



COMPATIBILITY ASSESSMENT – PROBLEMATIC AREAS AND THINGS LEFT UNSAID

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Abstract: *The purpose of this article is to provide an overview of the essential requirements specific to the Compatibility Assessment which is drawn up under the provisions of Directive 92/43/EEC and Directive 79/409/EEC and pursuant to Art. 31, para. 10 of the Biodiversity Act as well as in conjunction with Art. 20 para. 1 of the Decree on the conditions and procedures for the assessment of the compatibility of plans, programs, projects and investment proposals with the object and purpose of conservation of protected areas. Some critical moments in the Compatibility Assessment have been analyzed herewith, seen not only from their legislative, but above all from their content and methodical side. Some of the weak points in the process of development of Compatibility Assessment based on the specific conditions of Bulgaria have been pointed out and some suggestions have been made on the improvement of the climate for the preparation of an objective Compatibility Assessment.*

Key words: *Directive 92/43/EEC, Compatibility Assessment, Biodiversity Act*

After some initial difficulties related to the conservation regime and the requirements of Art. 6 of the Habitats Directive, and with the exception of some details, Art. 6 has been applied successfully in practice. The legal basis of the conservation regime of Art. 6 para. 3 of the Habitats Directive generally consists of three stages of evaluation, each one of which tries to answer one basic question: “Can a project, a plan, or an investment proposal, individually or together with some other investment intentions, which are completed, in the process of realization or already in exploitation, lead to a significant impact on the components and the conservation objectives of the protected area of Natura 2000 network?” [1]. That is why a preliminary assessment is required for all projects, programmes and investment proposals. It should decide whether there are legal as well as expert prerequisites which make the Compatibility Assessment (CA) mandatory or the project at hand could be accepted without it. During the preliminary assessment it should be clarified whether the realization

of the proposed plan or a project could alone or in combination with some other plans and projects harm an area of importance for the Community or a European protected area under the Birds Directive.

In order to answer this question there are three basic principles that need to be addressed:

1. Does this measure in its essence fulfill the legal definition of a plan, a project or an investment proposal?
2. Does the plan/ project relate to an area under Natura 2000, which in its own turn requires further assessment?
3. Can considerable influences be definitely ruled out in that particular case?

Contrary to the assessment of the need for Compatibility Assessment, Compatibility Assessment itself presents the essence of the whole process of assessment. At the time of its making there is evidence that is being gathered whether a project or a plan would lead to considerable impacts on some substantial components of the protected area under Natura 2000 which are at the same time essential for the achievement of the conservation goals. If the answer to this question is negative the project can be given a green light, if the answer, however, is positive, the project is inadmissible or may be authorized in exceptional cases only, when the examination of the conditions permitting exceptions shows that the legal requirements for such exceptions are met.

Practical experience shows the importance of registering and documenting the results from the primary assessment of the need for CA. This is especially valid in the cases when a decision has been reached that the execution of a plan or a project will not lead to considerable impacts and that is why a procedure for CA is not necessary to be initiated. The report on the assessment of the need for CA records the information used for the decision to be reached and serves as a proof for the conclusions and decisions which were made. It is also important for the assessment of future projects as at that time the cumulative effect of the realized project should be reported.

The preliminary assessment could lead to various results. In some cases the need for CA is so obvious that the preliminary assessment of the need for CA could be considered unnecessary. The preliminary assessment can be brief in the cases when there is no area under Natura 2000 close to the territory subject of the intended project as well as when impacts such as a rupture of the connection between remote areas or the flow of pollutants, transported at great distances, into the rivers are considered impossible. Here the preliminary assessment is more or less restricted to documenting the actual state, e.g. documenting the protected areas included in the assessment. In other cases the situation is a bit clearer which brings up the question of the degree of detail and scope of the preliminary assessment of the need for CA and of the borderline between the preliminary assessment of the need for CA and the CA itself.

The borderline between the preliminary assessment of the need for compatibility assessment and the compatibility assessment itself is not clearly defined in the Habitats Directive or in the Law on biological diversity and there is still complete darkness on the matter. With the objective of obtaining higher efficiency and applicability a distinction should be made between the preliminary assessment and the compatibility assessment within the frame of a graded approach [2].

1. A preliminary assessment is built around the strict principle of caution. It assesses whether in principle there could occur some negative impacts on any area under Natura 2000. Later on, in the process of CA, it is studied whether the negative impact could be rated as considerable for the components of the area which are crucial for the object and goals of conservation.

2. A preliminary assessment should be able to exclude totally the considerable negative impact. What matters here is the “*scale of opportunity*”. If the possibility of a considerable negative impact cannot be ruled out, then there is a need for CA. On the other hand, there is “*the scale of probability*” which is included in CA: how probable it is for a considerable negative impact on the area to occur without the actual need for greater accuracy of forecast.

3. In general, the preliminary assessment is *approximate, based on the information available* on the distribution of species and habitats, as well as on the generally available information on default values (out of experience) for the impact and intensity of violations to an area (e.g. audible or visual interruptions). CA in its own turn is based on *detailed research* which includes mapping of habitats and species, and allows for accurate conclusions on the special chains of influences and harm.

