, which they formerly lacked i.e. it is an attempt to incorporate the external costs or

benefits of an action.¹⁹ Rational individuals are expected to respond by adopting the behaviour which costs them the least. If the price signals are set at the right level, they are expected to lead to better resource use. A disadvantage of cost-based instruments is that it is hard to predict the extent of changes in behaviour. Since the effect of these instruments relies on price signals rather than “real” scarcity, there is still the danger of overexploitation.²⁰

II.a.i Taxes, charges

Taxes and charges on resource use are “classical” market-based environmental policy tools. However, in the framework of incentivising private land conservation, they are of minor practical relevance. Charges are rarely used to directly influence behaviour relevant for nature conservation on private lands, but indirect effects of charges linked to certain land uses can play a role (e.g. charges for logging, fishing or hunting). One exemption is the use of soil sealing fees, although most fees in practice are not high enough to significantly discourage land take. Sealing fees are applied in several countries and regions with the intention of conserving agricultural land and urban open space.²¹ No tax laws in the EU are explicitly linked to biodiversity conservation. However, some of the common taxes (income tax, property tax, estate tax, VAT) have the potential to become highly relevant if used in new and creative ways. For example, deductions linked to charitable contributions already play an important role for the financing of non-profit conservation organisations (see chapter IV.b).

II.a.ii Compensation payments, environmental subsidies

Private landowners and land users in Natura 2000 sites and other protected areas often have to deal with stipulations that restrict the range of permitted land uses. To increase acceptance of these restrictions and compliance with them, EU and national funding programmes foresee compensation payments and other financial incentives that abate the economic loss stemming from land use restrictions and to provide incentives for compatible land uses. The optimal design of such payment schemes has been the subject of a vast number of scientific inquiries and political debates.²² Agri-environmental subsidies are probably the most common form of public support for private land conservation. Despite continued discussion about their impact on target species and habitats, they continue to be a key component of European Union policy.²³ About 10% of the EU subsidies for agriculture and forestry go to agri-environment schemes.²⁴ Their design and application are not the subjects of this study.

¹⁹ Aidt 1998 Political internalization of economic externalities and environmental policy. *Journal of Public Economics* 69.1: 1-16.

²⁰ Krautkraemer 2005 Economics of natural resource scarcity: The state of the debate. RFF Discussion Paper 05 - 14.

²¹ Prokop et al. 2011 Overview on best practices for limiting soil sealing and mitigating its effects in EU-27, Environment Agency Austria Technical Report 50.

²² Uthes and Matzdorf 2013 Studies on Agri-environmental Measures: A Survey of the Literature. *Environmental Management* 51.1: 251-266.

²³ E.g. Kleijn et al. 2006 Mixed biodiversity benefits of agri-environment schemes in five European countries. *Ecology letters* 9.3: 243-254; Wätzold and Schwerdtner 2004 Why be wasteful when preserving a valuable resource? A review article on the cost-effectiveness of European biodiversity conservation policy, UFZ-Diskussionspapiere, No. 1/2004.

²⁴ Merckx and Pereira 2014 Reshaping agri-environmental subsidies: From marginal farming to large-scale rewilding. *Basic and Applied Ecology* 16.2: 95-103.

II.a.iii Funding of private land acquisition for conservation purposes

The importance of land acquisition for land conservation has been acknowledged for a long time.²⁵ Land purchase for conservation purposes has traditionally been an eligible action in several EU funding programmes, of which LIFE+ and the RPD figure most prominently. The acquisition of less-than-fee property rights has also been supported by EU funding, for example the acquisition of use rights or long-term leases. In EU funding programmes, the eligibility of such acquisitions is generally contingent upon the location of the land parcel within the boundaries of Natura 2000. Exemptions from this rule concern the purchase of sites of strategic importance or the creation of stepping stones, both of which contribute to the coherence of Natura 2000 as well.²⁶

On the other hand, the acquisition of land to support private conservation of non-statutory sites and without connection to Natura 2000 has usually been considered ineligible. The focus of EU programmes on land purchase in statutory conservation areas is due to the need to prioritise the use of scarce public funds. It also results from concerns about the long-term effectiveness of conservation investments. If land is purchased for conservation, safeguards need to be taken to ensure that the investment is not lost when the land ownership changes or the landowner no longer supports the conservation objectives.

To foster private land acquisition in the wider countryside, this funding gap needs to be closed. This does not necessarily mean that the eligibility criteria of EU nature conservation financing have to change. Other funding sources could step into the breach if EU and member states create the necessary favourable conditions. One way to do so is to further elaborate the institutional framework encouraging the funding of acquisitions from private sources, e.g. by supporting corporate partnerships, the use of lottery funds, sponsoring, or offsetting.²⁷ This also includes the facilitation of access to information about available funding sources.

II.a.iv Biodiversity mitigation and offsetting

In environmental politics, the idea that environmental impacts caused by human activity should be mitigated and compensated by the one that caused the impact is known as “polluter-pays-principle”.²⁸ In the context of nature conservation, the principle has been implemented by Community legislation (Habitats and Birds Directive, Environmental Impact Assessment Directive²⁹, the Strategic Environmental Assessment Directive³⁰, the Environmental Liability Directive³¹), and by various additional national laws, e.g. in Germany, the UK, France, the Netherlands, Sweden and Finland.³² The European Commission is currently elaborating a No-Net-Loss-Initiative that will propose policy options for an EU-wide consolidation of the polluter-pays-principle. A first draft of the Initiative text is expected for 2015.³³

²⁵ Fairfax et al. 2005 *Buying Nature*. Boston: MIT Press.

²⁶ <http://ec.europa.eu/environment/life/about/index.htm>

²⁷ Endicott (ed.) 1993 *Land conservation through public/private partnerships*. New York: Island Press; Levitt 2005 *From Walden to Wall Street: frontiers of conservation finance*. Clark 2006 *A Field Guide to Conservation Finance*. Washington D.C.: Island Press.

²⁸ Morin and Orsini (eds.) 2014 *Essential Concepts of Global Environmental Governance*. New York: Routledge.

²⁹ Directive 85/337/EEC

³⁰ Directive 2001/42/EC

³¹ Directive 2004/35/EC

³² Tucker et al. 2013 *Policy Options for an EU No Net Loss Initiative*. Report to the European Commission. Institute for European Environmental Policy, London.

³³ http://ec.europa.eu/environment/nature/biodiversity/nnl/index_en.htm

Biodiversity offsetting and compensation schemes usually follow a three step mitigation hierarchy of avoidance, minimisation and offsetting/compensation. This means that negative impacts on the environment in general and on biodiversity in particular need to be avoided or prevented whenever possible, and that all inevitable impacts need to be minimised and rehabilitated on-site. Only if inevitable impacts cannot be healed on-site, offset/compensation measures are undertaken as a last resort (on or off-site).³⁴

The last step of the mitigation hierarchy, offsetting, is an important driver and funding source of private land conservation. Numerous standardised accounting procedures have been developed to quantify the scale of required compensation measures for environmental impacts for different types of projects (e.g. road infrastructure, wind turbines) and various regions (e.g. each federal state in Germany has its own standards).³⁵ Sophisticated offsetting mechanisms, such as habitat banking³⁶ and compensation pools³⁷, help to bundle compensation measures of separate projects and facilitate the compensation process.

Compensation pools represent a flexible approach to mitigation. By enabling private landowners to produce biodiversity benefits that can be counted towards biodiversity losses elsewhere, they come close to the idea of creating markets for the trade of biodiversity use rights³⁸, a concept whose broader application otherwise has rarely gotten beyond the conceptual stage in Europe yet.³⁹

II.b Social and ethical incentives

Social and ethical incentives such as community recognition can act as an important non-monetary incentive for private land conservation. The involvement and empowerment of private landowners to manage biodiversity resources alone generates awareness and a sense of responsibility, with positive impacts on patterns of natural resource use. Transparency, participation, inclusion and ownership are important factors in the effective empowerment of communities.⁴⁰ Relationships of trust, reciprocity and exchange, common rules, norms and sanctions, and connectedness in groups form the social capital

³⁴ No Net Loss Working Group 2013 Glossary of the terms used in the Working Group.

³⁵ Rayment et al. 2014 Study on specific design elements of biodiversity offsets: Biodiversity metrics and mechanisms for securing long term conservation benefits. DG Env Final Report: ENV.B.2/ETU/2013/0060r.

³⁶ Conway et al. 2013 Exploring potential demand for and supply of habitat banking in the EU and appropriate design elements for a habitat banking scheme. ICF GHK and BIO Intelligence Service report; eftec, IEEP et.al 2010 The use of market-based instruments for biodiversity protection –The case of habitat banking –Technical Report.

³⁷ Wende et al. 2005 Mitigation banking and compensation pools: improving the effectiveness of impact mitigation regulation in project planning procedures. *Impact Assessment and Project Appraisal* 23.2: 101-111.

³⁸ Heal 1998 Markets and Biodiversity. In: Guruswamy and McNeely (eds.) *Protection of Global Biodiversity – Converging Strategies*, 118-128, Duke University Press. Jenkins et al. 2004 Markets for biodiversity services: potential roles and challenges. *Environment: Science and Policy for Sustainable Development* 46.6: 32-42.

³⁹ Wissel and Waetzold 2010 A conceptual analysis of the application of tradable permits to biodiversity conservation. *Conservation Biology* 24.2: 404-411. However, in 2011 a pilot project in the Netherlands tested the feasibility of biodiversity auctions, where participants can bid on the implementation of conservation actions, with the highest bidder becoming the patron for the respective conservation area. At present, the initiative seems to be dormant. The last entry in the news section of the project's website is from 2013, see <http://www.biodiversiteit.nl/slag/voorbeelden/landschapsveiling>.

⁴⁰ Secretariat of the Convention on Biological Diversity 2006 Incentive measures for the conservation and sustainable use of biological diversity - Case studies and lessons learned. Montreal: CBD Technical Series No. 56.

necessary for shaping individual action to achieve biodiversity conservation objectives.⁴¹ A range of policy instruments can foster this social capital.

II.b.i Certification and labels

Certification and labelling programmes exist for a number of products and services that are distinguished by “sustainable”, “conservation-oriented” or “nature-friendly” production standards. Organic farming certification makes up the biggest share of such programmes.⁴² The EU-eco-regulation⁴³ sets the standards for organic farming on the Community level, while various national certification schemes in the member states supplement it, e.g. the "Biogarantie" label in Belgium, the "AB - agriculture biologique" label in France, the “Bio”, “Demeter”, “Bioland” or “Ecovin” labels in German speaking countries, “BIOHELLAS” and “DIO” labels in Greece, and “KRAV” in Sweden. Other certification and labelling programmes concern the production of timber (Forest Stewardship Council – FSC), fish (Marine Stewardship Council – MSC) and tourism (Viabono). On a regional and local level, umbrella brands have often been employed to strengthen the brand awareness of regional products. Many of these brands are connected to environmental production standards, such as organic farming.⁴⁴ The benefit of participating in such labelling schemes is a better visibility for consumer groups with a demand and a willingness to pay for “green”, regional premium products. This increase in market access can be sufficient to make private land conservation through conservation-compatible land uses profitable.

II.b.ii Land stewardship

Land stewardship is a strategy to involve landowners and land users in the conservation of their properties. It usually comes in the form of a contractual or informal voluntary agreement between the landowner and the land stewardship (i.e. nature conservation) organisation to take care of the target habitats and species on the property. Land stewardship agreements often target land that is not protected by statute and that does not enjoy the attention of a designated site administration, e.g. in France, where natural areas conservation societies (“Conservatoires d’espaces naturels”) manage over 2000 sites in public and private ownership, two thirds of which are not protected area by statute.⁴⁵ The concept is best applied to habitats and landscapes formed by traditional sustainable land uses whose continued existence relies on active caretaking rather than absolute preservation and the prevention of human uses. Land stewardship can thus provide a strategy of modern sustainable land management on privately owned land, such as nature-friendly agriculture and forestry, combined with elements of habitat restoration and maintenance.⁴⁶ The idea of land stewardship has been strongly promoted by the recently finished LIFE+ project “LandLife”. Its outputs remain available for download on the project’s

⁴¹ Pretty and Smith 2004 Social Capital in Biodiversity Conservation and Management. *Conservation Biology* 18.3: 631-638.

⁴² Willer and Lernoud (eds.) 2015 *The World of Organic Agriculture – Statistics and Emerging Trends 2015*. FiBL-IFOAM Report, Research Institute for Organic Agriculture (FiBL), Frick, and IFOAM – Organics International, Bonn.

⁴³ Regulation 834/2007/EC

⁴⁴ Kullmann 2007 Regional marketing in German Biosphere Reserves. *UNESCO Today* 2:40-43.

⁴⁵ Guignier and Prieur 2010 *Legal Framework for Protected Areas: France. Guidelines for Protected Areas Legislation*. IUCN Environmental Policy and Law Paper 81.

⁴⁶ Sabaté et al. 2013 *Caring together for nature. Manual on land stewardship as a tool to promote social involvement with the natural environment in Europe*. Online publication.

website.⁴⁷ As the concept of land stewardship has been presented there extensively for various audiences, it is not further pursued in the context of this study.

II.b.iii Information campaigns

In times of constrained public budgets, policymakers and conservation organisations look for ways to enhance private land conservation without increasing the need for public subsidies. One possibility is to inform private landowners about conservation potentials on their properties that do not create a big financial burden or require additional site management. Car manufacturing companies, such as Daimler⁴⁸, Volkswagen⁴⁹, Toyota⁵⁰, and Nissan⁵¹, building material producers such as Lafarge⁵², and packaging producers such as Stora Enso⁵³ have been successful targets for such information campaigns. The Business and Biodiversity Research Centre, an initiative of the Earthwatch Institute, provides examples of successful conservation projects on properties of private businesses.⁵⁴ A similar project led by the Global Nature Fund and funded by LIFE+, the Business and Biodiversity Campaign, disseminates information about tools that help businesses to support biodiversity and ecosystem services on their premises.⁵⁵ The European Landowners Organisation (ELO) together with Syngenta manages the Pollinators Network initiative (PNI) to enhance environmental gains alongside productive agriculture. PNI is a network of farmers and land managers willing to use field margins as habitat for plants that are particularly adept for pollination.⁵⁶

II.b.iv Strategic partnerships

Companies often have mutual interests with conservation organisations, in particular those whose operations are known to have impact on biodiversity or those that own land of conservation interest. Many of these want to minimise the impact of their operations on biodiversity, thereby avoiding legal consequences that might interfere with their business. Others are conservation-minded and have a genuine own interest in biodiversity conservation. These companies can form partnerships with conservation organisations that help them optimise their operations and planning reliability. The partnership of Heidelberg Cement, one of the leading operators of quarries, with BirdlifeInternational is a prime example of such a partnership. BirdlifeInternational helps the company with the planning, operation and decommissioning of quarries. In exchange, Heidelberg Cement supports conservation-oriented project, such as the Quarry LIFE Award, an international competition for biodiversity-friendly quarry operators.⁵⁷ Another example is the Industry Nature Conservation Association (INCA), an umbrella organisation of conservation-minded businesses in England.⁵⁸ Such partnerships are not only good PR for

⁴⁷ www.landstewardship.eu

⁴⁸ <http://sustainability.daimler.com/environmental-protection/conservation-of-nature-land-use-and-biodiversity>

⁴⁹ http://www.volkswagenag.com/content/vwcorp/info_center/en/themes/2014/04/Think_Blue_Nature_in_Mexico.html

⁵⁰ http://www.toyota-global.com/sustainability/environment/blessings_of_nature/biodiversity/

⁵¹ www.nissan-global.com/EN/ENVIRONMENT/SOCIAL/BIODIVERSITY/

⁵² <http://www.lafarge.com/en/biodiversity>

⁵³ <http://storaenso.com/rethink/responsibility/forest-and-land-use>

⁵⁴ www.businessandbiodiversity.org

⁵⁵ <http://www.business-biodiversity.eu/>

⁵⁶ <http://www.europeanlandowners.org/projects/pollinators-network-initiative-pni>

⁵⁷ <http://www.quarrylifeaward.com/>

⁵⁸ <http://www.inca.uk.com>

the participating companies, they also provide conservation organisations an entrance door to the industry, thereby raising awareness and understanding among corporate decision makers about the risks and opportunities of business operations in relation to biodiversity conservation.

