Appropriate Assessment under Article 6(3) of the Habitats Directive – a Justice and Environment position paper

Position Paper

Justice and Environment 2021

Position paper prepared by: Dr. Sándor Fülöp, PhD[1]

EXECUTIVE SUMMARY

The public interest environmental lawyers of the Justice and Environment network have been following the practical implementation of the Habitats Directive in the last decade. Our primary focus is Article 6, especially Article 6(3) on appropriate assessment (AA) of plans and projects that might have significant effect on Natura 2000 sites. In this Position Paper we summarize our experiences concerning case studies and legal analyses, as well as have a small survey of the latest legal literature and the 2016 REFIT analysis of the Commission, which surveys the relevant nature protection information mostly ensuing from the national authorities responsible for environmental protection.

The official data of the European Environmental Agency show a continuous deterioration of the Natura 2000 sites in Europe, a situation where the overwhelming majority of these territories have suffered or is directly threatened by irreversible changes. Yet, business and supporting political groups keep complaining about the severity of the Natura 2000 laws and wish to see more compromises and less hindrances of economic development on the account of the protected sites. The environmental authorities offer the usual weak set of solutions: information gathering, comparison of best practices and targeted training packages. Our opinion is that we should go much further: a systematic analysis is necessary concerning the substantive and procedural laws on appropriate assessment and preparation of a set of creative, bold measures in order to be ready, when our societies will demand more lauder a more decisive, system and result oriented nature protection. In this short study we make some steps into this direction with revisiting the most important topics of the appropriate assessment of Article 6(3) of the Habitats Directive with our practice-oriented methodology.

As concerns an initial question of positioning the AA in the system of the environmental impact assessments, our standpoint is rather conservative. We think that merging the appropriate assessment with either SEA or EIA procedures might entail fertile methodological exchange and a more complex analysis, but also loss of focus on the obligatory rules of protection of the Natura 2000 sites.

Both the substantive and the procedural aspects of the appropriate assessments are determined by the collision of the short term, partial economic interests and the long term,

[1] Associate Professor, National University of Public Services, Hungary; president of Environmental Management and Law Association, Hungary.

broader community interests that are more in harmony with the protection of the sustaining ecological systems. While the designers of the relevant plans and projects strive to convince the authorities that there are no alternatives to their investments, the civil side would like to see alternatives in the broadest possible sense, positioning the plan or project on table into its context.

On the substantive legal side, we examine first of all the matter of significance. The CJEU have made it clear in several decisions that plans and projects concerning any future activity might have significant effect on a Natura 2000 site, notwithstanding its name and legal form. Other pages of arguments are opened in the practice, however: initiators of the plans and projects try to convince the authorities and the general public that no appropriate assessment will be necessary if the investment is just bearing a minimal effect on the site, because of occupying a very small part, polluting only slightly or causing the disturbance not on the site but only in the vicinity of it. The low prestige, weak environmental authorities are defenceless against such arguments, unless such substantive issues are considered in correct procedural arrangements, with the participation of all the interested stakeholders that are enabled to have full understanding of the professional ramifications of the case (through capacity building measures). Also, there shall be strong procedural guarantees on the adequate professional level and lack of bias on the side of the experts.

These substantive and procedural conditions might only be fulfilled by specialised, decentralised and independent nature protection authorities. Certain parts of the state nature protection system should be exempted from the administrative work, they should rather concentrate on the professional management of the Natura 2000 sites and on the protection of them when some valuable parts of these sites are going to be occupied by certain economic activities.

Courts, especially on the level of the European Union help a lot in the protection of the Natura 2000 network on the continent and could help even more if the coherence of the system of substantive and procedural rules of impact assessments and appropriate assessment were reinforced. We have observed in the environmental court practice a frequent use of the basic principles of environmental law that support the decisions in considering long term social and ecological interests rather than the short-term economic ones. Especially the precautionary principle has already a meaningful position in the court practice of nature protection, but it is aimed to be counterbalanced by the proportionality principle. This contradiction is not settled down yet, similarly to the various other pending issues in connection with the appropriate assessment.

TABLE OF CONTENTS

Appropriate Assessment under Article 6(3) of the Habitats Directive 1
– a Justice and Environment position paper 1
Executive summary 2
TABLE OF ContentS 4
1 Description of the general problem: lack of effectiveness 6
2 Appropriate ASSESSMENTS together with SEA or EIA procedures 7
(merger considerations) 7
(slicing) 9
3 The substantive aspects of appropriate assessment 10
(alternatives) 10
(plans or projects with significant effects) 11
(effects on Natura 2000 sites from outside) 12
(removal from the network or proving ecological weaknesses on the site) 13
4 Authorities 14
5 Procedural elements 15
(screening) 15
(evidence taking) 16
(guarantees of the independence and high professional level of the experts) 17
(suspension of the procedure) 19
6 Decision and legal remedies 19
(conditions in the decisions) 19
(legal remedies) 20
7 Follow up and revision 21
8 Public participation 22

(subjects of public participation) 23
(access to information) 23
(access to participation) 24
(access to justice) 24
(capacity building) 25
9 Principles of environmental law 25
(precautionary principle) 25
(proportionality principle) 27
(prevention principle) 28
(integration principle) 29
Conclusions 30
(no teeth) 30
(system thinking would be of help) 30
List of case studies 33
Literature 34
Justice and Environment studies 35
Other sources 35
Annex 36

1 DESCRIPTION OF THE GENERAL PROBLEM: LACK OF EFFECTIVENESS

The two major nature protection Directives have been in force for several decades, their legal structures are amongst the most carefully developed ones of the EU environmental legislation. Assignments of Natura 2000 sites resulted in a very ambitious network of nature protection, encompassing more than one fifth of the territory of the European Union. Development and supervision of the sites are performed by skilled, specialised officials with acceptable infrastructure and budget, especially if we compare it to the other branches of environmental protection and related fields of administration. Plans and projects, in the meaning of basically all human activity, which might have significant effect on the Natura 2000 sites, have to undergo an assessment procedure which is more stringent from professional side and more obligatory from legal angle than other environmental assessments, such as the environmental impact assessment (EIA) or the strategic environmental assessment (SEA).

Yet, nature is still being eroded overall and the pressures continue. For the whole of the EU, only 16% of the protected habitats and 23% of the protected species are currently at a favourable conservation status according to the latest report of the European Environmental Agency in 2015. In spite of their relatively old age, the implementation and enforcement of the EU nature directives still leaves a lot to be desired. All in all, a limited number of plans and projects are subject to an appropriate assessment. An even smaller number of these assessments eventually lead to the application being refused. [2]

For the lobbyists of the developers, for the majority of politicians and concerned officials and, unfortunately, for the majority of literature sources, even this limited hindrance on the steamroller of economic 'development' is too much. The EU nature directives have recently been facing serious opposition from businesspeople but also, increasingly, from some member states that struggle with the exclusive focus on conservation objectives when dealing with administrative or quasi administrative procedures of harmful project developments. Although in the practice the Habitats Directive in effect poses only a minimal constraint to a wide range of industrial, agricultural or service developments, an increasing number of business people and politicians is of the opinion that the protection rules are too rigid and lead to disproportionate

[2] Shoutens, 2016, p.3

costs for the economy.[3] Ensuing from this starting point, many authorities concentrate on the possible ways of mitigation or compensation the harmful effects, while in effect giving way to the majority of obviously harmful activities that destroy the protected habitats and species.[4]

In the last decade IMPEL carried out several projects focussing on Natura 2000 and Article 6(3) appropriate assessment issues from the angle of the environmental authorities in Europe and arrived at the following conclusions:

- There is a need for improving knowledge about and use of EU guidance
- Further awareness raising measures are necessary
- Sharing existing national experiences (guideline and scientific studies, screening criteria, assessment methodologies, 'Critical Loads' criteria, new kinds of hazards, such as nitrogen balance of soil etc.) would be beneficial and
- Targeted user-friendly sector specific guidance should be developed.[5]

For those, who have been dealing with several similar focal problems in the European environmental law, this set of problems is familiar: the authorities complain about lack of information, and all that they can suggest is some more research and training as basic elements of the programs of the official side of environmental protection. In our views, these points are valid, but not concrete and substantial enough.