4. A preliminary assessment generally includes damage control measures (mitigating or preventive measures). A CA is required when considerable negative impact could be prevented only through damage control. The CA specifies on the one hand, the negative impact, while on the other, the impact of the damage control measures. CA fully integrates damage control measures. Their planned execution and projected efficiency are presented separately.

This shows that the preliminary assessment on the need for a compatibility assessment is important mostly in cases of plans and projects outside or within the borders of protected areas as well as for small projects lacking in direct impact on protected habitats and species [3].

Compared to these, preliminary assessments (based on the definition presented above) of plans and projects within protected areas are not a suitable tool as the possibilities which occur in such cases and the potential for negative impact are mostly the subject of CA.

For a good CA it is necessary to have both qualitative and quantitative information on all components of the protected area which are essential to the object and purpose of preservation as well as such which may be affected by the

plan or project. In addition to the collection of data from standardized forms or existing management plans, as a rule, mappings to identify the specific distribution of habitat types and species in the scope of the project or plan are also needed. The corresponding range and intensity of impact factors are of importance for the delimitation of the area and the scope of the study [4].

It is not always easy to decide on the characteristic species from the protected habitats which require information within a CA. There is a variety of species typical for a habitat type. The choice of important data to be collected so that a decision could be reached should focus on those species/ groups of species, which on one hand are susceptible to the impact factors induced by the project, and which, on the other hand, are typical for the habitats of the studied region, and thus potentially occur in them. Above all, species will determine the scope of the study, due to their sensitivity to factors with long-range effects such as noise, light or fragmentation.

It is not necessary to study the characteristic species (groups of species), which up to the present moment have not exhibited any effects as a result of certain impact factors, or which in the particular case might be excluded as a possible impact target [5]. This applies to all species that do not show any other specific vulnerability but the one characteristic of the habitat type; they cannot provide additional important decision-making information.

In practice, it is still open to debates whether it is still necessary in the work with specific species to use the biocenotic, therefore the indirect observation of groups of species (ecological guilds), or to concentrate on single important species which as an important component of the area can indirectly determine the result of the compatibility assessment of a project.

The significance of impacts is always determined separately for each specific case. The most frequent criteria to be used are the scope, intensity and duration of impact [6].

Even if the significance of the impact of a particular project does not lead firmly to its inadmissibility, it is frequently the reason for the project to be reworked, special damage control measures to be implemented or for assessment of exceptions to be conducted.

Although the significance of impacts within CA is determined independently and according to specific scales laid down in Art. 6 para. 3 of the Habitats Directive, the term "significance" not only creates certain linguistic but also content-methodological problems. Determining the threshold of significance poses a major problem in its use [7].

There is no quantification of the degree of impact. Concepts such as "low impact", "medium impact", "high impact", "no effect" are commonly used in the text of any report but are not evaluated in terms of quantitative indicators. When it is a matter of impact assessment of a habitat which is under protection in a protected area, the problem is solved to a great degree by its presence or absence

in the area included in the investment proposal. When a habitat is affected by an investment intention the degree of impact is assessed quantitatively based on the ratio between the percentage of damaged territory and the total representation of the habitat in the specific area or in the country as a whole.

Whether any use of space and the associated destruction of habitats subject to conservation in the protected area must be assessed as a significant impact or there could be exceptions in the cases when it is a matter of a very small area losses in relatively large habitats as well as in habitats in a similar state has been and continues to be a controversial issue among scholars.

As there are no envisioned measures to assure coherence for the impacts considered insignificant, such habitat losses could lead to a constant reduction and slow-acting destruction of the area of Natura 2000 network.

That is why habitat losses in the big sites of Natura 2000 should be assessed as considerable even in cases in which they look relatively small compared to the total size of the type of habitat in the site. Impacts should be assessed first on the basis of some qualitative-functional criteria as well as according to their absolute area size and they should not be assessed as smaller based on a comparison to the size of the site as a whole.

In separate cases, territories outside the protected area should also be taken into consideration as far as there are any expectations for any effects of the impact on the components of the site. In order to achieve certainty of the prognosis in some complicated and dubious cases, the use of more comprehensive methods could be required, such as population viability analysis.

When assessing the impact on animal populations the principles used are the same, with the only difference that the determination of the distribution, abundance and population status is quite difficult and depends entirely on the preparation and accuracy of the person carrying out the CA. In this case the assessment of the degree of impact is quite subjective and it is frequently provoked by commercial motives. Therefore, the method of payment of the labour of the person doing the CA should be seriously reconsidered. Payment is usually made by the investors who having paid the agreed fee expect the conclusion of the assessment to be in their favour; while experts led by their desire to receive their payment are very often not free in their decision-making process.

This could be avoided with the inclusion of a preliminary deposit made by investors to compensate the work of the experts regardless of the final decision of CA. The amount of this fee could be arranged in the Compatibility Assessment Guidelines.