II.b.v Public recognition

Another way to incentivise private stakeholders to implement conservation measures on their land is to give them public appreciation for their efforts. Such promotional incentives vary from product labelling schemes that allow companies to display their commitment to conservation by putting the logo of a conservation organisation on their product (e.g. the cooperation of the supermarket chain Edeka with WWF⁵⁹ or the Global Organic Textile Organisation with the fashion company C&A⁶⁰) to the Ambassador Programme, the various award contests and other public events organised in the framework of the UN Decade on Biodiversity⁶¹. The “Wildlife Estates” project targets private landowners of large rural estates. It has been developed to acknowledge exemplary management of private land where hunting, shooting or fishing activities take place. The landowners and managers of such territories can join the initiative if they sign the Wildlife Estates Charter and pass an evaluation procedure that checks different aspects of land management practices and their impact on nature and biodiversity. Each applying property is assessed on 12 criteria (level of tranquillity, hunting or fishing practices, conservation plans and measures, habitat value etc.).⁶² The label is not only good PR for the estate owner towards the general public, but also creates a competitive atmosphere among the peer group as to who does the most for wildlife on his land and whose land hosts the most prestigious flagship species.

II.b.vi Involvement of volunteers

For over a century, volunteers have been providing an invaluable contribution to nature conservation by dedicating their unpaid time to conservation work. Most aspects of modern conservation, from data collection and monitoring to restoration work, recurring management and environmental education are not conceivable on a large scale without the help of volunteers. Most of the larger professionally run conservation organisations have a lot of experience in getting significant numbers of people from local communities involved in hands-on conservation work on properties under their responsibility, with some NGOs such as Birdlife Denmark having institutionalised volunteer networks for site management.⁶³

However, volunteer cultures differ significantly between countries. Finland and Belgium are countries where the involvement of volunteers in nature conservation has been very strong for decades. In other countries, such as Italy or Greece, the volunteer sector in the field of nature conservation is weaker.

II.c Other incentives, legal tools

There are several other important legal tools that can be employed to support private actors in land conservation, but that do not neatly fit in the above categories. In some countries, enabling legislation for the designation of properties as formal private reserves (or privately protected areas) has proven an

⁵⁹ <https://www.edeka.de/nachhaltigkeit/unsere-wwf-partnerschaft/die-kooperation/index.jsp?>

⁶⁰ <http://www.c-and-a.com/fr/fr/corporate/qui-sommes-nous/developpement-durable/>

⁶¹ www.cbd.int/2011-2020/

⁶² <http://www.wildlife-estates.eu/>

⁶³ <http://www.birdlife.org/europe-and-central-asia/news/volunteering-danish-way>

important legal prerequisite for fostering private land conservation; other countries rely heavily on the use of conservation easements and conservation leases. Supportive tax policies and the creative application of existing conservation law are also among the tools that create the legal possibilities and incentives for private land conservation.

II.c.i Privately protected areas (PPAs)

Privately protected areas (PPAs) are essential to achieving the targets of the EU Biodiversity Strategy. They can play a critical role when the designation of public protected areas is resisted for political or economic reasons, in particular in areas where most land is in private hands. However, there is no commonly accepted definition of PPAs in the EU. Worldwide, there are currently at least 50 definitions of privately protected areas in use.⁶⁴ This greatly encumbers initiatives of private land conservation, because public administrations not always support private stakeholders in the creation of protected areas, even if the land in question qualifies for protection from a scientific point of view and is entirely in the ownership of the stakeholder seeking legal protection of the land. At the last World Parks Congress in November 2014 in Sydney, the International Union for Conservation of Nature (IUCN) therefore spearheaded an initiative to unify and harmonise the existing definitions of PPAs as a first step towards a more coherent legal standing of PPAs in the various nature conservation laws.⁶⁵

One of the most pressing challenges PPAs face is their legal conservation status. To date, only a few EU member states formally recognise PPAs as a distinct conservation category in their nature conservation legislation: Portugal⁶⁶, Slovakia⁶⁷, Belgium (Flanders⁶⁸ and Wallonia⁶⁹) and (historically) France⁷⁰. However, some member states explicitly foresee the right of initiative for the designation of private properties as protected areas, e.g. Finland⁷¹, Estonia⁷², Bulgaria⁷³, France⁷⁴, Belgium (Wallonia⁷⁵ and Flanders⁷⁶), Hungary⁷⁷, and Lithuania⁷⁸. The nature conservation acts of other member states do not mention this possibility, but allow it implicitly.⁷⁹ In some member states, protected areas may only be

⁶⁴ Stolton et al. 2014 *The Futures of Privately Protected Areas*. Gland, Switzerland: IUCN.

⁶⁵ <http://worldparkscongress.org/drupal/node/129>

⁶⁶ Decreto-Lei 142/2008 – Nacional Áreas Conservação Protegidas, <http://www.legislacao.org/primeira-serie/decreto-lei-n-o-142-2008-nacional-areas-conservacao-protegidas-178805>.

⁶⁷ Art. 22 of the Slovakian Nature and Biodiversity Preservation Act,

⁶⁸ Besluit van de Vlaamse Regering tot vaststelling van de voorwaarden voor de erkenning van natuureservaten en van terreinbeherende natuurverenigingen en houdende toekenning van subsidies 2003, <http://codex.vlaanderen.be/Zoeken/Document.aspx?DID=1011567&AID=1049162¶m=inhoud>

⁶⁹ Art. 10 Loi sur la Conservation de la Nature en Wallonie, <https://wallex.wallonie.be/index.php?doc=6927>

⁷⁰ IUCN France 2013 *Protected Areas in France: a diversity of tools for the conservation of biodiversity*, Paris.

⁷¹ Section 24 of the Finnish Nature Conservation Act of December 20, 1996,

<http://www.finlex.fi/en/laki/kaannokset/1996/en19961096>

⁷² § 8 of the Estonian Nature Conservation Act, <https://www.riigiteataja.ee/akt/745306>

⁷³ Art. 36 of Bulgaria's Protected Areas Act, <http://www.moew.government.bg/?show=75&lang=en>

⁷⁴ Loi n° 76-629 du 10 juillet 1976 relative à la protection de la nature

⁷⁵ Art. 10 Loi sur la conservation de la nature of July 12 1973

⁷⁶ Art. 33 Decreet betreffende het natuurbehoud en het natuurlijk milieu, datum 21/10/1997

⁷⁷ § 25 Law no. LIII of 1996

⁷⁸ Art. 23 Law of the Republic of Lithuania on Protected Areas, December 4, 2001 No. IX-628

⁷⁹ Stanciu and Ioniță 2014 *Governance of Protected Areas in Eastern Europe - Overview on different governance types, case studies and lessons learned*. Bonn, Germany: Bundesamt für Naturschutz Skript 360.

established on private properties with the consent of the landowner, e.g. in Finland, Belgium and in the UK.⁸⁰

There are several arguments why PPAs should be treated distinctly from publicly protected areas. The most striking difference is the voluntary nature of PPAs. Private landowners or land users protect their properties because of philanthropic motives, cultural, religious or spiritual values, or because of economic or scientific interests. All these incentives are powerful motivations for the designation and management of PPAs. The standard conservation categories of protected areas, as they are found in the nature conservation legislation of most member states, do not sufficiently respect these motivations behind PPA designation. They treat landowners who voluntarily protect their land the same as those who will only comply with conservation objectives if threatened with the exertion of coercive power. If landowners know that their conservation initiative will trigger statutory area protection, this may pose a disincentive for private commitment. This lack of clarity about the function PPAs has sometimes limited their creation and prevented long-term conservation solutions.

II.c.ii Safe harbour agreements

Safe harbour agreements are a conservation tool that was developed in the 1990s in the context of the US Endangered Species Act to prevent perverse incentives created by traditional command and control approaches to land conservation. Under a safe harbour agreement, landowners voluntarily propose to implement restorative and habitat management measures aimed at the conservation of threatened species. In return for restoring natural habitats of endangered species, the landowner is provided with a 'safe harbour guarantee', ensuring them that no additional conservation measures will be required and no additional land, water or resource restrictions will be imposed if the number of listed species increases as a result of the landowner's actions.⁸¹ In contrast to other market-based incentive tools for private land conservation, such as offsetting and compensation mechanisms, safe harbour agreements are not directly linked to permit procedures for projects with negative impacts on nature. This means that they can provide a real additional, albeit temporary, benefit for nature conservation. The concept, despite its relatively young age, has delivered promising results in the US.⁸² Similar approaches have recently been developed in the Netherlands⁸³ and in Belgium (Flanders).⁸⁴

II.c.iii Right of first refusal

Some EU member states have developed special rules to facilitate the acquisition of suitable conservation land (e.g. private properties within existing nature reserves) when it comes on the market. The right of first refusal⁸⁵ for conservation purposes exists in Denmark, France, Hungary, Italy, Spain, Slovenia and Germany.⁸⁶ In Germany, this right may not only be exercised by public authorities, but also

⁸⁰ De Klemm and Shine 1996 Legal measures for the conservation of natural areas. Council of Europe Report Nature and Environment No. 82.

⁸¹ Schoukens 2015 Habitat Restoration on Private Lands in the United States and the EU: Moving from Contestation to Collaboration? Utrecht Law Review 11.1: 33-60.

⁸² Trainor et al. 2013 Evaluating the effectiveness of a Safe Harbor Program for connecting wildlife populations. Animal Conservation 16.6: 610-620.

⁸³ <http://www.innovatienetwerk.org/en/concepten/view/38/TemporaryNature.html>

⁸⁴ Panis, personal communication.

⁸⁵ Also called right of first purchase or right of first offer

⁸⁶ Cf. footnote 80

approved conservation NGOs. The right of first refusal can be of critical importance for private land conservation. Conservation organisations often encounter situations where they want to acquire a particular property important to their goals but the owners have no interest in selling. When conditions change and the owners decide to sell their property, a right of first refusal requires the owners to offer the property to the person who holds the right at market price before offering the property to others.

In addition, all EU member states invest public authorities with the right of eminent domain for reasons of overriding public interest. In some countries, land conservation is explicitly listed as a possible public interest, e.g. in Greece, Germany, and in Denmark. It must be emphasised though that eminent domain has hardly ever been used for nature conservation purposes, because governments fear adverse reactions from the public.

II.c.iv Conservation easements

Conservation easements (also called conservation covenants, conservation servitudes, or conservation restrictions) are a tool of real property law. They grant a right to a public authority or a qualified conservation organisation (often called land trust) to restrict land use on properties not in their ownership. These land use rights are otherwise held by the landowner. Conservation easements thus function similarly to regulatory restrictions on land use, but result from direct contractual agreements between two private parties. Conservation easements are usually in gross (they “run with the land”), meaning that they are binding for the present and all future owners of the respective property. Although they can be altered and revoked under certain conditions, they are normally designed to remain effective in perpetuity. A conservation easement on a property is recorded in its title, which means that it has to be registered at the responsible land registry office.⁸⁷

Conservation easements are very heterogeneous in form and scope. In their simplest form, they merely state that a property (or part of it) is dedicated to conservation purposes. This implies that all actions that run counter to this objective are prohibited. More sophisticated easements specify what natural features (habitats, species, scenery etc.) of the property are protected, what may or may not be allowed on the property, and by whom the allowed activities may be carried out. In their most comprehensive form, they can resemble detailed management plans, or they refer to planning documents that are not registered with the deed and that can thus be updated more easily.

Conservation easements have become the most popular conservation tool in the US. Land trusts in the US now protect more acres by conservation easements than by all other forms of land conservation combined.⁸⁸ Their unparalleled rise has been triggered by a combination of push- and pull-factors that are unique to the situation in the US. The regulatory and fiscal framework that made conservation easements such a success in the US is described in more detail and compared to the situation in the EU in chapter IV.

Although no explicit legal obstacle exists for their use in most member states, conservation easements are not yet as widely used in the EU. The provision of most EU funding programmes (e.g. LIFE+, RDP) stating that land acquisition for conservation is only eligible if the investment is adequately ensured in the long-term through adequate legal safeguards has led to an increased use of easements for conservation purposes in some member states. However, conservation-related entries in the property

⁸⁷ Byers and Ponte 2005 *The Conservation Easement Handbook*, 2nd edition, Washington: Land Trust Alliance.

⁸⁸ Land Trust Alliance 2010 *The 2010 Land Trust Census Report*, Washington: LTA.

title, as described above, rarely go beyond general language dedicating the land to conservation purposes.

II.c.v Conservation leases

Conservation leases can take different forms. Firstly, they are a tool used by conservation organisations to gain temporary (preferably long-term) use rights for properties in private ownership, so that conservation actions can be implemented on that land. In this sense, conservation leases are often an alternative to land acquisition, when purchase is either impossible because of high costs or because the landowner is not willing to sell. Particularly in countries that allow long-term leases, e.g. in the UK where leases routinely last for 99 years, they provide a useful tool for the conservation of private properties.

Secondly, conservation leases are a mechanism for conservation organisations to delegate the management of a property in their ownership to private land users (farmers, ranchers etc.) on the condition of certain management obligations. In most countries, the law (e.g. the German Civil Code⁸⁹) grants the lessor of a property the right to include strict provisions about the allowed land uses in the lease contract, so as to ensure that they are compatible with the conservation objectives. To compensate for the economic loss associated with the restrictions, conservation land is often leased below market value. In some countries however, legal obstacles impede the inclusion of such management restrictions in the lease contract. For example, the French Rural Code prevented clauses in the lease contracts that restricted the tenant's freedom to employ the cultivation methods deemed most appropriate. Any such prohibition in the lease contract was automatically void. That is why in 2007, conservation leases ("baux environnementaux") were inserted as a new form of land leases in the French Rural Code.⁹⁰ The new conservation leases allow for a series of precise land use restrictions and specifications (extensification, diversification, use of fertilisers and biocides, water management etc.). However, conservation leases in France can still only be closed under certain conditions (e.g. the property either has to be within a protected area or the owner must be a conservation organisation).

II.c.vi Tax reliefs

Nature conservation as part of environmental protection is considered a public-benefit activity in all EU member states.⁹¹ Most EU member states support the operation of public-benefit or charitable organisations through their tax laws. In principle, there are two ways this can be done. Firstly, charitable organisations can be relieved from taxes. Some form of tax exemptions or tax rate reduction is provided to charitable organisations in every EU member state.⁹² Such tax reliefs concern various taxes, which vary between countries.

Secondly, conservation organisations increasingly depend on private resources for the financing of their activities. Fiscal encouragement of private donations is hence of great significance for the operational capacity of the entire non-governmental sector. Tax laws in most EU member states reward donations to

⁸⁹ http://www.gesetze-im-internet.de/englisch_bgb/index.html#gl_p2400

⁹⁰ Décret 2007-326, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000794340>

⁹¹ Salamon and Anheier 1996 The international classification of nonprofit organizations: ICNPO-Revision 1, Johns Hopkins University Institute for Policy Studies. Moore et al. 2007 A Comparative Overview of the Public Benefit Status in Europe, European Center for Not-for-Profit Law. Budapest.

⁹² European Foundation Centre 2011 Comparative highlights of foundation laws - The operating environment for foundations in Europe. Brussels.

charitable organisations in the form of tax reliefs for individual and corporate donors. Only Slovakia has no tax incentives in place for either individual or corporate giving, while Malta, Finland, Hungary and Sweden only provide tax incentives for corporate donors. At the other end of the scale, very high tax incentives exist in France, where donors can offset between 66% and 75% of the value of their donations against their tax bill.⁹³ Some countries, such as Italy, Lithuania, Poland, Portugal, Slovakia and Spain use percentage schemes that allow an individual donor to allocate a certain percentage of the payable taxes to a designated public-benefit organisation.⁹⁴

Tax	Incentive for non-profit	Incentive for donor
Income	Exemption for some or all economic activities	Donations can (partially be) subtracted from the taxable income
Capital gains	Exemption for capital gains from certain investments (endowment fund of foundations etc.)	N/A
Gift and inheritance	Exemption or reduced rate	Optimisation of the transfer costs of property (e.g. reduction of the tax base) by planned giving to charities
Value added	Purchase and offer of goods and services at reduced rates	N/A
Real property	Cost reduction for conservation landowners	Reduction of the tax base by (partially) donating land/use rights to non-profits

Table 1 – The most common tax incentives for non-profit conservation organisations

II.c.vii Insurance and liability

Private land conservation can be supported by public policies that facilitate the management of the protected property. This concerns liability rules for danger defence on private land with public access. Risk abatement obligations can be lowered on conservation land with regard to tree hazards, pest control, flood prevention, wildfires and other risk associated with natural processes. For example, the occupier of a parcel of land is normally liable for any personal injury or other damage caused by breaking or falling trees that are in decay or show structural weakness. This liability arises from provisions by which the occupier has a common duty of care to others who enter the land or its vicinity.⁹⁵ However, in a widely recognised ruling in 2012, the German Federal Court of Justice decided that owners of publicly accessible forest land in principle cannot be held liable for injuries stemming from “forest-typical hazards”. In other words, visitors of private forests enter these at their own risk and cannot sue the owner if they are hurt by a falling branch or other naturally occurring incidents in the forest. This exemption does not include trees adjacent to public roads.⁹⁶

⁹³ Davy 2010 The Power of Perks, WSJ March 1, 2010, <http://www.wsj.com/articles/SB10001424052748703787304575075400171203026>

⁹⁴ Cf. footnote 92.