2 APPROPRIATE ASSESSMENTS TOGETHER WITH SEA OR EIA PROCEDURES

(merger considerations) The REFIT Analysis points out some important similar and different features of the EIA and SEA procedures on one side and the appropriate assessment on the other. These procedures are considered to be consistent with and

[3] Shoutens, 2016 p.9
[4] We do not quote from those authors who support this approach, because of our strong disagreement with these opinions and also because at the time being their views are in sheer contradiction with the rulings of the European Court of Justice.
[5] IMPEL, 2018, p.1

complementary to each other. The REFIT text establishes that there are close parallels between the administrative steps involved in the assessment procedures under EIA/SEA and the appropriate assessment (AA) required under the Habitats Directive. However, AA is focused specifically on the implications of plans and projects for Natura 2000 sites, whereas EIA and SEA address wider environmental impacts of projects, plans and programmes. These wider prospects might be inseparable from the nature protection effects, and *vice versa*, in case of the more general environmental assessments any nature protection aspects shall be taken into consideration, too. A major difference is that the AA conclusions require any negative impacts be addressed within the examination of the proposed developments, which means that the projects which affect the integrity of Natura 2000 sites may only proceed if they have also satisfied the specific conditions set out in Article 6(4) of the Habitats Directive, whereas the results of assessments under SEA and EIA need only be taken into account in the decision-making but they do not have binding effect.[6]

A comparative advantage of the merger with SEA in close connection with strategic spatial planning is that it might help remove potential conflicts at an early stage of the project development.[7] As J&E lawyers earlier noted 'any such assessments give a negative signal to project promoters who either waste further resources in vain and/or will claim presumption of admissibility of their plans in later proceedings. Therefore, it is recommended that according to the EU Directives and interpreting CJEU case law, the decision of excluding certain developments should be taken at the earliest possible stage.'[8]

The concrete examples examined in earlier Justice and Environment projects show that designers frequently strive to merge their appropriate assessment procedures with SEA or EIA procedures, in order to save time and money on the environmental expertise. A plan for an Estonian fish farm was assessed as part of the SEA of the detailed plan for the whole fish farm complex (Audru Fish Farm). Appropriate assessment was carried out as part of the SEA of the plan to connect the largest island of Estonia with the mainland. A programme for the SEA was developed, together with the detailed plan for carrying out the appropriate assessment. After publication of the SEA report, it was amended according to comments and submitted for review to the Environmental Board (Suur väin connection). Seemingly, the early consideration of the plan in these cases allowed for a genuine consideration of a line of real alternatives, as well as the due consideration of the public opinion. On the other hand, in an emblematic Polish case about enhanced logging activity in a rare, ancient forest, the assessment in the SEA turned out

[6] REFIT, 2016, p. 67
[7] REFIT, 2016, p. 53
[8] J&E, 2016, p. 7

superficial and inappropriate to the requirements of the Habitats Directive. The prognosis indicated mainly the effects of the failure to conduct the 'conservation measures' (in effect, logging) planned by the Forest Management Plan, rather than an analysis of the impact of logging on habitats and species (Bialowieza).

In a mining project the AA procedure was carried out as part of the EIA of the investment proposal (Krastava wolfram mine), also in a river regulation project (Děčín canal). As an extreme example of merger, though, a decades old environmental impact study carried out in 1997 was used instead of an ecological network impact assessment (Drežničko polje retention).

Similarly to other countries, according to the Hungarian legislation the appropriate assessment can be part of either the EIA or SEA or can be conducted as an independent procedure by the nature conservation authority, if the EIA/SEA is not required in relation to the project (Tisza floodplain regulation).

(slicing) Under certain circumstances the leeway given to the developer to design the assessment together with SEA or EIA or separate, might result in an unforeseeable delay of the essential examinations of the concrete effects. In a complex see and island development case the SEA report contained the "screening" for appropriate assessment, which concluded that there are several likely adverse effects to a whole range of habitats and species protected under the EU Habitats and Birds Directives. Despite this, the appropriate assessment was not carried out, arguing that this can and should be done at later stages for some planned activities (underwater power cables, fish and crab farms, and offshore wind parks) (Hiiumaa Island spatial plan).

Taking all of these into consideration, in our views, appropriate assessment together with EIA and SEA has more disadvantages than advantages. The disadvantages accompanied to the separate handling of these examinations might be compensated, for instance, the holistic view of all the water, waste, accompanying activities (such as transport of construction materials or of products), social-economic side effects might be examined in a separate SEA or EIA procedure, while the separate procedure and decision in the matter of appropriate assessment might be informed by the results thereof. Also, the methodological experiences (*inter alia* in connection with revealing and analysing the alternatives on the substantive side or the screening on the procedural side) of the SEA and EIA examinations that have grades more

cases and much more experiences accumulated, still can be used in the appropriate assessment procedures, too, without an actual merger.

3 THE SUBSTANTIVE ASPECTS OF APPROPRIATE ASSESSMENT

While there are several guidelines available both on European and national level, the methodology of the appropriate assessment is not well enough developed yet. In a short survey of several practical cases, mostly from the experiences of the Justice and Environment network, we have learned that there are various techniques by which the developers might try to push through their plans, even if they are incompatible with the protection of the relevant Natura 2000 sites. They might insist that the place of investment is right outside the border of the protected zone or might also claim that there are no more alternatives, which could be more favourable for the protected habitats or species. Finally, if they cannot succeed otherwise, they might prove that the given Natura 2000 site is not worth protection anymore, therefore no assessment of the impacts of the investment is needed.

(alternatives) In a Czech water management project the appropriate assessment contained no alternatives to the proposed activity (Brodarci dam). While – contrary to the other types of environmental impact assessment – examination of the alternatives is in the strictest sense not part of the appropriate assessment, the concept of 'alternative solutions' within the context of article 6(4) of the Habitats Directive should be taken into consideration during the assessment. An interesting proposal from the J&E layers is that 'alternative solutions' should not only refer to alternative modalities for an activity as such (e.g., different routes, number of lanes etc. for roads), but rather a broader set of alternative solutions that achieve the same objective. E.g., whether a rail connection improvement could be considered as an alternative to a new road, wind energy development an alternative to a hydro power plant etc. – and if so, who, how and when should determine the scope of possible alternatives. 'Alternatives' in this context should not be limited to only alternatives proposed by the developer, following his

narrow economic or professional interests, while overlooking social and ecological ones, especially on longer run.[9]

(plans or projects with significant effects) In the cases we have surveyed we have found examples for investors attacking all the elements of the legal provision describing the necessity of an appropriate assessment. Either the plan or project was not found a plan or project, or it was not said significant enough, despite the quite obvious facts that referred to the opposite in both cases.

