Natura 2000

Legal Analysis Collection

2007

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Introduction

Justice & Environment (J&E) is an association of public interest environmental law organizations based in the EU member states. J&E aims to use law to protect people, the environment and nature. Our primary goal is to ensure the implementation and enforcement of the EU legislation through the use of European law and exchange of information.

Having started its work as an informal network in 2003, the first full-year work plan was implemented by J&E in 2006. Implementation and transposition of the Habitats Directive[1] (HD) was chosen by J&E members as one of three first legal areas to be worked on. In 2006, J&E carried out an analysis on implementation and transposition of the HD, more specifically on implementation and transposition of Articles 6(3) and 6(4) of HD in Estonia, Czech Republic, Hungary and Slovakia.

On the basis of a legal analysis of the transposition of Articles 6(3) and 6(4) of HD into the national legislation of these four EU Member States[2] and case studies that represent typical cases of implementation of Article 6(3) and 6(4) of HD in practice[3], J&E issued a position paper. It described problems with implementation of HD in new Member States and made suggestions about improving their situation[4].

In 2006, J&E detected several systematic problems in the transposition of HD in the four new Member States, the most important of which narrowed the obligations for assessment down to certain activities and narrowed the concept of "alternative solutions" needing consideration before authorizing a particular plan or project in question.

It was also clear that the concept of 'compensatory measures' was unclear to these Member States.

In 2007, J&E members monitored changes in national legislation regarding the transposition of Articles 6(3) and 6(4) of HD. On the basis of these observations, national legal analyses of 2006 have been both complemented and compared, in order to detect improvements and map problems which still exist.

J&E Austrian member Ökobüro composed a legal analysis on transposition of Articles 6(3) and 6(4) in Austria. This provided an opportunity to evaluate the level of transposition of these provisions in new Member States, compared to an old Member State.

The analysis consists of an overview of the common problems in four Member States; Austria, Estonia, Czech Republic and Hungary[5], with separate national analysis.

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

[2] The legal analysis is electronically available at J&E webpage: http://www.justiceandenvironment.org/wp-content/wp-upload/JE2006Naturalegalanalyis.pdf

[3] The comparative case study collection is available at J&E webpage: http://www.justiceandenvironment.org/wp-content/wp-upload/JE2006Naturacasestudy.pdf

[4] The position paper is available at J&E webpage: http://www.justiceandenvironment.org/wp-content/wp-upload/JE2006Naturapositionpaper.pdf

[5] Unfortunately J&E cannot present complemented version of Slovakian legal analysis which was included in 2006 legal analysis collection

Articles 6(3) and 6(4) of the HD

Article 6(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."

Article 6(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."

Comparative Overview

1. General information about the transposition of the Habitats Directive

All Member States in question had an obligation to transpose Habitats Directive by the time of accession to EU.

The new Member States in question (Estonia, Czech Republic and Hungary) accessed EU on 1st May 2004. The transposition of HD provisions may formally be described as timely in these countries, although the transposition has not been implemented correctly in any of them (as appears from the present analysis).

In Hungary, the transposition was faulty to the extent that the European Commission turned its attention to it. Additionally, infringement procedures regarding transposition of HD have been initiated by the Commission against Estonia in March 2006[6].

Austria acceded to the EU on 1st January 1995 and submitted lists, including areas to be classified under the Bird Directive (Special Protection Area, SPA) and proposed Sites of Community Interest to be classified under Habitats Directive (pSCI) in June 1995. Due to a lack of any relevant federal competence, the transposition of Articles 6(3) and 6(4) of HD was carried out mainly within the nine Nature Conservation Acts of the nine "Länder" (Provinces of Austria). Other legal acts refer explicitly to the transposition of these norms. Regarding transposition of HD, the Commission initiated an infringement procedure against Austria, which ended with a decision by the European Court of Justice (ECJ) in case C-508/04[7]. Recently, the Commission brought two more actions before ECJ, regarding designation of Natura sites.

However, none of these infringement procedures are or were directed to transposition of Article 6(3) or 6(4) of HD.[8] Nevertheless, since 1st May 2004, Member States in question have made substantial amendments to their national legislation which complement or specify the interpretation of provisions about "Natura assessment", in order to comply with requirements of Article 6(3) and 6(4) of HD.

The present analysis is based on the state of legal norms as of September 2007.

2. Overall framework

The Natura 2000 network was incorporated into their national legal systems differently in the four MSs in question. In some of them, new protected areas were added to existing categories (Czech Republic), in some, new categories of protected areas were established (Hungary), and in some both were included (Estonia, Austria).

[6] This infringement procedure is focused on transposition of Articles 12 and 13 of the Habitats Directive
[7] In result, ECJ declared that Austria has failed to fulfil its obligations under Article 1(e), (g) and (i), Article 6(1) and (2), Articles 12 and 13, Article 16(1) and Article 22(b) of the Habitats Directive
[8] In Austrian case, Articles 6(3) and 6(4) were originally included in the action of Commission, but later the Commission withdrew its action related to these Articles. Also, in Hungarian case, the European Commission presented objections on basis of Art 6(3) and 6(4), but it did not became a full infringement procedure

The assessment of impacts of projects and plans to Natura sites is also regulated differently. In all MSs in question, Natura assessments are loosely linked to EIA/SEA proceedings, but the legal link between these two procedures differs by country. They are most closely linked in Estonia (where EIA may in some cases have characteristics of Natura assessment), and most vaguely in Hungary (where it is not clearly regulated if and how Natura assessment is linked to EIA/SEA proceedings at all). While it is clear that the two kinds of proceedings have different legal natures ("Natura assessment" being a procedure for decision-making and EIA/SEA being a procedure for assessment in stricter sense), the assessment of impacts in Natura assessment has a similar legal nature as the EIA/SEA procedure. The issue of assessment proceedings is further analyzed by p 3.2 Appropriate assessment.

3. Analysis of particular problems

Any plan or project…

The transposition of the concept of "*plan and project*" is problematic in most of the countries in question and can be described as their most characteristic and deep problem generally.

In Estonia, Czech Republic and Austria the legislation frames the definition of a "*project or plan*" in a narrow way. Accordingly, the concept of project or plan in national legislation might not cover all the activities that could possibly fall under category of plan or project in the meaning of Article 6(3) HD.

In Estonia, only activities that require environmental permitting or framework of a plan are subject to EIA or SEA (and therefore to Natura assessment), yet some activities do not require environmental permit or plan. In Estonian legal frameworks, the "Natura assessment" is not a separate proceeding, but the EIA/SEA proceedings may in some cases have characteristics of a Natura assessment.

The EIA Act specifically foresees that *"environmental impact shall be assessed, if activities are proposed which alone or in conjunction with other activities may potentially significantly affect a Natura 2000 site"* and SEA will be carried out if the relevant plan *"is the basis for activities which are likely to significantly affect a Natura 2000 site"*. So the Natura assessment should be applicable to all kinds of projects and plans, if needed.

However, in Estonian legal frameworks the EIA is only a procedural stage in proceedings of an administrative permit. The EIA can be initiated only on the basis of an application for such permit; so in case there is no permit required for an activity, EIA (and Natura assessment) shall not be carried out. Such activities would include, for example; cultivation of semi-natural grasslands, changing crop type in large cultivation area etc.

In Czech Republic, the narrow definition is not clear from the wording of the law, but may arise as an issue of interpretation. The Act No. 114/1992 Coll., on Nature and Landscape Protection uses the term "*any policy or project*", which may be interpreted in the meaning of Czech Act on No.100/2001 Coll., on EIA, determining a list of policies and projects that are or should be considered subject to EIA.

In addition, there is a specific problem in Czech Republic, with the clear exemption of the forestry management plans from the scope of the Natura assessment. Namely, Article 45h of the referred Act on EIA says that *"[the assessment obligation] shall not apply to management plans prepared by a nature protection authority for this area, and further to forest management plans and forest management lay-outs, for which, in such case, the binding opinion pursuant to Article 4 paragraph 3 shall take into account Article 6 paragraphs 3 and 4 of the Habitats Directive"*. Hence, the nature protection bodies have only an obligation to take into account Article 6(3) and 6(4) HD. This clearly does not ensure a suitable level of assessment.

In Austria, the Natura assessment provisions in the Nature Conservation Act of the Province of Lower Austria cover only *projects*, whereas *plans* are separately and solely dealt with by the Spatial Planning Act. That act only covers two forms of spatial plans. Hence, not all plans covered by Article 6(3) of the HD are subject to adequate assessment. In Provinces of Upper Austria and Vienna, the Nature Conservation Acts use solely the term "*Maßnahmen*" (measures), but it remains unclear what kind of activities or plans this term precisely covers. Furthermore, in several Provinces (Upper Austria, Salzburg, Vienna), the nature conservation laws allow listing in by-laws, measures that will never lead to adverse effect (and which subsequently shall not be subjected to Natura assessment).

In conclusion, the specific problems with definition of "*plan or project*" may be somewhat different in each country. But because of improper transposition, some projects or plans might be left out of the scope of Natura assessment, which is not in accordance to the HD. It seems better to define plans and projects in national legislation more generally, rather than narrowly, in order to guarantee that relevant plans or projects are involved (as seems to be the case in Hungary).

Appropriate assessment

Lack of clear rules to ensure appropriate *assessment* seems to be a problem in the countries in question, as well as the narrow definition of plans and projects.

In all new Member States in question, *assessment* is to be carried out according to EIA/SEA requirements. Note that in Hungary the new Natura Decree (in force since 17 October 2006) does not explicitly refer to EIA or SEA procedures, so the legal link between the two procedures is formally missing.

However, in any of them it is not clear how to incorporate the requirements of Article 6(3) of Habitats Directive into assessment proceedings. Whereas the formal requirements, such as recording proceedings and reasoning the assessment may be fulfilled, the regulation might be too vague to guarantee a proper assessment according to the principles of the Habitats Directive.

For example, in Estonia the EIA proceeding has to be carried out with particular requirements when the activity or plan may affect a Natura site. However, the nature of EIA/SEA is somewhat different than the assessment foreseen in the Habitats Directive. The biggest differences concern objectives of assessment and considerations of alternatives. These differences are not clearly laid out by law, so in practice the "Natura assessment" is usually only one (rather small) part of the whole EIA, whereas in fact it should determine the goal and give directions for the EIA. The problems with too vague provisions about how the assessment should be carried out in cases of interference with Natura sites, is common to all new Member States in question.

The issue of Natura assessments taking into account the site's conservation objectives may also be a problem. While the Estonian EIA Act and the nature conservation laws of Austrian Provinces contain references to the fact that Natura assessments should take into account the site's conservation objectives, in Czech Republic and Hungary this reference is not clearly made. For example, in Hungary the Natura 2000 Decree mentions the conservation objectives of a site, but not with regard to an assessment of environmental effects (that the assessment has to take that into account), but only what plan or project can be adopted or permitted.

Again, the specific problems with transposition might vary in the Member States in question, but it is obvious that the relation between decision-making rules of articles 6(3) and 6(4) of HD and EIA/SEA should be defined more clearly. If necessary, specific regulations for Natura assessments should be developed.

Ascertaining no adverse effect to the integrity of sites concerned

There is no mention of "*integrity of the site*" in Czech or Hungarian law in connection with adverse effects. Czech regulation concerns any adverse impacts on the territory, therefore being more stringent than the Habitats Directive. Although the concept has been literally transposed into Estonian law, there is no definition of what it means, causing misinterpretations in practice. For example, a percentage of the whole surface area is calculated for defining the importance of the impacts. In Austria, the "*integrity of the site*" is mentioned in nature conservation laws of most Provinces (except Upper Austria), but the '*adverse effect*' is supplemented with additional conditions such as '*wesentlich*' (basic, essential, fundamental) or '*erheblich*' (considerable, substantial).

The flaws in transposing this part of the Natura assessment provisions may cause narrow-sighted evaluations of possible effects.

Alternative solutions

Consideration of alternative solutions, being a tender issue in practice, is not sufficiently guaranteed even on a legislative level.

In Estonia, the EIA Act states that *"If, regardless of the potential significant effect of the proposed activities or resulting from implementation of a plan on a Natura 2000 site […], and <u>due to lack of alternative solutions</u>, an authorization may be issued with the consent of the Government of the Republic"*. The transposition seems correct; the obligation to assess alternatives is mentioned. However, as the Natura assessment is part or specific characteristic line of EIA/SEA procedure, general EIA/SEA assessment rules apply. In the course of EIA, "real" alternatives have to be assessed. There is no definition about the "real" alternatives which makes it possible to interpret "real" as possible alternatives for the developer (who usually defines the possible alternatives by economic criteria).

In Hungary, the Natura 2000 Decree requires *"lack of any other reasonable alternatives"* as a condition for enabling adoption of plans or permitting of projects, even if it is likely to cause a harmful effect on the Natura 2000 site in question. Similarly to the Estonian situation, the developer can consider some solutions unreasonable, taking into account only his own interests (for instance costs and benefits).

In Austrian Provinces a similar problem is represented. The Nature Conservation Act of Province Styria adds the adjective '*reasonable*' to the alternatives to be considered, while the Nature Conservation Act of Province Tyrol requests '*satisfactory*' alternatives. Furthermore, the Nature Conservation Act of Province Vienna does not request alternative solutions, but questions whether the aims of measures could be reached in a technical and '*economically justifiable*' manner in order to have less effect on the conservation objective.

Interestingly, the **Czech** Act on Nature and Landscape Protection states that *"if the assessment […] shows an adverse impact on Natura 2000, and a variant solution having lower or no adverse impact does not exist, the proposed policy or project may be approved, […]"*. Following the same line, the new Czech Building Act (determining the legal framework for spatial plans) states that *"if the Ministry of the Environment determines in its opinion on the SEA assessment that the development policy has a negative impact on the site of European importance or bird area and there does not exist any alternative solution with a smaller negative impact or without it, it is possible to approve the development policy […]"* This approach also seems not in line with Article 6(4) of HD which requires absence of any alternative solutions.

In conclusion, the problem with defining alternatives as "real" or "reasonable" which could come down to interpretation on a basis of economic interests, is a problem of all Member States. The consideration of alternatives is one of the major issues in Natura assessments in practice. Taking into account the emphasis in the Natura handbook[9] that *in this stage only alternatives concerning the site's conservation objectives can be considered*, and *no other, including economic criteria can be used at this stage of decision-making*, this matter is of crucial importance.

Imperative reasons of overriding public interest

Taking into account imperative reasons of overriding public interest while deciding about authorization of project or plan, having negative effects on Natura site, is a confusing issue for most of the surveyed Member States.

The **Estonian** EIA Act requires that in order to authorize an activity or plan, having potential significant effect to Natura site, the activity or plan should be (among other conditions such as lack of alternatives) *"necessary for the public due to vital reasons, including social or economic reasons"*. This clearly gives more room for discretion than foreseen in the Habitats Directive which does not refer to merely *essential* reasons, but requires that the reasons should be 'imperative' and the public interest 'overriding'.

Similar problems appear in nature conservation laws of the **Austrian** Provinces. The Nature Conservation Acts of Provinces Carinthia, Upper Austria and Vienna (the latter only regarding non-priority habitats and species) use the term without the adjective '*overriding*', which is not in line with Article 6(4) of HD. The relevant legal provisions of Province Salzburg do not refer to such a term at all, but the Nature Conservation Act of Salzburg speaks about '*proved direct public interests of particular importance which have priority against the interests of nature conservation*'.

[9] Managing Natura 2000 sites: the provisions of Article 6 of the 'Habitats' Directive 92/43/EEC. Office for Official Publications of the European Communities, 2000.

In **Czech Republic**, the wording of the regulation is unclear to the extent that it may lead to misinterpretation. Namely, the Czech Act on Nature and Landscape Protection states that *"if the assessment […] shows an adverse impact on Natura 2000, and a variant solution having lower or no adverse impact does not exist, the proposed policy or project may be approved, only for imperative reasons of overriding public interest, and under simultaneous ordering of compensatory measures necessary to ensure protection and coherence of Natura 2000 […]"* This formulation can lead to the interpretation that, due to existence of imperative reasons of overriding public interest, it is necessary to examine only those projects during approval that do not have an alternative with a lower or no adverse impact on a Natura 2000 site. In other cases where there exists an alternative that has lower adverse impact, the condition of overriding public interest will not be taken into consideration.

In **Hungarian** law, the regulation about public interest is also inconsistent, although it does not result in incorrect transposition (see the Hungarian national analysis for further explanations).