⁹⁵ Lonsdale 2000 Hazards from Trees - A General Guide. Forestry Commission Practice Guide, <http://www.forestry.gov.uk/PDF/fcpg13.pdf>

⁹⁶ <http://wbvfs.de/wp-content/uploads/2014/01/BGH-Urteil-zu-waldtypische-Gefahren.pdf>

III. Case studies

The following section presents examples of alternative ways to support private land conservation in the EU. All the case studies have in common that they go beyond “conventional” approaches to private land conservation (compensation payments for private landowners or tenants in protected areas, agri-environmental payment schemes for land users, regulatory land use restrictions, certification and labelling initiatives etc.). All of them rely on the voluntary participation of private landowners; none of them require large amounts of public funds to be implemented. When selecting the case studies, attention was given to an even geographical distribution and a wide array of incentive mechanisms.

The case studies concern four topics: 1) privately protected areas, 2) conservation easements, 3) offsetting, and 4) temporary nature. Each incentive mechanism is analysed with regard to its underlying legal regime, the timeframe, process and scope of its use, its distribution and growth trend in the EU, and the financial implications of its wider application. The case studies are based on literature research and complementary interviews with representatives and stakeholders. A list of contacted experts is provided in Annex I. The chapter concludes with summarised conclusions on all case studies.

III.a Privately Protected Areas – A continuum of legal regimes

Case studies from Belgium (Natagora and Natuurpunt reserves), Portugal (Faia Brava), Finland (Aarnikotka Forest Nature Reserve), Slovakia (Vlčica and Rysia reserves), and Slovenia (Logarska-Dolina Landscape Park)

The variable use of the term “privately protected areas” reflects the ambiguity of the underlying concept. In the EU, a continuum of applications of the term can be found, from *de jure* designations of PPAs to their *de facto* establishment. Most member states do not codify the term PPA in their nature conservation acts, but frequently use it when referring to conservation areas that are governed by private individuals/companies or non-profit conservation organisations.⁹⁷ In some of these cases, the term “PPA” means nothing more than a private property that is affected by a public conservation regime. Only three countries explicitly mention the term PPA (or variations of it) as a distinct protected area category in their nature conservation acts. These are Portugal, Belgium and Slovakia.

Belgium has by far the most “official” PPAs in the EU, with the Flemish conservation organisation Natuurpunt managing about 18,000 ha of PPAs and the Walloon conservation organisation Natagora another 4,300 ha. The possibility to establish privately protected areas also exists in the Brussels-Capital Region, but has not yet been utilised there. In the Walloon Region, PPAs are called “approved nature reserves” (“réserves naturelles agréées”), in the Flemish Region “recognised nature reserves” (“erkende Natuurreservaten”). Portugal and Slovakia on the other hand have hardly any PPAs, despite the legal possibility to designate them. (Portugal has one PPA, Slovakia two.)

A similar contrast can be found between Finland and Slovenia. Both countries include in their nature conservation acts the possibility for private landowners to apply for the designation of their property as protected area. They hence employ the PPA concept without calling it that in their legislation. In analogy

⁹⁷ E.g. in the Thematic Reports on Protected Areas under the Convention on Biological Diversity, <http://www.cbd.int/kb/Results?RecordType=nr&FreeText=protected%20areas>

to Belgium and Portugal/Slovakia, the PPA concept has been used hundreds of times in Finland, but only twice in Slovenia.

III.a.i Legal basis

In Belgium, PPAs are legitimated by special legislation, the “Order of the Walloon Regional Council on Approved Nature Reserves and Subsidises for Land Purchases in Approved Nature Reserves by Private Associations (MB 11.10.1986)⁹⁸ and the “Decision of the Flemish Government Establishing the Conditions for the Recognition of Nature Reserves and of Land Management Associations and the Awarding of Grants”⁹⁹.

In Portugal, Art. 21 of the Decree No. 142/2008 on National Protected Conservation Areas¹⁰⁰ in connection with the Ordinance No. 1181/2009 on Private Protected Area Management¹⁰¹ establishes the legal basis for private landowners to propose and manage their land as a protected area. According to this legislation, landowners or the owners of land use rights (provided they have the agreement of the owner) or NGOs (provided they established an agreement with the owner) can propose a territory as a PPA.

In Slovakia, the designation of PPAs is codified in Art. 22 of Act 287/1994 on the Preservation of Nature and Landscape.¹⁰² It states that the owner of a piece of land, which satisfies the conditions for the establishment of one of the categories of protected areas (with the exception of the National Park and the Protected Landscape Area), can request the District Environment Office to designate the property as PPA. If the request is granted, the District Environment Office will sign an agreement with the landowner on the designation of the property and on the rights and duties necessary for its protection. The PPA designation is recorded in the property’s title at the land register. The owner of a PPA has the authority to monitor and collect data on the state of the PPA, supervise land use restrictions, to identify persons violating the conservation provisions, to place and collect fines for delinquencies, and to accompany delinquents to the police station.

In Finland, PPAs are established as nature reserves (“Luonnonsuojelualueen”) pursuant to Section 24 of the Finnish Nature Conservation Act¹⁰³, which states that the Finnish Regional Centres for Economic Development, Transport and the Environment may, on application or with the consent of the landowner, establish a nature reserve. The decision cannot be issued until the landowner and the Centre for Economic Development, Transport and the Environment have agreed on the protection provisions for the reserve and the landowner’s compensation. The designation of the nature reserve includes the

⁹⁸ Arrêté de l'Exécutif régional wallon concernant l'agrément des réserves naturelles et le subventionnement des achats de terrains à ériger en réserves naturelles agréées par les associations privées (M.B. 11.10.1986), <http://environnement.wallonie.be/legis/consnat/cons021.htm>

⁹⁹ Besluit van de Vlaamse Regering tot vaststelling van de voorwaarden voor de erkenning van natuurreservaten en van terreinbeherende natuurverenigingen en houdende toekenning van subsidies 27/06/2003, <http://codex.vlaanderen.be/Zoeken/Document.aspx?DID=1011567&AID=1049162¶m=inhoud>

¹⁰⁰ Cf. footnote 66.

¹⁰¹ Portaria 1181/2009 – Área Protegida Privada Gestão, <http://www.legislacao.org/primeira-serie/portaria-n-o-1181-2009-area-protegida-privada-gestao-183512>

¹⁰² Zákon Národnej Rady Slovenskej Republiky 287/1994, <http://www.zbierka.sk/sk/predpisy/287-1994-z-z-p-3016.pdf>

¹⁰³ Luonnonsuojelulaki 1996/1096, <https://www.finlex.fi/fi/laki/ajantasa/1996/19961096>

necessary provisions on the protection of the reserve and, as necessary, on its management. The establishment of a new nature reserve needs to be entered in the Real Estate Register.

In Slovenia, only the government or the “competent body of one or more local communities” may establish protected areas, according to Art. 55 of the Slovenian Nature Conservation Act. While the law is silent as to who may propose the establishment of a protected area, it explicitly states in Art. 50 that anybody may propose the temporary protection of valuable areas.

III.a.ii Timeframe, process and scope of the use of PPAs

Finland:

The first PPA designations in Finland date back to around 1920. By 1970, there were about 170 PPAs covering 4,550 ha. To date, there are over 9,500 PPAs covering about 295,300 ha. Lakes and marine areas make up 45 % (100,000 ha) of the total PPA coverage. Most PPAs have been established within the national nature conservation programmes, which have also provided financial support for land acquisition and compensation. The Forest Biodiversity Programme (METSO 2003-2025), which aims to establish 96,000 ha of protected forest areas in Southern Finland by 2020, has helped the number of PPAs grow dramatically. About 7,600 new PPAs have been designated since 2000. They are for the main part located in southern Finland.

Funding for the establishment and management of many PPAs comes from the State budget. Tax-free compensation payments for income loss are regularly paid to the private landowners as a deal sweetener. The government has invested an estimated € 185 million in compensation payments for the establishment of PPAs since 1996. Another € 81 million have been paid as PPA compensations in the METSO Programme since 2005.

The owners of the PPA are actively involved in the site management planning and can veto individual management measures. Most PPAs are established in perpetuity, with the exception of about 5 % of the forest properties protected in the framework of the METSO Programme, which are initially established for a time span of 10 to 20 years.

The Aarnikotka Forest Reserve

In the South of Finland lies Repovesi, an area forested with pines and birches and interspersed with lakes and streams. The area is traditionally a popular recreational summer destination because of its scenic beauty and its vicinity to the Helsinki metropolitan area. Most forests of Repovesi were actively logged until 1977 by the biggest private landowner in the area, the timber company UPM. Between 1997 and 2002, UPM carried out an inventory of valuable habitats on all company-owned forest land in Finland. The results were recorded in a GIS system, which helped with the planning and implementation of conservation-friendly forestry operations. As a consequence of the inventory, UPM applied for the designation of a 1,400 ha property as PPA “Aarnikotka Forest Reserve”. The PPA was designated in 2003. Simultaneously, UPM donated 560 ha of forest land adjacent to the PPA to the state, which greatly facilitated the establishment of the national park “Repovesi”. Aarnikotka and Repovesi now form the largest protected forest area in South-Eastern Finland. The main objectives of the two protected areas are biodiversity conservation and recreation. Management is limited to the maintenance of visitor infrastructure to mitigate human disturbance of sensitive areas.



Image 2 - Repovesi National Park - image by M. Passinen licensed under CC BY-SA 3.0 via Wikimedia Commons

A Governance Steering Group (Aarnikotka Forest Administrative Committee) composed of two representatives from the State Forest Agency (“Metsähallitus”), two delegates from UPM and two representatives of the Regional Centre for Economic Development, Transport and the Environment, with the chairman being from UPM takes all important decisions for the PPA, including the adoption of the annual work plan, construction investments, and PR measures.

UPM did not receive any compensation payments for designating the PPA and donating the land to the national park, but does not have to pay for the management of the PPA either. The work plan is financed and implemented by the Natural Heritage Service of Metsähallitus, in cooperation with the affected municipalities of Kouvola and Mäntyharju, which strongly lobbied for the establishment of the national park.

The PPA “Aarnikotka” is a good example for the conservation activities of UPM and other timber companies in Finland. UPM, one of the biggest timber companies worldwide, owns about 850,000 ha of forestry land in Finland. Since the 1990s, UPM has sold or exchanged more than 20,000 ha of land with the State of Finland for protection purposes. It now manages or protects over 10 % of its properties separately to promote biodiversity values.

Slovakia:

The “Vlčia” (“Wolf”) and “Rysia” (“Lynx”) reserves are PPAs owned by the non-profit conservation organisation “WOLF” (“Lesoochrannárske zoskupenie VLK”). The PPAs were established in 2004, after a successful fundraising campaign by the NGO (“Buy your own tree”). The PPAs are managed as wilderness areas, with the aim to protect the natural processes at the sites. The Wolf PPA has an area of 21.24 ha and is situated in the Čergov Mountains. WOLF bought the forest from a private landowner in 1998 for 3.2 million Slovak crowns. Since then, no interventions have been carried out at the site except for trail maintenance. According to the NGO, the process of PPA application and designation was long and

cumbersome. The first proposal to declare the area a PPA pursuant to the Slovakian Nature Conservation Act was submitted in 1999. The proposal was only accepted by the district environment office after three years of litigation. It took another two years and a legal suit against the district environment office before the head of the office signed the designation declaration.



Image 3 - PPA Vĺčia in Slovakia, image used with permission of the author Martin Roskanin

The difficulties in gaining official PPA status indicate that WOLF's initiative was also a response to the general state of public land conservation in the regions. On its website, the organisation complains that despite the high percentage of statutory conservation areas in Slovakia (about 36% of the national territory), "real protection is virtually non-existent".¹⁰⁴ While this statement seems hyperbolic, it points at existing difficulties with the enforcement of conservation stipulations in public reserves. As an example, WOLF cites the logging of almost 400,000 m³ timber in the Tatra National Park over the last years.

Belgium:

In Belgium PPAs can be established on the initiative of private landowners and non-profit conservation organisations. The biggest Belgian conservation NGOs, Natuurpunt in Flanders and Natagora in Wallonia, have made extensive use of this instrument, owning approximately 75 % of the PPAs in Belgium. The application for PPA designation has to include a thorough site description explaining the natural values of the property as well draft management and monitoring plans. The application is assessed by a technical expert group before being submitted to the responsible authorities. After designation, the owner of the PPA receives financial support from the region for recurrent management and restoration measures. The PPA designation statute is temporary, usually expiring after one year. This means that PPA owners

¹⁰⁴ <http://www.wolf.sk/en/buy-your-own-tree/-wolf-private-nature-reserve>

regularly have to prove that the area still qualifies as PPA and that the agreed management plan is properly implemented. When additional properties are purchased to complement the existing PPA, they have to undergo their separate PPA designation procedure.¹⁰⁵

Conventional farmers in Flanders do not particularly like the policy support of PPA, as they own only a few PPAs themselves and consider the funding of recurring activities in the PPAs an unfair advantage for agricultural land use in protected areas. At the same time, the Flemish farming lobby has traditionally resisted the introduction of agri-environmental funding schemes from the RDP in Flanders.

Land purchase for the expansion of the PPA system in both Belgian regions has mostly been financed through LIFE Nature projects and national funds. This public support of private land acquisition is an important element of the PPA strategy. However, another factor that greatly facilitates PPA designation is the network of local chapters of the organisations. This enables them to recruit many volunteers for management measures, allows for successful fundraising campaigns, but also provides the organisations with timely information on the real estate market, as local members can use their personal contacts to learn about properties becoming available before they get on the market. In fact, many of the negotiations concerning land purchased are carried out by local volunteers, while the professional staff only joins when deals are closed.

The volunteer network is also a cost-efficient resource for site management, which means that public subsidies do not have to be very high. Local chapters do not only possess of their own management equipment, but also cooperate with job creating programmes in order to integrate unemployed or socially disadvantaged people into their workforce.

Portugal:

In Portugal, the application procedure for PPA designation is similar to the Belgian model. The application is sent to the Institute for Nature Conservation and Forestry¹⁰⁶, using an electronic application form available at ICNF's website. The application for PPA designation must be accompanied by documents showing that the applicant is the landowner or has the permit of the landowner, a map of the area's boundaries and land use, a justification of the reasons and objectives of the designation request, a description of the area's natural values, and a draft management plan with foreseen conservation actions (to be agreed with the ICNF). The decision about the designation must be taken by the ICNF within 90 days after the application. Within two months after the designation, a management protocol has to be agreed between the applicants (who will be responsible for the management) and the ICNF. The designation is published in the official journal ("Diário da República") 30 days after this. The applicant has to send the ICNF an annual report on the implementation of the management protocol. The recognition of the PPA can be withdrawn at the request of the landowner (or authorized land user), upon breach of the management protocol, or upon disappearance of the natural values that justified the PPA designation.

However, there are some significant differences between Portugal and Belgium that explain the different levels of distribution of the PPA model. To date there is only one PPA in Portugal, the Faia Brava, owned

¹⁰⁵ Gazenbeek, personal communication.

¹⁰⁶ Instituto da Conservação da Natureza e das Florestas – ICNF, <http://www.icnf.pt/portal/ap/amb-priv>

by the Portuguese Association for Transhumance and Nature.¹⁰⁷ As the Portuguese law permitting PPAs is still young (5 years), not many conservation NGOs have used the opportunity to designate their land as PPA. Moreover, most conservation NGOs in Portugal do not own land. The only larger private owner of conservation land is the League for Nature Protection¹⁰⁸, the oldest conservation NGO in Portugal. It has recently applied for PPA designation of one of its properties.

The application process for PPA Faia Brava took about one year, although it was expedited by local political support. Although the procedure is still new to the administration and will probably accelerate once it becomes more of a routine, such long waiting periods certainly do not induce private landowners to apply for PPA designation.¹⁰⁹

Land acquisition for private land conservation is complicated by the fact that a long-awaited land reform in Portugal has been pending since the 1950s. Land ownership is highly fragmented in rural areas, with average property sizes ranging below 1 ha and collective ownership by several persons being the norm. At many land registries land titles are incomplete or faulty, making a legally proper purchase of land difficult, although this is a fundamental prerequisite for charitable organisations depending on the good name and the transparency of their work. Uncertainties with land ownership create problems not only for conservationists, but also for farmers and foresters.

No political support (technical guidance, publicity etc.) is provided by the ICNF for PPA designation. In contrast to Belgium, there are no national funds to support land purchase by conservation organisations or the management of PPAs. The benefit of PPA designation lies hence in the increased publicity and recognition for the conservation area. For the managers of Faia Brava, it also acts as a proof that private conservation organisations can be reliable partners in Natura 2000 management, a perspective still new to many public conservation authorities in Portugal.