A Hungarian local government that planned a hotel on the shore of Fertő lake arrived at the conclusion that the physical planning of Fertő Beach cannot be considered neither as a plan nor a project according to the Art 6. par (3) of the Habitats Directive, because that is just a decision of the municipality, not the developer. The Supreme Court of Hungary, with reference to the points 43-44 of judgment of the CJEU in the Waddenzee-case (C-127/02.) and to the points 54-56 of Case C-6/04 (Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland) concluded that the local land use plan for the given territory was to be considered as „plan", which may have considerable influence on later development decisions and on the sites concerned. (Fertő Beach). We note that the indirect connection with further activities that bear significant effects on a Nature 2000 site is clearly strong enough in the case of spatial plans, the same might not be so widely accepted in the case of financial support decisions, although they determine the fate of a plan or project in a quite decisive manner, too.

The local municipality in an Estonian case acted as an investor but based on an opinion issued by the environmental authority, insisted that the drainage of a part of the N-2000 land would not have a significant effect on the wetland area. In this case the civil participants turned also to the higher-level forum of legal remedy, and the Supreme Court obliged the municipality to carry on with the appropriate assessment (Kadakaranna drainage).

Another problem of significance is the occupation of land or other actions seriously disturbing the Natura 2000 sites, but only in a very small portion. This problem was analysed in depth by several German authors, whose work was summarized by Möckel in 2017. The starting concept is that permanent land loss essentially always constitutes a significant adverse impact on protected habitat types, as a prerequisite to the favourable conservation status for a habitat

[9] J&E 2017, p. 8

type is that the area it covers in the site is stable or expanding. Apart from the usual cases of occupation, such as involvement in a built-in area, laying roads or other linear constructions, significant land loss may also occur if the abiotic environmental conditions change, e.g., changes in groundwater levels or an influx of pollutants, in such a way that the plant and animal species that are characteristic for a given type of habitat can no longer survive there in a healthy, complex sense. The same principle applies if anthropogenic land use is intensified, or changes (e.g., increased logging in a forest, more intensive fertilisation or the transformation of permanent grassland) and these result in previous habitat structures (e.g., dead wood, old trees) and species communities being removed or subject to significant change.[10]

In the spirit of harmonisation with other social and economic interests, quite minimal occupation of the protected lands is still possible. The criteria of the so called *de minimis* cases are dependent on habitat type or species and, subsidiary to this, a general threshold of a 1% loss of the total area of the habitat in the Natura 2000 site is still concerned acceptable, supposing that it is not part of a cumulative change in time. As concerns other disturbances, an example of thresholds for bagatelles for nitrogen can be mentioned as of 0.3 kg N per hectare per year. Up to now, these thresholds for bagatelles have no normative legitimacy, which is why reasons in individual cases may justify deviations, such as the exceeding or undercutting of guideline values. Even so, they have great practical importance in Germany due to their recognition by the authorities and being included in several guidelines they issue. According to the latest draft produced by the Ministry for the Environment, the stated cut-off criterion and *de minimis* threshold for nitrogen should be adopted and also applied for sulphur. Such guidelines constitute an administrative regulation that does not establish external obligations (it is binding only for the authority, making its practice coherent and calculable), in contrast to legislation or a legal ordinance. Nevertheless, it is mandatory for the internal licensing procedures of the competent authorities, given that Federal states have not established deviating legal or administrative regulations.[11]

(effects on Natura 2000 sites from outside) A specific substantive legal issue in connection with significance, which would need to be addressed in a coherent manner, is the case when the planned investment would not take place right on the Natura 2000 area, but close enough to exert significant harmful effects on it. A dam on a non-protected

[10] Möckel, 2017, p. 13
[11] Möckel, 2017, p. 14-16

river segment might entail numerous effects on the biodiversity, complexity of the river habitats, and reduction of the sediment and the level of underground waters in the area, as well as by creating barriers on the fish migration corridors, therefore that should be subject of an appropriate assessment (Barilović HPP, Croatia). In a Hungarian case, where a part of a historical city park was to be built in, the participating local NGO claimed that the assessment was rough, it did not contain any scientific data, any detailed surveys, and no professional evaluation of the likely fragmentation of habitats. It was also pointed out by the civil participants that regardless of the fact that the construction site itself is not located on protected area, the impacts of the project on the surrounding NATURA 2000 sites shall be assessed (Nagyerdő Apartments).

In a Bulgarian project the distance between the borders of the protected sites and the site of the proposed project were respectively 2445 m to Rodopi-Zapadni and 850 m to Zapadni Rodopi, and part of the concession area fell in the protected area Zapadni Rodopi. These were found to bear significant effect, even though there are not any activities or construction planned within it. The likely impacts of the development on the protected sites included indirect destruction of natural habitats and habitats of species, objects of protection in the sites, fragmentation of the habitats and habitats of species, disturbance of specimen of animal species, barrier effects for the animal species and possible mortality of specimen of the animal species (Krastava Wolfram mine).

(removal from the network or proving ecological weaknesses on the site) As a preparation for a controversial Croatian project, the authorities have removed the Korana River from the Natura 2000 network. Experts underlined that the river had to be returned to the list of Natura 2000 sites. The main argument was that, based on the loyalty principle and the binding nature of EU Directives, while the procedure for establishing the eco network is on-going, member states should refrain from activities that could undermine conservation objectives of the Birds and Habitats Directives (Barilović HPP).

A similar manoeuvre is to find some biological illness of the protected territory. The Polish State Forests Service says that their decision is motivated by the desire to halt the ongoing outbreak of bark beetle that they claim is ravaging the forest’s spruce population. The outbreak is declared as a threat to the 'survival of the forest'. This ignores the fact that bark beetle outbreaks

occur in the forest every 8-10 years and should be viewed as a natural factor shaping changes in the forest composition, especially in an era of rapid climate change (Bialowieza).

4 AUTHORITIES

Mc Kenna and co-authors have reviewed more than 100 relevant sources of literature and prepared a survey of the factors of effectiveness of the Natura 2000 legal regime. They establish that land use change and changes in agriculture and forestry activities and structure and expansion of built land (artificial areas) are serious threats to biodiversity across all of Europe and within the Natura 2000 network. They suggest that *decentralisation and specialisation* (emphasis from us) are needed to properly react these land use changes, as change processes and socio-economic, historical and political factors differ greatly between regions.[12] In the same line of thoughts, it is impossible to provide one set of guidance for all different species and particular targeted features.[13]

In another research it was found that the transposition of the Habitats Directive did mostly follow general compliance types, but the effectiveness of this process was also determined by the extent and adequacy of adaptations and changes to the institutional framework in the implementation processes following the Directive's adoption. Implementation challenges were different for different countries. They showed some typical patterns, however, in the following aspects:

a) a need to align institutional frameworks for Natura 2000 in areas with several existing types of landscape protections and ensuing spatial and institutional overlaps;

b) clarifying the roles and responsibilities of various authorities involved in implementation;

c) ensuring coordination with the other sectorial policy areas that interact with the Habitats Directive (such as the Nitrate Directive and the Water Framework Directive).

