

The Vekerd Car Battery Recycling Facility in Hungary

EIA

Case Study

Justice and Environment 2011

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On the territory of the municipality called Vekerd, a car-battery dismantling factory has been planned. A factory with serious environmental effects (lead dust, So2 vapor, dioxins and furans from the plastic components etc.) on a Natura 2000 territory. The main issue in the case was the effect on a protected species (otis tarda) and also on the living conditions of the locals (eco-tourism, bio-agriculture, real-estate prices etc.)

The territory of the planned factory is part of the Natura 2000 network: it is a "priority natural habitat type", and a proposed "site of Community importance" pursuant to the Habitats Directive Art. 4. (1). Additionally the area is a special protection area according to the Birds Directive, as it is habitat of the great bustard (Otis tarda) listed in Annex I of the Birds Directive.

The Habitats Directive

Art. 1. (d): priority natural habitat types means natural habitat types in danger of disappearance, which are present on the territory referred to in Article 2 and for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority natural habitat types are indicated by an asterisk (*) in Annex I;

Article 6 of the Habitats Directive states:

“1. For special areas of conservation, 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.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.”

The relevant Hungarian legislation

The environmental impact assessment cases are handled by the competent administrative authorities within the framework of Act No. 140 of 2004 on the General Rules of the Procedure and Services of Administrative Organizations (hereinafter: Ket.). This act determines the formal rules of initiating the cases, the rights and responsibilities of participants, evidence taking, and openness of the procedure, decision-making, legal remedies and enforcement of the decisions. Rules of Chapter XX on Administrative Litigation of Act No. 3 of 1952 on the Civil Procedure (hereinafter: Pp.) are applied when the final decision of the second instance environmental administrative authorities are further challenged at court.

Act No. 53 of 1995 on the General Rules of Environmental Protection (Environmental Code) contains a series of rules that are important for the interpretation and implementation of the specific EIA rules. Such general rules of the Environmental Code encompass the principles of environmental protection (where precautionary principle or the polluter pays principle are especially important), the definitions that are generally applicable in all environmental administrative cases (e.g. the definition of the environmental elements, endangerment, pollution, harming, the territory of the scope of the effects etc.) and the basic institutional and procedural rules of the environmental administrative procedures including public participation (with a special emphasis on ensuring standing for the environmental NGOs in environmental administrative cases on their territory of activity). We note that these procedural rules are specific in relation to Ket., but general in relation to the specific EIA rules.

The Hungarian EIA processes are governed by Government Decree No. 314 of 2005 (25th December) on the procedures of environmental impact assessment and integrated environmental permitting (hereinafter: EIA Decree). The Decree regulates both the EIA and the IPPC permitting procedures and also determines the cases when these two procedures shall be handled in a single comprehensive procedure or in a consecutive procedural order. The EIA Decree in its EIA part contains specific definitions, the rules of the preliminary (screening-scoping) procedure, the requirements of the EIS, the EIA procedure, international (Espoo) rules and also the rules of sanctions for different kinds of infringements of the Decree. Annex 1 of the Decree lists those activities that are subject to EIA in all cases, while Annex 3 lists those activities where the necessity of the EIA procedure is subject to decision of the environmental inspectorate in the preliminary procedural phase.

The designation of the national Natura 2000 areas is specified in the Governmental Decree 275/2004. (X.8.) on the nature protection sites of European significance.

275/2004. Decree 4 § (2):

(...) other development goals, specified in an Act or in a Governmental Decree like the country's main socio-economic development, or national security considerations"

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" (1) Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

(2) In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 1, the competent national authority shall agree to the plan or project only after having established that it will not affect adversely the integrity of the site concerned - with respect to

10/A. § Governmental Decree No. 275/2004. (X. 8.):

The definition of imperative reasons of overriding interest is word by word implemented in the decree.

The planned project was subject to environmental impact assessment procedure.

The public authority, in view of the environmental expert's report and based on the environmental impact assessment study, alleged that the project would not affect the ecological integrity of the special protection area concerned, and the flock of the great bustards. As the great bustard is not listed as a priority species the authority did not check if the project is justifiable on the ground of imperative reasons of overriding public interest (human health or public safety, to beneficial consequences of primary importance for the environment (based on Art 6. (4) second subparagraph of the Habitat Directive).

