

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

Summary of Case Studies

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.

Contents

- Introduction 4
- I. Screening 5
- II. Content of the appropriate assessment..... 6
- III. Authorisation of plans and projects..... 7
- Conclusions 8

Introduction

In February 2014, the European Commission received a mandate to carry out a regulatory fitness-check (REFIT) on the so-called EU Nature Directives (Birds Directive¹ and Habitats' Directive²). Members of J&E have already contributed to this process and plan to continue to do so. As one specific step, we undertook analysing the application practice of the so-called „appropriate assessment” mechanism established by the Art 6(3) of the Habitats' Directive in selected EU member states.

To verify the progress of the application of the criteria set to such assessment by the Court of Justice of the European Union in the EU Member States, J&E member organisations conducted short case studies on national case-law regarding the “appropriate assessment”. Case studies were based on a common questionnaire, which contained the main aspects of the case law to be studied.

Three EU Member States were observed in case studies: Croatia (3 cases), Estonia (2 cases) and Hungary (2 cases). In Estonia and Hungary, judgements that have entered into force were analysed. In Croatia, due to the fact that the country acceded to the EU only recently, only proceedings still underway could be studied. Case studies are presented as an annex to this summary.

¹ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version)

² Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

I. Screening

The threshold for the obligation to carry out an “appropriate assessment” has been set low by the CJEU. In the landmark case C-127/02³ the Court ruled any plan or project is to be subject to an appropriate assessment, if it cannot be excluded, on the basis of objective information, that it will undermine the site’s conservation objectives (para 39-49). As the CJEU explains, this threshold rests on the precautionary principle and is needed to ensure effectively that harmful projects are not authorised and contribute to ensuring biodiversity.

The application of this criterion in EU Member States has, however, proven to be problematic.

In the *Kadakaranna* case, both the municipal authority as well as the local environmental authority in Estonia disregarded the obligation to carry out an appropriate assessment. Neither of the authorities even listed potential impacts to the site, despite the fact that it could be presumed that the construction project threatened protected habitats, including priority habitats. The Supreme Court of Estonia ruled in December 2012 that such an approach was in direct violation of the obligations of the authorities under Art 6(3) of the Habitats’ Directive and transposing legislation.

In *Fertő Beach* case on the other hand, a local government in Hungary refrained from the appropriate assessment, as it did not consider its decision in question to be a „plan or project” in the meaning of Art 6 (3) of the Habitats’ Directive. The decision challenged in the courts was local land use plan and building code. Here too, the Curia (highest court in Hungary) ruled in July 2012 that such activity was in violation of the EU law and its transposing acts as well as the CJEU case-law (cases C-127/02 and C-6/04) as the challenged decision may have considerable influence on development decisions and on the sites concerned.

In *Nagyerdő Apartments* case the environmental inspectorate in Hungary also tried to claim that a project not taking place on a Natura site cannot have adverse impacts on it and therefore appropriate assessment doesn’t need to be carried out. Fortunately, this false conception was also overturned by the Administrative Court of Debrecen in March 2013.

3

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=49452&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=89193>

II. Content of the appropriate assessment

As regards the content of the appropriate assessment, here too the CJEU has established stringent standards. All aspects of the plan that can individually or in combination with other plans or projects, affect conservation objectives of the site should be identified in the light of the best scientific knowledge in the field.

National case law of the Member States demonstrates shortcomings of application of EU Directives also in this regard.

In *Nagyerdő Apartments* case some impact assessment was carried out, but was challenged by NGOs as too rough and not in compliance with national legislation transposing the Habitats' Directive. This conclusion was also confirmed by the Administrative Court in Debrecen which ordered a new, more thorough assessment to be carried out.

In *Dreznickopolje retention* case, the appropriate assessment was based on an environmental impacts study which was conducted in 1997, i.e. more than 15 years ago. To make matters worse, this study was not even made available to the public.

III. Authorisation of plans and projects

After an appropriate assessment has been carried out, its results will significantly reduce the authorities' discretion in authorizing plans and projects. According to the CJEU, a plan or project may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned, i.e. no reasonable scientific doubt remains as to the absence of such effects. Yet again, the Court has iterated that such strict criteria are needed to ensure protection of the Natura 2000 sites.

In Member States' practice, however, the authorities have disregarded these requirements in numerous cases.

In *Audru Fish Farm case*, local municipality of Audru, Estonia ruled that although species protected under the EU Nature Directives were affected by the proposed activity, this happened outside of a protected area and therefore was not in violation of the EU law. Such a narrow interpretation of the protection obligations is problematic, as it contravenes the EU guidance in this matter⁴. The interpretation was not explicitly overturned by the District Court of Tallinn either. However, it was not the only grounds for dismissing the action by the court. The latter also found that the impacts were reduced to nothing also by eliminating potential cumulative effects by halting other developments in the area and therefore the criteria provided by CJEU in case C-127/02 were met.

In the *Brodarci HPP case*, the authorities decided to permit construction of a hydro power plant in Croatia. The authorities concluded that the impacts of the project are "acceptable" provided the appropriate environmental protection measures are adopted and regular monitoring of the status of the network is conducted. As such a decision was made despite the fact that the appropriate assessment carried out concluded that the negative impact on the site was inevitable, this constitutes a clear violation of Art 6(3) of the Habitats' Directive. Unfortunately, there is still no final judgement of the matter.

⁴ Managing Natura 2000 Sites. The Provisions of Article 6 of the „Habitats“ Directive 92/43/EEC, p 3.6.2.
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf

Conclusions

CJEU has provided strict criteria to screening and contents of the appropriate assessment as well as set narrow limits to the discretion of the authorities of the Member States when it comes to authorising the projects and plans that may affect the Natura 2000 sites. These are, however, no arbitrary limits; the CJEU has iterated that such approaches are necessary to ensure the effective application and achievement of the EU Nature Directives.

Case studies conducted by J&E members in three EU Member States imply that the national authorities are sometimes reluctant to apply these criteria. Part of the problem may be lack of knowledge of the criteria, part of it may be attributed to missing national case-law.

As the cases from Hungary and Estonia exemplify, however, the courts are more aware of the requirements related to appropriate assessment and have in recent case-law annulled the authorities' decisions. This has definitely led to a better knowledge and understanding of the requirements also among the authorities, even if it has taken almost a decade of application practice to reach this.

In the light of the current REFIT-exercise regarding the EU Nature Directives J&E therefore concludes that although the application practice as regards appropriate assessment in Member States has been sometimes rocky, it does not provide reasons to change the Directives. On the contrary – as there is already some good case law on national level that conforms with and explains the CJEU case law any changes to the Nature Directives would render the recent progress obsolete.

Contact information:

name: Siim Vahtrus
organization: J&E
address: Kastani 42, 50410, Estonia
tel/fax: +372 55 683 880, + 372 742 4524
e-mail: info@justiceandenvironment.org
web: www.justiceandenvironment.org

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