[12] McKenna, 2014, p. 8
[13] IMPEL, 2018, p. 9

It turned out that there could be a need for more flexible and less top-down European legislation, providing a larger room for manoeuvre and for more specific integration with domestic approaches.[14]

Diversity of bodies represented a major factor of progressive solution in the Polish ancient forest case. The State Council for Nature Conservation in Poland issued an official statement protesting against the planned increase in forestry activities in the Bialowieza Forest. This was followed by similar statements by the Committee for Nature Conservation of the Polish Academy of Sciences and the Council of the Bialowieza National Park (Bialowieza).

Our opinion is that nature protection authorities and other bodies responsible for nature protection should have a higher-level independence in the system of state administration and this way could exercise a watchdog function in order to prevent that the bulk of projects having significant effects on the Natura 2000 sites could successfully avoid appropriate assessment. Their procedural role in the AA procedures should rather be a professional client than an authority serving the interests of the economic developments.

5 PROCEDURAL ELEMENTS

While the substantive elements of the appropriate assessment are underpinned in the text of the Directive, there are less hints on the procedural steps to follow. The practice of these nature protection permitting procedures mostly align with the other two closest types of the family of environmental impact assessment.

(screening) There was a screening procedure in a Croatian case in order to decide if an impact assessment was necessary and in the given case it was concluded in a separate screening decision that it should be done (Brodarci dam). In a Slovakian case the national court concluded, based on the CJEU practice, that a preliminary decision whether an appropriate assessment is to be carried out or not, should be based on criteria that is different from usual EIA screening decisions. Namely, the threshold for carrying out the assessment should be

[14] Frederiksen, 2017, p. 2

lower (Kadakaranna drainage). In connection with screening in the AA cases, we have to underline that the widest participation of all the stakeholders should be ensured, and all participants have to have access to justice. If any participants were in the position to join later or challenge the decision only in a later stage, it would entail significant loss of time and resources at all interested parties.

All projects not directly connected with or necessary to the management of the site but having significant effects shall be subject to AA procedure. For instance, in case of rivers and other waters under Natura 2000 protection, works in connection with the regulation of water flow cannot qualify as necessary to the management of the site. Amongst the cases J&E has surveys, not only the dams on major rivers of the given country (such as the Barilović HPP case), but even smaller ones with the primary aim of flood defence (such as the Brodarci dam case) were subject to appropriate assessment, beyond doubt.

(evidence taking) In environmental cases timeliness of the evidence has an inherent importance, since both the relevant facts of the environment and our knowledge are quickly evolving. That is why it was unacceptable in a Croatian case that 15 years old data were used as evidence, based on the environmental impact study carried out in 1997. In addition to that, the structure and content the EIS did not fully respond to the requirements of a Natura 2000 appropriateness assessment, because no specific eco network impact assessment had been undertaken at that time within the environmental impact assessment (Drežničko polje retention).

While the evidence might show into a certain direction, the authorities have to evaluate them in the context of the case. This gives them a certain level of discretion, while their professional and legal conclusions shall be convincingly explained in the decision. In an Estonian case the expert opinion concluded that the planned fish farm (together with other activities nearby) will hamper the fulfilment of the conservation objectives of the Natura 2000 bird site and will have negative impacts on it. Yet, the environmental authority in its decision interpreted that the effects are only indirect, because the fish farm would not be located on the very N-2000 site, so there would be no adverse impacts on the Natura 2000 site (Audru Fish Farm).

In a Hungarian case such lack of consideration of the evidence could mount to a level, where the authority hasn't dealt with them at all. In the permitting procedure of a housing area near a protected forest, the assessment was carried out by the applicant and was approved by the

environmental authority without any consideration of other possibly conflicting evidence and without any measures taken for collecting more evidence in the case (Nagyerdő Apartments).

In the prestigious book on „Comments on the Forest Act', Bartosz Rakoczy underlines the importance of a formal procedure and the legality of the collection and consideration of the evidence: 'Assent should be granted by administrative decision. There is no doubt what we are facing here is an individual case under the scope of public administration, in which rights and obligations of an individual are established. Therefore, control of decisions to grant or deny assent to the draft version of a plan needs to be assured via rules of procedure'[15]. The court, which revised the procedure that led to the acceptance of the forest management plan (FMP) in the emblematic Polish ancient forest case, however, has presented a different opinion. As stated in the judgment of the Supreme Administrative Court (SAC) of 12th March 2014, the assent of a FMP by the Minister of the Environment is not an administrative decision, but rather an 'internal act'. The SAC explained that this assent cannot be another type of public administrative act or decision concerning rights and duties stemming from the Law on Proceedings before Administrative Courts (LPAC), because every act or decision made under its provisions was addressed to an external entity. Since the SAC considered the assent to an FMP an internal act, it was not an administrative procedure (Bielowieza). Needless to say, very few experts and lawyers agreed with the conclusion that a state decision, which determines the fate of a large Natura 2000 site, is just an ‘internal matter’ between the ministry and the state body that exercises the ownership rights above the forest.

(guarantees of the independence and high professional level of the experts) Lack of independence of the experts in the several types of environmental impact assessment procedures is the major hindrance of their effectiveness in social and ecological terms. In the nature protection cases, however, an additional lack of special competence might prevent the authorities from clearly evaluating the consequences of a project on a habitat or on certain species, especially concerning the long run effects. The 2016 J&E study on Natura 2000 underlines: ‘When evaluating whether a plan or project may have significant effects, best scientific knowledge in the field shall be taken into account. This

[15] Quoted by Client Earth, 2017

principle includes that the experts participating in the assessment should be qualified, competent and independent, and the methods and data applied have to be adequate.' [16]

Similarly, the CJEU underlines: "Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those (conservation) objectives must be identified in the light of the *best scientific knowledge* in the field. Those objectives may be clear from Articles 3 and 4 of the Habitats Directive, in particular Article 4(4)." (emphasis from us)[17]

In most countries the Natura 2000 experts come from the project developer's team and are supervised by the experts of the authority, but in some countries in case of collision of the opinions of the participants, there is a possibility of supervision by an independent and high prestige body, such as an Expert Environmental Council (BL). In a Bulgarian case the assessment had to be carried out by a *team* of experts, specialized in protection of Eurasian wolf and brown bear and by experts in protection of birds and habitats. Additional requirement to the AA report was to analyse the impact of the project on the underground waters and how that would affect the species and habitats (Krastava wolfram mine).

The widespread arrangement by which the investor contracts his experts casts doubt on the objectivity of the expert opinion. When the investor is not content with the evaluation prepared by his experts, he is totally free to hire other experts for a 'better' evaluation. According to the information of our Czech colleagues, in a river regulation project appropriate assessment was carried out twice, because the first one determined the impact on Natura 2000 sites as overall significant and suggested to introduce numerous mitigation and compensatory measures. Whereas the second assessment concluded that the impact on the environment is likely to be significant, however in fewer cases and with fewer and less stringent measures to be taken by the operator. The project submitter, therefore, chose the more lenient appropriate assessment to be submitted for the procedure. Actually, the information above were provided by authorised Natura assessors, authors of the first, more stringent assessment. They have many years of experience and claim that "choosing" an assessor is a usual business in the field (and in effect more profitable for those who provide more lenient assessments) (Děčín canal).