There seems to be a continuous attempt to soften the term "*imperative reasons of overriding public interest*" in the national legislation of some Member States (Estonia and Austria), which creates a basis for misuse. In others (Hungary and Czech Republic) there are smaller problems with clarity when using the terms in procedural requirements. Those might or might not lead to bad implementation.

Compensatory measures

In analysis of 2006, J&E highlighted certain problems regarding the concept of *compensatory measures*. In this field, the improvements to legislation during 2007 are most visible.

The obligation to take compensatory measures is represented in national laws of all countries in question.

In **Estonia**, this obligation was introduced by amendments to the EIA Act and Nature Protection Act, enforced in 1st April 2007. The EIA Act was supplemented by the sentence "*When authorizing the project, an obligation to implement compensatory measures has to be imposed.*" (Analogous regulation was enacted for plans.) The nature of compensatory measures is described in amendments to the Nature Protection Act. However, there is still no obligation under Estonian law to inform the European Commission about compensatory measures.

In **Hungary**, the compensatory measures are limited to "*measures […] proportionate to the expected damage*" which may also be considered an incorrect transposition. Situations may occur when a compensatory measure is not proportionate but necessary to ensure the coherence of a site of community importance, but in Hungarian law they cannot be imposed.

4. Conclusions

In general, articles 6(3) and 6(4) are transposed satisfactorily into the national legislation. However, taking into account the fact that carrying out projects and plans that may have significant effect upon the environment is a controversial issue, the exact wording of national legislation may be of significant importance to the real consequences in the real environment. In the case of Natura 2000, the affected environment is the most valuable network of habitats throughout all Europe.

Therefore, following shortcomings must still be highlighted:

- the concept of projects and plans to be assessed is sometimes restricted and /or some types of projects and plans exempted from the scope of assessment;
- the requirements for assessment of proceedings is (in some Member States) still as vague as discovered by J&E in 2006;
- the problem of restricting the obligation for considering alternative solutions only to "real", "reasonable" or "satisfactory" solutions was emphasized again. It seems to be a problem not only in new Member States in question, but also in Austria;
- there are attempts to soften the term of imperative reasons of overriding public interest to less significant public interest.

These problems are more or less visible in several Member States. Comparison of the legislation of new Member States to Austrian legislation shows that problems are similar.

Estonia

1. Introduction

1.1 Analyzed problems

This analysis focuses on transposition of Articles 6(3) and 6(4) of the EU Directive 92/43/EEC[10] (Habitats Directive) into Estonian national legislation.

1.2 General information on the transposition of the Habitats Directive

The transposition of Articles 6(3) and 6(4) of the Habitats Directive into Estonian legislation has been carried out in three stages to date:

- first, via the new Nature Protection Act (in force since 10th May 2004) which contained amendments to Environmental Impact Assessment and Environmental Auditing Act (hereinafter referred to as 'old EIA Act');
- second, via the Environmental Impact Assessment and Environmental Management Systems Act (in force since 3rd April 2005, hereinafter referred to as 'EIA Act').
- third, via the amendments to the EIA Act and Nature Protection Act (in force since 01.04.2007)

With the amendments in the old EIA Act, the impact assessment of projects according to Articles 6(3) and 6(4) was incorporated into the EIA proceeding. The old EIA Act did not prescribe rules for strategic environmental impact assessment (SEA). This deficiency was solved through the new EIA Act which prescribes separate regulations for EIA and SEA.

With amendment of the EIA Act and Nature Protection Act, significant gaps concerning implementation of compensatory measures were partly eliminated.

As the first transposition was implemented 10th May 2004, Estonia has formally kept the designated time-frame for transposition. However so far, the transposition is not entirely correct.

10 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206)

1.3 Overall framework

The European network of protected areas, Natura 2000, was incorporated into the national system of nature protection, which has been in effect in Estonia since 1994. On 10th May 2004, a new Nature Protection Act was enforced, containing Natura 2000 sites provisions.

The new protected areas (SCI, SPA) were mostly added to existing categories of protected areas. However, a new type of protected area, *special conservation areas*, was created for sites that need less stringent protection.

The administration system of protected areas did not change due to incorporation of the Natura 2000 system. It did, however, change since 1st January 2006, due to administrative reform of protected areas. The administrators of protected areas (including SCAs) are presently regional departments of Ministry of Environment (MoE).

With previously mentioned amendments to the Nature Protection Act the authority over protection management as well as some administrative rights over SCAs were given to another state authority, National Centre of Nature Protection (Riiklik Looduskaitsekeskus).

The list of pSCIs and SACs was presented to the European Union by the Estonian Government, decided 5th August 2004. According to the opinion of the Estonian environmental NGOs, the list of selected areas is satisfactory. However, problems have occurred with some areas planned to be left out or even actually left off the list for economic reasons.

2. Analysis of particular problems

The analysis follows the logical structure of Articles 6(3) and 6(4) of the Habitats Directive.

2.1 Any plan or project not directly connected with or necessary to the management of the site

Projects and plans

According to § 3 p 2 of EIA Act, *environmental impact shall be assessed, if activities are proposed which alone or in conjunction with other activities may potentially significantly affect a Natura 2000 site*. Also, according to § 33 (1) 4), SEA *will be carried out before enacting a plan, in case the plan is the basis for activities which are likely to significantly affect a Natura 2000 site*.

As the list of projects and plans that are subjected to EIA or SEA proceedings is not extensive and no projects or plans are excluded from it (except for certain reservations made in Directive 85/337/EEC and 2001/42/EC), the Natura assessment should be applicable to all kinds of projects and plans, when needed.

However, the definition of *„proposed activities"* is a term out of context with the EIA Act. The EIA Act foresees two different kinds of proceedings,

- EIA in proceedings of permits and
- SEA in proceedings of plans.

Therefore, it is questionable whether the scope of the EIA Act also covers activities, for which no permit or plan is required, but which nevertheless may significantly affect Natura 2000 site.

> *Example; cultivation of natural or semi-natural grasslands, which are very important habitats in Estonia, or changing crop types in large cultivation areas, which is important for birds.*

For these kinds of activities, initiating EIA would not be legally justified; essentially it would not be possible to initiate EIA as a separate proceeding in cases of proposed activities are not subject to any permit or plan proceedings.

The European Commission handbook „*Managing Natura 2000 sites*"[11] (hereinafter referred to as Handbook) declares that „*project*" should be defined in a very broad manner, and it should not be limited to physical construction; for example, a significant intensification of agriculture which threatens to damage or destroy the semi-natural character or a site may be covered.

As such activities are not covered by Estonian EIA proceedings, the EIA Act is not in accordance with the Habitats Directive.

There are more problems with implementation of the EIA Act in practice.

> *Example; forest notifications (permits for cutting the trees) and forest management plans are never subjected to EIA or SEA (including 'Natura assessment') in practice, although the forest management plans can be considered as 'plans' in meaning of EIA Act.*

'Not directly connected with or necessary to the management'

According to Estonian EIA Act, all the plans and projects, significantly affecting Natura 2000 sites, are subjected to assessment, including such plans that are connected to or necessary for management of the site. Such EIA and SEA proceedings have indeed been initiated in practice (e.g. restoration of Prästvike lagoon, one of goals is the precise inventory of Natura 2000 habitats in order to plan management works for the lagoon). It is hard to evaluate if such regulation is a major problem in practice, but it definitely mists the purpose of EIA, regarding assessment according to Habitats Directive.

2.2 'Is likely to have a significant effect thereon, either individually or in combination with other plans or projects'

Significant effect

The definition of significant effect is given in § 5 of EIA Act in terms of general EIA proceedings: „The environmental impact is significant if it may potentially exceed the environmental capacity of a site, cause irreversible changes to the environment, endanger human health and well-being, the environment, cultural heritage or property."

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11 Managing Natura 2000 sites: the provisions of Article 6 of the 'Habitats' Directive 92/43/EEC. Office for Official Publications of the European Communities, 2000.

The activities which always are considered to have significant effect are listed in § 6 (1) (the list is analogous to Annex I of the Directive 85/337/EEC); in other cases the decision about initiating EIA/SEA is decision of discretion. In cases when the EIA will not be initiated, the decision has to be written and reasoned. If proposed activities may potentially affect Natura 2000 sites, the decision-maker shall obtain approval for the draft decision to refuse initiation of environmental impact assessment of the proposed activities with the administrator of the specified protected natural features. It can be concluded that, the transposition of the Habitats Directive is more or less correct.

In practice, however, the decisions about not initiating EIA are often not reasoned or even not formulated and/or published. It is also a clear tendency that the most important criteria for declaring the effect as significant is position of the activity on Natura site or directly next to it. In practice, the most problematic cases could be forest management plans and forest notifications, but also drainage system restorations and building permits. The problems may arise with permits/plans, over which the regional departments of MoE have no authority.

'Likely to have'

The Habitats Directive does not give further explanation about what is meant with "likely" in Article 6(3). According to the Handbook, in line with the precautionary principle, it is unacceptable to fail to undertake an assessment on the basis that significant effects are not certain.

Estonian EIA Act prescribes: environmental impact shall be assessed, if activities are proposed which alone or in conjunction with other activities may potentially significantly affect a Natura 2000 site. More precise translation would be even presumably affecting a Natura 2000 site. The wording is not exactly in accordance with the meaning of Article 6(3) of the Habitats Directive. However, there have been no problems in practice with this particular issue.

'Either individually or in combination with other plans or projects'

Estonian EIA Act prescribes: environmental impact shall be assessed, if activities are proposed which alone or in conjunction with other activities may potentially significantly affect a Natura 2000 site. Also the more exact provisions about requirements to EIA and SEA report contain obligation to evaluate cumulative effect together with other activities.

It has to be concluded that the transposition is correct.

In practice, there have been problems with evaluation what kind of projects to take into account while assessing the cumulative effects, so a more precise definition in national legislation could be helpful.

2.3 'Appropriate assessment of its implications for the site in view of the site's conservation objectives'

Appropriate assessment

As mentioned before, the "Natura assessment" has been incorporated into EIA and SEA proceedings. The requirements for these proceedings are quite strict so the requirements for recording and reasoning the assessment (as stated in the Handbook) are fulfilled.

The expert for EIA must have certain license and the expert for SEA has to fulfill certain requirements, in order to be entitled to carry out the proceedings. There are special provisions (§ 29 (1) and § 45 (1)) about specific orientation to view of the site's conservation objectives in case the proposed activity may affect Natura 2000 site. Therefore, the transposition has been correct.

In practice, however, several problems have occurred with the implementation of EIA Act.

First, the nature of EIA (SEA) is somewhat different from the assessment, foreseen in Habitats Directive. The national courts have at least in one case stated that the purpose of proportionate EIA is not carrying out voluminous and long-term scientific research or financing such kind of researches by developers, otherwise there would be no possibility to establish complicated new constructions in a very long time.[12] It has to be noted that in this particular case, the EIA was initially carried out in period of 3 months (the additional complementation of the EIA report lasted another 8 months, but no substantial amendments regarding the possible impacts were made at that additional period). Considering the ECJ position in Waddenzee case[13] - the assessment according to Habitats Directive means that "all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field", the assessment according to Habitats Directive should be precisely scientific research and it has to be sufficiently thorough.

Second, the regulation of EIA foresees that the EIA expert is directly hired by the developer. This has caused situation where the expert often is in fact not independent or unbiased towards the proposed project.

Site's conservation objectives

§ 29 (1) and § 45 (1) of the EIA Act prescribe special provisions, regarding assessment in case of activities that may affect Natura 2000 site – in such cases, the purpose of protection of the site must be particularly taken account of upon EIA/SEA.

The site's conservation objectives are determined in the decision for placing natural object under protection and mostly the protection rules of protected areas containing Natura 2000 sites contain since February 2005 references to the obligation of impact assessment of proposed activity according to the purpose of protection of the site.

Therefore, the transposition has been correct.

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12 Judgement of Tallinn Administrative Court of 9 June 2004 in case of Saaremaa port, case No 3-1152/2004 (Estonian Fund for Nature and Estonian Green Movement v Ministry of Environment); see also the case study about Port of Saaremaa
13 Case C-127/02

2.4 'Agreement 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'

'Having ascertained that it will not adversely affect'

According to § 29 (2) and § 45 (2) of EIA Act, an authorization may be issued or plan enacted if permitted by the protection rules of Natura 2000 sites and the decision-maker is convinced that the proposed activities do not have a negative impact on the integrity of the Natura 2000 site or on the purpose of protection thereof.

There may be a problem of transposition in this provision because of poor wording. The phrase "is convinced" in Estonian can mean also state of mind where the decision-maker is inwardly convinced of something. Therefore, the concept "ascertained" would express the meaning of the Habitats Directive more properly.

However, no problems in practice have been detected, regarding this particular issue.

Integrity of the site concerned

According to § 29 (2) and § 45 (2) of EIA Act, an authorization may be issued or plan enacted if permitted by the protection rules of Natura 2000 sites and the decision-maker is convinced that the proposed activities do not have a negative impact on the integrity of the Natura 2000 site or on the purpose of protection thereof.

Although the transposition is correct, there have been some problems in practice while defining the "integrity of site". There is no definition in the national law about what is the integrity of the site. In some cases, the EIA experts just calculate how much of the surface area of Natura site will be affected by the project, in other cases refer to other areas of same value. This is, however, a problem of implementation rather than transposition.

Obtaining the opinion of the general public

The public participation is mandatory part of EIA and SEA proceedings. Therefore, the transposition has been correct.

2.5 Initial considerations in Article 6(4)

Alternative solutions

According to § 29 (3) and § 45 (3) of EIA Act: If, regardless of the potential significant effect of the proposed activities or resulting from implementation of a plan on a Natura 2000 site, the activity is still necessary for the public due to vital reasons, including social or economic reasons, and due to lack of alternative solutions, an authorization may be issued with the consent of the Government of the Republic.

These provisions refer to a possibility that alternative solutions will be looked for only after the potential significant effect to Natura 2000 site has been ascertained and the activity is still necessary for the public. According to the Handbook (p 5.3.1), the alternative solutions should have been determined already during the screening stage according to Article 6(3) – such alternatives could be alternative locations, different scales or designs of development, or alternative processes.

The 'zero-option' should be considered too. Assessment of alternatives is a task for competent national authorities and the reference parameters for such comparison should deal with aspects concerning the conservation and the maintenance of the integrity of the site and of its ecological functions. In this phase, therefore, other assessment criteria, such as economic criteria, cannot be seen as overruling ecological criteria.

Although it may seem that transposition is correct – the obligation to assess alternatives is mentioned – the transposition may be too shallow to guarantee proper evaluation of alternatives.

According to EIA Act, both EIA and SEA reports should contain assessment of alternatives. However, only real alternatives should be assessed. There is no definition about the „real" alternatives, but in practice the possible alternatives are determined by the developer, who's approach to which alternatives are real and which not, is usually determined by economic criteria.

Imperative reasons of overriding public interest

According to § 29 (3) and § 45 (3) of EIA Act: If, regardless of the potential significant effect of the proposed activities or resulting from implementation of a plan on a Natura 2000 site, the activity is still necessary for the public due to vital reasons, including social or economic reasons, and due to lack of alternative solutions, an authorization may be issued with the consent of the Government of the Republic.

The transposition of concept of imperative reasons of overriding public interest has not been correct. The Directive does not refer to just essential reasons, but to imperative and exceptionally important reasons. According to Handbook, these reasons should be so important that they can be balanced against the conservation aims of the directive (to protect the natural heritage of EU on the highest level). Moreover, such reasons should be long-term, not short-term economic interests or other interests which would only yield short-term benefits for society and which would not be sufficient to outweigh the long-term conservation interests protected by the directive.[14]

2.6 Compensatory measures

'Shall take all compensatory measures'

Until 01.04.2007 Estonian national legislation contained no obligation to take compensatory measures, even if the proposed activity or plan might affect Natura 2000 site and the project/plan still had to be authorized for imperative reasons of overriding public interests.

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14 The same position has been taken by Dr iur Hannes Veinla of Tartu University in his article „Saaremaa sadama ja teiste samalaadsete projektide arendamine. Õiguslikud riskid Euroopa Ühenduse looduskaitsedirektiivide kontekstis" Juridica X/2005 p 693-704. (Development of port of Saaremaa and other similar projects. Legal risks in context of nature protection directives of the European Union)

This significant gap was partly improved via the amendments to EIA Act and Nature Protection Act.