The assessment of cumulative effects is a significant part of CA. When two projects or plans are viewed separately, they might not cross the threshold of significance, however, if they are combined they might lead to a significant impact. In such cases it should be taken into consideration that previous burdens

could possibly increase the sensitivity of a site and that once the official period for the declaration of a site has passed a CA should report on all projects and plans which have been carried out.

Thus a project awaiting approval today could be admitted on the basis of having an insignificant impact, however, a second project with a similar impact might be inadmissible in the future as cumulatively both projects will cross the threshold of eligibility. This justifies on the one hand the need for a system to register in a systemized manner all CAs which have been conducted of all sites and regions, while on the other hand, the need for prudent, managerial, spatial planning decisions, so that should a conflict arise, one could correctly set the priorities following the principle of sustainable spatial planning.

In addition, it should be taken into consideration that the different impact factors are interdependent and that their interaction leads not only to cumulative but also to mutually enhancing (synergetic) effects.

In order to assess the cumulative effect objectively, the experts carrying out the CA should have at their disposal the complete information on all other investment projects in the region which have been completed, admitted or in the process of development which in combination with the plan being assessed could have a negative impact on the protected area. This information is required by the respective regional inspectorate, who is responsible for the assessment of the proposal, however, such information is also very difficult to obtain and as a rule is incomplete and inaccurate. Information cannot be obtained on objects within the powers of other Regional inspections which based on the assessment of the expert could have a cumulative effect through transfer of masses of air or of underground and surface waters.

A mandatory part of the CA is an assessment of the degree of fragmentation of the habitats and populations of species. The effects of fragmentation determined by the facility or its operation can lead to significant impacts principally through two distinct courses of action. They include first the occurrence of barrier effects and disruption of the various forms of spatial and functional relationships between different parts of the habitats and second isolation of different parts of the habitats and populations in which the residual areas are often smaller than the minimum necessary for a species or the habitat for its survival.

The content of the term “fragmentation” is not entirely clearly defined [8]. Is the implementation of the project going to dramatically fragment the habitat and the populations of species in it, so that the individuals of the separate fragments cannot exchange genetic material with each other or is it going to limit the mobility of individuals in the border areas of the fragments. The construction of a house can really be an insurmountable obstacle for some species, but for others it can have a positive effect. New ecological niches emerge and conditions are created for the entry of suburban and synanthropic

species. The urbanization of a site is not always linked to a reduction of biodiversity - if the neighboring areas offer suitable conditions many species migrate there, and new ones that enrich the composition of the biota in the area come in their place.

The impact of fragmentation between the area and its surroundings can be significant when different parts of the habitat or separate parts of the populations of the species are located outside the protected area [4]. In cases of very mobile species (e.g. migratory birds) or species that need habitats of big size (e.g. a vulture, wolf, jackal), the effects of fragmentation between different areas may also have significant negative effects, without directly affecting the area announced in Natura 2000 sites.

The compatibility assessment involves as a main task the evaluation of alternatives [9]. As a rule, the discussion of possible alternatives and assessing their impact on the protected area is carried out formally. Land ownership is the main argument given for the realization of an investment proposal in a particular part of the country. This, however, in no case justifies a positive decision in the CA. A zero alternative is only mentioned as a possibility and is almost never discussed. In it the lost benefits outweigh by far the possible negative effects on the components of the environment and on biodiversity. If a project or a plan is a viable alternative with less or no adverse effects on the Natura 2000 site, then this alternative should be selected. The sponsor of the project is not given any leeway in this case. Only the fact that it is a project whose implementation would be considered the exception to the rule, Article 6 para. 4 of the Habitats Directive [10], requires its avoidance.

“Alternatives” can refer to the technical alternatives and alternatives to the spatial location or route as well as to the content of the project as far as such alternatives are appropriate for the achievement of the objectives of the plan or project with other means.

The apparent higher costs of the implementation of the alternatives are not a fundamental criterion for its rejection [9]. If an alternative has significantly fewer impacts than those preferred by the project proponent, higher costs cannot be the ground for its rejection.

Alternatives that seemed impossible during a previous EIA or in another preliminary process (e.g. a spatial planning procedure) can be considered acceptable and even mandatory if they have fewer negative effects on Natura 2000 sites.

Compensatory measures, if there is still a negative impact found in the implementation of the project, are very banal and almost always the same. As a rule, it is recommended that in the construction and operation of a property the neighboring properties are not affected, that in excavation work the topsoil is removed and disposed of on a designated site in the field, and is later on used for reclamation, that spills of lubricants and transport vehicles fuel is not allowed,

that elements foreign to the local flora and fauna are not to be imported and so on.

In conclusion, we stress the need to rethink some parts of the Regulation on the terms and conditions for assessing the compatibility of plans, programs, projects and investment proposals with the object and purpose of conservation of the protected areas. It is necessary to increase the qualification of the experts responsible for providing compatibility assessments by organizing courses, seminars, discussions and other forms of education.

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