In Hungary the relevant legislation lays down that based on the AA documentation prepared by the project promoter the appropriate assessment shall be conducted by the competent nature conservation authority. The wording of the same article points out that the documentation of the AA may be prepared by an expert qualified in accordance with the specific piece of

[16] J&E, 2017, p. 3
[17] Case C-127/02 Waddenvereniging and Vogelbeschermingsvereniging

legislation on nature conservation experts. Namely, the Hungarian legislation provides for, but does not require that the documentation is to be prepared by a qualified expert.[18]

Disagreements within the expert group should be qualified as “reasonable scientific doubt” that bars the decision maker from approving the plan or project. According to the Estonian J&E authors, the same criteria should apply to the instances when authorities that are in charge disagree, or the same authority hesitates between approving or rejecting the assessment (Suur väin connection).

(suspension of the procedure) For the nature, investment cases are seldom urgent. Just the contrary, if a case in a created, subjective urgency is decided hastily, there might be irreversible negative changes and losses in the protected sites. A procedural legal tool for allowing more time for more, if necessary, repeated expert opinions or for collecting other evidence is the suspension of the procedure. As concludes, when waiting for a relevant decision of another authority, but also for clarification of important aspects of the case or even for collecting baseline data it is advisable to suspend the AA procedure. In line with these, in a Bulgarian case the procedure was suspended pending on a decision of the River Basin Directorate for the designation of sanitary protected zones around river catchments, used for drinking water supply of the nearby town (Krastava wolfram mine).

6 DECISION AND LEGAL REMEDIES

(conditions in the decisions) While the environmental authorities are often not in the position to prevent a harmful investment of large social and economic interest, they try to decrease the negative effects with certain conditions. This solution is a kind of compromise made by the environmental professionals, but in our opinion, it is not in harmony with the Directive. As the NGOs explained in their legal remedy in a Croatian case, if negative impact was inevitable, a test of public interest should have been done after the completion of the appropriate assessment that establishes the negative effects of the project. In the concrete

[18] J&E p. 22

case, contrary to this, an admitting decision was made, stating that the activity is acceptable from the viewpoints of the protection of the Natura 2000 network, because the appropriate environmental protection measures are adopted and regular monitoring of the status of the network is conducted, but in the explanation of the decision it was clearly stated that the negative impacts on the site were inevitable (Brodarci dam case, while a similar decision was brought in the Drežničko polje retention case, too, in Croatia).

Justice and Environment lawyers would like to see much more stringent decisions in the appropriate assessment cases. In its suggestions for the *updated guidance document* J&E suggested that the document should clarify that 'site integrity' refers not only to the habitats and species protected by the Directive, but also to factors beyond the designated features themselves. Specifically, as noted in Art 1 (e) and (i) of the Habitats Directive and confirmed by the CJEU in Sweetman (Case C-258/11), in order to avoid adverse effects on site integrity, in addition to protected features, the 'typical species' associated with those features must also be maintained at, or restored to, favourable conservation status. In addition, the guidance should clarify that, following Sweetman, even a small loss of part of a site can already constitute an adverse effect on site integrity.

The practice is really far from the suggestions of J&E. Typically, the environmental authority continues its procedure from the Article 6(3) evaluation to the exceptional measures of Article 6(4) as a regular practice. The Hungarian environmental authority established significant effects on the Natura 2000 site, but also established that flood prevention is of public interest, therefore imperative reasons of over-riding public interests (IROPI) exist, which verifies the project (Tisza floodplain regulation). As a shortcut – we think not an allowable one – in a Slovakian case the environmental authority decided to conduct no EIA neither an AA procedure, because of a similar consideration, namely that the small hydro power plant would serve over-riding public interests (Nitra HPP). Eventually, such solutions in the practice exclude the compromises in favour of the nature. One can describe it as a three-stage procedure, where our environmental authorities have reached the worst phase from the angle of long-term sustainability: first nature protection, second, nature protection with some compromises for the economy, third, only the economy.

(legal remedies) Similarly to many other countries, in the Estonian legal practice, assessments (EIA, SEA or AA) of a plan or project can normally be only challenged together with the final decision (Suur väin connection). This solution, in our view might cause

unnecessary expenses in the cases when the final results of environmental assessments turn out to exclude the realisation of the project. On the other hand, such a legal arrangement might be an overt acknowledgement of the fact that these assessments result in prevention of the harmful activity extremely rarely.

Justice and Environment network of public interest environmental lawyers follows the legal practice and the priority cases of appropriate assessment in the last decade. They found that the national administrative and court remedies could not contribute meaningfully to the weak protection the environmental authorities can offer to the Natura 2000 sites. Contrary to these national level legal remedies, we might establish that almost no cases were unsuccessful at the CJEU from the angle of nature protection. In a 2014 collection of the court cases, the court usually found that the national authorities did mistakes when had granted permits to certain plans or projects that might negatively influence the integrity of a Natura 2000 site. The cases analysed by a recent systematic overview were: C-127/02, C-304/05, C-388/05, C-404/09, C-98/03, C-6/04, C-418/04, C-538/09, C-256/98, C-226/08, C-182/10, C-2/10, C-241/08, Case C-43/10, C-209/02, C-239/04, C-258/11, C-521/12, C-392/96, C-209/04, C-244/05, C-43/10.[19]

7 FOLLOW UP AND REVISION

Even if in a case the environmental authorities could not find any reasons to halt the investment for the protection of the Natura 2000 sites, the validity of such decisions should be kept controlled during the lifetime of the permitted activities. As the European Court of Justice explained in the Waddenzee case: “Nevertheless, it cannot be precluded that such a plan or project subsequently proves likely to give rise to such deterioration or disturbance, even where the competent national authorities cannot be held responsible for any error. Under those conditions, application of Article 6(2) makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, as stated in the first recital in the preamble to that directive”.[20]

[19] Sundseth, 2014, p. 73-78
[20] Case C-127/02, Waddenvereniging and Vogelsbeschermingvereniging

J&E lawyers have pointed out that the Waddenzee judgment makes it clear, furthermore, that the Article 6(3) and (4) regime applies not only to 'new' activities, but also to on-going activities, where these could have adverse effects on site integrity. Clear reference should be made to the fact that measures which are or will be implemented after a damage has already occurred as well as monitoring for potential impacts, are not mitigation measures and thus cannot be taken into account as part of the screening or appropriate assessment procedures under Article 6(3). Such measures are compensatory measures and may only be considered as part of an Article 6(4) process, in case the other preconditions for derogation exist (similarly established in cases C-521/1221, C-387/15 and C-388/1522).[21]

8 PUBLIC PARTICIPATION

McKenna in his wide review of the literature finds public participation as a key to improve the effectiveness of nature protection management practices. The role of the public in general, according to the reviewed publications, is often unacknowledged by decision makers and implementing authorities. However, the crucial role of landowners and users, local populations and volunteers are highlighted as being key for reaching high ecological effectiveness in Natura 2000 sites. Volunteer-driven citizen science also has the potential to play an increasingly important role in biodiversity conservation and monitoring in the future as the vast data volume that can be collected by a large number of volunteers far exceeds professional capacity for monitoring. The bottleneck of this activity is the special training that is necessary for one to recognise the most important facts of the protected sites, such as detailed knowledge of certain plant or insect variations, the methodology to count them, as well as being familiar with the features of the different habitats in their different status. Encouraging public participation and the indispensable capacity building efforts are beneficial to raising public awareness and the level of understanding of issues related to biodiversity. Monitoring systems that incorporate volunteer data and encourage the sharing of knowledge should continue to be developed.[22]

Public participation is vital in the Natura 2000 cases, because the quality of the EIA and AA reports in practice is almost in every case dependant on the interests of the investor who contracts the EIA and AA team of experts so that they are very careful not to conclude anything

[21] J&E, 2017, p. 7
[22] McKenna, 2014, p. 25

decisive against the project, whose initiator has commissioned them. Often the only chance for a thorough and quality assessment procedure to be carried out is the participation of strong environmental NGOs and active local citizens who oppose the project and bring in arguments and facts for its review and potential rejection.[23]

In a Croatian case a national NGO could participate as public concerned in the screening phase, but, paradoxically, had no access to the text of the screening decision, which was not published either. For the main phase of the procedure a call for public participation in the appropriate assessment process was published. A simple procedural mistake prevented effective public participation here, namely that the appropriate assessment procedure has not been determined in a normative manner yet, therefore there was no information on the deadlines for filing complaints against the Decision (Brodarci dam).