§ 29(3) and § 45(3) of the EIA Act are now supplemented with one sentence: "*When authorizing the project (plan), an obligation to implement compensatory measures has to be imposed.*"

The Nature Protection Act is supplemented with a whole paragraph „Implementation of compensatory measures". According to § 70 1 (1) *"If EIA or SEA report states, that proposed activity may potentially significantly affect Natura 2000 site and due to lack of alternative solutions the activity is still necessary for impressive reasons of public interest, including social or economic reasons, authorization of the project or plan must include compensatory measures, which should be implemented before the realization of the activity".*

§ 70 1 (2) determines following measures as compensatory measures in stricter sense:

- restoring of habitats;
- creation of new habitats,
- improving existing habitats;
- other measures that could help avoid further deterioration of the overall coherence of Natura 2000 network.

The regulation also contains criteria to which the compensatory measures should respond. According to § 701 (3) „Compensatory measures must:

1) be directed to habitats and species, which will be damaged and they must be proportional with the damage caused;
2) function as close as possible to the habitat, which will be damaged;
3) assure that the purposes of a damaged Natura 2000 site will be equally filled
4) satisfy the implementation and conservation purposes so that those measures help to maintain or enlarge the overall coherence of Natura 2000."

Therefore, the content of compensatory measures in national legislation is sufficient, in order to correspond to the requirements of the Habitats Directive.

'Overall coherence' of the Natura 2000

See the previous paragraph.

Informing the Commission of the compensatory measures adopted

There is no obligation in national legislation to inform the Commission of the compensatory measures adopted. The amendments in EIA Act and Nature Protection Act do not contain supplementary provisions in this matter.

In this regard, the national legislation is not in accordance with the Directive.

2.7 Sites hosting priority natural habitats and/or priority species

The sites concerned

According to § 29 (4) and § 45 (4) of the EIA Act, *if the proposed activity may potentially affect priority natural habitat or priority species within the meaning of Directive 92/43/EEC, on the Natura 2000 site the Government of the Republic shall issue its consent only if proposed activity is connected to human health, public safety or beneficial consequences of primary importance for the environment. In case of other imperative reasons of overriding public interest, European Commission should be consulted.*

The restrictions of second half of Article 6(4) would apply only in cases where the activity proposed may affect the priority habitat or priority species hosted by the Natura 2000 site.

However, according to the Handbook (p 5.5.1), Article 6(4), second subparagraph may be understood as applying to all sites hosting priority habitats and/or species, when these habitats and species are affected.

Therefore, the national legislation is in accordance to the Directive even if amended in such a way. Nevertheless, more exact wording would be helpful.

The concepts of 'human health', 'public safety' and 'beneficial consequences of primary importance for the environment'

According to § 29 (4) and § 45 (4) of the EIA Act the government could give its consent only in case the proposed activity *"is connected to human health, public safety or beneficial consequences of primary importance for the environment"*. In cases of other imperative reasons of overriding public interest, the Commission should be consulted (see the next point).

Although this regulation seems to be generally in accordance with Article 6(4) of the Directive, there are some questionable issues. It is not entirely clear from the wording that the considerations, connected to human health, public safety or beneficial consequences of primary importance for the environment, should also be imperative and overriding public interest. More clear and precise wording would be helpful.

Opinion from the Commission

According to the EIA Act the Commission should only be consulted in case of other imperative reasons of overriding public interest. This approach is in accordance with the Habitats Directive and its interpretation in the Handbook (p 5.5.3).

3. Conclusions

The transposition of Article 6(3) and 6(4) of the Habitats Directive into national legislation is only partly correct. There are deficiencies as follows:

- not all activities possibly influencing Natura sites are subject to the assessment, but only those activities which require development consent;

- the concept of imperative reasons of overriding public interests has turned into just "*necessary for the public due to vital reasons*" in the national legislation, which diminishes the importance of possible reasons to override the nature protection values, stressed in the Directive.
- Although the current national legislation obliges to implement compensatory measures, if the proposed activity or plan may affect Natura 2000 site and the project/plan still has to be authorized for imperative reasons of overriding public interests, there is still no obligation to inform the Commission about such compensatory measures.

In one part, the current legislation is more stringent than the Directive itself: the assessment is also required in case the activities are directly connected to or necessary for the management of the site.

However, some theoretically correctly transposed provisions may cause problems in practice because of vagueness, imprecise wording or structure of the provisions of national legislation.

Inclusion of Natura assessment directly to EIA assessment may have caused misunderstandings of the requirements of the Natura assessment, especially in the issues that should be considered in both proceedings, but from different point of view. For example, it is not very clear from the EIA Act that Natura assessment presumes considerations of possible alternatives and measures from ecological (not economical) point of view (see, for example, ECJ judgment in case C-239/04, p 34-36).

Czech Republic

1. Introduction

1.1 Analyzed problems

This analysis focuses on the insufficient transposition of Article 6, Subsections 3 and 4 of Directive 92/43/EEC (hereinafter "Habitats Directive") into Czech legal system. Other provisions of the Directive and other legal regulations can only be taken into account if they are relevant to the transposition of the stated Article of the Habitats Directive.

1.2 General information on the transposition of the Habitats Directive

Transposition of Habitats Directive into the Czech legal system was carried out via Act No. 218/2004, Collection of Laws (hereinafter "Coll."), which changes Act No. 114/1992 Coll., on Nature and Landscape Protection, as later amended; Act No. 50/1976 Coll., on Territorial Planning and the Building Code (Building Act), as later amended; and Act No. 219/2000 Coll., on the Property of the Czech Republic and its Acting in Legal Relationships, as later amended.

The Act became effective on 28 April 2004, i.e. before 1 May 2004, when the Czech Republic entered the European Union. Therefore, the designated time frame for transposition was kept on the part of the Czech Republic.

It is necessary to state that since 8 May 2006 Annex No. 4 of the Habitats Directive has been transposed into the Czech rule of law correctly through the Regulation No. 175/2006 Coll., which changed and amended the Regulation No. 395/1992 Coll. implementing certain provisions of Act No. 114/1992 Coll.

The new Act No. 183/2006 Coll., on town and country planning and building code (Building Act) became effective as from 1 January 2007. At the same day became effective Act No. 186/2006 Coll., which changed among others Act No. 114/1992 Coll., on Nature and Landscape Protection.

The NATURA assessment (if the significant effect has not been excluded) of "town and country planning instruments" is regulated only by the new Building Act since 1 January 2007.

Remark: The official English translation of the Czech law has been used for the purpose of this analysis. However the official English translations of different legal Acts which are on-line accessible on the official websites of the Ministry for Regional Development and Ministry of the Environment does not follow the same vocabulary. Some terms might be translated differently.

1.3 Overall framework

The European system of nature protection, NATURA2000, was incorporated into the national system of nature protection, which has been in effect in the Czech Republic since 1992. Act No. 114/1992 Coll., on Nature and Landscape Protection, created in the Czech Republic an integrated system of protected areas of varying degrees (national parks, reservations, etc.) and protected endangered species of flora and fauna (the legally binding list is an annex to the Act).

Transposition of Habitats Directive was carried out in such a manner so that new protected areas (SCI, SPA) were added to existing categories of protected areas. No new system of administrative authorities was created that would have the task of protecting of the NATURA2000 system. This task was taken up by existing nature protection bodies with the provision that the manner of protection was changed in order to comply with the requirements of the Habitats Directive.

The adoption of the amendment to Act No. 114/1992 Coll., on Nature and Landscape Protection, was accompanied by great controversy, mainly with regard to resistance of the economic lobby to expand protected areas in a blanket manner. As a result of this pressure during the course of discussing the bill, changes were approved in the parliament that had, as their objective, the weakening of nature protection bodies with regard to the protection of the NATURA2000 system. So, for example, the government of the Czech Republic received final power to adopt resolutions on agreement with infringement into NATURA2000 system locations instead of it being given to nature protection bodies (see chapter 2.6.1. of this analysis).

The attempt to integrate the protection of NATURA2000 system landscapes into the existing nature protection system in the Czech Republic resulted in the need to reformulate the provisions of Habitats Directive in order to ensure its interconnection to the existing system of nature protection in the Czech Republic. This led to certain formulation inaccuracies resulting in the incorrect transposition of the Habitats Directive, as is described in the text below.

Another significant problem is complicated relation between Nature and Landscape Protection Act and EIA/SEA procedure. If the nature protection authority, through its opinion does not exclude the possibility of a significant impact of the policy or project on NATURA2000, then the given policy or project must be subject to “NATURA assessment” according to the Act No. 114/1992 Coll., on Nature and Landscape Protection and Act No. 100/2001 Coll., on Environmental Impacts Assessment (EIA/SEA) and also to “EIA/SEA assessment” according to the Act No. 100/2001 Coll., on Environmental Impacts Assessment (EIA/SEA).

2. Analysis of particular problems

The analysis follows the logical structure of Articles 6(3) and 6(4) of the Habitats Directive.

2.1 Any plan or project not directly connected with or necessary to the management of the site

Projects and plans

> **a)** According to Article 45h, Subsection 1 of Act No. 114/1992 Coll., on Nature and Landscape Protection, *any policy or project which may, either individually or in combination with other policies or projects, have a significant effect on the territory of a site of European importance or bird area, shall be subject to assessment of its implications on this territory and its conservation status from the stated points of view. This shall not apply to management plans prepared by a nature protection authority for this area, and further to forest management plans and forest management lay-outs, for which, in such case, the binding opinion pursuant to Article 4 paragraph 3 shall take into account Article 6 paragraphs 3 and 4 of the Habitats Directive.*

The wording "policy or project" refers to Act No. 100/2001 Coll., on Environmental Impacts Assessment (EIA), specifically to the wording of Articles 3, 4 and 10a. These provisions refer to the Annex No. 1 of the Act which divides the policies and projects into the two categories and determines which are subject to either case-by-case EIA/SEA assessment or categorical EIA/SEA assessment.

Since 27.4.2006 all policies or projects which may, either individually or in combination with other policies or projects, have a significant effect on the territory of a site of European importance or bird area are subject of the case-by-case EIA/SEA assessment. The fulfillment of the condition "may, either individually or in combination with other policies or projects, have a significant effect on the territory of a site of European importance or bird area" is approved by the nature protection bodies.

Till 26(4).2006, before the amendment of the Act No. 100/2001 Coll. made by the Act 163/2006 Coll., the definition of policy or project in the Act No. 100/2001 Coll. did not cover all activities that could separately, or in combination with others, significantly affect the Sites of Community Interest or Specially Protected Areas, as the Habitats Directive requires. Thus, the wording of the provisions of Article 45h does not clearly lay down whether the concept of "any policy or project" can be defined in a broader manner than was laid down in the Act No. 100/2001 Coll. In practice, cases could occur when the relevant authorities would define the concept of "any policy or project" in a narrow manner, which with regard to Habitats Directive was not allowable.

> **b)** According to the Article 45h of the Act the obligations to assess the impacts of policy or project on NATURA2000 system locations do not apply to so-called forest management plans and forest management lay-outs, the elaboration of which is based on Articles 24 - 27 of Act No. 289/1995 Coll., on Forests and the Obligations of Forest Owners. However, forest management plans and lay-outs clearly fall under the definition of plans pursuant to Article 6, Subsections 3 and 4 of the Habitats Directive. But the Act says that the standpoint of nature protection bodies concerning the draft of the forest management plan shall only take into account Article 6, Subsections 3 and 4 of the Habitats Directive.

In this case the requirements of the Habitats Directive are transposed into Czech law via a reference. In this case the general reference to the wording of Article 6, Subsections 3 and 4 of the Habitats Directive does not ensure a suitable level of assessment, which is required by the Habitats Directive, for the following reasons:

- The provisions of Article 6, Subsections 3 and 4 of the Habitats Directive are too general. They do not give the pertinent authorities sufficiently detailed instructions in order for them to ensure a suitable level of assessment,
- The text of the provisions of the Act gives authorities the opportunity to deviate from the procedures laid down in Article 6 of the Habitats Directive, when it says that the approving forest management plans and lay-outs shall only take into account the requirements of the Habitats Directive. So it is up to a specific authority to what extent it will abide by the requirements of the Habitats Directive,
- If legislators required the bodies creating the forest management plan or lay-out to not deviate from the requirements of Article 6, Subsections 3 and 4 of the Habitats Directive, they would formulate the above-mentioned provisions of the Act as an obligation (e.g. "The body drawing up a forest management plan is obligated to proceed pursuant to Article 6, Subsections 3 and 4.")

Thus, the fundamental prerequisite of correct transposition is not fulfilled, i.e. the transposition in its form, its content and with regard to the clarity and preciseness of its formulation is not drawn up so that its application does not cause application problems.

> ***c)*** *New Building Act has extended the types of different "town and country planning instruments". Since 1 January 2007 are "Development policy", "Development principles", "Plan" and "Regulatory plan" subject to NATURA assessment under the new Building Act (if the significant effect has not been excluded).*

The development policy is procured by the Ministry for the whole territory of the Czech Republic and is approved by the Government. It is binding for procurement and issuance of development principles, plans, regulatory plans and for decision-making within the area. The development policy determines, within the stipulated period, the requirements for specification of the tasks of the town and country planning within the republic wide, over border and international context, especially with respect to the area sustainable development. It determines the strategy and basic conditions for the implementation of these tasks.

The development principles are procured for the whole territory of the administrative region and are binding for procurement and issuance of the plans, regulatory plans and for the decision-making in the area. The development principles determine especially the basic requirements for purposeful and economic arrangement of the region´s territory, delimit the areas or corridors of supra local importance and determine the requirements for their utilization. Especially in the areas or corridors for the public works, public benefit measures, they determine the criteria for decision making on possible variants or alternatives of the changes within their utilization.

The plan determines the basic concept of the development of the municipality, protection of its values, its areal and spatial arrangement, arrangement of the landscape, and the concept of the public infrastructure. It delimits the developed area, areas and corridors, especially the areas with development potential and the areas delimited for the alteration of the existing development, for redevelopment or repeated utilization of the depreciated area, for public works, for public benefit measures, and for the territorial reserves and determines the conditions for utilization of these areas and corridors.

The regulatory plan within the settled area determines the detailed conditions for the use of the grounds, for location and spatial arrangement of structures, for protection of values and character of the area, and for creation of a favorable environment.

'Not directly connected with or necessary to the management'

The specification "not directly connected with or necessary to the management" is effectively transposed into the exclusionary provision in the Article 45h, Subsection 1 of Act No. 114/1992 Coll.: *"This shall not apply to management plans prepared by a nature protection authority for this area"*. We conclude the Czech legislation is in conformity with the Habitats Directive.

2.2 'Is likely to have a significant effect thereon, either individually or in combination with other plans or projects'

Significant effect

According to Article 45h, Subsection 1 of Act No. 114/1992 Coll., on Nature and Landscape Protection, *any policy or project which may, either individually or in combination with other policies or projects, have a significant effect on the territory of a site of European importance or bird area, shall be subject to assessment of its implications on this territory and its conservation status from the stated points of view.*

The Czech legislation does not contain the definition of "significant effect". Therefore if the policy or project has a significant effect it is approved case-by-case by the nature protection bodies.

'Likely to have'

According to Article 45h, Subsection 1 of Act No. 114/1992 Coll., on Nature and Landscape Protection, *any policy or project which may, either individually or in combination with other policies or projects, have a significant effect on the territory of a site of European importance or bird area, shall be subject to assessment of its implications on this territory and its conservation status from the stated points of view.*

As the expressions "likely to have" and "*may have*" have the same meaning in this context we conclude the Czech legislation is in conformity with the Habitats Directive.

’Either individually or in combination with other plans or projects’

According to Article 45h, Subsection 1 of Act No. 114/1992 Coll., on Nature and Landscape Protection, *any policy or project which may, either individually or in combination with other policies or projects, have a significant effect on the territory of a site of European importance or bird area, shall be subject to assessment of its implications on this territory and its conservation status from the stated points of view.*

As the wording has been transposed word-by-word into the Czech legislation we conclude conformity.

2.3 ’Appropriate assessment of its implications for the site in view of the site’s conservation objectives’

Appropriate assessment

According to Article 45h, Subsection 1 of Act No. 114/1992 Coll., on Nature and Landscape Protection, *any policy or project which may, either individually or in combination with other policies or projects, have a significant effect on the territory of a site of European importance or bird area, shall be subject to assessment of its implications on this territory and its conservation status from the stated points of view.*

The word “*appropriate*” has not been transposed into the Czech legislation. However, whether the assessment is appropriate will depend on the factual implementation and application by the nature protection bodies.

