

Application of Art 6(3) of the EU Habitats' Directive in Selected Member States

Case Studies from Croatia, Estonia and Hungary

Justice and Environment 2015

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Association Justice and Environment (J&E) is a European network of environmental law organisations that strives to protect the environment and nature by improving environmental legislation and enhancing the enforcement thereof. J&E and its members have been working on nature conservation related issues for years tackling and analysing the matter from different legal perspectives.

In order to contribute to the undergoing "fitness check" of the EU Nature Directives, this year J&E members researched national court practice (case-law) to check whether and how successfully have the national authorities and courts applied one of the cornerstones of the Nature Directives, i.e. the "appropriate assessment" mechanism established by the Art 6(3) of the Habitats' Directive.

The following case studies were compiled by members of the J&E network. To read the conclusions of the case studies, please refer to the summary of case studies (in a separate document).

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I. Croatia

A. Barilovic HPP

1. Title and No of the case, court that made the final decision

Small hydro power plant Barilovic; Administrative court in Rijeka; still in procedure (since 2014)

2. Proposed activity (what, where)

Building of a small hydro power plant on the river Korana

3. Administrative procedures

When the assessment was started, the site where the power plant was supposed to be built was a part of Natura 2000. During the appropriate assessment procedure, a new governmental regulation on the ecological network was put into force, and by its provisions, the site was removed from the network.

Due to the new situation, authorities claimed that, since the project is no longer a part of the ecological network and cannot have any adverse effects on the network's integrity, species or habitats, it can be concluded from the results of the screening procedure that there can be no negative effects on the ecological network and the full appropriate assessment is not needed. However, they admitted there are numerous effects it could have on the biodiversity, complexity of the river habitats, and reduction of the sediment and the level of underground waters in the area. Extreme negative effect of the dam on the fish migration corridors was noted as was the fact that numerous fish species of the Korana River are categorized as endangered or protected.

4. Legal challenge

A complaint was filed by Zelena akcija.

Main issues in this case are the transposition/direct effect of the Directive 2011/92/EU, and protection of sites that are in the process of becoming a part of Natura 2000.

5. Recent developments

Concerning the Natura 2000 itself, the issue at hand is the fact that in September 2014 a biogeography seminar was held, and according to detailed conclusions of the representativity of habitats in the SCI's of Croatia, the river Korana is to be returned to the list of Natura 2000 sites. The main argument is that, based on the loyalty principle and the binding nature of EU Directives, while the procedure for establishing the eco network is on-going, member states should restrain from activities that could undermine conservation objectives of the Birds and Habitats Directives.

B. Brodarci HPP

1. Title and No of the case, court that made the final decision

Flood defence system in the central Sava basin - part of Brodarci knot phase I - small hydropower plant Brodarci; case No. Usl-44/14, Administrative court in Rijeka (since 2013.)

2. Proposed activity (what, where)

In this first phase of the project, the idea is to build a small hydro power plant on the river Kupa, along with a canal, which is to channel the excess water from the river, and a dam to regulate the flow of water in the river and the canal.

3. Concerned Natura 2000 site and its conservation objectives (species, habitats), were priority habitats concerned?

The activity site includes HR1000001, site important for birds, and habitats of species and habitat types HR2000642 and HR2000639 where the objectives of conservation are species *Cobitis elongata*, *Sabanejewia balcanica*, *Rutilus pigus*, *Hucho hucho*, *Barbus balcanicus*, *Cottus gobio*, *Gobio uranoscopus*, *Zingel streber*, *Rhodeus amarus*, *Thymallus thymallus*, *Gobio albipinnatus*, *Astacus astacus*, *Austropotamobius torrentium*, *Lutra lutra*, *Unio crassus*, *Eudontomyzon* spp., *Austropotamobius torrentium*, *Ixobrychus minutus*, *Ciconia nigra*, *Egretta alba*, *Ciconia ciconia*, *Netta rufina*, *Aythya nyroca*, *Haliaeetus albicilla*, *Aquila pomarina*, *Porzana parva*, *Chlidonias hybrida*, *Dendrocopos medius*, *Ficedula albicollis*, and habitats such as water flows with vegetation *Ranunculion fluitantis* and *Callitricho-Batrachion*, hydrophilic edges of high greens of rivers and forests (*Convolvulion seppi*, *Filipendulion*, *Senecion fluviatilis*), but also a priority habitat, namely alluvial forests.