Despite these difficulties, Associação Transumância e Natureza has been able to steadily increase its land base. It has financed the land purchase mainly from membership fees and donations, with a considerable share coming from abroad (mainly the Netherlands). The organisation considers the PPA as a show case for civic sector engagement in Portugal, involving local volunteers as well as a network of ambassadors, friends, and visitors. It has been able to revive traditional land uses on abandoned land (olive yards, pastures) with the help of modest payments from the RDP. The organisation dedicates 10 % of its income to an acquisition fund for future land purchase.

Fiscally, PPAs are treated no other than for-profit land uses, meaning that in term of taxes the organisation is considered a big landowner carrying out a different, yet commercial land use. Entry tickets to the area from visiting birdwatchers, schools, families, and international tourists, sales of agricultural and artisan products and mixed services represent minor sources of income. The organisation is currently trying to strengthen the cooperation with local tourism operators, offering their guests access to the area in exchange for donations to the acquisition fund. It is also expanding regional marketing for wildlife and archaeology (Faia Brava is situated inside an archaeological area hosting the oldest open-air rock engravings worldwide). The organisation networks with different Portuguese

¹⁰⁷ Associação Transumância e Natureza, <http://www.atnatureza.org/index.php/visitar/2-uncategorised/39-faja-brava>

¹⁰⁸ Liga para a Protecção da Natureza, www.lpn.pt

¹⁰⁹ Gama and Prata, personal communication.

conservation NGOs, but no formalised network of conservation landowners exists. Faia Brava is also part of the Rewilding Europe campaign, which provides visibility for the project on an international level.¹¹⁰

Slovenia:

PPAs can also be initiated without explicit enabling legislation. One such example, the Logarska Dolina Landscape Park, is situated in the Logar valley, an Alpine glacial valley in the Kamnik-Savinja Alps in the Solčavsko region. “Landscape Park” is a public conservation area category in Slovenia, but the site was designated as park thanks to the initiative of the citizens of the valley. The motivation was largely economic: Tourism is the most important source of income in the valley, and local stakeholders realised that the natural scenic values that make the valley attractive could only be protected from development through a joint effort. The park was established in 1987 on 2,430 ha, but site management was not organised until 1992, when – in reaction to growing visitor pressure – the non-profit company “Logarska Dolina d.o.o.” as founded by local landowners and businessmen. The company now cooperates with the Solčavsko municipality and regional authorities in the implementation of various management measures (visitor management, information service, operation of visitor centre, land management on the properties owned by the company’s members). It also has competences in the authorisation of construction projects (shared with the municipality). In addition to the regular income sources of tourism, the landscape park generates revenue in the form of entrance fees to the visitor centre and contributions for guided tours. The Logarska Dolina company was also the driving force behind the development of a sewage system for the valley and the development of a biomass energy plant. The initiative is currently spreading to the whole region. A stakeholder consultation process for establishing the Kamnik Regional Park is on-going. The Logarska Dolina Landscape Park is thus a public protected areas in paper, but de facto a PPA, as it was initiated and is being managed by private stakeholders.¹¹¹

III.a.iii Distribution and growth trend in the EU

The above examples of PPAs demonstrate that the PPA concept has had very mixed results in different contexts. As the cases of Portugal and Slovakia have shown, the explicit definition of a separate PPA category in national conservation legislation alone is not necessarily a key driver for a wider application of the concept. On the contrary: The situation in Finland makes clear that existing public conservation area categories can also do the job of providing a sufficient legal protection regime for a privately owned conservation area, if they are coupled with clear national policies supporting the establishment of PPAs. A look at other EU member states with a strong tradition of private land conservation and a lack of a clear legal PPA definition, such as Germany, supports this finding.

III.a.iv Financial implications of its wider application

The wider application of PPA designation in the EU probably depends on providing legal certainty for private conservation landowners and setting the right economic incentives. In this respect, Belgium and Finland lead the way. Private landowners in these countries (conservation organisations included) can rely on a well-defined set of legal rules and institutional support from the competent public authorities for the process of PPA designation. They also know in advance the financial implications of PPA designation of their property, be it in the form of property tax reliefs or in the form of compensation

¹¹⁰ <http://www.rewildingeurope.com/>

¹¹¹ Lenarcic, personal communication.

payments for income loss. The financial implications of these systems, however, are a great reliance on public funds. The magnitude of the necessary public support cannot be easily quantified, as it depends on a number of factors. In peripheral regions with a large tourism sector, the competitive advantages of PPA designation combined with modest tax reliefs may already provide incentive enough to trigger private land conservation by local stakeholders.

III.b Voluntary carbon markets for peatland restoration

“MoorFutures” certificates in Germany

Biodiversity offsetting is the practice of allowing development to proceed provided that the damage to the development site is compensated by an equivalent or greater contribution to conservation on another site. Biodiversity offsetting has been the subject of much public discussion (and criticism¹¹²) on the EU level over the last two years, prompted by the “No Net Loss” initiative of the European Commission.¹¹³ While the public reaction to the establishment of an offsetting/compensation system turned out to be largely critical, with a majority being against developing an EU level legal framework for it¹¹⁴, such systems have been in effect in several member states for decades without meeting fundamental opposition.¹¹⁵ Germany is probably one of the EU member states with the best established legal biodiversity compensation mechanism, the “intervention regulation” (“Eingriffsregelung”) pursuant to Art.13-19 of the German Federal Nature Conservation Act¹¹⁶. This ecological compensation system, which has been in effect since 1976, not only applies to species and habitats, but to entire ecosystems, their functions and services and the natural scenery.

The latest version of the German Federal Nature Conservation Act codified new trends in biodiversity offsetting in Germany, such as the establishment of “compensation pools” and “mitigation banking”.¹¹⁷ These tools have led to a more flexible application of the offsetting mechanism, as they allow for compensation measures to be less directly spatially, functionally and temporally linked to the impact.¹¹⁸ Critics have pointed out that this flexibility further erodes the concept of the mitigation hierarchy, which gives preference to the avoidance and reduction of an impact before considering the compensation of the remaining impairments. This is in line with the criticism voiced against offsetting policies in general, which is often depicted as “licence to trash”.¹¹⁹ Advocates of the approach have pointed to the advantages, such as the reduction of bureaucracy, the control of property prices, efficiency and benefit gains, and the avoidance of competition with other land uses.

¹¹² E.g. <http://www.fern.org/campaign/biodiversity-offsetting>

¹¹³ http://ec.europa.eu/environment/nature/biodiversity/nnl/index_en.htm

¹¹⁴ European Union “No Net Loss” public consultation from the 6 June to the 17 October 2014, results available at http://ec.europa.eu/environment/nature/biodiversity/nnl/results_en.htm

¹¹⁵ It is interesting to note that none of the big German conservation NGOs have signed the various letters protesting against the offsetting policy plans of the EC, see e.g. <http://naturenotforsale.org/>.

¹¹⁶ Act on Nature Conservation and Landscape Management (Federal Nature Conservation Act – BNatSchG) of 2009, http://www.bmub.bund.de/fileadmin/Daten_BMU/Download_PDF/Naturschutz/bnatschg_en_bf.pdf

¹¹⁷ Wende et al. 2005 Mitigation banking and compensation pools: improving the effectiveness of impact mitigation regulation in project planning procedures, *Impact Assessment and Project Appraisal* 23.2: 101-111.

¹¹⁸ eftec, IEEP et.al 2010 The use of market-based instruments for biodiversity protection –The case of habitat banking –Technical Report, <http://ec.europa.eu/environment/enveco/index.htm>

¹¹⁹ <http://www.bbc.co.uk/news/science-environment-23502362>

To date, the German biodiversity offsetting system has been closely linked to legal compensation requirements. It has led to the birth of “land agencies” in several federal states in Germany. These agencies specialise in real estate services in the field of land conservation. Land agencies work as intermediaries between investors, landowners/land users and public authorities. They oversee regional compensation pools and connect developers with compensation measures and the respective properties.

Since 2012, a new initiative involving the land agencies of the states of Schleswig-Holstein, Mecklenburg-Vorpommern and Brandenburg has transferred the concept of mitigation banking to the market of voluntary carbon trading in order to finance peatland rewetting projects. Although peatlands only cover about 3 % of the world’s terrestrial surface, they contain more than 500 billion tons of carbon, more than twice the amount of the entire biomass of all forests worldwide.¹²⁰ There are about 660,000 ha of peatlands in Schleswig-Holstein, Mecklenburg-Vorpommern and Brandenburg. Most of them are actively drained. The peatlands in the three states emit a total of 15 million tons of CO₂/year. In Mecklenburg-Vorpommern, drained bogs and mires are responsible for 27 % of all CO₂ emissions, making them the state’s biggest carbon source.¹²¹

The importance of peatlands for biodiversity and climate change has been acknowledged by a number of international agreements (UN Convention on Biological Diversity, UN Framework Convention on Climate Change). The Verified Carbon Standard (VCS)¹²², the world’s most widely used standard for voluntary greenhouse gas reduction projects, has developed a programme for peatlands in 2010. In parallel, regional peatland restoration programmes in North and East Germany began to look for new potential funding sources. In 2011, MoorFutures© (“peatland futures”) were introduced as the first regional carbon credit scheme for peatland rewetting. The land agencies of the federal states of Schleswig-Holstein, Mecklenburg-Vorpommern and Brandenburg now manage the joint project. MoorFutures are certificates for voluntary payments to fund the rewetting of drained peatlands, thus reducing CO₂ emissions. Private individuals and companies can buy the certificates to offset their carbon footprint. One MoorFutures certificate is equivalent to the reduction of one ton of CO₂ emissions.

III.b.i Legal basis

There is no specific legal basis for the use of the MoorFutures certificates. However, the brand name MoorFutures© is a registered trademark, so that abuse by third parties can be persecuted. The certificates are exclusively issued by the state ministries for the environment. The quality control for the emission of the MoorFutures certificate follows its own standard. The quality criteria are clearly defined and scientifically validated. They are based on the principles of the VCS and the Kyoto Protocol. External institutions (TÜV - Technical Inspection Association, Greifswald University, and Eberswalde University for Sustainable Development) monitor and validate compliance with the standard.

III.b.ii Timeframe, process, scope

¹²⁰ Joosten et al. 2013 MoorFutures. BfN Skript 350, Bonn.

¹²¹ http://www.schleswig-holstein.de/UmweltLandwirtschaft/DE/NaturschutzForstJagd/13_Projekte/06_Moorschutz/PDF/Positionspapier.html

¹²² www.v-c-s.org

The certificates are sold via the website www.moorfutures.de. In each of the participating states, the MoorFutures are linked to a specific rewetting project. The potential CO₂ reduction at the sites was calculated using a regionally validated tool that uses hydrological data and vegetation as a proxy (“GEST” model¹²³). Other ecosystem services, such as water quality improvement, flood retention, increased ground water levels, as well as biodiversity benefits were also quantified.



Image 3 - Königsmoor, Schleswig-Holstein, image by Olag licensed under CC BY-SA 3.0 via Wikimedia Commons

In Mecklenburg-Vorpommern, the project site is located in the “Polder Kieve”, a 65 ha wetland in private ownership. The property belongs to privately owned forestry company. Most of it is currently drained to water levels of 50-70 cm below surface and used as grassland. The owner has signed an agreement with the state to allow the rewetting of the area, which renders current land use impossible. In exchange, he receives a financial compensation. The GEST model predicts that the implementation of the rewetting project will lead to a reduction of 14,325 tons of CO₂ equivalents over the next 50 years. By dividing the total cost of the project (€ 500,000) by this amount, the price of the MoorFuture certificate (one ton of CO₂ emission reduction) is fixed at € 35,-.

III.b.iii Distribution and growth trend in the EU

To date, three project sites in Germany are operational. “Polder Kieve” in Mecklenburg-Vorpommern has been the most successful of them. Since its inception in September 2012, almost 11,000 of the 14,325 certificates have been sold to a wide array of customers. The list of certificate owners is published on the project’s website.¹²⁴ Currently, new project sites in Mecklenburg-Vorpommern are under preparation. At those sites, compatible wetland uses (e.g. paludicultures¹²⁵) will also be possible.

¹²³ Couwenberg et al. 2012 Towards developing IPCC methane ‘emission factors’ for peatlands (organic soils). *Mires and Peat* 10 (3), 1-17.

¹²⁴ <http://www.moorfutures.de/stilllegungsregister/mecklenburg-vorpommern/>

¹²⁵ Joosten et al. 2014 Managing Soil Carbon in Europe: Paludicultures as a New Perspective for Peatlands, in Bankwart et al. (eds.) *Soil Carbon: Science, Management and Policy for Multiple Benefits*: 297-306., <http://www.paludiculture.uni-greifswald.de/en/index.php>

The rewetting project “Rehwiese, Fließgraben” in Brandenburg has met less demand for carbon offsets. To date, only 147 of the 6,744 available certificates have been sold. In Schleswig-Holstein, the project “Königsmoor” started too recently (Feb 9, 2015) to allow an assessment of its success.

In principle, the approach is transferable to any region with degraded peatlands. A similar programme to the MoorFutures, the Peatland Code, has recently concluded its pilot test phase in the UK. The Peatland Code is also conceived as a voluntary standard for sponsoring peatland restoration projects on the basis of their climate and other benefits. It is designed to provide sponsors with precise and reliable information on the carbon and other benefits of peatland restoration. The pilot phase of the Peatland Code was launched in September 2013 for an 18 months period. A number of peatland restoration projects have been under investigation to develop robust standards on the metrics of emission reductions and auxiliary biodiversity conservation benefits. The programme has been implemented by IUCN’s UK National Committee, with support from all of the four UK devolved governments and relevant agencies. Currently, a broader application of the Peatland Code is under consideration.¹²⁶ Its full implementation may be hampered by the fact that current carbon prices do not always meet peatland restoration costs in the UK. The price range of CO₂ emission reductions from peatland restoration in the UK varies widely, from £ 10 to £ 100, depending on the method and the region.¹²⁷

III.b.iv Financial implications of its wider application

Although the Kyoto Protocol created an international carbon market, no open exchange market for emission reductions from peatland rewetting exists today. However, there is a growing interest in the creation of regional carbon markets that combine the reduction of CO₂ emissions with biodiversity benefits and a positive identification of buyers with the regional rewetting projects. Studies have shown that regional initiatives such as the MoorFutures also lower verification and accreditation costs.¹²⁸

The quality standards for the MoorFutures certificate lists several criteria that the rewetting projects need to fulfil. They need to ensure that the certificates finance additional land conservation, i.e. that the project would not have been implemented without them. They also need to ensure the long-term legal protection of the restored properties either by land purchase or entries in the property title. Last not least, the project must provide proof that stopping land use in one bog does not lead to the use of another bog. Such standards ensure that income from voluntary payments on the carbon market do not crowd out investments from other sources, such as statutory offsetting.

III.c Conservation easements

Scotland: conservation burdens, legislative proposals in France (“obligations réelles environnementales”) and the UK (“conservation covenants”)

Chapter II.c.iv outlined the concept of the conservation easement. Here, I reiterate its core features in more detail. Regardless of its name in the legal vocabularies of the various national jurisdictions around

¹²⁶ Reed et al. 2013 Peatland Code Research Project Final Report. Defra, London.

¹²⁷ Reed 2015, personal note.

¹²⁸ Bonn et al. 2014 Investing in nature: developing ecosystem service markets for peatland restoration. Ecosystem Services 9: 54-65.

the world – be it conservation easement, conservation covenant, conservation restriction, environmental servitude or conservation burden – some characteristics of the concept are similar in all instances:

- Contracting parties: A conservation easement is established by an agreement between a landowner and someone who is interested in the conservation of the property and is eligible to hold a conservation easement (normally a conservation organisation or a public body).
- The contractual agreement to establish a conservation easement is voluntary on both sides.
- The conservation easement is registered in the title of the property. It has to be recorded at the land register in order to be valid.
- The conservation easement is a tool specifically designed for conservation purposes, which means that its scope is somehow defined in legislation.
- A conservation easement “runs with the land”, i.e. it burdens the current landowners and his/her successors in title.
- Contrary to covenants or easements benefiting a neighbouring property (“appurtenant easements” in US law), a conservation easement benefits a legal person (“easement in gross”). It thus does not necessitate the benefit to a neighbouring property in order to be established.
- Unless explicitly specified, conservation easement usually last in perpetuity.
- A conservation easement may impose negative and positive obligations on the landowner.

This makes the conservation easement an ideal tool for private land conservation. It gives both private individuals/companies owning land and (eligible) conservation organisations the opportunity to initiate the conservation of private properties.

For conservation organisations, conservation easements can be used as an alternative to the acquisition of land in fee simple. This can be practical whenever a landowner agrees to permanently protect his/her property, but does not want to sell the land. But conservation easements can also be less costly than the outright purchase of the entire property. Ownership of land has often been likened to owning a “bundle of sticks”, where each stick symbolises a certain right connected to the land.¹²⁹ From this metaphor it is clear that it is generally more efficient to acquire only those “sticks” that are actually needed for fulfilling the conservation objectives. This of course depends upon the degree to which land use needs to be restricted. The establishment of a conservation easement that makes all economic land use virtually impossible will probably be almost as expensive as the purchase of the property in fee simple.