Article 45h, Subsection 2 of the Act No. 114/1992 Coll. further states that during assessment of implications of policies and projects pursuant to paragraph 1, it shall be proceeded according to separate legal regulations on environmental impact assessment (which is Act No. 100/2001 Coll.), unless another procedure is set out in Article 45i.

However, according to the Article 23, Subsection 13 of the Act No. 100/2001 Coll. the evaluation of consequences of plans and projects in the territory of sites of European importance and bird protection areas pursuant to a special regulation is not affected by the Act No. 100/2001 Coll. This unclear provision points out the difference between the word “*assessment*” as the procedure carried out by the nature protection authority and the word “*evaluation*” as the result of the procedure – the opinion of the nature protection authority. The assessment as procedure is carried out according to the Act No. 100/2001 Coll., whereas the conclusions of the evaluation and the opinion are compiled according to the Act No. 114/1992 Coll. which contains the special legislation about the NATURA 2000 requirements.

However, if the policy or project has such a nature that it is also subject of EIA/SEA proceedings, the “NATURA assessment” is carried out within the EIA/SEA proceeding. The opinion of the nature protection authority contains a part only concerning results of “NATURA assessment” and a part only with results of “EIA/SEA assessment”. The Czech legislation also lays down different requirements for authorization of the persons carrying out either the “EIA/SEA assessment” or “NATURA assessment”.

"Town and country planning instruments", such as "Development policy", "Development principles", "Plan" and "Regulatory plan" are assessed pursuant to the new Building Act. It will depend on the factual implementation and application by the competent authority, if the assessment is appropriate.

Since 1.1.2007 according to the new Building Act in the procedure of the town and country planning are assessed the impacts of the development policy, the development principles or the plan on a balanced relationship of territorial conditions for a favorable environment, economic development and for cohesion of the inhabitants community of the territory ("assessment of impacts on sustainable development of the territory"); its component is the assessment of impacts on the environment (SEA assessment elaborated according to the Annex to the new Building Act and according to the Act 100/2001 Coll.) and the assessment of impact on the territory of a site of European importance or bird area (NATURA assessment pursuant to the new Building Act).

In view of the site's conservation objectives

According to the Article 45h, Subsection 1 of the Act No. 114/1992 Coll., on Nature and Landscape Protection, any policy or project which may, either individually or in combination with other policies or projects, have a significant effect on the territory of a site of European importance or bird area, shall be subject to assessment of its implications on this territory and its conservation status from the stated points of view.

The Habitats Directive states clearly that the point of view is "the site's conservation objectives". Whereas the Czech legislation refers to any stated points of view and therefore makes the application more uncertain because it is not clear which stated points of view were meant.

We conclude the transposition in its form, its content and with regard to the clarity and preciseness of its formulation is not drawn up so that its application does not cause application problems.

2.4 'Agreement 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'

'Having ascertained that it will not adversely affect'

According to the Article 45i, Subsection 8 of the Act No. 114/1992 Coll., on Nature and Landscape Protection, the authority competent to approve a policy or project mentioned in Article 45h may approve it only if, on the basis of the opinion, according to separate legal regulations on environmental impact assessment, this policy or project will not have an adverse impact on the territory of a site of European importance or bird area, or under conditions specified in paragraph 9, or, optionally, in paragraph 10.

The Czech transposing measure in the Act No. 114/1992 Coll. contains the provision with the same purpose as the Habitats Directive.

Whether the development policy or the development principles have the negative impact on the site of European importance or the bird area is ascertained by the Ministry of the Environment in its opinion on the SEA assessment.

If some negative impact on the site of European importance or the bird area was not a subject to the consideration of the issued development principles, it is stated by the regional authority in its opinion on the SEA assessment of the plan.

Regulatory plan, which states the conditions for realization of projects according to the Annex No. 1 of the Act No. 100/2001 Coll., which may have a significant effect (which was not a subject to the consideration of the issued development principles nor plan) on the territory of a site of European importance or bird area is subject to EIA assessment pursuant to the Act No. 100/2001 Coll. and NATURA assessment pursuant to the new Building Act. The negative impact of regulatory plan is ascertained in NATURA assessment.

Other regulatory plans, which may have a significant effect (which was not a subject to the consideration of the issued development principles nor plan) on the territory of a site of European importance or bird area are subject to SEA assessment pursuant to the Act No. 100/2001 Coll. and new Building Act and NATURA assessment pursuant to the new Building Act. The negative impact of regulatory plan is ascertained in NATURA assessment.

Integrity of the site concerned

According to the Article 45i, Subsection 8 of the Act No. 114/1992 Coll., on Nature and Landscape Protection, the authority competent to approve a policy or project mentioned in Article 45h may approve it only if, on the basis of the opinion according to separate legal regulations on environmental impact assessment, this policy or project will not have an adverse impact on the territory of a site of European importance or bird area, or under conditions specified in paragraph 9, or, optionally, in paragraph 10.

According to the Article 34, Subsection 2, Article 37, Subsection 5, Article 50, Subsection 4, Article 65, Subsection 3, Article 66, Subsection 5 of the new Building Act the competent authority consider any negative impact of "Town and country planning instruments" on the territory of a site of European importance or bird area.

The Czech transposing measures are more general because they concern any adverse (negative) impact on the territory, whereas the Habitats Directive only excludes plan or project adversely affecting the integrity of the territory. Thus, Czech legislation is more stringent than the Habitats Directive.

Because the HD is based on Article 175 of the EC Treaty (environmental powers), Member States may put in place measures that are stricter than those found in a Directive.

It has to be concluded that the transposition is correct.

Obtaining the opinion of the general public

All policies and projects which may, either individually or in combination with other policies or projects, have a significant effect on the territory are subject of either only "SEA/EIA assessment" or "SEA/EIA assessment" containing the part with conclusions of the "NATURA assessment". Both types of assessment are carried out according to the Act No. 100/2001 Coll. which assures the right of the general public to give its opinion.

The transposition is therefore correct.

According to the Article 33, Subsection 4 of the new Building Act the general public has at least 90 days to submit remarks directly to the Ministry for Regional Development. The Ministry for Regional Development takes into account remarks of the public.

Development principles are subject to the public debate, where everybody may submit remarks, and the representative of the public may submit objections with a reasoning, according to the Article 39, Subsection 2 of the new Building Act.

Anybody may submit his/her remarks to the plan specifications according to the Article 47, Subsection 2 of the new Building Act. Regarding to the plan draft it is held a public debate. Within 15 days from the date of public debate anybody may submit his/her remarks. Within the identical period the owners of the grounds and structures, which are affected by the proposal of the public works, public benefit measures and areas with development potential and the representative of the public may submit their objections according to the Article 48, Subsection 2 of the new Building Act.

According to the Article 52 of the new Building Act, objections against the plan before approval may be submitted only by the owners of the grounds and structures, which are affected by the draft of the public works, public benefit measures and the areas with development potential, and the representative of the public. At the public debate anybody may submit their remarks and the affected persons their objections.

According to the Article 64, Subsection 3 of the new Building Act, anybody may submit the request for specifications content of the regulatory plan. According to the Article 67 of the new Building Act, a public debate is held on the regulatory plan draft debated with the respective authorities, with the participation of the respective authorities and the municipality, for which the regulatory plan is procured. The affected persons are authorized to submit the objections to the regulatory plan draft. Anybody may submit remarks to the regulatory plan draft

The new Building Act assures the right of the general public to give its opinion to the new prepared town and country planning instruments as well.

The Czech transposing measure is in this part in conformity with the Habitats Directive.

2.5 Initial considerations in Article 6(4)

Alternative solutions

According to the Article 45i, Subsection 9 of the Act No. 114/1992 Coll. if the assessment (...) shows an adverse impact on Natura 2000, and a variant solution having lower or no adverse impact does not exist, the proposed policy or project may be approved, only for imperative reasons of overriding public interest, and under simultaneous ordering of compensatory measures necessary to ensure protection and coherence of Natura 2000, through a procedure pursuant to paragraph 11.

According to the Article 34, Subsection 2 of the new Building Act if the Ministry of the Environment determines in its opinion on the SEA assessment that the development policy has a negative impact on the site of European importance or bird area and there does not exist any alternative solution with a smaller negative impact or without it, it is possible to approve the development policy only due to urgent reasons of the prevailing public priorities and only then, if there has been adopted the compensation measures for securing the protection and integrity of site of European importance or bird area.

According to the Article 37, Subsection 5, Article 50, Subsection 4, Article 65, Subsection 3, Article 66, Subsection 5 of the new Building Act it applies the same provision also to the development principles, plan and regulatory plan.

The Czech transposing measure is more stringent because according to the Czech transposing measures it should be only looked for a variant solution having lower (smaller negative) or no adverse impact. However the Habitats Directive requires the absence of any alternative solution. Only in the theoretical way could it be concluded that the purpose of the Habitats Directive is also to find alternative solution having lower or no adverse impact.

Because the HD is based on Article 175 of the EC Treaty (environmental powers), Member States may put in place measures that are stricter than those found in a Directive.

For the reason of the narrower scope of the transposition of this measure cannot be therefore concluded that the transposition is incorrect.

Imperative reasons of overriding public interest

According to the Article 45i, Subsection 9 of the Act No. 114/1992 Coll. if the assessment (...) shows an adverse impact on Natura 2000, and a variant solution having lower or no adverse impact does not exist, the proposed policy or project may be approved, only for imperative reasons of overriding public interest, and under simultaneous ordering of compensatory measures necessary to ensure protection and coherence of Natura 2000, through a procedure pursuant to paragraph 11.

According to the Article 34, Subsection 2 of the new Building Act if the Ministry of the Environment determines in its opinion on the SEA assessment that the development policy has a negative impact on the site of European importance or bird area and there does not exist any alternative solution with a smaller negative impact or without it, it is possible to approve the development policy only due to urgent reasons of the prevailing public priorities and only then, if there has been adopted the compensation measures for securing the protection and integrity of site of European importance or bird area.

According to the Article 37, Subsection 5, Article 50, Subsection 4, Article 65, Subsection 3, Article 66, Subsection 5 of the new Building Act it applies the same provision also to the development principles, plan and regulatory plan.

This formulation can lead to the interpretation that due to the existence of imperative reasons of overriding public interest (urgent reasons of the prevailing public priorities), it is necessary only to examine those policies and projects during approval that do not have an alternative with a lower or no adverse impact on a NATURA2000 location. In other cases where there exists a variant solution of a given policy or project that has a lower adverse impact on a NATURA2000 system landscape (be it even slightly), the condition of overriding public interest will not be taken into consideration.

herefore, the policy or project can be approved even if there are no reasons given of overriding public interest, as is required by Article 6 of the Directive.

This awkward formulation by Czech legislators can lead to absurd procedures when the announcer or submitter first presents a draft alternative that would not allow approval and then presents any kind of alternative with a smaller impact, which he actually wants to realize. He thus proves that an alternative solution exists. This solution would then be approved without an examination of whether it is necessarily due to overriding public interest.

In the given case, this is again an unclear transposition of Article 6 of the Habitats Directive, which allows interpretations that are directly against the objectives of the Directive. Thus, one of the fundamental conditions of the transposition is not fulfilled when the provisions that aim to lay down the rights and obligations of individuals (natural persons and legal entities) allow various interpretations.

2.6 Compensatory measures

'the Member State'

Article 2 of Habitats Directive lays down that the objective of the measures for granting approval on the basis of this Directive is preserving or renewing favorable status with regard to protection of natural stands and species of freely-living fauna and wild-growing flora in the interest of the Community. The provisions of Article 6, Subsection 3 and 4, among other things, serve to carry out this objective of the Directive, which were transposed into the Czech rule of law via the provisions of Articles 45h and 45i, Subsections 9 and 10 of Act No. 218/2004 Coll., which amends Act No. 114/1992 Coll., on Nature and Landscape Protection. This Act also contains the provisions of Article 43, from which arises that the competent body that shall permit exemptions from prohibitions through its decision in each individual case in specially protected areas pursuant to Articles (...) 45h and 45i, in the cases when a public interest considerably overrides the interest of nature protection is the government of the Czech Republic.

Although the Articles 45h and 45i do not expressly contain any prohibition, it is followed from these provisions that the policies or projects whose conclusions of the assessment are negative are prohibited. Approving such policies or projects (with fulfillment the transposed conditions) is therefore some kind of exemption.

However, the government of the Czech Republic, pursuant to the Czech legal system, is not equipped with the legal instruments to make sure that its procedures when approving projects that impact NATURA2000 sites are in compliance with the requirements of Article 6 of the Directive and lead to the fulfillment of the objectives of the Directive, which are specified in the Article 2, Subsection 2.

The transposition of the Habitats Directive was carried out by the bodies of the Czech Republic in a manner that does not ensure the achievement of the objectives that this Directive requires.

Therefore, in this regard the Czech law does not conform to the above-mentioned Directive.

In order to justify this conclusion, it is necessary to state that the government, in the legal system of the Czech Republic, is mainly a political body and not a typical administrative authority. The government does not have available the personnel and technical resources that would allow it to reliably assess the actual state of matters that it decides about (gathering evidence, authorizing expert opinions, summoning witnesses, carrying out local investigations, etc.).

Usually the government meets once a week. Discussing exceptions pursuant to Article 43 of Act 114/1992 Coll., is only one of the many points of the discussion. Due to time constraints, exceptions are discussed and approved in "packages" essentially without detailed debates on individual cases.

As a result of this, the government is not able to properly assess all the circumstances concerning the assessed case and to assess if there are urgent prevailing public interest reasons, as is required by the Directive. In spite of any expressly written provision, the Ministry of the Environment prepares some suggestion concerning the policy or project which has to be approved.

However the government is not bound by this.

As the government is not a typical administrative body, the exemption does not have the form of an administrative decision, so it is not disputable in court. The governmental decision-making process is subject to all administrative requirements, given by the Administrative code. Its decision has not to be reasoned, government is not obliged to gather all necessary information. Public has no access to the governmental decision-making process.

Giving the above-mentioned competence to the government even surpasses the regular habits of the rule of law. Thus, the application of these provisions in practice results in the above-mentioned problems, which most certainly will affect the correct application of Article 6, Subsections 3 and 4 of the Directive. *Thus, the requirements of a correct transposition were not fulfilled, which with regard to its legal form, with regard to its contents, and with regard to the clearness and preciseness of its formulation must be drawn up so that its application does not cause any application problems.*

According to the Article 45i Subsection 11 of the Act No. 114/1992 Coll. the nature protection authority (either Ministry of the Environment or the regional authority) determines the compensatory measure.

The new Building Act does not contain any similar provision as quoted above concerning the government exemptions.

Compensatory measures according to the new Building Act have to be always agreed with the Ministry of the Environment.

'Shall take all compensatory measures'

According to the Article 45i, Subsection 9 of the Act No. 114/1992 Coll. if the assessment (…) shows an adverse impact on Natura 2000, and a variant solution having lower or no adverse impact does not exist, the proposed policy or project may be approved, only for imperative reasons of overriding public interest, and under simultaneous ordering of compensatory measures necessary to ensure protection and coherence of Natura 2000, through a procedure pursuant to paragraph 11.

According to the Article 34, Subsection 2 of the new Building Act if the Ministry of the Environment determines in its opinion on the SEA assessment that the development policy has a negative impact on the site of European importance or bird area and there does not exist any alternative solution with a smaller negative impact or without it, it is possible to approve the development policy only due to urgent reasons of the prevailing public priorities and only then, if there has been adopted the compensation measures for securing the protection and integrity of site of European importance or bird area.

According to the Article 37, Subsection 5, Article 50, Subsection 4, Article 65, Subsection 3, Article 66, Subsection 5 of the new Building Act it applies the same provision also to the development principles, plan and regulatory plan.

The Czech transposing measure is in this part in conformity with the Habitats Directive.

'Overall coherence' of the Natura 2000

According to the Article 45i, Subsection 9 of the Act No. 114/1992 Coll. if the assessment (…) shows an adverse impact on Natura 2000, and a variant solution having lower or no adverse impact does not exist, the proposed policy or project may be approved, only for imperative reasons of overriding public interest, and under simultaneous ordering of compensatory measures necessary to ensure protection and coherence of Natura 2000, through a procedure pursuant to paragraph 11.

