



**Natura 2000
Position Paper
2007**



1. Background

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.

Implementation and transposition of the Habitats Directive¹ (HD) has been chosen by J&E members as one of 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 legal analysis on transposition of Articles 6.3 and 6.4 of HD into national legislation of four abovementioned EU Member States² and case studies that represent typical cases of implementation of Articles 6.3 and 6.4 of HD in practice³, J&E issued a position paper, describing problems with implementation of HD in new Member States and making suggestions about improvement of the situation⁴.

In 2006, J&E detected several systematic problems in transposition of HD in the four new Member States, most important of which were narrowing the obligations for assessment down to certain activities and narrowing down the concept of “alternative solutions” that need to be considered before authorizing plan or project in question.

It was also evident that the concept of compensatory measures was unclear in the Member States in question. The J&E case study collection from 2006 described 4 cases in different new Member States which we considered as expressive examples of capability (more specifically incapability) of new Member States to comply with requirements of assessment of plans and programs, according to Articles 6(3) and 6(4) of the Habitats Directive.

In 2007, J&E members have been monitoring changes in national legislation, regarding transposition of Articles 6.3 and 6.4 of HD. On basis of these observations, national legal analyses of 2006 have been complemented and newly compared, in order to detect improvements and map the still existing problems.

In addition, J&E Austrian member Ökobüro has composed a legal analysis on transposition of Articles 6.3 and 6.4 in Austria, evaluating the level of transposition of these provisions in new Member States, compared to an old Member State.

Also, 4 new case studies from Estonia, Czech Republic, Hungary and Austria have been composed, in order to ascertain whether the reason for violation of provisions of Habitats Directives in earlier cases were only caused by recent accession to EU (and maybe by the fact that some projects had been initiated before the accession).

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/IE2006Naturalegalanalysis.pdf>

³ The comparative case study collection is available at J&E webpage:

<http://www.justiceandenvironment.org/wp-content/wp-upload/IE2006Naturacasestudy.pdf>

⁴ The position paper is available at J&E webpage:

<http://www.justiceandenvironment.org/wp-content/wp-upload/IE2006Naturapositionpaper.pdf>

On basis of the legal analysis and collected case studies, J&E renewed its position paper, specifying the problems and suggestions for their elimination or mitigation.

2. Problems

The comparative overview of transposition of Articles 6.3 and 6.4 HD shows that by the end of 2007, these articles are in general transposed satisfactorily in the national legislations – actually, in some of the analyzed Member States, improvements have been made during 2007.

However, there are still some shortcomings that might end in improper implementation. Taking into account the fact that carrying out projects and plans having significant effect to the environment is a rather controversial issue and the exact wording of national legislation may be of significant importance.

Such negative consequences have proven to be true, as seen in the case studies in question.

Shortcomings in legislation

1. The concept of projects and plans to be assessed is, in some Member States, restricted. Specific types of projects and plans are exempted from the scope of assessment. For example, in **Estonia** only activities that need environmental permit or a plan are subject to Natura assessment; in **Austria**, the Province of Lower Austria requires only an assessment of spatial plans, but not of other plans; in the **Czech Republic**, forest management plans are *expressis verbis* exempted from the scope of assessment etc. This is not in accordance with art 6(3) HD. The concept of “project” should go beyond activities which are subject to authorization or EIA requirements under national legislation⁵.
2. The requirements for appropriate assessment are vague, especially regarding the relation between decision-making rules of articles 6(3) and 6(4) HD and EIA/SEA proceedings.
3. There is problem of narrowing the obligation for considering alternative solutions down to only “real”, “reasonable” or “satisfactory” solutions in Estonia, Hungary, and some Austrian Provinces. In 2006, this problem was also evident in Slovakia. This approach could come down to interpretation the on basis of economic interests, but in this stage only alternatives concerning site conservation objectives can be considered and no other--including economic criteria.
4. There are attempts to soften the term “*imperative reasons of overriding public interest*”, using the term without “*imperative*” (Estonia) or “*overriding*” (Provinces of Carinthia, Upper Austria, Vienna and Salzburg in Austria). This creates a basis for misuses.