(subjects of public participation) Practice of the environmental authorities in the appropriate assessment cases, similarly to any other environmental assessment procedures should accommodate to the main types of the participants. They range from large international NGO networks, such as Greenpeace and World Wildlife Fund, through national umbrella organisations, called mainstream NGOs, such as the national birdwatch and nature protection alliances, to the local initiatives which might take the form of an NGO, such as the "Citizen Initiative for protection of Velingrad municipality as ecologically clean region without mining" in a concrete environmental conflict in Bulgaria (Krastava wolfram mine) and also just loose local networks, Facebook and other circles that can organise themselves quite effectively.

(access to information) The basis of public participation is the proper information on the onset of the appropriate association procedures – otherwise the concerned communities and organisations will be unable to participate. Furthermore, a line of general and case specific information shall be at hand, in order to provide for successful participation. In a Croatian case neither the assessment study, nor the decision of the authority was published, so the public could not effectively participate in the commenting or raising complaints. Even later on, when access to the study was demanded based on the Aarhus convention provisions, it was not made available (Drežničko polje retention). An important message of this case was, however,

[23] Conclusion of the Bulgarian case study in J&E, 2016, p. 11

that the members and associations of the public could refer to the Aarhus Convention (or their European or national level counterparts) in the nature protection administrative cases, apart from the special, sectoral laws and the general administrative and constitutional (access to public information) laws.

(access to participation) Generally in the environmental assessment procedures the most typical way of participation is to express objections, prefer certain alternatives or suggest some modifications on the planned activities. In the field of nature protection there are more creative forms of public participation, too. The Estonian Ornithological Society (EOS) for instance, reached an agreement with the developer on different measures that were designed to reduce the cumulative impacts in a way that would prevent adverse effects on the integrity of the site. A private person, however, living near the place initiated a court case, because was not content with the agreement (Audru Fish Farm). This is a bitter experience of the authority, because usually the authorities expect the public side in the case to harmonize their procedural measures and act univocally. In the practice, however, this is seldom the case, as we have seen above, the composition of the participating public is really heterogeneous.

(access to justice) Usually in the environmental cases the smallest portion of public participation actions is represented by the third pillar, access to justice. No wonder, court procedures are mostly too expensive, time consuming and very complicated to foresee if it makes sense at all. In the Natura 2000 cases, however, there is a unique tool of access to justice, which is relatively frequently used. More specifically, the members and associations of the public try to initiate infringement procedures with a mostly informal procedure (which is not binding for the Commission, but if the public raises valid cases, they might have a chance there). The fit for purposes evaluation performed by the Commission has revealed that there have been many complaints addressed to the Commission in relation to alleged bad implementation of some provisions of the Nature Directives, notably in relation to the protection and procedural safeguards applying to Natura 2000 sites under Article 6(2) and 6(3) of the Habitats Directive and to hunting activities under Article 7 of the Birds Directive.[24]

[24] REFIT, 2016, p. 23

(capacity building) The three pillars of public participation form a coherent system, but it will not work in the practice if there is no one who is willing and able to use them. Capacity building is needed both generally (such as awareness raising in the nature protection matters and information about the available legal tools) and in specific cases (such as support of those communities that try to protect integrity of Natura 2000 sites). In the case of nature protection, it is sometimes extremely difficult to find one's way amongst the legal titles of protection of nature. In a Bulgarian Natura 2000 AA-case a nature protection designation order also was issued by the Minister of Environment and Water with prohibitions and restrictions on activities contradicting the conservation objectives of the site – these rules of protection are in principle independent from the AA procedure (Krastava Wolfram mine).

9 PRINCIPLES OF ENVIRONMENTAL LAW

Environmental cases are more and more frequently decided by the courts, especially by CJEU with the help of the principles of environmental law, which reflect the broader and long-term social interests, rather than the detailed environmental laws, which are mostly results of compromises with the short-term interests of the most influential economic groups.

(precautionary principle) The precautionary principle roots in risk societies, and the most frequently used definition of it is that scientific uncertainty shall not be used as an argument for remaining idle when environmental damages might happen (the active form of the principle). Furthermore, if there is a plan or investment where one cannot exclude beyond reasonable doubt that it will seriously endanger the healthy environment and the interests of future generations, such projects shall be rejected or ongoing projects shall be halted (passive form). On the other hand, as a protection for the developers, practical implementation of the precautionary principle demands recurrent post-project analyses and continuous clarification of the possible environmental effects (reconciliation element of the principle). The CJEU has established in a Natura 2000 case that "in the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by

reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned".[25]

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

While the precautionary principle is applied together with the proportionality principle (see in the following paragraphs), Justice and Environment lawyers call the attention of the right balance between the former worldwide accepted mandatory principle that is included in the TFEU and in many environmental laws of the EU and the latter, a practical approach that strives to make compromises for the economic side. Furthermore, the Waddenzee case (C- 127/02) and a line of later relevant judgments, such as the Kaliakra Case (C-141/14), the Waldschlösschenbrücke Dresden Case (C-399/14) and the Moorburg Coal Power Plant Case (C-142/16) clarified that the precautionary principle should be applied *unconditionally and to their full extent* by the competent authorities.[26]

Shoukens points out that the incorporation of *on-site biodiversity offsets* in project design has grown increasingly popular in some member states, such as the Netherlands and Belgium. Under this approach, the negative effects of developments are outbalanced by restoration programs that are functionally linked to the given infrastructure projects. Although the positive effects of onsite restoration measures lead to more leeway for harmful project development, the EU Court of Justice has recently dismissed this approach for going against the preventative underpinnings of the EU Habitats Directive. Also, *the expected beneficial outcomes of the restoration efforts are uncertain* and thus cannot be relied upon in an ecological assessment under Article 6(3) of the Habitats Directive. Although biodiversity offsets can still be relied upon whenever application is being made of the derogation clause under Article 6(4) of the Habitats Directive, they cannot be used as mitigation under the generic decision-making process for plans and programs liable to adversely affect Natura 2000 sites.[27]

[25] Case C-127/02, Waddenvereniging and Vogelbeschermingsvereniging
[26] J&E 2017, p. 3
[27] Shoukens, 2016, p. 20