Conservation easements can also be used as safeguards for donors when conservation organisations purchase and/or restore land with external funding, be it from conservation programmes or offsetting schemes. In fact, in many EU and national funding programmes, land purchase for conservation is only eligible if a stipulation in the title of the property is added that its use is restricted to conservation purposes. Such title entries can be regarded as conservation easements. They become especially important when conservation organisations dispose of their land, because they bind subsequent owners to the conservation objectives. Some conservation organisations systematically buy land, burden it with a conservation easement and then sell it to conservation-minded private individuals. This practice is called “conservation buyer programme”.¹³⁰ In the same vein, private landowners can secure certain natural features or values on their land before selling or bequeathing the property.

¹²⁹ Ely 1998 *The Guardian of Every Other Right – A Constitutional History of Property Rights*. New York: Oxford.

¹³⁰ E.g. <http://www.nature.org/about-us/private-lands-conservation/conservation-buyer/index.htm>

As the dramatic rise of the tool in the US has shown, conservation easements also represent an excellent alternative to a financial donation for many landowners. This possibility is discussed in more detail in chapter IV.c.

III.c.i Legal basis

Easements (or similar instruments such as covenants, servitudes, burdens etc.) represent a non-possessory interest in land. They exist in various forms in all EU member states as part of the respective property law, which in civil law countries (all member states except the UK) is part of the civil code. A complete analysis, country by country, of all the real property legislation applicable to the establishment and use of easements goes beyond the limited scope of this report. However, despite differences in the terminology¹³¹, it can be said that many national jurisdictions legally restrict the use of “regular” easements for conservation purposes to various degrees. Two major limitations limit their use in important ways: Many national laws allow easements only for the benefit of neighbouring properties and they only allow “negative obligations” (prohibitions), and ban “positive obligations” (instructions).

Moreover, no national legislation (except for Scotland, see below) explicitly allows for the option to limit land uses to those compatible with conservation objectives in the title of a property. This means that there is ample room for legal interpretation on the side of the land registers. In some countries, land registers allow to describe the conservation purpose in an annex to the title or a notary deed, but not the title itself (e.g. in Belgium and Slovenia¹³²). In other countries, there is a great variability between land registers concerning the language and the level of detail of easements for conservation purposes (e.g. in Germany, where easements in gross are possible¹³³).

Scotland is currently the only country in the EU with legislation explicitly mentioning the possibility to use easements for conservation purposes. Under the Title Conditions Act of 2003, a “conservation burden” can be created under which both positive and negative obligations can be enforced against the owners and possible successors of the burdened land. The law also allows for easement in gross. The power to enter into contracts establishing easements is limited to the Scottish Ministers and 15 recognised conservation bodies (e.g. National Trust for Scotland, RSPB, Woodland Trust, John Muir Trust etc.).¹³⁴ Conservation burdens were developed as part of the reform of the feudal system. The rights of the feudal superior historically enabled the creation and enforcement of enduring restrictions and conditions on the use of land, regardless of whether neighbouring land was held. When the future of such feudal burdens was considered by the Scottish Law Commission, the potential of this tool for environmental purposes was recognised by looking at the US experience of conservation easements. Accordingly, the new legislation allows existing feudal burdens to be converted into conservation burdens and enables new burdens to be created.¹³⁵

¹³¹ Which is also due to historic reasons, there have been attempts to simplify the overlapping concepts of easements, covenants and servitudes, see French 2000 Highlights of the New Restatement (Third) of Property: Servitudes. *Real Property, Probate and Trust Journal*: 225-242.

¹³² Kaligarić personal note.

¹³³ Brauner, personal communication.

¹³⁴ Rodgers 2013 *The Law of Nature Conservation*. Oxford: Oxford University Press: 305.

¹³⁵ Reid 2011 *The Privatisation of Biodiversity? Possible New Approaches to Nature Conservation Law in the UK*. *Journal of Environmental Law* 23.2:203-231.

Although Scotland to date has the most extensive legal basis for conservation easements in the EU, there are limits to their use. The only eligible purposes are the preservation or protection of the architectural, historical or any other characteristics of any land (including those derived from the flora, fauna or general appearance of the land) for the benefit of the public. Secondly, the tool is available only to a limited range of parties. A burden created by a private landowner can only take effect with the consent of an eligible conservation organisation or the ministers. Finally, conservation burdens are not necessarily permanent. They can be discharged by a deed of discharge granted by the holder, or can be varied or discharged by the Lands Tribunal for Scotland if such a step is considered to be reasonable.¹³⁶

III.c.ii Timeframe, process, scope

There is relatively little evidence available about how widely conservation burdens have been used in Scotland. The Law Commission of England and Wales, in preparation for drafting a proposal on the introduction of conservation easement legislation, inquired land registers in Scotland about the use of conservation burdens. They estimate that Historic Scotland (the Scottish executive agency for safeguarding historic buildings and landmarks) holds approximately 310 conservation burdens and that about 270 feudal real burdens were transformed into conservation burdens.¹³⁷

With regard to the use of conventional easements in other EU member states, the picture is heterogeneous. No cases could be identified of their use as tools for voluntary private land conservation aside from their function as safeguards in land purchase projects for conservation, particularly LIFE Nature projects.¹³⁸ The use of easements in these cases shows that in principle, the current property law in many member states already provides useful tools for private land conservation.

III.c.iii Distribution and growth trend in the EU

The idea of adopting conservation easements in Europe surfaced already in the 1990s. In 1998, the Standing Committee on the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention) adopted Recommendation No. 71 (1998) concerning “Guidelines for the protection and management of habitats through private or voluntary systems”. In this recommendation, it asked the Contracting Parties to “examine the possibility (...) of adopting (...) measures relating to conservation mechanisms for land owned by third parties”. It specifically pointed at “the use which can be made of property law instruments, such as easements and covenants, and contractual mechanisms (management agreements and payment schemes) to promote private conservation of habitats by individuals or associations”, and asked national governments to “develop mechanisms encouraging third parties to conserve their land, insofar as such mechanisms are cheaper than acquisition and have the added advantage of mobilising new sectors of society to contribute to conservation” and to “provide, where necessary, for an exception to legislation on easements and servitudes to remove the requirements of contiguity and benefit to the dominant tenement; authorise the donation of easements to approved

¹³⁶ Footnote 135.

¹³⁷ Law Commission 2014 Conservation Covenants. London: Law Com No 349.

¹³⁸ Vassen, personal communication.

conservation bodies; and support this reform by fiscal provisions to encourage individuals to grant nature conservation easements”.¹³⁹

Unfortunately, this call for the use of conservation easement in Europe remained largely unheard. Only recently, the idea gained new momentum in France and in England/Wales.¹⁴⁰ In France, a new Act on the Protection of Biodiversity is in the legislative process, which also foresees the creation of “environmental servitudes”.¹⁴¹ It has been adopted by the National Assembly of France and now awaits lecture in the working commission.¹⁴² The act would include a section on “land policies” (mesures foncières) stating in art. 33 that “property owners are allowed to enter into contracts with public authorities, public institutions or a legal person under private law acting to protect the environment in order to burden themselves and subsequent owners with the obligations they see fit for the maintenance, conservation, management and restoration of elements of biodiversity or ecosystem services in a natural, agricultural or forestry area”.¹⁴³

A similar initiative is under way in England, where the Law Commission has issued a Consultation Paper in 2013 that proposes the introduction of a statutory scheme enabling the establishment of “conservation covenants”.¹⁴⁴ The legislation would remove the obstacles in English law currently impeding the use of covenants for conservation purposes, namely their limitation to burdens benefiting neighbouring land, the difficulties in passing obligations on to subsequent owners, and the limitation of the covenant to negative obligations. The proposal is currently considered by the government. A reply to the Law Commission is expected for later in 2015.¹⁴⁵

III.c.iv Financial implications of its wider application

As conservation easements are a voluntary tool of property law, they essentially do not pose an extra financial burden on the public budget. However, simply creating such the enabling legislation is unlikely to make a big impact on conservation without ways of encouraging landowners and those who can hold the easements or burdens to participate. This inevitably raises issues of money not only because the landowner may expect a one-off compensation or continued financing payment for entering a conservation easement, but also because the agreement is likely to reduce the market value of land by reducing the uses to which it can be put in future.¹⁴⁶

In this light, the appraisal of the land value becomes important, not only for calculating the taxes due on the transfer of the burdened land, but also for property and or inheritance taxes. As the case of the US has shown, tax incentives making conservation easements financially attractive (or at least not disadvantageous) are of vital importance if the scheme is to succeed in enlarging the area of private land

¹³⁹ Convention on the Conservation of European Wildlife and Natural Habitats - Standing Committee 1998 Recommendation No. 71 (1998) concerning guidelines for the protection and management of habitats through private or voluntary systems, <https://wcd.coe.int/ViewDoc.jsp?id=1488159&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>

¹⁴⁰ Gilles 2008 Pour l'introduction en droit français d'une servitude conventionnelle ou d'une obligation propter rem de protection de l'environnement. *Revue juridique de l'environnement* extra 1: 123-131

¹⁴¹ <http://www.assemblee-nationale.fr/14/dossiers/biodiversite.asp#ETAPE330161>

¹⁴² For details of the process see <http://www.senat.fr/dossier-legislatif/pjl14-359.html>

¹⁴³ <http://www.assemblee-nationale.fr/14/projets/pl1847.asp>

¹⁴⁴ <http://lawcommission.justice.gov.uk/areas/conservation-covenants.htm>

¹⁴⁵ http://lawcommission.justice.gov.uk/docs/Lord_de_Mauley_letter_090215.pdf

¹⁴⁶ Cf. footnote 144.

conservation. On the other hand, the history of conservation easement incentives in the US can also be seen as a warning that great care is required to set the level of incentives right and to avoid abuse of the system (see chapter IV).

III.d Temporary nature and safe harbour agreements

“tijdelijke natuur” in the Netherlands

In the industrialised world, huge plots of land designated to development often remain undeveloped for years or even decades because of economic or other reasons. Such private land could easily be changed into temporary areas for nature conservation. It is often located close to or within urban areas, where the demand for recreational open space is high. Estimates from the Netherlands say that 35,000-40,000 ha of land remain undeveloped in the mid-term while awaiting development for industry, infrastructure or housing.

On many of these sites, landowners invest considerable amounts to prevent natural succession, e.g. by recurrent mowing, ploughing, or by applying pesticides. They are afraid that the colonisation of their land by protected species will create problems with getting the necessary permits once they decide to develop the land. Current law stipulates that landowners that temporarily allow nature take its course must later apply for an exemption from species protection or provide compensation for the impact. This is a risky and time-consuming procedure, which often triggers legal battles and negative publicity. To avoid this risk, many landowners ensure that no valuable species or habitats take root on their land in the first place. In other words, the legal stipulations of conservation law create the perverse incentive for landowners to take pre-emptive action against protected species and habitats.

A pilot programme in the Netherlands has tried to deal with this conundrum under the title “temporary nature”. It provides incentives for landowners to use their land awaiting development for the conservation purposes. InnovationNetwork¹⁴⁷, a think tank and consultancy set up by the Dutch Ministry of Economic Affairs, accompanied the pilot phase of temporary nature in the Netherlands.

The strategy of temporary nature focuses in particular on pioneer species that quickly colonise barren soil habitats, such as construction land, sand heaps, backfill or reclaimed coastal land. Pioneer species suffer from the fact that their preferred habitat conditions are hardly found in permanently conserved areas, as many of them tend to be too small or otherwise not well suited to allow natural dynamics that create pioneer habitats. The basic concept of temporary nature is to allow derogations from the requirements of species conservation law before endangered species emerge on the property.¹⁴⁸

The pilot studies in the Netherlands showed that particularly pioneer and early species benefit from temporary nature, as they are adapted to the ecological niches offered on barren soil habitat.¹⁴⁹ When populations of pioneer species colonised the temporary nature areas, they most often used them as stepping stones or temporary source areas, and disappeared in later succession stages, meaning that after a while, they left the areas of their own accord. Species that colonise temporary nature areas at a

¹⁴⁷ <http://www.innovatienetwerk.org/en/>

¹⁴⁸ Lingsma 2009 Concept Guide - Temporary nature, permanent benefits. InnovationNetwork, Utrecht, The Netherlands.

¹⁴⁹ Linnartz 2006 Temporary Nature and protected species: permanent gains. An ecological rationale. InnovationNetwork Report no 06.2.134, Utrecht, The Netherlands

later stage draw less or no benefit, but do not suffer any negative effects either. In the best case, part of the population growth was retained after the site had been developed. So temporary nature yields no added value for these species, but does not impair their status either. A population growth on a temporary nature area followed, after development of the area, by a decrease to below the starting level of the population, is only expected if the species' conservation status is generally worsening, meaning that the actual cause of the species decline has nothing to do with temporary nature.

III.d.i Legal basis

The core of the temporary nature concept is the derogation from the requirements of species protection law, in particular the stipulations of Art. 12-15 of the Habitats Directive and Art. 5 Birds Directive, which deal with gathering, disturbing, killing etc. of protected species. (These articles are translated into Dutch law in Art. 8-12 of the Dutch Flora and Fauna Act.) The legal basis for the derogation is Art. 16.1a Habitats Directive, which states that “[p]rovided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b) in the interest of protecting wild fauna and flora and conserving natural habitats”.

Proponents of the “temporary nature” concept underline that this is precisely the case. The temporary support of pioneer species and habitats, they argue, is *in the interest of protecting wild fauna and flora and conserving natural habitats*, as compared to the status quo of preventing their emergence on the land in question. As nobody knows which endangered species will grow on a particular temporary nature area, the exemption must cover all potential species.

So far, all areas that have taken part of the temporary nature programme are located outside of Natura 2000. The derogations thus did not concern exemptions from the impact assessment pursuant Art. 6.3 Habitats Directive.

III.d.ii Timeframe, process, scope

On 5 June 2007, the Dutch Lower House passed a motion asking the Government to make it possible for nature to develop on wasteland via temporary exemption. In the same year, the Dutch government issued a policy paper providing a legal definition of the temporary nature (“tijdelijke natuur”) concept, which served as guidelines for the treatment of applications for exemption by landowners in the pilot phase. Two pilot test cases were chosen. Within the pilot projects, landowners had to request a dispensation for all activities that might have negative consequences for species protected under the Dutch Flora and Fauna Act. The dispensation would be granted for a period of ten years because Dutch land use plans can only be laid down for a maximum of ten years in advance. In the derogation procedure, three categories of species are distinguished:

- 1) “ordinary” species, for which a dispensation is usually allowed on the grounds that the work is beneficial to the area’s spatial planning or development,
- 2) protected species, for which the dispensation will be allowed if a code of conduct for the work is drafted and approved by the Ministry of Infrastructure and Environment,

3) strictly protected species: species listed in Annex IV of the Habitats Directive¹⁵⁰, additional species listed in the Annex of the Dutch Dispensation Directive (based on the Dutch Flora and Fauna Act), and bird species. For species that are strictly protected, any disturbance, even a small one, cannot get a dispensation because the dispensations allowed for these species do not include spatial planning and development.

A project developer therefore had to take note of all species that inhabited his land at the start of the project to show that it was not yet inhabited by protected species. If the area at the time of application had no natural values, it could be considered in the interest of nature to let it be colonised by protected species, even if they eventually had to disappear again. To facilitate the process, the temporary nature areas were not allowed to be situated in the vicinity of a protected nature reserve. This was to avoid complexities arising from permit procedures based on Art. 75 of the Dutch Flora and Fauna Act and Dutch Environmental Protection Act. Dispensations allowed under the temporary nature programme sometimes included rules to reduce the harm to nature when the area is prepared for its designated use (i.e. work when birds are not hatching eggs in their nests).¹⁵¹

III.d.iii Distribution and growth trend in the EU

In 2011, the Dutch Minister for Economic Affairs and landowners associations signed a “Green Deal Temporary Nature”, in which they agreed to expand the concept to five new case studies.¹⁵² This goal has been surpassed by far. About 30 temporary nature projects are currently being carried out on 2.000 ha in the Netherlands, the biggest of which is the port of Rotterdam with a project area of 780 ha. About half of the 30 case studies are municipalities, the other developers and companies. The potential for temporary nature projects in the Netherlands was estimated at 40,000 ha.¹⁵³ In a reply to the Flemish government inquiring about the compatibility of temporary nature projects with the species protection regime of the Habitats and Birds Directives, the European Commission has agreed that under certain conditions, ad hoc derogations from the requirements of Art. 6.3 Habitats Directive can be granted for “temporary nature” projects on the basis of Art. 16.1a, thus acknowledging the added value of such initiatives.¹⁵⁴

III.d.iv Financial implications of its wider application

There are no direct costs associated with the temporary nature concept. On the contrary, private landowners save costs by being able to renounce to pre-emptive maintenance measures on their land. This more than compensates the investments necessary for the initial species inventory and the permit application. As it turned out, many of the 30 landowners currently participating in the programme have implemented voluntary initial measures to support the colonisation of the land by certain species. Their motivations to engage in temporary nature go beyond financial considerations. Some are driven by

¹⁵⁰ In the Netherlands, these are yellow-bellied toad, olive midwife toad, natterjack toad, root vole, floating water-plantain and fen orchid.