According to the Article 34, Subsection 2 of the new Building Act if the Ministry of the Environment determines in its opinion on the SEA assessment that the development policy has a negative impact on the site of European importance or bird area and there does not exist any alternative solution with a smaller negative impact or without it, it is possible to approve the development policy only due to urgent reasons of the prevailing public priorities and only then, if there has been adopted the compensation measures for securing the protection and integrity of site of European importance or bird area.

According to the Article 37, Subsection 5, Article 50, Subsection 4, Article 65, Subsection 3, Article 66, Subsection 5 of the new Building Act it applies the same provision also to the development principles, plan and regulatory plan.

The Czech transposing measure is more stringent because it requires that the compensatory measures not only ensure the coherence (integrity) but also the protection of Natura 2000. The Czech legislation also fails to transpose the word "overall" which makes the word "coherence" more specific. Because the HD is based on Article 175 of the EC Treaty (environmental powers), Member States may put in place measures that are stricter than those found in a Directive.

Therefore, from these reasons the Czech legislation is in conformity with the Habitats Directive.

Informing the Commission of the compensatory measures adopted

According to the Article 45i, Subsection 11 of the Act No. 114/1992 Coll. and the new Building Act the Ministry of the Environment shall inform the Commission about the ordered and carried out compensatory measures.

We conclude the transposition is correct.

2.7 Sites hosting priority natural habitats and/or priority species

The sites concerned

According to the Article 45i, Subsection 10 of the Act No. 114/1992 Coll. in the case of an adverse impact on a site hosting priority habitat types or priority species, the proposed policy or project may be approved, only for reasons relating to public health, public safety or beneficial consequences of unquestionable importance for the environment.

According to the Article 34, Subsection 2 of the new Building Act if it refers to a negative impact on the locality with priority types of habitat or with priority species, it is possible to approve the development policy only due to the reason of public health, public safety, or favorable consequences of the indisputable importance for the environment.

According to the Article 37, Subsection 5, Article 50, Subsection 4, Article 65, Subsection 3, Article 66, Subsection 5 of the new Building Act it applies the same provision also to the development principles, plan and regulatory plan.

We conclude the transposition is correct.

The concepts of 'human health', 'public safety' and 'beneficial consequences of primary importance for the environment'

According to the Article 45i, Subsection 10 of the Act No. 114/1992 Coll. in the case of an adverse impact on a site hosting priority habitat types or priority species, the proposed policy or project may be approved, only for reasons relating to public health, public safety or beneficial consequences of unquestionable importance for the environment.

According to the Article 34, Subsection 2 of the new Building Act if it refers to a negative impact on the locality with priority types of habitat or with priority species, it is possible to approve the development policy only due to the reason of public health, public safety, or favorable consequences of the indisputable importance for the environment.

According to the Article 37, Subsection 5, Article 50, Subsection 4, Article 65, Subsection 3, Article 66, Subsection 5 of the new Building Act it applies the same provision also to the development principles, plan and regulatory plan.

We conclude the transposition is correct.

Opinion from the Commission

According to the Article 45i, Subsection 10 of the Act No. 114/1992 Coll. in the case of an adverse impact on a site hosting priority habitat types or priority species, the proposed policy or project may be approved, only for reasons relating to public health, public safety or beneficial consequences of unquestionable importance for the environment.

Other imperative reasons of overriding public interest may be a reason for approval only in the case that an opinion to the intended policy or project was issued by the Commission. In such case, the Ministry of the Environment shall, on the basis of a demand of the relevant authority, request an opinion from the Commission. For the period of consultations with the Commission, the terms in the relevant proceedings stop running. Subsequently, it shall be proceeded analogously to paragraph 9.

According to the Article 34, Subsection 2 of the new Building Act if it refers to a negative impact on the locality with priority types of habitat or with priority species, it is possible to approve the development policy only due to the reason of public health, public safety, or favorable consequences of the indisputable importance for the environment. Other urgent reasons of prevailing public priorities may be the reason for approval only on the basis of the Commission´s assessment.

According to the Article 37, Subsection 5, Article 50, Subsection 4, Article 65, Subsection 3, Article 66, Subsection 5 of the new Building Act it applies the same provision also to the development principles, plan and regulatory plan.

It has to be concluded that the transposition is correct.

3. Conclusions

This analysis shows the shortcomings in the transposition of Article 6, Subsections 3 and 4 of the Directive. Mostly, this concerns cases when the national legal wording is not clear and even confusing and allows more than one interpretation. It can be anticipated that in most cases an interpretation conforming to Euro standards will be applied and the obligations of the Directive will be fulfilled. However, that does not mean that Article 6, Subsections 3 and 4 of the Directive were transposed without mistakes. These are cases when it cannot be said that the transposition was so clearly, precisely and transparently formulated that the addressees of these standards are able to ascertain the extent of their rights and obligations[15].

A nonconforming interpretation can be expected particularly in the most controversial cases of investment intentions in NATURA2000 sites. In these cases politically influenced decision-making can be anticipated, particularly because internal law entrusted a key role during the application of protective conditions in NATURA2000 system to the government of the Czech Republic as the top political body.

15 Comparative subject C-197/96 Commission in France, SbSD I-1997, with 1501, Subsection 15

Hungary

1. Introduction

1.1 Analyzed problems

This analysis focuses on transposition of Articles 6(3) and 6(4) of the EU Directive 92/43/EEC[16] (Habitats Directive) into Hungarian national legislation, with special regard to the changes happened since 15 October 2006.

1.2 General information on the transposition of the Habitats Directive

The transposition of Articles 6(3) and 6(4) of the Habitats Directive into Hungarian legislation has been so far carried out by the following pieces of legislation:

- Government Decree No. 275 of 2004 on Nature Conservation Sites of Community Importance (Natura 2000 Decree) – entered into force on 16 October 2004;
- Government Decree No. 2 of 2005 on Environmental Assessment of Certain Plans and Programs (SEA Decree) – entered into force on 19 January 2005; and
- Government Decree No. 314 of 2005 on Environmental Impact Assessment (EIA Decree) – entered into force on 1 January 2006.

The following piece of legislation being indirectly relevant for the transposition of Articles 6(3) and 6(4) of the Habitats Directive was enacted since 15 October 2006:

- Decree No. 45 of 2006 of the Minister of Environment and Water on the Pieces of Lands Affected by Nature Conservation Sites of Community Importance (List-of-Sites Decree) – entered into force on 16 December 2006

1.3 Overall framework

European Union regulatory framework concerning Natura 2000 areas has been incorporated into Hungarian law on various levels.

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[16] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206)

The Nature Conservation Act No. 53 of 1996 has introduced the basic notion of Natura 2000 area (site of European Community importance) and has delegated legislative powers to the Government and the Ministry of Environment and Water Management respectively. These areas are taken under protection by creating an original category of Natura 2000 areas (sites of European Community importance) and not by automatically including them into one of the already existing protected area types. However, it may happen that an area designated as a Natura 2000 area partly or totally coincides with an already existing "old" protected area.

The Natura 2000 Decree contains the comprehensive regulation regarding terminology, designation of areas, rules of compensation and detailed provisions with regard to Natura 2000 areas. The Natura 2000 Decree has been deficient in transposing community legislation and was contravening to the Natura 2000 Directive to such an extent that even the Commission noticed and remarked of it recently. In order to remedy this situation, the Ministry of Environment and Water Management has submitted a draft amendment of the Natura 2000 Decree to the Government under number KvVM/TJF/273/2006. The amendment was proclaimed as Government Decree No. 201 of 2006 and entered into force on 17 October, 2006.

The SEA Decree contains relevant provisions regarding environmental assessment of plans and programs, amongst others affecting Natura 2000 areas.

The EIA Directive contains substantive provisions regarding environmental impact assessment of projects but without having referred meaningfully to Natura 2000 areas.

Since 15 October 2006, the general regulatory framework of the Natura 2000 sites in Hungary has not changed. The aforementioned List-of-Sites Decree, however, has created a new situation. The change is of a predominantly legal character. Previously the list of pieces of lands falling under the scope the Natura 2000 regime has been published as an information circular of the Minister of Environment and Water. Thus lacking binding legal force, the Commission has communicated its objections against this legal construction. This problem was remedied by the enactment of the now-binding ministerial decree that in fact is identical with the previous information circular regarding its technical content.

In addition, one further development in legal regulation of environmental protection in Hungary is also worth mentioning; it is the Government Decree No. 91 of 2007 on the Rules of Establishing the Extent of Damage to Nature and Mitigation thereof (Damage-to-Nature Decree) – entered into force on 30 April 2007

This Decree is supposed to transpose relevant provisions of the Environmental Liability Directive[17] into the Hungarian legal system. The goal of the Decree – inter alia – is to protect nature conservation sites of community importance. It defines the basic notions such as conservation status, recovery, damage and remedial measures. Although the Damage-to-Nature Decree is not supposed to transpose any of the so-called Natura 2000 directives, it still contains provisions that may play an important role in the overall implementation of the Natura 2000 regime.

For further details, see below at the specific issues.

[17] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage

2. Analysis of particular problems

The analysis follows the logical structure of Articles 6(3) and 6(4) of the Habitats Directive.

2.1 Any plan or project not directly connected with or necessary to the management of the site

Projects and plans

Both the terms of project and plan used by Hungarian law conform to the relevant EU legislation that was transposed by the EIA Decree and the SEA Decree, respectively. However, assessment of impacts of projects and plans on Natura 2000 sites is regulated differently.

Under the EIA Decree, there is almost no explicit reference to Natura 2000 areas. Aspects to be taken into consideration by the environmental inspectorate when making a decision in the screening phase are included in Appendix No. 5 to the EIA Decree. Among such aspects, Point 2 is "sensitivity of the location of siting and of the presumable impact area". Under this Point 2 under Sub-point cb), Natura 2000 areas are indicated. It means that the fact whether an area being either the location of siting or situated within the impact area of a proposed project is a Natura 2000 site, plays a role in the decision if there is a need for an EIA procedure, of course if other conditions are fulfilled (e.g. the plan does not constitute an Annex I project where an EIA is always mandatory) as well.

Under the SEA Decree, among the conditions of when an SEA is mandatory for a plan or program, there is the following as an independent aspect under Article. 1.2 Point bb): "*may have a significant harmful effect on a Natura 2000 site*". The only exception to this (obligation to perform an SEA) is when the plan or program in question determines the use of small areas at local level or is a minor modification, in which case they should be subject to SEA only where the Member State determines that they are likely to have significant effects on the environment.

Under the Natura 2000 Decree, as amended recently, Article. 10.1 contains relevant provisions in this regard. It defines when the developer of the plan or the authority permitting the project must assess the impacts of the plan or project on the species or the habitats of a Natura 2000 area:

> *"Before the adoption of a plan or the permitting of a project not directly serving the nature conservation management of a Natura 2000 area or not definitely necessary thereto, but – based on the data relating to the fauna and flora of the area – can expectedly have a significant effect thereon, either individually or in combination with other plans or projects."*

Having taken into account all this, the transposition of the relevant community provision can be considered as mostly correct in Hungary.

'Not directly connected with or necessary to the management'

The Natura 2000 Decree, as amended, does not literally translate into Hungarian this terminology, since transposing the text of the Natura 2000 Directive word-by-word would results in the use of different expressions.

"Not directly connected" would be "nem közvetlenül kapcsolódik", while the current text of the Natura 2000 Decree, as amended, reads as "nem szolgálja közvetlenül", which means "not serving directly". In this sense, the Hungarian regulation may even be interpreted as stricter than the Natura 2000 Directive, since plans and projects directly connected to, but not directly serving the management of sites fall under the category requiring a prior assessment of impacts.

The same applies to "necessary to", since that would be "szükséges" in Hungarian. Whereas the current text of the Natura 2000 Decree, as amended, reads as "nem feltétlenül szükséges" which means "not definitely necessary to". This again is a stricter condition, thus may result in a situation that plans or projects necessary to, but not definitely necessary to the management of sites fall under the category requiring a prior assessment of impacts.

Having taken into account all this, the transposition of the relevant community provisions can be considered as correct in Hungary.

2.2 'Is likely to have a significant effect thereon, either individually or in combination with other plans or projects'

Significant effect

Significant effect is a category of natural sciences therefore its introduction into legal regulation raises problems.

Under the EIA Decree, a separate Appendix No. 5 lists those aspects that have to be taken into account when making a screening decision, viz. when deciding over the necessity of an EIA and whether significant effects are likely with regard to a project. This Appendix under Point 2 includes "sensitivity of the location of siting and of the presumable impact area", whereas under this Point 2 Sub-point cb) refers to – amongst others – whether the affected location is a Natura 2000 area.

Under the SEA Decree, again a separate Appendix No. 2 is collecting those aspects that have to be taken into account when making a decision whether there is a need for the assessment of plans or programs. Under its Point 2 Sub-point f) there is a category "[affecting] those areas that enjoy domestic (national or local), community or other international level protection". This – although not explicitly, but certainly – encompasses Natura 2000 areas. Therefore the significance of an effect also depends on whether the affected location is a Natura 2000 area.

Under the Natura 2000 Decree, as amended, the wording of the Natura 2000 Directive is literally transposed such as "likely to have a significant effect thereon" but with no further explanatory provision on what aspects must be taken into account for establishing it.

Having taken into account all this, the transposition of the relevant community provision can be considered as mostly correct in Hungary, with one remark: elaboration of the essence of what makes an effect significant remained the job of implementation and practice.

'Likely to have'

Likeliness of such an effect to occur is to be decided in every case by different authorities; therefore their own threshold of probability prevails in their decision over the likeliness in question.

Under the EIA Decree, the environmental inspectorate runs a screening procedure in those cases where a non-Annex I project is proposed thereto. In that process, the applicant must attach preliminary assessment documentation to the application over which the decision is made by the environmental inspectorate with the involvement of co-decision authorities. The documentation must present the prior estimation of environmental effects likely to occur.

Under the SEA Decree, the likeliness of occurrence of environmental effects is not an independent aspect to be taken into consideration, since the dividing line between plans and programs falling under and outside the scope of SEA is whether they use small areas at local level or are minor modifications. In the latter case, certainly the likeliness of effects is also considered by the plan or programs developer who has to obtain the opinion of competent authorities for the decision.

Under the Natura 2000 Decree, as amended, the wording of the Natura 2000 Directive is literally transposed such as "likely to have" a significant effect.

'Either individually or in combination with other plans or projects'

Only the Natura 2000 Decree, as amended, contains a – though literally identical to the text of the Natura 2000 Directive – reference to the issue whether a plan or project in itself or in combination with other pans or projects has a likely significant effect on the environment. However, this issue has no further elaboration in the respective pieces of legislation.

Having taken into account all this, the transposition of the relevant community provision can be considered as mostly correct in Hungary.

2.3 'Appropriate assessment of its implications for the site in view of the site's conservation objectives'

Appropriate assessment

The appropriateness of the assessment depends on numerous factors, such as who does it?, what does it encompass?, who endorses it?, etc. According to these aspects, the Hungarian regulatory framework shows a quite varying picture.

Under the EIA Decree, the environmental impact assessment procedure of projects ensures the most thorough assessment under the largest administrative scrutiny. Characteristics of the process are:

- documentation to establish significance and likeliness of environmental effect (preliminary assessment documentation),
- formal administrative decision on the necessity to perform a full EIA (screening decision),
- detailed documentation based on expert knowledge on environmental effects with mandatory contents pre-set by law (environmental impact statement),

- formal administrative procedure to decide over the merits of the case with opportunity for public participation,
- development consent in the form of an authoritative resolution (environmental permit).

Under the SEA Decree, the procedure has less legal guarantees to ensure an appropriate assessment. Characteristics of the process are:
- analysis of significance and likeliness of environmental effect by the developer,
- non-formal administrative opinions by competent authorities,
- environmental assessment prepared by developer with mandatory contents pre-set by law with opportunity of public participation,
- integration of assessment results into formal adoption procedure of plan or program,
- lack of authoritative resolution by consulted authorities on merits of the case.

Under the Natura 2000 Decree, as amended, the newly introduced assessment obligation is quite briefly regulated only. While the new Article. 10.1 establishes the obligation of the project or plan developer to assess the impacts of the project or plan on the species or the habitats of a Natura 2000 area, neither the previous nor the amended version of the Decree contains any details of this assessment nor does it refer to the EIA Decree or the SEA Decree.