The realization of a favourable conservation status according to Article 6(2) of the Directive is a result-oriented obligation in legal terms that must be realised within a reasonable period. However, according to Ziljmans, the lack of a clear deadline is a weak point in the Habitats Directive. In the Netherlands, there is too often a tendency to 'forget' or postpone this obligation, with the argument that in a time of economic crisis other problems must first be solved. This makes it difficult to see whether the proposed measures are sufficient and can be taken in good time or even whether it will be feasible to realise the objectives. In other terms, this is against the precautionary principle, too.[28]

(proportionality principle) Möckel brings this principle into the context of the Habitats Directive: in line with the European Principle of Proportionality based on Article 5(4) of the Treaty on European Union (TEU), the Habitats Directive does not intend to prohibit all human activities that will have an adverse effect. This is why, on the one hand in Article 6(3), but also in Article 6(2) HD, only significant adverse effects or disturbances in a Natura 2000 site are relevant. Furthermore, Article 6(4) still allows Member States to authorise a project or plan as a derogation in cases where significant effects cannot be excluded with certainty, if it is supported by imperative reasons of overriding public interest, including social and economic interests, no alternative solution is available, and the Member State is taking all necessary compensatory measures to ensure that the overall coherence of the Natura 2000 network is protected. Member States are not permitted to tone down the Directive, though. Pursuant to Article 193 of the Treaty on the Functioning of the European Union (TFEU), they are only permitted to increase the level of protection.[29]

In the Briels case, the Dutch Council of State decided to question the CJEU about the leverage left for permit issuing instances to use restoration actions in the context of project developments. This case revolved around the planning permission to the extension of the A2 motorway and the use of habitat creation measures as a counterbalance for the damage that would be inflicted upon the nitrogen-sensitive Molinia meadows, listed as protected habitat in Annex I to the Habitats Directive. In particular, the CJEU was asked to indicate to what extent measures with a view to ensuring the creation of new meadows elsewhere in the same Natura 2000 site, to replace or augment the habitats affected by the increase of nitrogen deposition, could qualify as mitigation and thus be taken into account in the assessment for the purported project. The CJEU decided to dismiss the more liberal approach to mitigation in its ruling of 15

[28] Zijlmans, 2014, p. 14
[29] Möckel, 2017, p.

May 2014. It grounded its reasoning on three premises. First, although accepting that measures, which form part of a plan or project and which effectively minimize its impacts may be taken into account under Article 6(3), the CJEU refused to qualify the creation of new meadows as mitigation measures because they do not lead to an adequate reduction of the said pollution. Instead, it reasoned that such measures basically seek to counterbalance the unavoidable negative impacts that go along with the project and therefore should be tagged as compensatory measures within the meaning of Article 6(4). Second, with reference to the precautionary principle, the CJEU noted that any positive effect of a future creation of a new habitat that is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, even if the new area will be bigger and of higher quality, is highly difficult to forecast with a degree of certainty and, in any event, will be visible only several years into the future. Third, the CJEU underlined that the restoration and enhancement measures, if inextricably linked to the road development project, could still be taken into account as compensation in the context of the derogation clause contained in Article 6(4).[30]

(prevention principle) The prevention principle is different from the precautionary principle, because in its case we can know for sure that environmental pollution and environmental damages will occur, unless we take proper measures to avoid them; prevention principle is closely related to the principle of handling pollutions at their sources and the principle of non-retrogression, which latter principle was developed in an early decision of the Hungarian Constitutional Court.[31] In the ancient forest case of Poland, Client Earth lawyers referred to the inherent urgency of the similar cases: “Such consequences are likely to constitute serious and irreparable damage for the interests of the European Union and for its common heritage. Indeed, once it has occurred, the damage caused by the felling and removal of the old trees and deadwood, including standing trees that are dying, would be impossible to rectify subsequently, should the Commission’s allegations concerning Poland’s failure to fulfil obligations be established, due to the obvious fact that, as the Commission rightly submits, it would be impossible to restore the areas affected by such operations to their former state. In addition, the seriousness of the damage alleged by the Commission is demonstrated by the fact that those operations, in view also of their scale and intensity, risk causing, if they are pursued, the irreversible transformation of a significant area of a natural forest into a harvested

[30] Shoukens, 2016, p.6
[31] Decision No. 28/1994. (V. 20.) AB

forest, risking the loss of the habitats of rare species, including a number of birds and endangered beetles."[32]

(integration principle) This principle ensues from the requirement of sustainable development; its essence is that environmental protection views shall be consequentially applied in all levels of State decision-making procedures, starting from the social-economic planning to legislation and administrative case practice. System approach is also inherent in the integration principle, as it is seen in its sub-principle, accumulation principle that demands that the decision-makers consider the joint effects of all relevant human activities, together with the processes in nature, also not only environmental effects shall be taken into consideration but public health and socio-economic effects, too. The integration principle entitles officials and judges of the regional and national levels to take environmental issues into consideration in decision-making procedures other than environmental ones (such as commerce, agriculture, transport, energy, public procurement, regional policies).

In harmony with the integration principle the appropriate assessment in a Bulgarian case had to be carried out by a team of experts, specialized in protection of Eurasian wolf and brown bear and by experts in protection of birds and habitats. Additional requirement to the AA report was to analyse the impact of the project on the underground waters and how that would affect the species and habitats (Krastava wolfram mine). As we see, an expert examination with a narrow specialisation on nature protection issues would not reveal all the significant facts alone.

According to Lai, nature protection is still very much an insulated field of administrative law. This calls into question the extent to which nature and biodiversity are integrated within territorial plans, which usually fail to appreciate biodiversity, overlook that it is irreplaceable and that sustaining the natural processes needed to support human life and development. Such generally low awareness is also at the root of perceived conflicts between biodiversity conservation and economic development.[33]

[32] Bialowieska case, C-441/17R
[33] Lai, 2020, p. 13

CONCLUSIONS

(no teeth) The 2016 REFIT Analysis deals with the results of Article 6 procedures primarily as an efficiency issue: 'Only a qualitative assessment of opportunity costs was possible, showing that the Directives do not create barriers to investments that are sustainable and not damaging to the conservation values of the sites. The vast majority of proposed projects and plans falling within the Article 6 permitting procedures are authorised. Delays in site and species derogation permitting procedures result from a combination of factors including inadequate knowledge, difficulties in access to data and complex procedures put in place at national level.'[34] While the environmental authorities strive to align with the mainstream economic and political requirements, effectiveness of nature protection lags behind. Naturally, a small and low prestige segment of the state administration cannot have the ambition to prevent the whole society from its self-destructing and irresponsible practices, however, we are convinced that the social recognition of the importance of the integrity of the natural environment will change, and the environmental legal and administrative tools will have to be *en garde* to serve these new demands, too.

(system thinking would be of help) The findings of the public interest environmental lawyers of J&E network in the last decade all point into one direction: the conservative, linear management techniques of the nature protection land lead only to a slow but sure loss in their spatial extent and an irreversible erosion of their quality. The environmental protection profession needs new approaches and behind these new approaches a new vision of the set of problems ahead of them. System scientists had called our attention first that the population, consumption and pollution trends in the worst (but most organically ensuing from the logic of industrial society) scenarios would lead to the collapse of this civilisation. Jay Forester's PhD students at the Massachusetts Institution of Technology, Donella and Dennis Meadows, Jörgen Randers and William Behrens authored the first famous warning in 1972[35]. Also, a group of system scientists lead by Dennis Meadows, called Balaton

[34] REFIT, page 7-8
[35] The Limits to Growth, Report of Club of Rome, 1972, see also Meadows, Donella; Randers, Jorgen; Meadows, Dennis (March 2005). Limits To Growth: The 30-Year Update

Group and some members, such as Johan Rockström warned that such systematic social, economic and ecological failures could only coped with by system level responses[36].