¹⁵¹ Woldendorp and Backes 2006 Temporary Nature: Advice about the legal aspects. InnovationNetwork Report no 06.2.136, Utrecht, The Netherlands.

¹⁵² <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2009/07/15/concept-beleidslijn-tijdelijke-natuur.html>

¹⁵³ Beun personal communication.

¹⁵⁴ Schoukens 2015, 53.

personal ecological interests; others like to take advantage of the green image that they can get from participating in the programme.

III.e Summary and conclusions

When analysing incentives for private land conservation, two defining questions are: who owns the land and who manages it? The answer to these questions helps with the distinction of the various possible property and governance structures in private land conservation. Leaving aside the role of public authorities in private land conservation, two types of stakeholders can be differentiated: private individuals/companies and non-profit conservation organisations. The roles and responsibilities in private land conservation can be divided between these groups in six ways:

- A) A private individual/company owns and manages a property for conservation purposes.
- B) A private individual/company owns a property and a conservation organisation manages it for conservation purposes.
- C) A private individual/company sells or donates a property to a conservation organisation, which then manages it for conservation purposes.
- D) A private individual/company owns a property and sells or donates certain use rights attached to it to a conservation organisation.
- E) A conservation NGO owns a property and a private individual/company manages it for conservation purposes.
- F) A conservation NGO owns and manages a property for conservation purposes.

Cases A and F are relatively clear-cut, as the ownership and the responsibility for the management of the property lie in the same hands. Cases B, C, D and E represent shared governance arrangements. Case E covers all cases, in which conservation organisations lease their land to land users under the obligation to comply with management impositions. Cases B, C, and D work the other way around. All of them concern the delegation of use rights (and management responsibilities) from the private individual/company to the conservation organisation. The difference lies in the duration of the delegation and its extent. Case B is the inverse case of E. The landowner leases the land to a conservation organisation or hires a conservation NGO as contractor for a limited period of time. Cases C and D in contrast are perpetual transfers of rights and duties. Case C concerns the entire property, i.e. the transfer of the fee title, while in case D, the private individual/company transfers some use rights, while keeping others.

Looking at the case studies, we can ask which tools are useful for which type of private land conservation. Table 2 provides an overview of this analysis.

	PPAs	BOS	CEs	TN
A	+	-	+	+
B	+	-	+	+
C	+	+	+	-
D	+	+	+	-
E	+	+	+	-
F	+	+	+	-

Table 2 – Suitability of private land conservation tools for various use-rights/ownership patterns

It shows that privately protected areas (PPAs) and conservation easements (CEs) are suitable tools for all ownership/use-rights scenarios. Biodiversity offsetting (BOS) usually requires a long-term commitment of the land to conservation purposes (>30 years), which makes it an unsuitable tool for conservation arrangements of indefinite duration (cases A and B). Temporary nature (TN) on the other hand is specifically tailored to such cases.

The tools presented in the case studies can be further assessed with regard to their usability by private landowners in the various stages of the process of private land conservation. Land conservation usually starts with baseline research and inventories of the potentially protected area. If the area is deemed worth being conserved, a proposal for designation as public reserve or PPA may be submitted, if such designation requires the involvement of public authorities. Otherwise, civic law tools can be used to privately protect an area. Ideally, the objectives of the conservation effort are specified through site management planning and implemented through an adequate land use. The effect of the measures can be monitored and evaluated to provide feedback for the adaptation of the management planning. Under certain conditions, the protection regime for an area may also be terminated.

Competences of private landowners	PPAs	CEs	BOS	TN
Research, inventory for potential protected areas	+	+	+	+
Proposal for designation	+	+	-	+
Designation	-	+	-	-
Management planning	+	+	+	+
Management plan implementation/oversight	+	+	+	+
Land use	+	+	+	+
Monitoring	+	+	+	+
Evaluation	+	+	+	-
Termination of designation	-	-	-	-

Table 3 – Suitability of private land conservation tools for private landowners at various stages of the conservation process

The tool of PPAs can be used by private landowners at all stages of the land conservation process except for site designation and termination, as these two steps require the involvement of public authorities. CEs on the other hand give control to the private landowner over the entire conservation process. However, once established, CE termination often requires the approval of the court or the general attorney. BOS does not constitute a stand-alone site designation category, which means that other tools have to be employed at this stage of the process. TN likewise depends upon the consent of public authorities.

The duration of a conservation arrangement and the degree of involvement of public authorities are thus the defining factors limiting the use of the presented private land conservation tools. In many cases, a combination of various tools may lead to the best results.

IV. Comparison of the EU experience with the situation in the US

The history of nature conservation in the United States of America (US) has differed markedly from that in most EU member states. Private landowners have played a far more important role, both in terms of deciding about the fate of public conservation efforts as well as leading initiatives for private land conservation. In the US, private land conservation has been one of the most important pillars of the nation's environmental history. It is thus worthwhile to investigate in more detail the circumstances that helped the US private land conservation movement strive and to ask whether its tools could be transferred to the EU.

IV.a Private land conservation in the US

Today, there are over 1.700 land trusts in the US. Together, they have protected more than 20 Mio. ha of land.¹⁵⁵ This is an area about five times the size of Switzerland. The biggest increase in private land conservation happened in the last 15 years. About half of the privately conserved area was protected after 2000. Although the land trust movement is a rather recent phenomenon, the history of land trusts dates back 125 years. The systematic conservation of private properties through their acquisition started with the foundation of the "Trustees of the (Public)¹⁵⁶ Reservations of Massachusetts" in 1891. This organisation, which in hindsight can be called the first land trust worldwide, acquired properties in the Boston area through donations of land by rich landowners. Its founder, landscape architect Charles Eliot Jr., outlined the concept in an article in *Garden and Forest* in 1890. He proposed to save "the finest bits of natural scenery near Boston" by establishing "an incorporated association, composed of citizens of all the Boston towns, and empowered by the State to hold small and well-distributed parcels of land free of taxes, just as the Public Library holds books and the Art Museum pictures – for the use and enjoyment of the public". He hoped that "generous men and women would be ready to buy and give into its keeping some of these fine and strongly characterized works of Nature; just as others buy and give to a museum fine works of art".¹⁵⁷

The idea of private land conservation proliferated in the US during the 20th century. But the land trust *movement* did not start until around 1980.¹⁵⁸ Although today it represents by far the biggest private land conservation movement worldwide, it developed its current size only in the last decades. Half of the land trusts in the US are younger than 20 years. So there are two questions to ask: Why did land trusts in the US develop steadily but without much momentum for about 70 years? And what triggered the explosive growth of land trusts in the last decades?

There are some fundamental differences between the US and the EU that explain why private land conservation took hold early as an important factor in the American conservation movement. Although the major driving forces for the birth of environmentalism were similar on both sides of the Atlantic – the industrial revolution and urbanisation until the early 20th century, the rise of the third sector society, affluence and suburbanisation after 1950 – these trends led to more drastic changes in the physical

¹⁵⁵ Land Trust Alliance 2010 National Land Trust Census. Washington DC: LTA.

¹⁵⁶ The word "public" was later dropped from the title of the organization.

¹⁵⁷ ELIOT Sr. 1902 *Charles Eliot, Landscape Architect*. Boston and New York: Houghton, Mifflin and Company.

¹⁵⁸ Brewer 2003 *Conservancy – The Land Trust Movement in America*. Hanover, London: University Press of New England.

environment in the US. The expansion of the suburbs into rural and natural landscapes happened so suddenly and brutally that, in the words of the historian Adam Rome, “the open space issue inspired the kind of grassroots activism that became the heart of the environmental movement after 1970. In the 1950s and 1960s, Americans formed countless organizations to preserve patches of green in fast-growing cities and suburbs. [...] In some cases, neighbors formed nonprofit organizations to acquire parcels of undeveloped land. Though the groups typically had staid names, their members often approached their task with a kind of militancy. ‘A suburban open space does not have to be glamorous or unique to be worth saving,’ argued a member of the Sudbury Valley Trustees, a Massachusetts open-space organization established in the 1950s. ‘Any unspoiled natural area in any suburb is threatened today and will be spoiled tomorrow unless someone starts fighting for it right now.’”¹⁵⁹

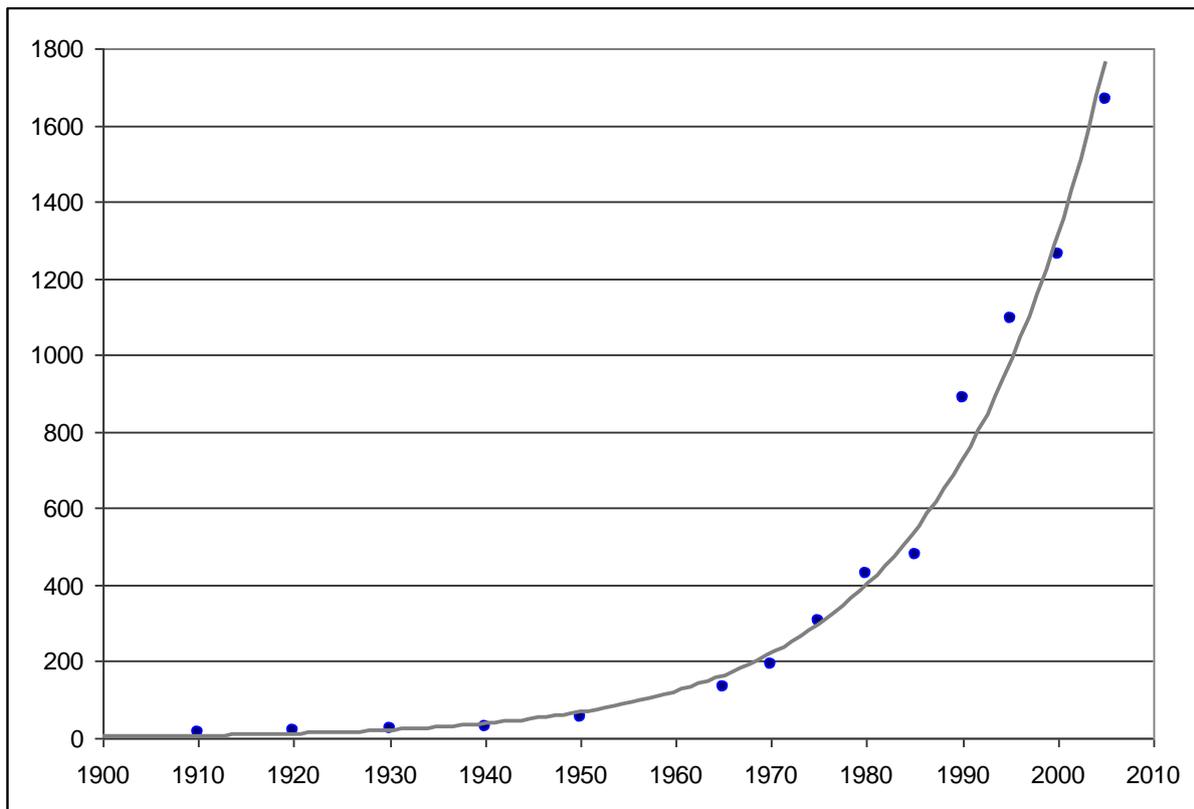


Diagram 1 - Number of land trusts in the USA 1900-2005 (with trend line), sources: Land Trust Alliance 2005, Land Trust Alliance 2010, Brewer 2003

Development pressure on rural and natural open space in itself does not explain why non-profit conservation organisations, and not public authorities, became the driving force behind conservation efforts. In order to understand the success of the land trust movement, one has to appreciate that the strength of the American civic/philanthropic sector is as much a factor as the corresponding weakness of public governments, in particular the environmental administrations after 1980.¹⁶⁰ In this context, it is also important to appreciate that in the US private property has always played a central role as a symbol for political freedom and national identity, much more so than in Europe. Very generally speaking, landowners in the US have much more freedom than their European counterparts to use their land as

¹⁵⁹ Rome 2001 *The Bulldozer in the Countryside*, 146-147

¹⁶⁰ Fairfax et al. 2005 *Buying Nature – The Limits of Acquisition as a Conservation Strategy 1780-2004*. Cambridge: MIT Press.

they see fit. Repeated attempts by American conservationists to curb land use rights through regulation have met bitter resistance from the property rights movement.¹⁶¹ Regulatory and fiscal framework of private land conservation in the US

Even a private conservation movement cannot thrive without the right regulatory framework. The most common tool of private land conservation in the US is the conservation easement. In terms of acreage, it has long surpassed more “traditional” approaches, such as the purchase or donation of land in fee simple. Two prerequisites paved the way for a widespread use of conservation easements by land trusts: robust enabling legislation and advantageous tax policies.

Although US conservation authorities had already used easements for conservation purposes well before the advent of the land trust movement (e.g. the US National Park Service for the protection of scenic views along the Blue Ridge Parkway in the 1930s¹⁶² and the US Fish and Wildlife Service in the 1950s to protect wetlands on private property in the Pothole region in the northern Great Plains¹⁶³), the instrument was virtually unknown in the private land conservation world until the 1960s. In 1959, urbanist William H. Whyte wrote a technical report for the Urban Land Institute title *Securing Open Space for Urban America: Conservation Easements*.¹⁶⁴ This was the first publication advocating for the use of easements by private land conservation organisations. Although the idea started to pick up, there was still a great degree of legal uncertainty about the scope, duration, and eligibility of conservation easements, in particular their use by non-profit organisations. This changed in the 1970s, when state legislations began passing conservation easement acts (the first one to do so was Massachusetts in 1969). In 1981, the National Conference of Commissioners (now the Uniform Law Commission¹⁶⁵) published the Uniform Conservation Easement Act (UCEA).¹⁶⁶ Today, all federal states have conservation easement enabling legislation, about half of which is based on the UCEA.

The UCEA gives a legal definition of the conservation easement¹⁶⁷, specifies who the eligible holders of such easements are (governmental bodies or charitable organisations with the purpose of land conservation), and opens the option for third parties enforce the terms of the easement. It also specifies how conservation easements can be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered. Most importantly in the common law context, it clarifies the validity of conservation easements despite them not being “of a character that has been recognized traditionally at common law”, such as not being appurtenant to an interest in real property, imposing an affirmative obligation upon the owner of the burdened property or upon the holder etc. With this legal backup, land

¹⁶¹ Helvarg 2004 *The War Against the Greens*. Boulder: Johnson Books.

¹⁶² Lee 1972 *Family Tree of the National Park System*, online at http://www.nps.gov/parkhistory/online_books/lee2/index.htm

¹⁶³ Bean and Rowland 1997 *The Evolution of National Wildlife Law*. Westport: Praeger.

¹⁶⁴ Whyte 1959 *Securing Open Space for Urban America: Conservation Easements*. Urban Land Institute Technical Bulletin 36.

¹⁶⁵ The Uniform Law Commission consists of commissioners from every federal state, as well as Washington DC, Puerto Rico and the Virgin Islands. Its task is to achieve homogeneity between state laws as far as possible. To this end, it regularly publishes template laws. The UCEA is an example of such a template law.

¹⁶⁶ <http://www.uniformlaws.org/Act.aspx?title=Conservation%20Easement%20Act>

¹⁶⁷ “a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property”

trusts were much better prepared to enter into agreements with landowners willing to protect their properties.

Secondly, a favourable fiscal framework for the use of conservation easement developed around 1980. In 1976, easement provisions were added to the Internal Revenue Code without much notice. For the first time, the deductibility of conservation and historic preservation easement donation was codified. The new provisions allowed taxpayers to claim an income tax deduction for the charitable donation of an easement to a charitable organisation. The provision was only supposed to stay valid for five years. However, by 1980 it was renewed and made permanent. When the statute was amended, land trusts throughout the US began to pay attention to the new possibilities it offered in the combination with the donation of easements. At the beginning, the provisions were poorly understood. As land prices were low, the government estimated to lose about 5 million \$ of income tax annually.¹⁶⁸ To clarify the new provisions, the Internal Revenue Service (IRS) drafted regulations that interpreted the language of the tax code. The “Notice of Proposed Rulemaking” and letter rulings by the IRS helped to narrow down the interpretational freedom of the tax rules and made land trusts more comfortable in dealing with landowners interested in making use of the possible deductions.

Since then, the deductibility of easement donations has been reformed several times in successive amendments of the tax code. Its basic principles however have stayed the same: If you donate a conservation easement meeting the requirements of the tax code, you are entitled to an income tax deduction for the value of the conservation easement. In addition, the value of your land can be reduced in the calculation of the estate tax.