4. Was it excluded, on the basis of objective information, that the proposed activity could likely undermine conservation objectives of the Natura 2000 site, either individually or in combination with other plans or projects?

In 2011, the competent authority, conducted a screening procedure to decide if an impact assessment was necessary and concluded in its Decision that it should be done. One year later, in 2012, a new screening procedure was done based on the same data. The reason for this was seen in the fact that during 2011 parliamentary elections were held and a new government came into office.

During the second screening process NGOs participated as public concerned, but a Decision was not published.

5. Appropriate assessment

In 2013 a call for public participation in the appropriate assessment process was published. The study for the assessment contained a copy of the Decision that was supposed to be published in 2012, stating that the impact assessment is not to be done, but an appropriate assessment is, all without revoking the previous decision. This prevented effective public participation since there was no knowledge on the deadlines for filing complaints against the Decision.

6. Decision-making and legal challenge

Later, after the completion of the appropriate assessment, a Decision was made, stating that the activity is acceptable for the eco network provided the appropriate environmental protection measures are adopted and regular monitoring of the status of the network is conducted, but in the explanation of the decision the negative impact on the site was seen as inevitable. This decision was also not published on the official web site of the authority.

The Decision was challenged by an NGO on the basis of authority's hindering of the public participation, because the appropriate assessment contained no alternatives to the proposed activity and finally because, if negative impact was inevitable, a test of public interest should have been done. Since the test was not conducted, the activity could not have been found acceptable.

There is no court decision yet.

C. Dreznicko polje retention

1. Title and No of the case, court that made the final decision

Dreznicko polje retention, Administrative court in Rijeka, still in procedure (since 2014.)

2. Proposed activity (what, where)

Dreznicko polje is a natural water retention field in a karst area. The idea of the project is to prolong the water retention period for a maximum of 15 days after the natural flooding has ended so as to reduce the water overflow on the accumulation dam Sabljaci and through that achieve a better use of water on two hydropower plants. This is to be done by sealing the karst areas with concrete to prevent the flow of water into the soil

3. Concerned Natura 2000 site and its conservation objectives (species, habitats)

The activity site includes habitats of species and habitat types HR2000648, where the objectives of conservation are *Telestes polylepis* and *Chouardia litardierei*; karst habitat HR2000665 where the conservation objectives are *Gobio albipinnatus*, *Castor fiber*, *Lutra lutra*, *Marsilea quadrifolia*, *Bombina variegata*, *Lucanus cervus*, *Cerambyx cerdo*, *Rhodeus amarus*, *Emys orbicularis*, *Carassius carassius*, *Rutilus pigus*, *Misgurnus fossilis*, *Cobitis elongatoides*, *Astacus astacus* and others. Habitat types *Deschamsietum cespitosae*, forests, natural eutrophic lakes with vegetation (Hydrocharion or Magnopotamion), amphibian habitats Isoeto-Nanojuncetalia, HR5000019 and HR2001124.

Also, site HR1000019 is important for birds *Aegolius funereus*, *Alectoris graeca*, *Anthus campestris*, *Aquila chrysaetos*, *Bonasa bonasia*, *Circaetus gallicus*, *Dendrocopos leucotos*, *Drycopus martius*, *Emberiza hortulana*, *Ficedula parva*, *Glaucidium passerinum*, *Pernis apivorus*, *Picoides tridactylus*, *Picus canus*, *Strix uralensis*, *Sylvia nisoria*, *Tetrao urogallus*

Site is also a habitat of *Proteus anguinus*, a priority species,

4. Appropriate assessment

In conclusion of the screening process, the possibility of undermining conservation objectives was not excluded and the full appropriate assessment was carried out.

In this case, the appropriate assessment was carried out based on old data, namely based on the environmental impact study carried out in 1997, even though eco network impact assessment should have been undertaken within the environmental impact assessment. Also, neither the study nor the

decision of the authority was published, so the public could not effectively participate in the commenting or raising complaints. Even later on, when access to the study was demanded based on the Aarhus convention provisions, it was not made available.