The authority has not examined the cumulative effects (Habitats Directive Art 6 (3). " combination with other plans") and the alternative solutions (Art. 6 (4) first subparagraph), but agreed in its decision on some compensatory measures, which had to be negotiated between the authority and the applicant to protect the species (like ensuring the monitoring activities, including financial support, as well as contribution to ensure the feeding of the species etc.)

Two applicants (a neighbor of the planned factory and a neighboring local municipality) brought an action for annulment before the administrative court against the authorization of the plant on the ground, that the authority did not take into account the site's conservation objectives (noise, air pollution, other disturbances of the habitat), and the alternative solutions, cumulative effects (the whole content of the EIA concerning nature protection part).

According to the court of first instance's view, the owner of the neighboring property has no standing, as well as the local municipality has no legal standing according the provisions of the national law concerning the protection, reservation, reparation of the environmental

status of the great bustards. Nevertheless, the court adopted a judgment about the application and found the decision of the authority justified and legally well-founded and rejected the appeal of the applicants.

The main reason for the lack of legal standing was the approach of the Hungarian appeal system, as the *actio popularis* is not applicable. According to the Civil Procedural Code the applicant must have legal standing in the administrative procedure, or the case must be related to the applicant's right or righteous interest, or it has to be a breach against his/her request for environmental information according to the Aarhus Convention.

The local municipality requested exceptional review before the Supreme Court for annulment of the decision concerning the authorization of the accumulator-processing plant as the authority did not take into account the "priority natural habitat type" character of the site, and that the project as it has a negative effect on the site should be justified the interference with imperative reasons of overriding interest according to § 10/A.(1) of the Decree No. 275/2004 (X. 8.).

Finally, the Supreme Court stated, that the neighboring municipality has legal standing in the case, as its population is affected by the effects of the planned plant. Regarding the environmental issues, the Supreme Court stated, that in the case of projects, which are likely to have significant effects on those territories, protected by the Natura 2000 network (priority natural habitat types), the imperative reasons of overriding interest has to be proved and examined – but in the given case neither the authorities nor the court have not examined that question.

So the Supreme Court annulled the previous decisions and ordered that the environmental authority has to repeat the licensing procedure.

The case has two main aspects to be mentioned: these are how the cumulative effects shall be examined and taken into account and secondly, the relationship of the EIA regulation with the nature protection regulations.

As regards the cumulative effects, assessment and analysis of cumulative effects is regulated at three different places in the respective EIA law.

The screening documentation

According to Annex 4 of the EIA Decree (contents of the screening documentation), the following – inter alia – must be presented to the environmental authority:

- the current and the regulatory way of land use at the foreseen location of the project
- the current and the regulatory way of land use in the neighborhood of the foreseen location of the project

The screening decision

According to Annex 5 of the EIA Decree (aspects to be taken into account at the screening decision-making), the following – inter alia – must be considered by the environmental authority:

- the attractiveness of the project for other projects with significant environmental impacts to be located in the neighborhood
- complex and difficult nature of potential environmental impacts (with special regard to the synergy of impacts)
- the possibility of accumulation of impacts with impacts of other existing or planned activities

The environmental impact study

According to Annex 6 of the EIA Decree (contents of the environmental impact study), the following – inter alia – must be presented to the environmental authority:

- impact processes in their complexity
- whether the impacts can be added to other impacts

Consequently, accumulation of impacts is satisfactorily regulated by EIA law. In practice, assessment of cumulative effects is more complicated that results in a situation which may give rise to satisfaction to a lesser extent. The reason may be that methodologically, cumulative effects are significantly more complicated to assess.

As regards the interrelationship of the EIA law with the nature protection regulations, if the development concerns Natura 2000 territories, the EIA process is usually accepted as a full-fledged evaluation of the relevant Natura 2000 issues that is required by Article 6 of the Habitats Directive. On the other side of the interrelationship, the EIA legislator has inserted the viewpoints of nature protection into Annex 1 and 3 of the EIA Decree. In case of as much as 41 activities of Annex 1, the fact that they take place on protected nature areas (collective noun for all kinds of legal nature protection) alters the respective thresholds or makes the activity subject to EIA in itself.

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The Work Plan of J&E has received funding from the European Union through its LIFE+ funding scheme. The sole responsibility for the present document lies with the author and the European Commission is not responsible for any use that may be made of the information contained therein.