Section 170(h) of the US Tax Code defines what kind of easements count as serving a “conservation purpose”. To qualify as deductible donation, they have to concern

- i) “the preservation of land areas for outdoor recreation by, or the education of, the general public,
- ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
- iii) the preservation of open space (including farmland and forest land) where such preservation is
 - (I) for the scenic enjoyment of the general public, or
 - (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or
- iv) the preservation of an historically important land area or a certified historic structure.”¹⁶⁹

The value of the donation needs to be officially appraised. Generally speaking, it is determined by a theoretical before-after comparison of the property burdened by the easement. To do this, the appraiser has to calculate the value of the property without encumbrances by the easement, and the value of the property after the easement has been added to its title. In practice, this is a very complex task, as not only properties differ widely from one another, but especially the language of the easement (i.e. the prohibitions and obligations) can vary drastically. Faulty appraisals have repeatedly given rise to harsh criticism about the deductibility of easement donations. In response, both the Land Trust Alliance (the

¹⁶⁸ SMALLS 2000 *An Obscure Tax Code Provision Takes Private Land Conservation into the Twenty-First Century*. In: Gustanski and Squires (eds.) *Conservation Easements Past, Presence and Future*.

¹⁶⁹ <http://www.landtrustalliance.org/policy/tax-matters/rules/documents/26-us-code-170h.doc>

umbrella organisation of the land trusts in the US) and the IRS have issued guidance documents on the appraisal methodology and defined who is a “qualified appraiser”.¹⁷⁰

In addition to these federal tax incentives, many states and municipalities have passed their own income and property tax incentives (Arkansas, California, Connecticut, Delaware, Iowa, Maryland, Massachusetts, Mississippi and North Carolina). The most powerful state tax incentives for private land conservation, however, are transferable tax credits. Such credits can be sold by the donor of an easement to an individual or corporation with higher tax liability and thus greater benefit from the deduction, generating immediate income for the donor. Such tax credit transfer schemes are available in Colorado, Georgia, New Mexico, South Carolina and Virginia. They create a market for private land conservation that connects “land rich – cash poor” rural landowners with the “cash rich – land poor” urban population. Land trust become intermediaries in this game, acting not only as recipients for the donation of conservation easements, but also as middle men connecting sellers and buyers of tax credits.

It has to be said that tax deductions are also available for donors of land in fee simple. A taxpayer who donates land to a charity or government agency may equally deduct its full fair market value (less any bargain sale payments) from the income tax. But the beauty of the donation of conservation easements is that landowners can continue to enjoy their property (under the stipulations of the easement), while receiving a financial compensation in the form of a tax break for giving up use rights that they may not have intended to exert in the first place. In fact, for many landowners, the deductibility of the donation is not the primary reason for their decision to burden their property with a conservation easement. Often, other motivations, such as place attachment, concern about future uses of the property, distrust of the heirs, or a general conservation interest play a more important role. The fact that the decision to protect one’s land is even financially rewarded often tips the balance in favour of creating a conservation easement.¹⁷¹

IV.b Comparison of the institutional, legal, and fiscal setting in the US and the EU

Both the EU and the US support the work of charitable organisations by preferential tax treatment of public-benefit (or charitable) organisations and of donations by private individuals and corporations to them. As discussed in chapter Taxes, charges II.c.vi, there are several ways charitable organisations can benefit from tax reliefs.

All EU member states except Romania provide for some form of special tax treatment for charitable organisations. However, there is no common definition of the public-benefit criteria that can lead to tax relief. What qualifies in one country might not qualify in another. Procedures for getting tax privileges vary considerably, e.g. application to the tax authority, decision by the ministry of finance, etc. While in some countries (e.g. Belgium, Czech Republic, Finland, France, Luxembourg, Slovenia), tax exemption is automatic, charitable organisations in most EU member states require special recognition from the tax authority to receive tax exemption.¹⁷²

The comparison of the different tax systems shows that tax policies for charitable organisations vary widely between member states. Table 4 provides an overview of the tax reliefs for charitable

¹⁷⁰ <http://www.landtrustalliance.org/policy/tax-matters/rules/documents/irs-guidance-appraisals.pdf>

¹⁷¹ Gustanski and Squires 2000 Conservation Easements Past, Present, and Future. Washington DC: Island Press.

¹⁷² Cf. footnote 92

organisations in the EU. The heterogeneity is in stark contrast to the US, where all charitable organisations meeting the requirements of section 503(c)(3) of the Internal Revenue Code are exempt from federal income tax and gift and inheritance (estate) taxes.¹⁷³ Sales taxes and property taxes are mostly regulated and levied on the state and municipal level. Here the picture is much more complex, so that a description of the tax law for charities on these administrative levels goes far beyond the limited scope of this report.¹⁷⁴

From the perspective of private individuals and corporations making contributions to charitable organisation, the picture is similar. Table 5 provides an overview of the tax reliefs for donations to charitable organisations. It shows that donations to charities are treated very heterogeneously in the EU.

¹⁷³ <http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Life-Cycle-of-a-Public-Charity-Private-Foundation>

¹⁷⁴ The sales tax software company Avalara provides a good overview of the answers to the most frequent questions, <http://www.avalara.com/learn/whitepapers/nonprofits-and-sales-tax/>

Tax Exemption	Income	Capital gains	Gift and inheritance	Value added	Real property
Austria	Yes	Reduced	No	No	Yes
Belgium	Reduced ¹⁷⁵	No	Reduced	No	Reduced
Bulgaria	Yes	N/A	Yes ¹⁷⁶	No	No
Cyprus	Yes	No	N/A	No	No
Czech Republic	Yes	N/A	Yes	No	Yes
Denmark	Yes ¹⁷⁷	No	Yes	No	Yes ¹⁷⁸
Estonia	Yes	N/A	N/A	No	No
Finland	Yes	N/A	Yes	No	No
France	Yes	N/A	Yes	Yes ¹⁷⁹	No
Germany	Yes	Yes	Yes	Yes ¹⁸⁰	Yes
Greece	Reduced ¹⁸¹	N/A	Reduced rate (0.5%)	No	No
Hungary	Yes	Yes	Yes	?	Yes
Ireland	Yes	Yes	Yes	No	N/A
Italy	Reduced ¹⁸²	No	Yes	Yes	No
Latvia	Yes	Yes	Yes	Yes ¹⁸³	Yes
Lithuania	Yes	N/A	Yes	No	N/A
Luxemburg	Yes	N/A	Reduced rate (4%)	Yes ¹⁸⁴	Yes
Malta	Yes	No	No	No	N/A
Netherlands	Yes	N/A	Yes	Yes ¹⁸⁵	No
Poland	Yes	Yes	Yes	No	Reduced ¹⁸⁶
Portugal	Yes	Yes	Yes	Yes	Yes
Romania	Yes ¹⁸⁷	No	N/A	No	No
Slovakia	Yes	N/A	N/A	Yes ¹⁸⁸	No
Slovenia	Yes	N/A	Yes	Yes	?
Spain	Yes	N/A	N/A	No	Yes
Sweden	Yes	Yes	N/A	No	N/A
UK	Yes	Yes	N/A	No	Reduced ¹⁸⁹

Table 4 - Tax reliefs for charitable organisations in the EU, data: European Foundation Centre¹⁹⁰

¹⁷⁵ Foundations are subject to the tax on legal entities, which only applies to income from specific sources (real estate, movable income, capital gains).

¹⁷⁶ A 5% gift tax is imposed for properties sold for purposes inconsistent with the organisation's mission,.

¹⁷⁷ Danish non-profits can receive a tax deduction for the amount they spend on charitable or public-benefit purposes specified in their statutes.

¹⁷⁸ Property tax is levied by the municipalities. Conservation NGOs are usually but not always exempted from it.

¹⁷⁹ If they do not perform economic activities, foundations and endowment funds are not subject to VAT.

¹⁸⁰ VAT is levied on goods and services received by non-profit organisations. They cannot deduct input tax.

Donations are not subject to VAT. Services can be subject to VAT, but most are exempt or the rate is reduced.

¹⁸¹ Only the income from renting buildings and land is taxed at a rate of 20%.

¹⁸² Non-profit organisations pay corporate income tax on capital gains, real estate, and business activities.

¹⁸³ If the income does not exceed €14,200/year.

¹⁸⁴ Unless they regularly carry out an economic activity and qualify as "taxable persons" under VAT legislation.

¹⁸⁵ Except for the supply of goods or services as a business.

¹⁸⁶ For the property that serves as the organisation's premise.

¹⁸⁷ Non-profit organisations do not pay profit taxes for incomes listed in Art. 15.2 Romanian Fiscal Code.

¹⁸⁸ If the income does not exceed € 49,790/year.

¹⁸⁹ UK charities are entitled to 80% relief from local taxes on the occupation of non-domestic real estate, the remaining 20% being at the discretion of the local authority.

¹⁹⁰ <http://www.efc.be>, no data available for Croatia

Tax Exemption	Individual donors	Corporate donors
Austria	Donations deductible up to 10% of taxable income.	Deductions up to 10% of business profits.
Belgium	Cash donations of €40 or more over the course of the financial year are deductible up to 10% of the taxable income, with an absolute maximum of €331,200 for the tax year 2009.	Only cash donations of more than €40, the exception being works of art donated to museums: up to 5% of the taxable income, with a maximum of €346,100 in 2010.
Bulgaria	Donations to registered public-benefit foundations deductible at rates of 5, 15, or 50% of the income depending on the recipient. Total deduction cannot exceed 65% of total income.	Donations can be deducted up to 10%, 15% or 50% (dependent on the recipient) from the profit before taxation. The total amount of the deduction cannot exceed 65% of the total income.
Cyprus	The full value of donations is tax deductible with no limits.	The whole amount of the donation can be deducted, subject to certain conditions. The same conditions are applicable to individual donors.
Czech Republic	Deductions up to 10% of taxable income provided at least 2% of taxable income is donated, but not less than 1,000 CZK.	The donation can be a movable asset or real estate. The donation is deductible up to 5% of taxable income.
Denmark	Gifts exceeding 500 dKK up to 14,500 dKK (the limit for the 2010 fiscal year) are deductible.	Gifts to qualifying charitable organisations exceeding 500 dKK up to 14,500 dKK are deductible each year. The limit is adjusted annually and was 14,500 dKK for the fiscal year 2010.
Estonia	Donations up to the value of 5% of the donor's total income can be deducted up to a total of €3,196.	Total of donations deducted from taxable income may exceed neither 3% of the sum of the payments made during the year and are subject to social insurance tax, nor 10% of the calculated profit of the latest fiscal year.
Finland	Only donations to publicly funded universities are eligible for any deduction.	Monetary donations made by corporations with a minimum amount of €850 are eligible for a tax deduction. Maximum amount depends on the recipient, divided in two categories: €250,000 for publicly financed university or a fund within the university, €50,000 for public-benefit foundations.
France	Income tax reduction at 66% of the value of the gift (75% for gifts made to foundations and other organisations which supply free meals to persons in difficult situations), up to 20% of the donor's taxable income. Alternatively donors may opt for a wealth tax reduction which is equal to 75% of the value of the gift, but is limited to €50,000.	Tax reduction equal to 60% of donations to public utility foundations up to 0.5% of their annual turnover.
Germany	Tax deduction up to 20% of the yearly taxable income; exceeding amounts can be carried forward to future tax years without any limitation. Individual donors can deduct the maximum amount of €1 million. This amount can be carried forward for a period of up to 10 years.	Tax deduction on the income up to 20% of yearly taxable income (or 0.4% of the sum of the turnover and salaries).

Greece	Deduction of 20% of the value of the gift from the taxpayer's gross income for a sum exceeding €100 during the fiscal year. The deduction only applies if the total of donations and sponsorships does not exceed 10% of the donor's income.	Cash donations are deductible up to a maximum of 10% of the taxable income.
Hungary	No tax incentives.	Up to 20% of the value of continuing donations (min. 4 years), both in cash and in kind, to public-benefit foundations can be deducted from the tax base. 50% of all donations (also one off) to prominently public benefit foundations can be deducted.
Ireland	Tax relief for donations of at least €250. Total tax relief claimed may not exceed 50% of gross income. Any excess over the 50% cap can be carried forward.	Donations over €250 are deductible in full.
Italy	Tax credit of 19% for donations to "onlus" and other kinds of charities, up to the value of €1,032.91.	Cash donations up to 2% of income up to €1,032.91 for donations to "onlus" and other NGOS. No limits on donations to universities or university foundations.
Latvia	Income tax deduction of a percentage of the value of donation equal to the income tax rate (26% in 2010), but not exceeding 20% of the donor's total taxable income.	Tax deduction of 85% of donated sums, up to 20% of total payable tax.
Lithuania	No tax incentives for individual donors but they can allocate 2% of their income tax to an approved public benefit entity.	Corporate donors can deduct cash, in-kind donations, and services.
Luxemburg	Tax deduction up to an annual total of 20% of the taxable income of the donor or €1,000,000, provided the donations have an aggregate value in excess of €120.	Donations deductible up to 20% of the taxable net annual income or €1,000,000 provided the donations have an aggregate value in excess of €120. Cash donations mostly, in-kind donations deductible in some cases.
Malta	No deduction incentives apply to individual donors.	Cash or asset donations (except immovable property) of €2,320 or more to certain national heritage organisations and of €11,600 or more for restoration works of certain organisations are deductible. Donations to the arts fund and to non-profits approved by it are limited to €50,000. Donations to sports regulatory bodies are limited to €60,000.
Netherlands	Donations can be deducted up to 10% of the donor's gross income. no deduction is possible for donations below 1% of the gross income or €60 (2010).	Donations of at least €227 can be deducted, up to a maximum of 10% of the annual income.
Poland	Donations of cash, shares, securities, real estate and in kind donations are deductible up to 6% of the taxable base.	Cash, shares, real estate and in-kind donations are deductible. Limit of incentive: 10% of the tax base.

Portugal	Cash donations: income tax deduction up to 25% of the amount donated where there is no limit for corporate donors. Where there is a limit on deduction for corporate donors, the amount deducted by individuals should not exceed 15% of the value of the donor's total income tax.	No limits on tax deduction when donations benefit state-supported foundations or represent endowment of private origin foundations pursuing social or cultural aims. Donations are calculated as a cost to the donor and rates range from 120%-150% of the monetary value of the donation.
Romania	2% of total income.	Donations can be deducted up to 3% of the turnover, but no more than 20% of the profit tax.
Slovakia	No tax incentives for individual donors.	No tax incentives in place for corporate giving.
Slovenia	The total amount of cash and in-kind donations to foundations may be deducted from the tax base up to 0.3% of the donor's taxable income.	Tax deduction on the amount of cash donations paid to a foundation, which accounts for 0.3% of taxable entity's taxed income in a tax year but may not exceed the tax base in a given tax period. There is additional tax relief for research funding.
Spain	Tax credit of 25% of the value of cash or in kind donations up to 10% of total taxable income.	Corporations can deduct 35% of all donations up to a limit of 10% of the taxable base or 0.1% of the company's turnover in the form of a tax credit.
Sweden	No tax incentives for individual donors.	No deductions in general. However, some donations can be deducted as business expenses.
UK	Cash donations are deductible via gift aid or payroll giving schemes. the donor claims a deduction from taxable income or capital gains for the amount of the donation grossed up by the basic rate of tax (currently 20%). Gift aid allows the charity to then reclaim the income tax deemed to be deducted from the donation from the tax authorities.	Money, qualifying shares and securities and interests in UK real estate. A deduction from taxable profits for donations of money to UK charities can be claimed.

Table 5 - Tax reliefs for donations to charitable organisations, data: European Foundation Centre¹⁹¹

¹⁹¹ Cf. footnote 190.

Another aspect of the fiscal system in the US merits consideration at this point: In the US, public spending is far more subject to the voters' will. In many US states and municipalities, citizens have the right to propose legislation for approval (or dismissal) by public vote. In this sense, ballot measures are a tool of direct democracy. Usually, they are initiated by gathering a certain number of signatures in support of the legislation. This tool has been used extensively for the financing of open space acquisitions. The Trust for Public Land maintains a database of all state and local ballot measures for conservation funding since 1988.¹⁹² It shows that since 1988, 1,856 out of 2,464 ballot measures have been passed (a 75 % success rate) dedicating over 72 billion Dollars to conservation purposes. In two respects, these ballot measures can be considered part of the private land conservation movement: 1) they are initiated by private individuals or non-profit organisations, and 2) they often benefit private land conservation, as many of them support land acquisition or other work of land trusts.