5. Decision-making and legal challenge

The authorities concluded that the activity is acceptable for the eco network provided the appropriate environmental protection measures are adopted and regular monitoring of the status of the network is conducted.

A local NGO, with assistance of experts and other NGOs challenged the decision based on the fact that there was no effective public participation, the assessment was based on old data so both the study and the assessment were incomplete.

There is no court decision yet.

II. Estonia

A. Audru Fish Farm

1. Title and No of the case, court that made the final decision

Anne Seimar vs Audru Municipal Council. Case No 3-09-1613, final decision by Tallinn District Court on 11 October 2010.

2. Proposed activity (what, where)

AS FjordFresh Holding planned to build a fish farm complex in Audru municipality (on the border of Põlde and Saulepa) by the western coast of Estonia.

3. Concerned Natura 2000 site and its conservation objectives (species, habitats)

Activity was planned in close proximity to the Pärnu lahe SPA. In this area several bird species are set as conservation objectives, including for example following birds listed in Annex I of the Birds Directive:

- 1) *Branta leucopsis*;
- 2) *Calidris alpina schinzii*;
- 3) *Circus aeruginosus*
- 4) *Cygnus cygnus*
- 5) *Philomachus pugnax*

4. Were priority habitats concerned?

No.

5. Was it excluded, on the basis of objective information, that the proposed activity could likely undermine conservation objectives of the Natura 2000 site, either individually or in combination with other plans or projects?

No.

6. Was the „appropriate assessment” carried out? (if no, move on to Q 8)

Yes. Impacts on the Pärnu lahe SPA were assessed as part of the SEA of the detailed plan for the fish farm complex.

7. Was the „appropriate assessment” carried out in the light of the best scientific knowledge in the field (did someone claim the opposite)?

The SEA report was based on the expert assessment of M. Kose and M. Ellermaa on the potential impacts of the fish farm complex on the Natura 2000 site. Study was based on the applicable implementation guidelines of art 6(3) and 6(4) of the Habitats Directive. No-one claimed that this study was incorrect or best scientific knowledge was not used.

The study concluded that the planned activity (together with other activities nearby) will hamper the fulfilment of the conservation objectives of the Natura 2000 site and will have negative impacts on the integrity of the site.

The SEA report in its latest, modified form however concluded that the impacts on the Natura 2000 site are indirect as the planned activity does not take place on the site. Final conclusion of the SEA report was that the planned activity will not have adverse impacts on the Natura 2000 site, despite the fact that there may be negative impacts on the bird species protected on the site. This position was in fact based on the interpretation given to the Natura protection regime by the Ministry of Environment in December 2008.

8. Did the authorities make certain that the proposed activity will not adversely affect the integrity of that site prior to authorization, i.e. no reasonable scientific doubt remained as to the absence of such effects based on the „appropriate assessment“? (In case of opposition, who challenged the results of the „appropriate assessment?)

No, the final conclusions of the SEA report and the detailed plan that was based on them were challenged by both the Estonian Ornithological Society (EOS) as well as the local inhabitant Anne Seimar. The EOS's main claim was that the integrity of the site can also be adversely affected by the activities that do not alter the physical properties of the site but disturb the species that are listed as the conservation objectives of an area.

However, the EOS reached an agreement with the developer on different measures that were designed to reduce the cumulative impacts in a way that would prevent adverse effects on the integrity of the site. A. Seimar initiated the proceedings despite this agreement and also raised Natura 2000 related arguments in the court case.

9. Summarize main findings of the court as regards:

a. if the appropriate assessment was needed and why;

N/A

b. what was the standard that should be applied to the assessment;

With reference to the ECJ case C-127/02, the District Court found that appropriate assessment must be carried out prior to approval of an activity based on the best scientific knowledge available and all aspects, that either separately or in combination with other plans and projects may have an impact on the achievement of conservation objectives of the site, must be assessed.

c. when can an activity potentially affecting Natura 2000 site be authorised?