⁵ Interpretation guidance for EC Natura 2000 legislation from Avosetta group (January 2006) (available at: www.avosetta.org)

Shortcomings in implementation

J&E case study collections from 2006 and 2007 illustrate problems in implementation of HD on specific issues.

1. First, the authorities remain reluctant to carry out assessment according to article 6(3) and 6(4) HD. In the 2007 case study collection, this attitude is well illustrated by the Hungarian case of a sewage plant, where no EIA was carried out at all. Also an Estonian case, where the reluctance of authorities was influenced by an unclear relationship between Natura assessment and EIA proceedings, but also the muddled status of the area in question.
2. Reluctance can also be related to issues of time-frame applications of HD, regarding projects and plans initiated before the accession to the EU. This is clearly visible in the J&E case study collection of 2006. The judicial practice of European Court of Justice (ECJ) (Case C-209/04, *Lauteracher Ried*) about time-frame application of HD, unfortunately increases the confusion about cases regarding which the assessment should be carried out and regarding which it is not obligatory.

It is not clear what should be considered as “initiation” or “application for authorization” for projects, especially big infrastructure project proceedings which may involve several plans and permits. The interpretation of such initiation or application should be narrow, as otherwise the articles 6(3) and 6(4) of HD would not be applicable in new Member States for years. In this way, the ambitious goal of the European Commission to halt biodiversity loss by 2010 would definitely not be achieved.

3. In case the assessment is nevertheless carried out, conclusions about the absence of adverse effects to integrity of the site are easily drawn, although doubts clearly remain as to the absence of adverse effects on the integrity of the site linked to the plan or project. This is not in accordance with ECJ decision in *Waddenzee* case (Case C-127/02) which states in case of such doubts, *the competent authority will have to refuse authorization*.
4. In the course of assessment, alternative solutions are not looked for. This is not in accordance with ECJ decision in the *Castro Verde* case (Case C-239/04) which states clearly that *absence of alternative solutions has to be demonstrated*.
5. Implementation of compensatory measures remains a problematic issue. This is more visible in 2006 case studies where in some cases, no compensatory measures were taken by the authorities, or the offered measures seemed to be insufficient to ensure the overall coherence of Natura 2000.

3. Suggestions

In order to address the abovementioned problems, J&E makes following suggestions:

1. Improvements in national legislation are needed, in order to bring it into accordance with EU legislation. The European Commission should turn the attention of national governments to this need, especially regarding:
 - a. concepts of projects and plans;
 - b. requirements for appropriate assessment;
 - c. requirement for consideration of alternative solutions;
 - d. use of term “*of imperative reasons of overriding public interests*”.
 - e. proceedings of implementation of compensatory measures.
2. In order to enhance the knowledge and capacity of officials in the implementation of HD, information about ECJ judicial practice should be more efficiently disseminated. At the end of 2006, the European Commission published a brochure, containing the most important ECJ rulings and cases concerning implementation of Birds and Habitats Directives. However, during year 2007, ECJ made several crucial new decisions in this field. Therefore, this brochure should be renewed and moreover, translated into national languages so that national officials may use it efficiently.
3. The Commission’s guidelines about articles 6(3) and 6(4) should be renewed according to new ECJ practice and opinions of Avosetta group; Concerning renewal of the guidelines regarding concept of alternatives, it is perhaps wise to take into account suggestions, made by the Avosetta group beginning in 2006⁶:
 - a. “*alternative solutions*” should be interpreted in view of public interest pursued by the project or plan;
 - b. “*solution*” implies that alternatives can go beyond the dimension of geographical location;
 - c. it is not necessary that the initiator of a project be responsible for realizing the alternative option; the essential requirement is that the alternative be realized at all, i.e. by any developer or administrative body.
4. As for the time-line application, more specific guidelines are necessary for the implementation of articles 6(3) and 6(4) HD during the period when the Commission has not yet approved the list of sites of Community importance. ECJ position should be interpreted in a most narrow way, also encouraging the Member States to carry out Natura assessment in cases officially initiated before the accession date.
5. Monitoring and comparative analyses concerning implementation of articles 6(3) and 6(4) HD are crucial for the improvement of implementation.

⁶ www.avosetta.org

Acknowledgements

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The publication has been made possible through funding from the European Commission – DG Environment.

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