IV.c Applicability of US circumstances enabling private land conservation to the EU

As chapter III.c has shown, conservation easements are used de jure (in Scotland) or de facto in many EU member states as well. The obvious difference between the US and the EU is the deductibility of their donation in the US, which created a demand from the landowners' side to engage in private land conservation. EU tax laws do not explicitly foresee tax reliefs for the donation of conservation easements, as codified in section 170(h) of the US Tax Code. While the gift of properties are considered donations in kind in the tax systems of most EU member states, no precedent for the deductibility of a donation of use rights could be identified in the scope of this study. From the information gathered, it seems that the tax deductibility of donated use rights is a largely unregulated matter in the EU, i.e. use right are not explicitly excluded as deductible donation either. Whether or not the voluntary relinquishment of use rights in the form of burdening one's property with an easement benefiting a charitable conservation organisation could be considered a renunciation of a legitimate claim for reimbursement (as the easement is given without compensation) and thus be treated equal to a cash donation remains to be seen. In any case, the circumstances under which the US tax approach to the donation of conservation easements could be transferred to the EU need further investigation.

¹⁹² www.landvote.org

V. Conclusions and policy recommendations

Chapters III and IV have shown that the landscape of private land conservation instruments in the EU is highly heterogeneous. This makes any attempt to provide a holistic picture of the situation very challenging. On the other hand, it offers the potential for knowledge exchange and investigating the suitability of case studies for replication.

V.a Initial assessment of private land conservation instruments in the EU

Agri-environmental funding programmes under the RDP and the use of certification and labelling schemes are probably the most advanced tools for private land conservation in the EU. In contrast, many of the promising *alternative* approaches for the support of private land conservation are still in their infancy. They are either restricted to a few member states (such as the legal option to establish PPAs) or have not yet gotten beyond the stage of pilot projects (such as peatland restoration using voluntary carbon markets). In many member states, land conservation has traditionally been considered a public duty rather than an opportunity for private initiatives. Tools to support private land conservation have thus focused on the cooperative implementation of regulatory instruments and the involvement of private landowners in statutory land protection. Instruments to release the potential of private initiatives have received less attention.

In the field of property law, EU funding policies have triggered the use of easements and notary deeds for the designation of private properties to conservation purposes. In many instances, such requirements confronted land registry offices with the demand for entries of conservation stipulations in the land title for the first time. As the possibility of such entries is not always mentioned in the civil law codes, but not explicitly prohibited either, it can be assumed that the continuous demand by the EC for such entries and subsequent requests of conservation organisations have led to changes in attitude on the side of land registry offices and have made them more lenient to allowing conservation-specific entries in the title of properties. However, in some member states, such entries are still obstructed by complex land use legislation (e.g. water law in Austria, rural code in France).¹⁹³

V.b Benefits and disadvantages of a bigger private land conservation movement in the EU

The advantages of a bigger private land conservation movement in the EU are obvious. As private land conservation is genuinely voluntary, it has a much higher acceptance from the side of the affected landowners than regulatory measures. As biodiversity is highly place-dependent, putting private landowners in the driver's seat for land conservation also brings the benefit of making use of local knowledge and existing social relationships, thus enabling a greater degree of flexibility and creativity in finding the right answers to local conservation challenges. As the European landscape has been shaped by millennia of interaction between humankind and nature, it makes sense to deploy collective traditional knowledge about which land uses work in a given context and which do not, something that is much harder to achieve with regulatory approaches to land conservation. Several studies have shown

¹⁹³ Vassen, personal communication

that the willingness to pay for biodiversity conservation represents a huge potential for soliciting voluntary payments from the private sector for land conservation.¹⁹⁴ This potential cannot be tapped through regulation. However, regulation can provide the right framework allowing private stakeholders to make use of it.

The drawback of private land conservation is that it is driven by local interests. This creates a risk that the conservation outcomes are haphazard and unsystematic. In particular if unguided by framework policies, private conservation priorities follow personal exigencies, not scientific analysis. Some have criticised that private land conservation caters to the socially privileged. Studies have shown that the level of engagement in philanthropic activities such as nature conservation depends on median household income and level of education.¹⁹⁵ In other words, the constituency for private land conservation predominantly comes from rich individuals of the higher classes. Their choices about which areas to conserve inevitably have a social bias.

Other authors question whether private land conservation is as private as it seems. In particular when supported by public funds, either directly or indirectly through preferential tax treatment, questions can be raised about the legitimacy, democratic control and transparency of their actions.¹⁹⁶

These issues have to be kept in mind when assessing policy options for the support of private land conservation. They underline the hypothesis that private land conservation cannot replace regulatory approaches, but merely complement them. The challenge is to strike the right balance between public and private land conservation.

V.c Governance issues with expanding private land conservation mechanisms

Many of the potential tools to support private land conservation fall within the legislative competences of the EU member states. Tax law and property law in particular are two legal domains that have traditionally been the exclusive competence of national governments. In these areas, policy options on the Community level can merely consist of support for legislative reform in the member states. Moreover, each member state has its unique history of land conservation. As a result, local conditions vary in terms of the social, cultural and political environment for private land conservation. For example, differences in volunteer culture and, more generally, in the strength of the civic sector hugely influence the success of private land conservation.

This heterogeneity can hardly be resolved on the Community level. EU-wide knowledge exchange and capacity building can help level out some discrepancies in this respect, but they will not eliminate them. (It may be argued that this is not even desirable, as the strength of private land conservation lies in its polymorphism.) From this observation follows that one has to be careful not to resort to one-size-fits-all approaches that do not respect different contexts. Nevertheless, a first step to nurture private land conservation where it is currently not as full-grown as in other places is to help the relevant stakeholders learn from those examples that have proven successful. First improvements could be achieved on the EC

¹⁹⁴ Martin-Lopez et al. 2007 The non-economic motives behind the willingness to pay for biodiversity Conservation. *Biological Conservation* 139:67-82; Bhandari and Heshmati 2010 Willingness to Pay for Biodiversity Conservation. *Journal of Travel & Tourism Marketing* 27.6: 612-623.

¹⁹⁵ Loughery 2008 Explaining the Occurrence of Public and Private Land Preservation Policies. University of Delaware.

¹⁹⁶ Cf. Footnote 25.

level by homogenising definitions of key terminology and providing further guidance on EC conservation legislation without interfering with national legislative competences. Starting points could be the development of a common EU PPA definition and guidance on the reconcilability of novel private land conservation approaches (such as temporary nature) with the legal stipulations of the Habitats Directive.

V.d Initial recommendations for strengthening private land conservation in the EU

From chapters II, III and IV, it has become clear that while various interesting initiatives of private land conservation in the EU exist, it would still be a far cry to speak of a European private land conservation movement. However, there are numerous options to bolster private land conservation in the EU. They touch upon the various motivations of private landowners to conserve their properties, ranging from the cultural dimension of private land conservation to its legal and financial aspects. Support can be provided to private land conservation by acknowledging and promoting the legitimacy of personal motives such as place attachment, family tradition, and local identity, by organising knowledge exchange among successful initiatives, by providing appropriate legal tools and by creating the framework conditions for making private land conservation profitable.

V.d.i Creating the conditions for a culture of private land conservation

Private land conservation relies on initiatives from the civil society, but without some degree of institutional support from the public sector it will have a hard time trying to thrive. For individual private land conservation actors to consider themselves part of a movement, it takes an understanding of common goals and the awareness that others fight for the same ideals and experience the same challenges. It also needs common causes to rally behind. In the US, the land trust movement started with the formation of the Land Trust Alliance, the national umbrella organisation that connected the many local and regional initiatives and gave them a voice in the political arena. The common cause was the fight for making the tax exemptions for donations of conservation easements permanent. From initial gatherings in the 1980s, a number of opportunities for cooperation and exchange spurned. Technical support, quality control and standard setting, legal advice, capacity building, visibility, PR, and lobbying are among the tasks the full-grown umbrella organisation covers nowadays.

To repeat the success of the American land trust movement, one does not have to copy it. It suffices to understand that a few key elements turned a number of disparate initiatives into an industry. These elements do not necessarily have to be the same in other parts of the world, but some of them are likely to be. The legal foundations of property and conservation law combined with helpful tax incentives gave land trusts a robust basis for their operations. The high standards the movement aspired to reach for its own work helped it keep its credibility as reliable partner for private landowners, even in times of financial turmoil and scandals. Its non-confrontational, bipartisan, solution-oriented way of doing business and its apolitical stance kept the movement accessible and attractive for different segments of society, from grassroots environmental activists to Wall Street tycoons.¹⁹⁷

¹⁹⁷ Cf. Footnote 158

V.d.ii Supporting knowledge exchange

The first meeting of the Land Trust Alliance (called Land Trust Exchange at the beginning) soon developed into biannual conventions. The name of these conferences, Rallies, symbolised the activist nature of the movement. Today, the LTA Rally is the biggest get-together of private land conservationists worldwide. It regularly attracts almost 2.000 participants from all over the US, and some international guests. The training courses offered at Rally cover the whole range of practical topics relevant in the everyday work of land trusts. Dozens of seminars and workshops are grouped under eight headlines: “community conservation”, “communicating effectively”, “conservation financing”, “effective advocacy”, “fundraising and membership”, “governance and management”, “managing land and water resources”, and “strategic conservation vision”.

In the EU, similar networking initiatives are currently developing on regional, national, and Community level. Most of them are still in their nascent phase, e.g. the “Land Stewardship Network” that came out of the LIFE+ project “LandLife”¹⁹⁸, the “European Forum on Nature Conservation and Pastoralism”¹⁹⁹, the Eurosite network²⁰⁰, the German “Nationales Netzwerk Natur” (National Network for Nature)²⁰¹, the English Wildlife Trusts network²⁰², the Dutch network “De12Landschappen” (12 Landscapes)²⁰³, and the French “Fédération des conservatoires d’espaces naturels” (Federation of Natural Area Conservatories)²⁰⁴. The European Commission can help these networks grow further and coalesce into a European movement for private land conservation by providing logistic, financial and technical support for their respective meetings and it could initiate the formation of a “network of networks” for private land conservation.

V.d.iii Developing enabling legislation

Essentially, the development of enabling legislation for private land conservation would be the competence of the member states. However, the EU could support the process by showcasing successful examples of conservation law and legal guidelines that help the respective private land conservation groups to lobby for reform on a national level. In this light, the establishment of a standing body dealing with the homogenisation of national laws relevant for nature conservation in the style of the US Uniform Law Commission or the English Law Commission merits consideration. Such a commission could also make proposals for legal reform and draft template laws.

As a first step however, there needs to be a better understanding of what the legal framework for private land conservation in each member states is and what shortcomings exist. The report at hand can only provide a coarse picture of the status quo. A more in-depth legal comparison of the national laws relevant for private land conservation would be necessary as a basis for any meaningful proposal for legal reform. This does not only concern the various nature conservation acts of the member states, but also executive orders for their implementation, interpretation guidelines, decrees and court decisions. At least three branches of law merit further analysis: the rules and regulations pertaining to private land

¹⁹⁸ <http://www.landstewardship.eu/>

¹⁹⁹ <http://efncp.org/>

²⁰⁰ <http://www.eurosite.org/>

²⁰¹ www.nationales-netzwerk-natur.de

²⁰² <http://www.wildlifetrusts.org>

²⁰³ www.de12landschappen.nl

²⁰⁴ <http://www.reseau-cen.org>

conservation organisations, the legal toolbox that conservation nature law offers to them, and the tax system supporting their operations.

V.d.iv Using property law to conserve land

As the case of the US land trust movement shows, the legal impulse for private land conservation sometimes comes from a direction that no one expected. It was not the reform of conservation law that triggered the land trust movement's success, but the expansion of property law. This happened incrementally, in an interplay between land trusts, landowners, the Internal Revenue Service, state legislations, and the courts. Conservation easements took about 25 years until they were established as fundamentally uncontested tool of private land conservation, although legal discussion about their use continues until today.²⁰⁵

Similarly in the EU, land notaries, land registries and legislations are beginning to warm up to the idea that entries in the property title are a legitimate way of ensuring the dedication of a property to conservation purposes in the long term. The legal initiatives for conservation easements in England and France, which both refer to the US as role model, show that there is rising pressure to reform property law for private land conservation.

It seems that to date, no conservation organisation or landowner in the EU has dared apply for a tax deduction for the donation of an interest in land to a charitable conservation organisation. As tax authorities of the EU member states apparently have not yet been required to deal with the deductibility of such donations, no legal opinion has been publicised on this topic. Whether national tax rules already provide sufficient guidance to decide upon the matter could not be investigated in the framework of this study. In any case, someone in the EU will have to be the first to try this. Only then will we know whether legal obstacles to treating easements as in-kind donations are factual or merely figments of our imagination.

V.d.v Making land conservation pay off for the landowner

As said earlier, private Landowners conserve their land for various reasons, and financial aspects may not be the most important among them. However, it is clear that even the most altruistic landowner will refrain from protecting his/her property if the costs for doing so are perceived prohibitive. Giving up use rights linked to a property equates to renouncing a (potential) financial benefit. In this sense, it is clear for a landowner that giving up property values costs money.

The social sciences have studied the relationship between philanthropy and personal motives for decades.²⁰⁶ A number of studies have shown that when the costs of a donation are lowered, giving increases. Importantly, this is not only true for the absolute costs but also for the perception of the costs

²⁰⁵ Pidot 2011 Conservation Easement Reform: As Maine Goes Should the Nation Follow? *Law and Contemporary Problems* 74.4:1–28.

²⁰⁶ Bekkers and Wiepking 2011 A Literature Review of Empirical Studies of Philanthropy: Eight Mechanisms That Drive Charitable Giving. *Nonprofit and Voluntary Sector Quarterly* 40.5:924–973.

of a donation.²⁰⁷ Public policy thus needs to create an environment in which private landowners feel that they benefit from land conservation or at least do not suffer a disproportionate burden.

As with other fields of charitable giving, one way to do this is through tax policies. Economic analyses of the link between tax incentives and charitable giving have reached the conclusion that changes in the tax deduction for charitable contributions have a large, persistent price effect between -0.79 and -1.26 and a smaller transitory price effect between -0.40 and -0.61 . This means that, depending on the circumstances, for each tax Euro foregone, governments can expect roughly a similar increase in support for public causes.

From these findings, the potential for using the tax code to stimulate private land conservation becomes obvious. As tax incentives are hardly ever the only factor motivating a landowner to conserve his/her property, they do not have to completely compensate the economic loss associated with the conservation. Governments can thus “buy” land conservation for below-market costs by making use of the mixed motivations of private landowners. By adding the right amount financial incentives to the mix, they can unleash the potential of private landowners who are already willing to conserve their land, if the price for doing so is not too high. To get the level of such incentives right is, however, will belong to the high art of public policymaking.

²⁰⁷ Wiepking and Breeze 2009 Feeling poor, acting stingy: The effect of money perception on charitable giving. *International Journal of Voluntary and Nonprofit Organizations* 10: 167-178.

VI. Annex I – List of experts who contributed to this report

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IX. Annex IV – Relevant legislative and policy documents

Act No. LIII. of 1996 on Nature Conservation in Hungary

Arrêté de l'Exécutif régional wallon concernant l'agrément des réserves naturelles et le subventionnement des achats de terrains à ériger en réserves naturelles agréées par les associations privées (M.B. 11.10.1986)

Besluit van de Vlaamse Regering tot vaststelling van de voorwaarden voor de erkenning van natuurresevaten en van terreinbeherende natuurverenigingen en houdende toekenning van subsidies 2003.

Besluit van de Vlaamse Regering tot vaststelling van de voorwaarden voor de erkenning van natuurresevaten en van terreinbeherende natuurverenigingen en houdende toekenning van subsidies 27/06/2003

Bulgaria's Protected Areas Act of 1998

Convention on the Conservation of European Wildlife and Natural Habitats - Standing Committee 1998 Recommendation No. 71 (1998) concerning guidelines for the protection and management of habitats through private or voluntary systems

Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91

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Portugal Decreto-Lei 142/2008 – Nacional Áreas Conservação Protegidas.

Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora

Environmental Impact Assessment Directive 85/337/EEC

Environmental Liability Directive 2004/35/EC

Estonian Nature Conservation Act ("Looduskaitseadus") of May 10, 2004

European Commission Communication COM2011/244 Our life insurance, our natural capital: an EU biodiversity strategy to 2020

Finnish Nature Conservation Act ("Luonnonsuojelulaki") 1996/1096

Finnish Nature Conservation Act of December 20, 1996.

French Loi n° 76-629 du 10 juillet 1976 relative à la protection de la nature

German Act on Nature Conservation and Landscape Management (Federal Nature Conservation Act – BNatSchG) of 2009

Law of the Republic of Lithuania on Protected Areas, December 4, 2001 No. IX-628

Loi sur la conservation de la nature en Wallonie, July 12 1973

Portugal Portaria 1181/2009 – Área Protegida Privada Gestão

Slovakian Act 287/1994 on the Preservation of Nature and Landscape (Zákon Národnej Rady Slovenskej Republiky 287/1994)

Strategic Environmental Assessment Directive 2001/42/EC