The Court relied on the national law and ECJ case law (C-127/02) and reasoned that a spatial plan such as the one at hand may only be approved in case the authority is convinced that the planned activity will not have adverse effects on the integrity of the site and conservation objectives. Such conviction is only possible in circumstances where scientific doubts as to the presence of such effects are removed.

10. Did the court annul the decision of the authority?

No. Although the court found that the criteria established by the ECJ in case C-127/02 should be applied, it found on the other hand that the negative impacts do not reach the SPA and it only impacts the protected species in areas surrounding the SPA. The court therefore concluded that these impacts are not contrary to the conservation objectives of the site. The court also relied on the decision of local municipality to halt all other developments that may have had a cumulative effect together with the fish farm, the latter decision being a compromise agreement reached with the EOS.

According to EOS, once the compromise is applied, impacts on the integrity of the site are no longer adverse.

11. Any other relevant comments

N/A

B. Kadakaranna

1. Title and No of the case, court that made the final decision

Elvi Maripuu vs Salme municipal authority. Case No 3-3-1-56-12, Estonian Supreme Court Decision on 6 December 2012.

2. Proposed activity (what, where)

Construction of a drainage system in Salme municipality (Kadakaranna property in Imara village), island of Saaremaa.

3. Concerned Natura 2000 site and its conservation objectives (species, habitats)

Laidunina SAC. Conservation objectives include different habitats, including 1210, 1630*, 3180*, 5130, 6210, 6270*, 6280*, 6410, 7230, 9070.

4. Were priority habitats concerned?

Yes, 6270*.

5. Was it excluded, on the basis of objective information, that the proposed activity could likely undermine conservation objectives of the Natura 2000 site, either individually or in combination with other plans or projects?

No. According to Supreme Court, the opposite could be presumed, namely that the area of protected habitats, including that of priority habitats, may be reduced.

6. Was the „appropriate assessment” carried out? (if no, move on to Q 8)

No.

7. Was the „appropriate assessment” carried out in the light of the best scientific knowledge in the field (did someone claim the opposite)?

N/A

8. Did the authorities make certain that the proposed activity will not adversely affect the integrity of that site prior to authorization, i.e. no reasonable scientific doubt remained as to the absence of such effects based on the „appropriate assessment”? (in case of opposition, who challenged the results of the „appropriate assessment?)

No. The local municipality based its decision mainly on the opinion of the local environmental authority. The latter concluded on the basis of a visit to the site that construction can be carried out if some additional conditions are followed. Neither of the authorities explicitly explained which impacts the activity may have on the site.

9. Summarize main findings of the court as regards:

a. if the appropriate assessment was needed and why;

The Supreme Court found that the appropriate assessment should have been carried out. The Court concluded, based on the ECJ practice, that a decision whether an appropriate assessment should be carried out, should be based on criteria that is different from usual EIA screening decisions. Namely the threshold for carrying out the assessment should be lower.

Supreme Court concluded that the appropriate assessment should be carried out if it cannot be excluded, based on the objective information that the activity may undermine the conservation objectives of the site. As in this case the area affected by the construction hosted several protected habitats (6270* and 6410), the criteria for deciding whether to carry out an appropriate assessment should have been whether the planned activity could adversely affect these habitats.

b. what was the standard that should be applied to the assessment;

N/A

c. when can an activity potentially affecting Natura 2000 site be authorised?

N/A

10. Did the court annul the decision of the authority?

Yes.

11. Any other relevant comments

It is worth mentioning that according to the Supreme Court, the local municipality could not excuse the lack of appropriate assessment with the fact that this was not considered necessary by the environmental authority in charge of managing the site. The court concluded that the final decision-maker bears full responsibility for the lawfulness of its decisions.

III. Hungary

A. Fertő Beach

1. Title and No of the case, court that made the final decision

Title: Local building regulation violating Natura 2000 provisions

No. and date of the decision: Köf. 5023/2012/9.; 11. July 2012

Court: Curia (former Supreme Court) of Hungary

2. Proposed activity (what, where)

The local government of Sopron adopted a decree on land use plan and local building code of Fertő Beach (Fertői Víztelep) in Sopron (Decree No. 29/2007. (X. 5.)) without assessing the environmental impacts – including the impacts on the NATURA 2000 sites - thereof.