This raises the question whether this is to be a separate assessment not falling under the scope of the EIA or the SEA, in which case serious objections can be raised against its appropriateness.

Site's conservation objectives

The site's conservation objectives do not appear in the EIA Directive and in the SEA Directive; moreover, it has no appearance in that version of the Natura 2000 Decree which was in force before the recent amendment. In the Natura 2000 Decree, as amended, mentions the conservation objectives of a site but not with regard to an assessment of environmental effects (that the assessment has to take that into account) but only regarding what kind of plan or project can be adopted or permitted.

Having taken into account all this, the transposition of the relevant community provision can be considered as incorrect in Hungary.

Since 15 October 2006, the Damage-to-Nature Decree contains relevant reference to this issue. According to its Article 3.3.b), the conservation status of an area is favorable when – inter alia – the objective of maintenance and the integrity of the Natura 2000 site is not endangered and will be able to be ensured also in the foreseeable future.

2.4 'Agreement 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'

'Having ascertained that it will not adversely affect'

Under the Natura 2000 Decree, as amended, no such wording is used for emphasizing the importance of scientific certainty when making a decision over a plan or a project affecting a site. However, the law reads as follows (Article. 10.2):

> *"Nature conservation authority can permit the project mentioned under Par. 1 or can give its consent thereto as co-decision authority if it can be established that it will not endanger or damage the Natura 2000 site, furthermore – taking Article. 4.1-2 into account – is not contrary to the objectives of designation."*

This wording uses the plain legal language ("establish" instead of "ascertain") without requiring extra administrative or scientific scrutiny therefore may raise the issue of improper transposition.

Integrity of the site concerned

There is no mention of the integrity of a Natura 2000 site in connection with adverse effects whose lack an assessment is supposed to ascertain. Instead, only "the Natura 2000 site" as such is what should not be affected adversely; whereas the "integrity" of the site appears only later in the law, with regard to compensatory measures (see later).

Obtaining the opinion of the general public

Under the Natura 2000 Decree, as amended, regulation of public participation is somewhat blurred: public participation manifesting in a public hearing is to be ensured but only if it is reasonable. The law reads as follows (Article. 10.5):

> *"Before the permitting of the project mentioned under Par. 1 – in reasoned cases – the opinion of the affected public has to be obtained. For this, the competent authority holds a public hearing."*

Nevertheless, what the criteria of a reasoned case, what the conditions of public participation, as well as what procedural rules are to be followed during public participation, are non-existent in the Natura 2000 Decree, as amended. This clearly indicates that such provision may be grammatically in line with the text of the Natura 2000 Directive but does not ensure meaningful opportunity for public involvement in decision-making.

2.5 Initial considerations in Article 6(4)

Alternative solutions

Under the Natura 2000 Decree, as amended, according to its Article 10.3, alternative solutions are regulated in a negative way, i.e. their lack enables the adoption of a plan or the permitting of project even if it is likely to cause a harmful effect on the Natura 2000 site in question.

The wording of the law requires the "lack of any other reasonable solution" regarding a plan or project. This may even be constructed in a more yielding sense than the text ("absence of alternative solutions") of the Natura 2000 Directive, therefore a conclusion can be drawn that transposition may result in incorrect situations in this regard. Demonstrating it through an example: if a project developer is obliged under Hungarian law to show that there are no other "reasonable solutions" to the one proposed, he can use his own logical framework.

Within this framework, some solutions can be considered unreasonable, taking into account only the aspects of the project developer (costs and benefits for instance). While if the lack of alternatives is to be shown, that can results in a more difficult situation for the project developer. In this case, some solutions still can be unreasonable by a limited number of aspects but are still alternatives to a proposed project, especially from an environmental protection or nature conservation point of view.

Imperative reasons of overriding public interest

The Natura 2000 Decree, as amended, somehow mixes the notions in this regard and there is a certain discrepancy between the usage of words by the Directive and the Decree.

The Natura 2000 Directive under Article 6(4) talks about a) imperative reasons of overriding public interest and b) within that, human health, public safety, etc.

The Hungarian law uses the terminology a) public interest and b) public interest of primary importance (human health, public safety, etc.). But when interpreting what 'simple' public interest means, the law under Article 10.3 refers to Article 10/A.2-3, which in fact details what public interest of primary importance is.

Thus, the very concept behind the Directive (i.e. to have a hierarchy of reasons of public interest according to the natural values of a site in case a project or plan is likely to have a harmful effect) is lost. However, this does not result in incorrect transposition because it seems that any exceptions for permitting or adoption must be a public interest of primary importance.

The picture is made even more complicated by Article. 10/A.3 which lists a new exception: socio-economic development of the country can be a public interest of primary importance. This is further elaborated under Article. 4.2 as: socio-economic development or defense interests defined by an Act of Parliament or a Government Decree.

Having taken into account all this, the transposition of the relevant community provision can be considered as correct in Hungary.

2.6 Compensatory measures

'Shall take all compensatory measures'

Under Article 10.4 of the Natura 2000 Decree, as amended, in order to ensure the overall coherence of Natura 2000 areas as well as a favorable conservation status of habitats and species,

> *"on other Natura 2000 sites restoration or development measures (hereafter: compensatory measures) proportionate to the expectable damage are to be defined."*

An interesting difference between the community and the Hungarian regulation may give rise to consideration whether the Natura 2000 Decree is fully in line with the Natura 2000 Directive. While the Directive requires "all compensatory measures necessary", the Decree limits it to "measures […] proportionate to the expectable damage".

Again demonstrating the importance of such language variations: situations may occur when a compensatory measure is not proportionate but necessary to ensure the coherence of a site of community importance but in Hungarian law they can not be imposed. In such cases, even incorrect transposition can be established.

Since 15 October 2006, the Damage-to-Nature Decree contains relevant reference to this issue. According to Point 4.4 of its Annex II, remedial measures in case of damage to a Natura 2000 site have an objective to restore the complex system of species of community importance and of habitats, and to promote the implementation of the goals set in the maintenance plans.

'Overall coherence' of the Natura 2000

Overall coherence of Natura 2000 areas appears in the Natura 2000 Decree, as amended, as an objective of compensatory measures. However, it is worth noting that the Decree stipulates: such compensatory measures have to be applied to other Natura 2000 sites and not to the one affected by the plan or project, presumably thus trying to ensure the coherence of the "coherent European ecological network" (Article. 3.1 of the Natura 2000 Directive).

Having taken into account all this, the transposition of the relevant community provision can be considered as correct in Hungary.

Informing the Commission of the compensatory measures adopted

According to the Article 10.6 of the Natura 2000 Decree, as amended, the nature conservation authority informs via the Ministry of Environment and Water Management the Commission by submitting a data sheet. The data sheet is defined by Appendix No. 8 of the Decree and contains data – besides the identification data necessary – such as:

- description of the plan or project
- negative impacts
- alternative solutions
- imperative reasons
- compensatory measures (within this sub-heading, the planned compensatory measures and the timing of the action plan are to be given)

Although the timing of information, i.e. in what stage of the proceeding the data sheet has to be presented to the Commission, is not set in the Decree, it can be figured out approximately from its contents given by Appendix No. 8: it must follow the adoption of the compensatory measure but must precede the realization thereof.

2.7 Sites hosting priority natural habitats and/or priority species

The sites concerned

The sites concerned are not directly defined by Article. 10/A.1 of the Natura 2000 Decree, as amended, but through setting what kind of plans or projects require a public interest of primary importance to be permitted or adopted, respectively. They are those

> *"that are likely to have – based on data relating to the fauna and flora found on the site – a significant effect on a priority community species or priority community natural habitat type which is hosted by the Natura 2000 site and served as basis of designation of the site."*

We may find a few restricting conditions in the Hungarian version but they do not significantly alter the original objective of the Directive, therefore may not give rise to considerations of the legality of transposition. The most important is the requirement that those species or habitat types that are affected must have served as basis of the original designation of the site. This can only cause problems when such species or habitat types are found on a Natura 2000 site that were not considered in the original compilation of the list of proposed sites, however, they are priority ones and are of community importance and furthermore, they receive impacts from the plan or project in question.

Since this combination is not too probable, the somewhat restrictive wording of the Hungarian law is not likely to result in infringement of community law.

The concepts of 'human health', 'public safety' and 'beneficial consequences of primary importance for the environment'

Article 10/A.2 of the Natura 2000 Decree, as amended, literally reads as follows:

> *"Public inters of primary importance are the protection of human life and health, the maintenance of public safety, and the achievement of beneficial consequences of primary importance for the environment."*

Having taken into account all this, the transposition of the relevant community provision can be considered as correct in Hungary.

Opinion from the Commission

Under the Natura 2000 Decree, as amended, Article. 10/A.3, the opinion of the Commission has to be obtained in case a priority species or habitat type is affected by a plan or project. Fully in line with community legislation, the opinion is a non-binding legal instrument, thus theoretically can be neglected, however, with all its consequences. The data sheet on which the opinion must be requested (by ticking the box next to "reason for sending the documentation: notification or opinion") is defined by Appendix No. 8 to the Decree.

3. Conclusions

In last year's legal analysis regarding the transposition of the Natura 2000 directives into Hungarian law, we concluded that the major shortcomings – that have been in fact prevailing for exactly 2 years and had been already noticed and remarked at by the Commission – were remedied by an amendment having entered into force on 17 October 2006. Also the proclamation of the pieces of lands affected by Natura 2000 by means of a binding ministerial decree (the List-of-Sites Decree) has repaired the previously existing unlawful situation when a non-mandatory ministerial information circular regulated the issue.

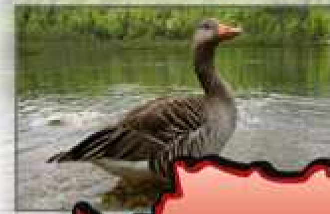
The recently adopted Damage-to-Nature Decree has provided criteria to evaluate what constitutes a significant effect to a Natura 2000 site, to date missing from the relevant legislation.

However, other instances of faulty transposition remained unaltered. Amongst others, these are the incorrect definition, improper regulation or simply total omission of areas such as

- a site's conservation objectives
- the integrity of the site concerned
- an appropriate assessment of the implications of a project or plan for the site in view of the site's conservation objectives
- all compensatory measures in case of an unfavorable impact to a Natura 2000 site

As an overall evaluation, we may conclude that the transposition of the relevant directives into Hungarian law has further improved and there are no major shortcomings in this regard. This of course does not imply that there are no incorrectly transposed provisions whatsoever. On the contrary, the obvious loopholes in domestic regulation as revealed in the 2006 legal analysis and highlighted again above may cause significant implementation problems.

In our view, in order to avoid an infringement procedure against Hungary, the aforementioned shortcomings should certainly be removed in the near future.



Austria

1. Introduction

1.1 Analyzed problems

This analysis focuses on the transposition of Articles 6(3) and 6(4) of the EU-Directive 92/43/EEC (Habitats Directive) into the Austrian national legislation.

1.2 General information on the transposition of the Habitats Directive

The correct transposition of Articles 6(3) and 6(4) Habitats Directive has been already subject to the infringement procedure C-508/04 which ended at 10th May 2007 with a judgment of the European Court of Justice (ECJ).

Originally in that procedure, the Articles 6(3) and 6(4) were included in the action of the Commission from 8th December 2004. But later the Commission withdrew its action inter alia related to these two Articles following a request, made by the Court under Article 54a of the Rules of Procedure, to submit additional information concerning the domestic legal instruments covered by the action (paragraph 39).

Nevertheless, the following work will again assess the whole legal framework as the national legal situation relevant to that case C-508/04 against Austria was the one from 17th December 2003 (see paragraph 51 of the judgment). Several national amendments as well as new interpretations of the ECJ occurred afterwards.

Austria accessed the Community with 1st January 1995 and submitted lists including area to be classified under the Birds Directive and potential Sites of Community Interest proposed to be classified under the Habitats Directive beginning with June 1995.

Nevertheless, recently the Commission brought in two actions at the ECJ against Austria with regard to the designation of sites.[18] The Commission's action with regard to the Habitats Directive alleges Austria's failure to designate sufficient sites regarding six natural habitat types in the alpine region and regarding ten other natural habitat types and 12 species in the continental region.

[18] The following is slightly changed taken from the press release of the Commission no IP/07/937 from 27/06/2007.

In the second case concerning the Birds Directive the Commission brought Austria before the ECJ for its alleged failing to designate the Special Protection Area (SPA) Hansag in Burgenland and to extend the SPA Niedere Tauern in Styria and for – as the Commission further alleges - not giving adequate legal protection to existing sites.

Due to the lack of any relevant federal competence the transposition of Articles 6(3) and 6(4) Habitats Directive has been so far carried out in several stages mainly within the nine Nature Conservation Acts of the nine 'Länder' (Provinces) of Austria[19], but also some other legal Acts refer explicitly to the transpositions of these norms.[20]

1.3 Overall framework

Based on the Habitats Directive and the Birds Directive all the nine Nature Conservation Acts contain provisions for the declaration of so called 'Europaschutzgebiete' (European Conservation Sites), except in Tyrol, where they are called 'Natura 2000 – Gebiete' (Natura 2000 – Sites).

Several National Parks constituted by own laws have been also declared to an 'Europaschutzgebiet' (European Conservation Site), and partly these National Park Acts have to implement for these specific sites the Articles 6(3) and 6(4) instead of the Nature Conservation Acts.[21]

Beside that, also in one Province (Salzburg) the hunting law contains provisions in order to enact by means of by-laws 'Wildeuropaschutzgebiete' (European game conservation sites) on behalf of species only covered by the hunting law.[22] If these provisions do not correctly transpose Article 6(3) and 6(4) Habitats Directive the other provisions on Nature Conservation do not apply subsidiary and hence, no correct transposition of EU law is given at all for these species.

In several Provinces some or all plans are solely or additionally subject to an assessment and/or procedure under the Spatial Planning Act of the respective Province.

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[19] 'Naturschutzgesetz' (Nature Conservation Act) of the Province Burgenland ('LGBl' [Provincial Law Page] number 27/1991 in the version of 58/2004); Nature Conservation Act of the Province Carinthia (LGBl number 79/2002 in the version of 103/2005; Nature Conservation Act of the Province Lower Austria (LGBl number 5500-5); Nature Conservation Act of the Province Upper Austria (LGBl number 129/2001 in the version of 61/2005; Nature Conservation Act of the Province Salzburg (LGBl number 73/1999 in the version of 58/2005); Nature Conservation Act of the Province Styria (LGBl number 65/1976 in the version of 9/2007; Nature Conservation Act of the Province Tyrol (LGBl 26/2005); Nature Conservation Act of the Province Vienna (LGBl number 45/1998 in the version of 12/2006); 'Naturschutzverordnung' (Nature Conservation by-law) of the Province Vorarlberg (LGBl number 8/1998 in the version of 12/2007) [in the following short 'Nature Conservation Act/by-law of the respective province].

[20] See e.g. the 'Raumordnungsgesetz' (Spatial Planning Act) of the Province Lower Austria, ('LGBl' [Provincial Law Page] number 8000-22); in the following short 'Spatial Planning Act of the Province Lower Austria'.

[21] The Acts constituting National Parks are excluded from the following assessment due to time and space limits.

[22] See Paragraph 100a Z 2 und Paragraph 108a 'Jagdgesetz' (Hunting Act) of the Province Salzburg ('LGBl' [Provincial Law Page] number 1993/100 in the version of 63/2006) in connection with the 'Verordnungen' (by-laws) concerning European game conservation sites ('Wild-Europaschutzgebietsverordnungen') Dürrnbachhorn ('LGBl' [Provincial Law Page] number 91/2006), Gernfilzen-Bannwald (LGBl 92/2006), Joching (LGBl 93/2006), Kematen (LGBl 94/2006), Klemmerich (LGBl 95/2006), Martinsbichl (LGBl 96/2006), Hochgimpling (LGBl 18/2007).

In Lower Austria project assessments based on Article 6(3) and 6(4) Habitats Directive are not compulsory during the time between the inclusion of a site in the Community list and its designation (in contradiction to Article 4 [5] Habitats Directive), but are only possible based on an application of the 'Umweltanwalt' (Public Environmental Attorney) according to Paragraph 38 (6) Nature Conservation Act.

This general structure could be considered to be very complex. It leads to the need for a high level of cooperation in case a federal plan applied to the whole area of Austria would need to be assessed once such as the 'Generalverkehsplan' (General Traffic Plan) or the 'Waldentwicklungsplan' (Forrest Development Plan) or the 'Gefahrenzonenplan' (Danger Zone Plan).