System approach offers solutions to the problems revealed in connection with the effectiveness of Article 6 of the Habitats Directive, including the legal practice of the appropriate assessment. First, a better coherence should be established between the substantive and procedural elements of the appropriate assessment. As we have seen, legal practice is different amongst and within the Member States, concerning significance, effects from outside N-2000 sites, mitigation and compensation, alternative solutions or removal of certain sites from the network, as well as screening, evidence taking, guarantees of genuine expert opinions, public participation, follow up and enforcement of the decisions. Environmental legal principles offer themselves as a backbone to such a more coherent concept of nature protection. A more coherent system of appropriate assessment laws and practices might in turn lead to a better protection against economic and political pressures in the individual cases for overlooking the viewpoints of long range, steady protection of nature.

Second, Member States should increase coherence between biodiversity policy and other policy areas beyond the Nature Directives, too, such as in the fields of agriculture and economic and rural development, that all have the potential to jeopardize the goals and effectiveness of the Natura 2000 network. Competition between economic and conservation interests is cited in the literature as one cause of continuous loss in certain habitats (e.g., marine, lowland, and freshwater) and species (e.g., those living in agricultural and urban area), which are especially underrepresented by the network. EU policies still need to improve their pursuit of a more holistic and integrated approach to recognize and address potential conflicts between economic and conservation interests and foster synergies. Concrete suggestions include strengthening environmental impact assessment requirements for EU policies and increasing the focus of responsible authorities on potential synergies, such as green infrastructure, ecosystem-based disaster protection, and climate mitigation and adaptation. Evidence suggests that there is also a great potential for increasing the ecological and cost effectiveness of Natura 2000 via improved policy coherence.[37] Precious natural lands are protected by a line of branches of our legal systems. While national parks, biosphere reserves, core zones and other nature protection zones are created by nature protection laws and procedures, landscape protection, ecological corridors and ecological networks evolve from territorial development and spatial planning laws, mostly belonging to the realm of construction law. Furthermore, sensitive

[36] Rockström, J., W. Steffen, K. Noone, Å. Persson, et.al. 2009. Planetary boundaries: exploring the safe operating space for humanity
[37] McKenna, 2014, p. 24

natural territories might be also protected by agricultural law, while world heritage scenes, including precious nature, are determined by international cultural heritage law[38] and its national counterparts.[39]

Our conviction is that harnessing system approach both within Natura 2000 laws and outside of them, in connection with the neighbouring fields of law would open more resources and ensure more resilience for the protection of our last remaining valuable natural sites.

[38] 1972 UNESCO Convention on World Heritage
[39] Fulop, 2016, p. 343-4

LIST OF CASE STUDIES

Audru Fish Farm, EE (J&E, 2015)

Barilovic HPP, HR (J&E, 2015)

Bialowieza Forest (CE, 2016)

Brodarci dam, HR (J&E, 2015)

Děčín canal regulation, CZ (J&E, 2016)

Dreznicko polje retention, HR (J&E, 2015)

Fertő Beach development, HU (J&E, 2015)

Hiiumaa Island spatial plan, EE (J&E, 2016)

Kadakaranna drainage, EE (J&E, 2015)

Krastava wolfram mine, BL (J&E, 2016)

Nagyerdő Apartments, HU (J&E, 2015)

Nitra HPP, SK (J&E, 2016)

Suur väin connection, EE (J&E, 2016)

Tichý Potok water reservoir, SK (J&E, 2016)

Tisza floodplain regulation, HU (J&E, 2016)

LITERATURE

Frederiksen, Pia; van der Sluis, Theo; Vadineanu, Angheluta; S. Terkenli, Theano: 'Misfits and compliance patterns in the transposition and implementation of the Habitats Directive–four cases', March 2017, Land Use Policy 62:337-350

Fulop, Sandor: Wilderness protection in Hungary; in Kees Bastmeijer (ed.): Wilderness Protection in Europe – The Role of International, European and National Law, Cambridge University Press, 2016

Kati et al.: The Challenge of Implementing the European Network of Protected Areas Natura 2000. in Conservation Biology, edited by: Mark A. Burgman, 2014 http://onlinelibrary.wiley.com/journal/10.1111/(ISSN)1523-1739

Lai, Sabrina: Hindrances to Effective Implementation of the Habitats Directive in Italy: Regional Differences in Designating Special Areas of Conservation; Sustainability 2020, 12, 2335; doi: 10.3390/su12062335

McKenna D., Naumann S., McFarland K., Graf A., and D. Evans, 2014. Literature Review, the ecological effectiveness of the Natura 2000 Network. ETC/BD report to the EEA, 30 pp.

Möckel, Stephan (2017): The assessment of significant effects on the integrity of "Natura 2000" sites under Article 6(2) and 6(3) of the Habitats Directive. In: Möckel S (Ed.) Natura 2000 appropriate assessment and derogation procedure – legal requirements in the light of European and German case-law. Nature Conservation 23: 57-85. https://doi.org/10.3897/natureconservation

Kerstin Sundseth and Petr Roth: Article 6 of the Habitats Directive – Rulings of the European Court of Justice, 2014

Simons, G. „Habitats Directive and Appropriate Assessment", (2010) 17/1 Irish Planning and Environmental Law Journal 4.

Schoukens, H., and A. Cliquet. 2016. Biodiversity offsetting and restoration under the European Union Habitats Directive: balancing between no net loss and deathbed conservation? Ecology and Society 21(4):10. http://dx.doi.org/10.5751/ES-08456-210410

Zijlmans, Jacqueline M.I.J.; Woldendorp, Hans E.: Compensation and Mitigation: Tinkering with Natura 2000 Protection Law, Utrecht Law Review, Volume 10, Issue 2 (May) 2014

JUSTICE AND ENVIRONMENT STUDIES

Application of Art 6(3) of the EU Habitats' Directive in Selected Member States – Case Studies from Croatia, Estonia and Hungary', Justice and Environment 2015

'Application of Art 6(3) of the Habitats' Directive in Selected Member States – Summary of Case Studies' Justice and Environment, 2015b

'Practical Problems in Implementation of the Appropriate Assessment of Natura 2000 – An analysis on Natura 2000 appropriate assessment in Bulgaria, Estonia, the Czech Republic, Hungary and Slovakia', Justice and Environment 2016

'NGO position on updating the guidance documents on Art 6(3) and 6(4) of the Habitats' Directive', Justice and Environment 2017

OTHER SOURCES

Commission Staff Working Document: 'Fitness Check of the EU Nature Legislation (Birds and Habitats Directives)', Brussels, 16.12.2016, SWD (2016) 472 final

An update on IMPEL's work on nature protection in permitting and inspection of industrial installations, June 27, 2018, https://www.impel.eu/an-update-on-impels-work-on-nature-protection-in-permitting-and-inspection-of-industrial-installations/

ANNEX

The text of Article 6 of the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

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

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

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

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

Contact information:

Association Justice and Environment, z.s.
European Network of Environmental Law Organizations
33 Udolni, 602 00 Brno, Czech Republic
Željka Leljak Gracin
Leader Team Assessments
e-mail: info@justiceandenvironment.org
web: www.justiceandenvironment.org

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