The Government Office of County Győr-Moson-Sopron, as legal supervisor of the local governmental legislation, initiated the judicial review of the local decree in front of the Curia, as the Office found the local government violated the provisions of Governmental Decree No. 275/2004. implementing the Birds and Habitats Directives and the rules of Governmental Decree No. 2/2005. (I. 11.) transposing the Directive on Strategic Environmental Assessment.

3. Concerned Natura 2000 site and its conservation objectives (species, habitats)

According to the national legislation designating the NATURA 2000 sites¹, Fertő Beach is located on the special protection area No. HUFH10001, on the special area of conservation No. HUFH20002 and on the territory of the Fertő-Hanság National Park.

The site is the third largest lake in Central-Europe, the Westernmost one of the Asian steppe lake series in Europe. The huge, continuous reed zone surrounded by alkaline dry and wet grasslands makes the wetland mosaic complex of international importance².

HUFH10001 (SPA) –species (examples): Marsh Harrier, Little Egret, Shoveler, Great White Egret, Greylag Goose, Lesser, White-fronted Goose, White-tailed Eagle, Corncrake, Mallard, Bittern, Gadwall, Red-breasted Goose, Kentish Plover, Avocet, Black-winged Stilt

HUFH20002 (SAC)- habitats:

- **Calcareous fens with *Cladium mariscus* and species of the *Caricion davallianae***
- **Pannonian woods with *Quercus pubescens***
- **Alluvial meadows of river valleys of the *Cnidion dubii***
- **Molinia meadows on calcareous, peaty or clayey-silt-laden soils (*Molinion caeruleae*)**
- **Pannonian-Balkan turkey oak –sessile oak forests**
- **Pannonic salt steppes and salt marshes**
- **Pannonic loess steppic grasslands**
- **Natural dystrophic lakes and ponds**
- **Natural eutrophic lakes with Magnopotamion or Hydrocharition - type vegetation**

¹Decree No. 14/2010. (V. 11.) of the Ministry of Environment and Water

²<http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=HUFH20002>

- **Rupicolous pannonic grasslands (Stipo-Festucetalia pallentis)**
- **Alkaline fens**

HUFH20002 (SAC)–species (examples): Fire-bellied toad, Sabrefish, Scarce Teleius, European souslik

4. Were priority habitats concerned?

Yes, the special area of conservation No. HUFH20002 (Fertő-tó) is designated as priority area³ based on I. Area contains following priority habitats: 1530 - * Pannonic salt steppes and salt marshes, 6250 - * Pannonic loess steppic grasslands, 7210 - * Calcareous fens with Cladium mariscus and species of the Caricion davallianae

5. Was it excluded, on the basis of objective information, that the proposed activity could likely undermine conservation objectives of the Natura 2000 site, either individually or in combination with other plans or projects?

No. The preparatory work and negotiations on the building code were carried out between 1999 and 2001, however, the decree was adopted six years later, in 2007. In 2004, the Birds and Habitats Directives have been transposed by the Governmental Decree No. 275/2004⁴. and also the SEA Directive has been implemented by Gov. Decree 2/2005.

The local government referred that the building regulation of Fertő Beach cannot be considered as a „plan or project” according to the Art 6. par (3) of the Habitats Directive (transposed by Art. 10. par (1) of Gov. Decree 275/2004.).

6. Was the „appropriate assessment” carried out? (if no, move on to Q 8)

No.

7. Was the „appropriate assessment” carried out in the light of the best scientific knowledge in the field (did someone claim the opposite)?

N/A

8. Did the authorities make certain that the proposed activity will not adversely affect the integrity of that site prior to authorization, i.e. no reasonable scientific doubt remained as to the absence of such effects based on the „appropriate assessment”? (in case of opposition, who challenged the results of the „appropriate assessment?)

No. The standpoint of the local government of Sopron was that the adoption of the building regulation was not to be considered as a „plan or project” according to the Art 6. par (3) of the Habitats Directive (Art 10 par (1) of the Governmental Decree 275/2004).

9. Summarize main findings of the court as regards:

a. if the appropriate assessment was needed and why;

The decision of the Curia stated that Art. 10 of Governmental Decree 275/2004 transposed the Art 6. para (3) of the Habitats Directive including the concept of „plans and projects”.