The incorporation of the Natura 2000 system into the national protected area system happened in general through the creation of new areas as well as through the inclusion of already existing sites. Most provinces started first with the second way (most extreme Upper Austria), but hat depended quite on the persons involved.

The assessment system is due to the competence situation formally separate regulated from the EIA, but in case an EIA is done and a Natura 2000 area is tangled the EIA authority applies together with water law, forestry law etc. also the provisions of of Article 6(3) and 6(4) HD.

2. Analysis of particular problems

2.1 Any plan or project not directly connected with or necessary to the management of the site

Projects and plans

This term seems to be included within the Nature Conservation Acts of the Provinces of Burgenland (Paragraph 22e [1]), Carinthia (Paragraph 24b [1]), Lower Austria (Paragraph 10 [1] only concerning projects), Styria (Paragraph 13b [1]), Tyrol (Paragraph 14 [4] and [8]) as well as in the Nature Conservation By-law of Vorarlberg (Paragraph 15 [2]).

The Nature Conservation Act of Upper Austria (Paragraph 24 [3]) uses solely the term 'Maßnahmen' (measures) and it remains unclear even in connection with the definitions especially of Paragraph 3 (3) of this Act what it exactly covers. Also the Nature Conservation Act of Salzburg (Paragraph 3a) uses solely the term 'Maßnahmen' (measures) and another time it remains unclear even in connection with the definitions especially of Paragraph 5 (8) of this Act what it exactly covers. Furthermore, the Nature Conservation Act of the Province Vienna (Paragraphs 22 [5]) uses solely the term 'Maßnahmen' (measures) and again it remains unclear even in connection with the definitions especially of Paragraph 3 (8) of this Act what it exactly covers.

The Hunting Act of the Province Salzburg (Paragraph 108b [4]) does <u>not</u> contain this term.

Additionally to the above mentioned concerning the Province Lower Austria, the plans mentioned in Article 6(3) Habitats Directive separately and solely are dealt with by the Spatial Planning Act. The Spatial Planning Act of the Province Lower Austria (Paragraph 2 [1]) only covers two forms of plans, so called 'örtliche Raumordnungsprogramme' (Local Spatial Order Programmes) and 'überörtliche Raumordnungsprogramme' (Regional Order Programmes). Hence, not all plans covered by Article 6(3) and 6(4) Habitats Directive are subject to an adequate assessment in the competent legislation of Lower Austria, which has to be considered an incorrect transposition.

Additionally to the above mentioned concerning the Province Burgenland, the 'Flächenwidmungspläne' (Local Spatial Plans) are assessed and decided within a special procedure under the 'Raumplanungsgesetz' (Spatial Planning Act) of this Province, but also based on the criteria laid down in the Nature Conservation Act.[23]

Additionally to the above mentioned concerning the Province Upper Austria, the Nature Conservation Act (Paragraph 24 [2]) allows to list in by-laws designating SCIs and SPAs as examples measures which will never lead to an essential adverse affect. In this sense for example according to the relevant by-laws designating the SPA 'Unterer Inn' in Upper Austria, land owners are allowed to enter the site by foot or all types of vehicles[24], which is by far not conform with the European provisions.

Furthermore, Paragraph 24 (8) of the Nature Conservation Act of the Province of Upper Austria states, that its provision in Article 24 (3) to (7), those which implement the Articles 6(3) and 6(4) Habitats Directive, do not apply for such 'Europaschutzgebiete' (European Conservation Sites) or parts of such area, which are also 'Naturschutzgebiete' (Nature Conservation Sites) based on the Paragraph 25 of the Nature Conservation Site or areas of the National Park 'Kalkalpen' of Upper Austria.

In this sense for example, the SPA 'Unter Inn' is a designated European Conservation Site as well as a designated Nature Conservation Site, and hence, no subject to an adequate assessment in the sense of Articles 6(3) and 6(4) Habitats Directive.

Similar to Upper Austria, the Nature Conservation Act of Salzburg (Paragraph 22a [3]) allows to list in by-laws designating SCIs and SPAs as examples measures which will never lead to an essential adverse affect. In this sense, for instance according to the relevant by-laws designating the SPA 'Weidmoos' in Salzburg inter alia the hitherto agriculture, the hitherto forestry and the hitherto hunting is allowed[25], which does not seem to take into concern possible cumulative affects and already therefore is by far not conform with the European provisions.

[23] See Paragraph 22e (5) Nature Conservation Act of the Province Burgenland.
[24] See Paragraph 4 of the 'Verordnung' (by-law) of Upper Austria, 'LGBl' (Provincial Law Page) number 69/2004 in connection with Paragraph 2 (1) of the 'Verordnung' (by-law) of Upper Austria, 'LGBl' (Provincial Law Page) number 148/2002.
[25] See Paragraph 3 (1) of the 'Verordnung' (by-law) 'LGBl' (Provincial Law Page) number 36/2006 of Salzburg.

Furthermore in Salzburg, based on the Hunting Act the hunting by-laws on 'Wildeuropaschutzgebiete' (European game conservation sites) contain general exemptions in favor of any activities of the owner of the sites.[26] Hence, also in this case not all plans or projects seem to be subject to an assessment in accordance with Article 6(3) and 6(4) Habitats Directive and, in general, these provisions cited do not contain all the elements requested by Article 6(3) Habitats Directive.

According to Paragraph 3 of the Nature Conservation Law of the Province Salzburg several aspects are not covered by this law, such as according to its Paragraph 3 (1) (d) affects of measures on volume of traffic at existing streets dedicated to the public traffic with motor vehicles. This general and very wide formulated exemption seems to constitute a contradiction of Article 6(3) and 6(4) Habitats Directive as these provisions do not provide any basis for such an exemption.

Similar to the situation in Upper Austria and Salzburg, the Nature Conservation Act of the Province of Vienna (Paragraph 22 [4]) allows to list in by-laws designating SCIs and SPAs as 'Europaschutzgebiet' (European Conservation Site) for example measures, which will never lead to an essential adverse affect. However, no such by-law seems to be enacted until July 2007. But, for example, the existing by-law classifying the SPA 'Lainzer Tiergarten' (AT1302000), which is listed in the Community list, as a 'Naturschutzgebiet' (Nature Conservation Site) does contain a long list of measures which will never lead to an essential adverse affect[27], without specifying the conservation objectives under the Habitats Directive and the Birds Directive. This situation already now constitutes a contradiction against Article 4.5 Habitats Directive in connection with Article 6(3) and 6(4) Habitats Directive.

In this connection, the Nature Conservation Act of the Province of Vienna (Paragraph 22a [1]) obliges the provincial government to enact protection measures for the birds of Annex 1 of the Bird Directive in certain sites (including the Lainzer Tiergarten), if this is suitable for their survival and reproduction in their area of distribution. Also, no such measures seem to be enacted until July 2007.

Additionally, the Nature Conservation Act of the Province of Vienna (Paragraph 22 [9]) states, that (translated) for 'Europaschutzgebiete' (European Conservation Sites), which were also designated as a 'Naturschutzgebiet' (Nature Conservation Site) or a National Park, regarding the granting of permissions for intrusions the relevant provisions for Nature Conservation Sites or National Park are applicable.

But it seems to be unclear if these provisions apply additionally or exclusively. As for example the Nature Conservation Act of the Province of Vienna (Paragraph 23 [4]) dealing with Nature Conservation Sites does not contain concerning the granting of permissions for intrusions all the criteria laid down in Article 6(3) and 6(4) Habitats Directive.

It is questionable, if this whole situation described for Vienna just before constitutes a sufficient clear transposition of Article 6(3) and 6(4) Habitats Directive.

[26] See e.g. Paragraph 3 (2) point 5 of the 'Verordnung' (by-law) concerning European game conservation sites ('Wildeuropaschutzgebiete') Dürnbachhorn ('LGBl' [Provincial Law Page] number 91/2006), based on Paragraph 108a (3) 'Jagdgesetz' (Hunting Act) of the Province Salzburg ('LGBl' [Provincial Law Page] number 100/1993 in the version of 63/2006).
[27] See Paragraph 3 (1) of the 'Verordnung' (by-law) 'LGBl' (Provincial Law Page) number 02/1998 of Vienna.

Additionally to the aspects above mentioned concerning the Province Vorarlberg, the Nature Conservation Act there explicitly excludes from the assessment plans within federal competences as well as plans based on the Spatial Planning Act of this Province (Paragraph 15 [3]). The latter Act has not been amended yet with regard to Article 6(3) and 6(4) Habitats Directive and hence concerning the 'Landesraumpläne' (provincial spatial plans) only an assessment based on the Strategic Environmental Assessment Directive[28] is provided for.[29] This has to be considered not a correct transposition of the requirements of Article 6(3) and 6(4) Habitats Directive.

Furthermore, the Nature Conservation Act of Vorarlberg only includes the change of uses within its definition of 'project', but not the continuation of a current use (Paragraph 15 [4]). This does not seem to be conform with the Habitats-Directive, because the ECJ's interpretation of the terms 'plans' and 'projects' for example in the case Waddensea (C-127/02, paragraph 29) does include the continuation of a current use.

'Not directly connected with or necessary to the management'

This term seems to be included within the Nature Conservation Acts of the Provinces of Burgenland (Paragraph 22e [1]), Lower Austria (Paragraph 10 [1] only concerning projects) and Tyrol (Paragraph 14 [4] and [8]).

The Nature Conservation Act of the Province Carinthia (Paragraph 24b [1]) left away the 'necessary', hence therein only an equivalent to the term 'not directly connected with to the management' remains and more plans and projects are – in a stricter sense – possible subject to an assessment.

The Spatial Planning Act of the Province Lower Austria (Paragraph 2) does not contain this term.

No Paragraph of the Nature Conservation Acts of the Province Upper Austria (and especially not Paragraph 24 [3]) does contain in this connection this term, but it might be included in by-laws based on the already mentioned Paragraph 24 (2) of this Act.

In the Province Salzburg the Nature Conservation Act (especially Paragraph 3a) and the Hunting Act (especially Paragraph 108b [4]) both do not contain this term.

The Nature Conservation Acts of the Provinces of Styria (especially Paragraph 13b) and Vienna (especially Paragraphs 22 and 22a) as well as the Nature Conservation By-law of the Province Vorarlberg (especially Paragraph 15) do not contain this term.

[28] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [OJ L 197 of 21.07.2001].
[29] See in Detail Paragraph 10a 'Raumplanungsgesetz' (Spatial Act) of the Province Vorarlberg ('LGBl' [Provincial Law Page] number 39/1996 in the version of 23/2006).

2.2 'Is likely to have a significant effect thereon, either individually or in combination with other plans or projects'

Significant effect

This term seems to be included within the Nature Conservation Acts of the Provinces of Burgenland (Paragraph 22e [1]), Carinthia (Paragraph 24b [1]), Lower Austria (Paragraph 10 [1] only concerning projects), Upper Austria (Paragraph 24 [3]), Styria (Paragraph 13b [1]), Tyrol (Paragraph 14 [4] and [8]), and Vienna (Paragraphs 22 [5] and 22a [2]) as well as in the Nature Conservation By-law of Vorarlberg (Paragraph 15 [2]).

The Spatial Planning Act of the Province Lower Austria (Paragraph 2 [2]) does contain this term.

The Nature Conservation Act of the Province Salzburg (Paragraph 3a [2]) does not contain this term for non- priority natural habitats and/or non-priority species, but it does contain it for priority natural habitats and/or priority species (Paragraph 3a [3]).

The Hunting Act of the Province Salzburg (Paragraph 108b [4]) does contain this term.

'Likely to have'

This term seems to be included within the Nature Conservation Acts of the Provinces of Burgenland (Paragraph 22e [1]), Carinthia (Paragraph 24b [1]), Lower Austria (Paragraph 10 [1] only concerning projects), Upper Austria (Paragraph 24 [3]), Styria (Paragraph 13b [1]), Tyrol (Paragraph 14 [4] and [8]), and in the Nature Conservation By-law of Vorarlberg (Paragraph 15 [2]).

The Nature Conservation Act of the Province Salzburg (Paragraph 3a [2]) does not contain this term for non- priority natural habitats and/or non-priority species, but it does contain it for priority natural habitats and/or priority species (Paragraph 3a [3]).

The Hunting Act of the Province Salzburg (Paragraph 108b [4]) does contain this term.

The Spatial Planning Act of the Province Lower Austria (Paragraph 2 [2]) does on the one hand contain this term, but on the other hand only makes all 'örtliche Raumordnungsprogramme' (Local Spatial Order Programmes) and 'überörtliche Raumordnungsprogramme' (Regional Order Programmes) subject to an assessment.

The Nature Conservation Act of the Province Vienna does use this term for SPA's (Paragraphs 22a [2]), but does not use it for other 'Europaschutzgebiete' (European Conservation Sites) (especially not in Paragraphs 22 [5]).

'Either individually or in combination with other plans or projects'

This term seems to be included within the Nature Conservation Acts of the Provinces of Burgenland (Paragraph 22e [1]), Lower Austria (Paragraph 10 [1] only concerning projects), Styria (Paragraph 13b [1]), Tyrol (Paragraph 14 [4] and [8]) and in the Nature Conservation By-law of Vorarlberg (Paragraph 15 [2]).

The Spatial Planning Act of the Province Lower Austria (Paragraph 2 [1]) does not contain this term.

The Nature Conservation Acts of the Province of Carinthia (Paragraph 24b [1]) uses only a formulation such as 'plans and project that have….either individually or in combination'. This constitutes a slight lack of clearness as it could be interpreted that the minimum requirement for any assessment is one plan and one project together.

As already mentioned above under 2.1.1., the Nature Conservation Act of Upper Austria (Paragraph 24 [3]) uses solely the term 'Maßnahmen' (measures), but combines them in the sense of 'either individually or in combination with other measures'.

The Nature Conservation Act of the Province Salzburg (Paragraph 3a [2] and [3]) and the Hunting Act of the Province Salzburg (Paragraph 108b [4]) both do not contain this term.

The Nature Conservation Act of the Province Vienna does not use this term for SPA's (especially not in Paragraphs 22a [2]), but does use it for other 'Europaschutzgebiete' (European Conservation Sites) (Paragraph 22 [5]), although with the restriction that only other measures applied for at the Nature Conservation Authority are covered. This restriction does not seem to comply with the Habitats Directive, as it is not contained there.

2.3 'Appropriate assessment of its implications for the site in view of the site's conservation objectives'

Appropriate assessment

This term seems to be included within the Nature Conservation Acts of the Provinces of Burgenland (Paragraph 22d [1] and 22e [1] and [4]), Carinthia (Paragraph 24b [1]), Lower Austria (Paragraph 10 [3] only concerning projects), Upper Austria (Paragraph 24 [3]), Salzburg (Paragraph 22 [4]), Styria (Paragraph 13b [1]), Tyrol (Paragraph 14 [4] and [8]), Vienna (Paragraphs 22a [2] by mentioning in general all conservation objectives and Paragraphs 22 [5]) and in the Nature Conservation By-law of Vorarlberg (Paragraph 15 [5]).

The Spatial Planning Act of the Province Lower Austria (Paragraph 2 [1]) does contain this term.

The Nature Conservation Act of the Province Salzburg (Paragraph 3a [2]) does not contain this term for non- priority natural habitats and/or non-priority species, but it does contain it for priority natural habitats and/or priority species (Paragraph 3a [3]).

The Hunting Act of the Province Salzburg (Paragraph 108b [4]) does contain this term but the task of the 'Verträglichlichkeitsprüfung' (appropriate assessment) is a sort of pre-check, if at all an exemption from the obligations laid down in the by-laws could have considerable adverse effects or not.

Site's conservation objectives

This term seems to be included within the Nature Conservation Acts of the Provinces of Burgenland (Paragraph 22d [1] and 22e [1] and [4]), Carinthia (Paragraph 24b [1]), Lower Austria (Paragraph 10 [3] only concerning projects), Upper Austria (Paragraph 24 [3]), Salzburg (Paragraph 22 [4]), Styria (Paragraph 13b [1]), Tyrol (Paragraph 14 [4] and [8]), and Vienna (Paragraphs 22a [2] by mentioning in general all conservation objectives and Paragraphs 22 [5]) as well as in the Nature Conservation By-law of Vorarlberg (Paragraph 15 [5]).