³Decree No. 14/2010. (V. 11.) of the Ministry of Environment and Water

⁴Decree No. 275 of 2004 (X. 8.) of the Government on nature conservation areas of European Community importance

With reference to the points 43-44 of judgment of the ECJ in Waddenzee-case (C-127/02.) and to the points 54-56 of Case C-6/04 (Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland) the Curia concluded that the local land use plan and building code for the given territory (Fertő Beach) are to be considered as „plans“, which may have considerable influence on development decisions and on the sites concerned.

The Curia stated that as a result of the failure to make the local land use plan and building code of Fertő Beach subject to appropriate assessment of their implications for SACs, Article 6 par (3) of the Habitats Directive (and Art. 10. § par(1) of Gov. Decree 275/2004.) has been violated. The local government should have carried out an appropriate assessment before adopting the building code.

b. what was the standard that should be applied to the assessment;

The decision of the Curia did not mention the standard, which should be applied to the assessment. However, the Annexes 14-15 of Gov. Decree No 275/2004 contains the requirements that shall be taken into account when preparing the appropriate assessment.

c. when can an activity potentially affecting Natura 2000 site be authorised?

The decision of the Curia did not mention when the land use plan and building code potentially affecting Natura 2000 sites, can be adopted.

Gov. Decree No 275/2004 transposing the Birds and Habitats Directive regulates that any plan or project likely affecting a Natura 2000 site may be accepted if - based on the appropriate assessment – it will not adversely affect the conservation status of protected areas and species listed in Annexes 1-4. and Natura 2000 site concerned, further if it does not undermine the conservation objectives.

If the assessment states that the plan would have negative impact on the Natura 2000 site concerned, the plan can be still adopted in case there are no alternative solutions and the plan or project is considered to be of overriding public interest according to Art 10/A par (2)-(3) of Gov. Decree 275/2004.

10. Did the court annul the decision of the authority?

The Curia annulled the Decree of the local government because it violated the national legislation transposing the Birds and Habitats Directives.

11. Any other relevant comments

N/A

B. Nagyerdő Apartments

1. Title and No of the case, court that made the final decision

Title: Apartment house in the neighbourhood of Nagyerdő

No. and date of decision: 7.K.29.672/2013/3.; 13. March 2013

Court: Administrative and Labour Court of Debrecen

2. Proposed activity (what, where)

The investor/applicant planned the construction of an apartment house (16 flats) in Kartács street, Debrecen and submitted its application for the construction permit. The grounds on which the apartment house would have been built were adjacent to a nature conservation area, Nagyerdő.

3. Concerned Natura 2000 site and its conservation objectives (species, habitats)

The neighbouring site concerned by the project is „Debrecen-hajdúböszörményi tölgyesek“ No. HUHN20033 (Oak Forests of Debrecen-Hajdúböszörmény). This NATURA 2000 site is a relatively large remnant of oak forests. There are important insects feeding on dead wood and healthy population of *Iris aphylla* subsp. *hungarica*.⁵

HUHN20033 – habitats:

- **Riparian mixed forests of *Quercus robur*, *Ulmus laevis* and *Ulmus minor*, *Fraxinus excelsior* or *Fraxinus angustifolia*, along the great rivers (*Ulmion minoris*)**
- **Euro-Siberian steppic woods with *Quercus* spp.**

HUHN20033 – species: Stag Beetle, Scarce Fritillary, Grand Capricorne, Geoffroy's bat, *Iris aphylla* subsp. *hungarica*, *Cucujus cinnaberinus*

4. Were priority habitats concerned?

Yes, HUHN20033 site is a priority area according to the national legislation⁶ that is in accordance with the Habitats Directive (area contains priority habitats of type 9110 - * Euro-Siberian steppic woods with *Quercus* spp.).

5. Was it excluded, on the basis of objective information, that the proposed activity could likely undermine conservation objectives of the Natura 2000 site, either individually or in combination with other plans or projects?

No, it was not excluded that the planned construction and the apartment building will have adverse effects on the protected site.

6. Was the „appropriate assessment“ carried out? (if no, move on to Q 8)

Partly yes. The investor had the documentation of the assessment prepared and submitted to the environmental inspectorate. The assessment listed the habitats and species protected in the NATURA 2000 sites concerned and stated that the project will not result in loss of habitats because the apartment house will be built nor on NATURA 2000 neither on other nature conservation site.

According to the assessment's conclusion, the project will not have impact on the species *Iris aphylla* subsp. *Hungarica* at all, and likely will have neutral - or just slightly negative - impact on habitats and other species of the NATURA 2000 sites.

⁵<http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=HUHN20033>

⁶Point 7.19 of Annex 5. of Decree No. 14/2010. (V. 11.) of the Ministry of Environment and Water

As a result of the assessment, the environmental inspectorate – stating that the project will not have significant effect on the species and habitats of the NATURA 2000 sites and it does not undermine the objectives of conservation - granted its consent to the construction permit.

7. Was the „appropriate assessment” carried out in the light of the best scientific knowledge in the field (did someone claim the opposite)?

Based on the documents available, the authorities and the applicant referred that the assessment was carried out in accordance with national Natura 2000 legislation⁷ (Gov. Decree No. 275/2004.) but it was not mentioned whether the assessment took the best scientific knowledge in the field into account.

8. Did the authorities make certain that the proposed activity will not adversely affect the integrity of that site prior to authorization, i.e. no reasonable scientific doubt remained as to the absence of such effects based on the „appropriate assessment”? (in case of opposition, who challenged the results of the „appropriate assessment?)

The authorities accepted the result of the assessment submitted by the applicant and raised no objections to the assessment or to the project, although the content of the assessment unambiguously did not comply with the legal requirements laid down by Annexes 14-15 of the Gov. Decree No. 275/2004.

By initiating the judicial review, an environmental NGO challenged the final decision and argued that the environmental inspectorate ignored the provisions of Art 6 par (3)–(4) of the Habitats Directive and the regulation of Art 10-10/A of Gov. Decree 275/2004., thus the inspectorate’s consent was unlawful.

The NGO claimed that the assessment was rough, it did not contain any scientific data, any detailed surveys, any information about likely fragmentation of habitats. It was also referred that regardless of the fact that the construction site itself is not located on protected area, the impacts of the project on the surrounding NATURA 2000 sites shall be assessed according to the Art. 6 (3) of the Habitats Directive (and Articles 10 and 10/A of the Gov. Decree too).

9. Summarize main findings of the court as regards:

a. if the appropriate assessment was needed and why;

The court accepted the plaintiff’s standpoint that Art 6 (3) of the Habitats Directive as well as Articles 10-10/A of Gov. Decree 275/2004. shall be applied even if the construction site is not in the conservation area and there aren’t protected species.

The court also stated that the assessment carried out by the applicant and approved by the environmental authority did not appropriately confirm the final conclusion thereof (namely that the project will have neutral or slightly negative impacts on species and habitats of the NATURA 2000 sites nearby). The assessment did not accord with the requirements of the Gov. Decree 2756/2004, the documentation contained only references to this piece of legislation.

b. what was the standard that should be applied to the assessment;

⁷Decree No. 275 of 2004 (X. 8.) of the Government on nature conservation areas of European Community importance

N/A

c. when can an activity potentially affecting Natura 2000 site be authorised?

In this regard the judgement referred to the national legislation, to Articles 10-10/A of the Gov. Decree No. 275/2004.

As any activities influencing the favourable conservation status of protected areas and Natura 2000 sites may be performed based on official permits, the environmental inspectorate participates in the permitting process as the decision-maker or as a contributing authority dealing only with nature conservation aspects. In this role it defines conditions related to the protection of nature, and ensures that nature conservation considerations are sufficiently integrated in the process.

The court ordered that in the procedure repeated, the environmental authority shall base its consent (or objection) to the project on appropriate assessment which complies with the Annexes 14-15 of the Gov. Decree 275/2004 as well as reflects the aspects raised by the plaintiff.

10. Did the court annul the decision of the authority?

Yes, the court has repealed the final administrative decision and ordered the permitting authority to repeat the procedure taking the judgement into account.

11. Any other relevant comments

N/A

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