The Spatial Planning Act of the Province Lower Austria (Paragraph 2 [1]) does contain this term.

The Hunting Act of the Province Salzburg (Paragraph 108b [4]) does not contain this term, but speaks from the 'wesentlichen' (essential) parts of the site.

2.4 'Agreement 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'

'Having ascertained that it will not adversely affect'

This term seems to be included within the Nature Conservation Acts of the Provinces Burgenland (Paragraph 22d [1] and 22e [1] and [4]), Carinthia (Paragraph 24b [1]), Lower Austria (Paragraph 10 [4] only concerning projects) , Salzburg (Paragraph 22 [4]), Styria (Paragraph 13b [2]), Tyrol (Paragraph 14 [4] and [8]), and Vienna (Paragraphs 22 [5] and 22a [2]) as well as in the Nature Conservation By-law of Vorarlberg (Paragraph 15 [5]).

But, in the Nature Conservation Act of the Province of Burgenland (Paragraph 22d [1] and 22e [1] and [4]) two additional adjectives to 'adversely affect' are alternatively applied, namely 'wesentlich' (basic, essential, fundamental, material, prime) or 'nachhaltig' (durable, sustainable).

Also the Nature Conservation Act of the Province of Vienna uses in the same manner 'wesentlich' (Paragraphs 22 [5]).

Similar, within the Nature Conservation Acts of Carinthia (Paragraph 24b [1]), Lower Austria (Paragraph 10 [4] only concerning projects), Salzburg (Paragraph 22 [4]), Styria (Paragraph 13b [2]) and Tyrol (Paragraph 14 [4] and [8]) additionally the word 'erheblich' (considerable, substantial) is used. The same is valid for the Hunting Act of the Province Salzburg (Paragraph 108b [4]), whereas for example (translated) no 'erheblicher' (considerable, substantial) adverse affect should be expected.

These additional words seem to be problematic in terms of a correct transposition as the ECJ stated in the judgment from 2004 concerning the case Waddensea (C-127/02) that '(i)t is therefore apparent that the plan or project in question may be granted authorization only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.' (paragraph 56).

The Nature Conservation Act of the Province Upper Austria (and especially not Paragraph 24) does <u>not</u> contain this term.

Additionally to the above mentioned, the Nature Conservation Act of the Province Styria (Paragraph 13b [2]) allows already in this stage to grant the permission, if required, under conditions subsequent. This does not seem to be covered by the procedure laid down by the Article 6(3) Habitats Directive.

The Spatial Planning Act of the Province Lower Austria (Paragraph 2) does not contain this term.

Integrity of the site concerned

This term seems to be included within the Nature Conservation Acts of the Provinces of Burgenland (Paragraph 22d [1] and 22e [1] and [4]), Carinthia (Paragraph 24b [1]), Lower Austria (Paragraph 10 [4] only concerning projects) , Salzburg (Paragraph 22 [4]), Styria (Paragraph 13b [2]), Tyrol (Paragraph 14 [4] and [8]), and Vienna (Paragraphs 22 [5] and 22a [5]) as well as in the Nature Conservation By-law of Vorarlberg (Paragraph 15 [5]).

But additionally, concerning the Provinces of Burgenland, Carinthia, Lower Austria, Salzburg, Styria, Tyrol and Vienna the same applies as already said above under 2.4.1.

The Spatial Planning Act of the Province Lower Austria (Paragraph 2) does not contain this term.

The Nature Conservation Act of the Province Upper Austria (and especially not Paragraph 24) does not contain this term.

The Hunting Act of the Province Salzburg (Paragraph 108b [4]) does not contain this term, but speaks from the 'wesentlichen' (essential) parts of the site.

Obtaining the opinion of the general public

This term seems to be included within the Nature Conservation Acts of the Provinces of Burgenland (Paragraph 22e [3] in connection with the Annex) and Carinthia (Paragraph 24b [1]).

In the Province Salzburg both, neither the Nature Conservation Act (especially not Paragraph 3a and Paragraph 22a) nor the Hunting Act (especially not Paragraph 108b [4]) contain this term.

Neither the Spatial Planning Act of the Province Lower Austria (especially not Paragraph 2 concerning certain plans) nor the Nature Conservation Act Lower Austria (especially not Paragraph 10 only concerning projects) do contain this term in this connection.

The same is valid for the Nature Conservation Acts of the Province Upper Austria (especially Paragraph 24), Styria (especially Paragraph 13b), Tyrol (especially Paragraph 14 [4] and [8]), Vienna (especially Paragraphs 22 [5] and 22a [2]) and the Nature Conservation By-law of Vorarlberg (especially Paragraph 15).

Although the opinion of the general public has only to be obtained 'if appropriate', it seem to contradict the community law if the discretion of a Member State leads to a legal exclusion of the opinion of the public in any case by not mentioning it at all.

2.5 Initial considerations in Article 6(4)

Alternative solutions

This term seems to be included within the Nature Conservation Acts of the Provinces of Burgenland (Paragraph 22d [2] and [3] as well as Paragraph 22e [1] and [4]), Carinthia (Paragraph 24b [1]), Lower Austria (Paragraph 10 [6] only concerning projects), Upper Austria (Paragraph 24 [4]), Salzburg (Paragraph 3a [2]), Styria (Paragraph 13b [3]) and in the Nature Conservation By-law of Vorarlberg (Paragraph 15 [6]).

But the Nature Conservation Act of Styria (Paragraph 13b [3]) adds 'zumutbar' (reasonable) to alternatives and therefore provides for some additional discretion, which is not included in Article 6(4) Habitats Directive.

The Hunting Act of the Province Salzburg (Paragraph 108b [4]) does not contain this term (nor all the other terms of Article 6(4) Habitats Directive). As already mentioned, any exemption from the obligations laid down in the by-laws could only be granted, if no 'erheblicher' (considerable, substantial) adverse affect should be expected.

Hence, to grant exemptions while on the one hand adverse effects are not excluded and on the other hand a total lack of all the considerations of Article 6(4) exists in the law, could be considered an incorrect transposition of the Habitats Directive [in the sense of the citation of the ECJ judgement from 2004 in the case Waddensea (C-127/02)].

The Spatial Planning Act of the Province Lower Austria (Paragraph 2 [2]) does contain this term.

Paragraph 14 [4] of the Nature Conservation Act of the Province Tyrol does not use the term 'alternative', but uses 'satisfactory' in connection with other solutions. Due to the discretion provided this does not seem to be a correct transposition of Article 6(4) Habitats Directive, although Paragraph 43 (2) of the Nature Conservation Act of the Province Tyrol obliges to show the alternatives including the 'Nullvariante' (Sero-Alternative) in the application.

The Nature Conservation Acts of the Province Vienna does not use this term, but questions if the aim of the measure could be reached by another technical and economic justifiable manner in order to effect less the conservation objective (Paragraphs 22 [6]). This restriction concerning an economic justifiable manner does not seem to comply with the Habitats Directive, as it is not contained there and it opens too far discretion to the competent authority.

Imperative reasons of overriding public interest

This term seems to be included within the Nature Conservation Acts of the Provinces of Burgenland (Paragraph 22d [2] and [3] as well as Paragraph 22e [1] and [4]), Lower Austria (Paragraph 10 [6] only concerning projects), Styria (Paragraph 13b [4]), Tyrol (Paragraph 14 [5]) and in the Nature Conservation By-law of Vorarlberg (Paragraph 15 [6]).

The Hunting Act of the Province Salzburg (Paragraph 108b [4]) does <u>not</u> contain this term (see also the explanations of 2.5.1).

The Spatial Planning Act of the Province Lower Austria (Paragraph 2) does not contain this term, but states generally that in any case the 'Verträglichkeit' (amicability) has to able to be established. This formulation does not ensure that this amicability will be established indeed.

The Nature Conservation Acts of the Province Carinthia (Paragraph 24b [2] and [3]) and Upper Austria (Paragraph 24 [4] and [5]), do use the term imperative reasons of public interest respectively, but left away the wording 'overriding'.

Additionally it has to be obeyed that the public interest in nature conservation mentioned in Paragraph 24 [4] in Upper Austria (which has to be weighted against the 'Gemeinwohl' [common interest] in the implementation of the potential harmful measure) refers to the very anthropocentric formulated legal definition of Paragraph 1 of this Act. Translated, Paragraph 1 states, that this Act has as its aim, to conserve, manage and care for the nature and landscape in Upper Austria in order to provide thereby the best possible basis for living appropriate to the human being and concludes in brackets with public interest in nature and landscape protection.

The Nature Conservation Acts of the Province Salzburg (Paragraph 3a [2]), does not use the term 'imperative reasons of public interest', but speaks about (translated) proofed direct public interests of particular importance which have priority against the interest on nature conservation.

The Nature Conservation Act of the Province Vienna does use the term 'overriding' for SPA's (Paragraphs 22a [2]) and priority habitats and species (Paragraphs 22a [2]), but does not use it for other species and habitats of the Habitats Directive (especially not in Paragraphs 22 [6]).

2.6 Compensatory measures

'Shall take all compensatory measures'

This term seems to be included within the Nature Conservation Acts of the Provinces of Burgenland (Paragraph 22d [2] and [3] as well as Paragraph 22e [1] and [4]), Carinthia (Paragraph 24b [2]), Lower Austria (Paragraph 10 [7] only concerning projects), Upper Austria (Paragraph 24 [6]), Styria (Paragraph 13b [5]), Tyrol (Paragraph 14 [6]), and Vienna (Paragraphs 22 [7] and 22a [3]) as well as in the Nature Conservation By-law of Vorarlberg (Paragraph 15 [6]).

The Nature Conservation Act of the Province Salzburg (Paragraph 3a [4]) constitutes a duty to take compensatory measures, names primarily the construction of compensatory habitats for animal and plant species and living communities, but allows , if latter is not or not fully possible to compensate solely by means of money. It is questionable, that this possibility constitutes a correct transposition of Article 6(4) Habitats Directive.

The Hunting Act of the Province Salzburg (Paragraph 108b [4]) does not contain this term (see also the explanations of 2.5.1).

Additionally to the abovementioned concerning Styria, the Nature Conservation Act of the Province Styria (Paragraph 13b [5]) constitutes (translated) that all compensatory measures to secure the overall coherence of the Natura 2000 or other suitable measures have to be taken. With regard to the last term 'or other suitable measures….' it does not seem compliant with Article 6(4) Habitats Directive to open another possibility for compensation than the one mentioned in that Article.

The Spatial Planning Act of the Province Lower Austria (Paragraph 2) does not contain this term.

'Overall coherence' of the Natura 2000

This term seems to be included within the Nature Conservation Acts of the Provinces of Burgenland (Paragraph 22d [2 c.] and [3 c.] as well as Paragraph 22e [1] and [4]), Carinthia (Paragraph 24b [2]), Lower Austria (Paragraph 10 [7] only concerning projects), Upper Austria (Paragraph 24 [6] directly referring to Article 6(4) Habitats Directive), Salzburg (Paragraph 3a [5]), Styria (Paragraph 13b [5]), Tyrol (Paragraph 14 [6]), and Vienna (Paragraphs 22 [7] and 22a [3]) as well as in the Nature Conservation By-law of Vorarlberg (Paragraph 15 [6]).

The Hunting Act of the Province Salzburg (Paragraph 108b [4]) does not contain this term (see also the explanations of 2.5.1).

The Spatial Planning Act of the Province Lower Austria (Paragraph 2) does not contain this term.

Informing the Commission of the compensatory measures adopted

This term seems to be included within the Nature Conservation Acts of the Provinces of Burgenland (Paragraph 22d [4]), Carinthia (Paragraph 24b [2]), Lower Austria (Paragraph 10 [7] only concerning projects), Salzburg (Paragraph 3a [5]), Styria (Paragraph 13b [5]), Tyrol (Paragraph 14 [6]), and Vienna (Paragraphs 22 [7] and 22a [3]) as well as in the Nature Conservation By-law of Vorarlberg (Paragraph 15 [6]).

The Nature Conservation Act of the Province Upper Austria does not contain this information obligation, but at least refers in Paragraph 24 [6] to Article 6(4) Habitats Directive, however only with regard to the description of the compensatory to be adopted.

The Hunting Act of the Province Salzburg (Paragraph 108b [4]) does not contain this term (see also the explanations of 2.5.1).

The Spatial Planning Act of the Province Lower Austria (Paragraph 2) does not contain this term.

2.7 Sites hosting priority natural habitats and/or priority species

The sites concerned

This term seems to be included within the Nature Conservation Acts of the Provinces of Burgenland (Paragraph 22d [3] as well as Paragraph 22e [1] and [4]), Carinthia (Paragraph 24b [3]), Lower Austria (Paragraph 10 [6] only concerning projects), Upper Austria (Paragraph 24 [5]), Salzburg (Paragraph 3a [3]), Styria (Paragraph 13b [4]), Tyrol (Paragraph 14 [5]), and Vienna (Paragraphs 22 [8] and 22a [2]) as well as in the Nature Conservation By-law of Vorarlberg (Paragraph 15 [6]).

The Hunting Act of the Province Salzburg (Paragraph 108b [4]) does not contain this term (see also the explanations of 2.5.1).

The Spatial Planning Act of the Province Lower Austria (Paragraph 2) does not contain this term.

The concepts of 'human health', 'public safety' and 'beneficial consequences of primary importance for the environment'

This term seems to be included within the Nature Conservation Acts of the Provinces of Burgenland (Paragraph 22d [3] as well as Paragraph 22e [1] and [4]), Carinthia (Paragraph 24b [3]), Lower Austria (Paragraph 10 [6] only concerning projects), Upper Austria (Paragraph 24 [5]), Salzburg (Paragraph 3a [3]), Styria (Paragraph 13b [4]), Tyrol (Paragraph 14 [5]), and Vienna (Paragraphs 22 [8] and 22a [2]) as well as in the Nature Conservation By-law of Vorarlberg (Paragraph 15 [6]).

The Hunting Act of the Province Salzburg (Paragraph 108b [4]) does not contain this term (see also the explanations of 2.5.1).

Additionally to the abovementioned concerning Styria, the Nature Conservation Act of this Province (Paragraph 13b [4]) explicitly includes in the term 'public safety' also 'Landesverteidigung' (state defense), which does not seem to be conform to the Habitats Directive.

The Spatial Planning Act of the Province Lower Austria (Paragraph 2) does not contain this term.

Opinion from the Commission

This term seems to be included within the Nature Conservation Acts of the Province of Burgenland (Paragraph 22d [3]), Carinthia (Paragraph 24b [3]), Lower Austria (Paragraph 10 [6] only concerning projects), Upper Austria (Paragraph 24 [5]), Salzburg (Paragraph 3a [3]), Styria (Paragraph 13b [4]), Tyrol (Paragraph 14 [5]), and Vienna (Paragraphs 22 [8] and 22a [2]) as well as in the Nature Conservation By-law of Vorarlberg (Paragraph 15 [6]).

The Hunting Act of the Province Salzburg (Paragraph 108b [4]) does not contain this term (see also the explanations of 2.5.1).

The Spatial Planning Act of the Province Lower Austria (Paragraph 2) does not contain this term.

3. Conclusions

The whole situation in Austria could be considered to be quite complex. This is on the one hand due to the nine different Provinces involved (with additional competences of the federal level) and on the other hand due to the different thematic legal areas involved in several Province.

Despite the ECJ-judgment in the case C-508/04 (mainly based on the legal situation from December 2003) did not declared any wrong transposition of the Article 6(3) and 6(4) Habitats Directive in May 2007, in general, the transposition of these Articles has to be considered not complete in Austria.

While the Nature Conservation Acts only show rather few failures in the transposition, the Acts of other legal areas (hunting law, spatial planning law), in case they are involved, show quite huge lacks.

The biggest short comings in the Nature Conservation Acts concern:

- General possibilities for exemptions from the provision of Article 6(3) and 6(4) provided for to the by-laws
- Vague definition of projects and plans
- The lack of a written possibility for public participation in the assessment procedure in the majority of Acts
- Lack of adaptation to the ECJ judgment from 2004 to the case Waddensea (C-127/02, paragraph 56) with regard to the assessment procedures.

Additionally the relevant Acts of the other legal areas (Spatial planning, hunting) fully lack in most cases in particular the transposition of Article 6(4) Habitats Directive.

Especially in several Provinces not all possible plans seem to be covered by the whole legislation in a manner that is compliant with the Article 6(3) and 6(4) Habitats Directive.

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