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SUBJECT: NATURA 2000: DE-DESIGNATION OF SITES OR PART OF SITES - CONDITIONS & JUSTIFICATIONS *(Doc Nadeg 19-05-03)*

1. Purpose of this note

The conditions for modification of boundaries of existing Special Protection Areas (SPAs) designated under Directive 2009/147/EC[1] and Sites of Community Importance (SCIs) designated under Directive 92/43/EEC[2], have been addressed in a previous note by the Commission, discussed with Member States authorities in the Habitats and ORNIS Committees[3].

Since then, the EU Court of Justice (CJEU) has issued several rulings further clarifying the conditions under which Member States can modify the boundaries of Natura 2000 sites.

The CJEU has established for both directives that, although the Member States have a certain discretion[4] with regard to the choice of the territories that are most suitable for classification/designation of Natura 2000 sites, they do not have the same discretion when modifying or reducing the extent of designated Natura 2000 areas. Otherwise, Member States could unilaterally escape obligations imposed by the relevant articles of the directives[5].

This note focuses on the conditions and justifications for the partial or complete de-designation of Natura 2000 sites and in this context recalls the main principles established by the CJEU. Changes relating to the presence/absence, quantity, representativity, etc. of habitats and species in a site are not covered by this note.

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[1] Directive 2009/147/EC on the conservation of wild birds - OJ L 20 of 26.01.2010. p. 7.

[2] Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora - OJ L 206 of 22.7.1992, p. 7.

[3] Commission note to the Habitats Committee of 21/6/2005 (Doc Hab 05-06-02) and its annex (Doc: Orn. 00/07 agreed in September 2000 in the ORNIS Committee).

[4] The Court has held that the Member States' margin of discretion in choosing the most suitable territories for classification as SPAs concerns not the appropriateness of classifying as SPAs the territories which appear most suitable according to ornithological criteria, but only the application of those criteria for identifying the most suitable territories for conservation of the species listed in Annex I to the Birds Directive (judgment in Commission v Austria, C 209/04, EU:C:2006:195, paragraph 33 and the case-law cited).

[5] For SPAs this was established in case C-57/89 (Leybucht judgement) para. 20, for SCIs this was established in case 281/16 para 35.

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2. In which circumstances can sites or parts of sites be de-designated?

The CJEU has long clarified (in 1996) that SPAs boundaries must be determined exclusively based on ornithological criteria[6].

While the reduction of site boundaries or de-classification of a SPA is not explicitly foreseen by the Birds Directive, the CJEU clarified that there may be exceptional circumstances where a scientific error has occurred in the original classification of a SPA, particularly as regards the delimitation of the site, which may justify a reduction in its boundaries[7]. It was confirmed later by the CJEU that indeed, "*an error in the particulars forwarded to the Commission at the time of the designation of a special protection area may lead to a reduction in the size of that area by virtue of a rectification of that error (see, to that effect, judgment of 25 November 1999, Commission v France, C-96/98, EU:C:1999:580, paragraph 55). In the case that gave rise to that judgment, the Court found that the administrative error that was made, concerning the surface area, could be rectified by adapting the protection area concerned"* [8].

As regards SCIs, Article 9 of the Habitats Directive allows for declassification of sites (and arguably parts of sites) *"where this is warranted by natural developments noted as a result of the surveillance provided for in Article 11"*.

Indeed, the CJEU has confirmed that declassification must be warranted by natural developments in the area and '*pointed out that a mere allegation of environmental degradation of an SCI…..cannot suffice of itself to bring about such an adaptation of the list of SCIs*'[9]. "*The failure of a Member State to fulfil that obligation of protecting a particular site does not necessarily justify the declassification of that site … On the contrary, it is for that State to take the measures necessary to safeguard that site*"[10]. "*Member States are required to propose to the Commission the declassification of a site on the list of SCIs (…) provided that that request is based on the fact that, despite compliance with the provisions of Article 6(2) to (4) of that directive, that site can definitively no longer contribute to the conservation of natural habitats and of the wild fauna and flora or the setting up of the Natura 2000 network*"[11].

According to the CJEU *"a proposal by a Member State to reduce the size of a site placed on that list requires proof that the areas in question do not have a substantial interest in achieving that objective* (the Habitats Directive's objective of conserving natural habitats and wild fauna and flora) *at national level. In addition, the Commission may accept and implement the proposal only if it concludes that those areas are also not necessary from the perspective of the entire European Union"*[12]. In short, proof is required that the areas in question do not make (even if only in future after restoration as in this case) a contribution to achieving the objective of the Habitat Directive, both at national level and EU level.

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[6] Judgement of the Court of Justice in Case C-355/90 (Santoña Marshes), para 26, and Judgement of the Court of Justice in Case C-44/95 (Lappel Bank), para 26.

[7] Judgement of the Court of 25 November 1999 in case C-96/98 (Marais Poitevin), para. 55.

[8] Judgement of the Court of Justice in Case C-281/16 (Leenheerenpolder), para 29.

[9] Judgement of the Court of Justice in case C-301/12 (Cascina Tre Pini), para. 30.

[10] Judgement of the Court of Justice in case C-301/12 (Cascina Tre Pini), para. 32.

[11] Judgement of the Court of Justice in case C-301/12 (Cascina Tre Pini), para. 36.

[12] Judgement of the Court of Justice in Case C-281/16 (Leenheerenpolder), para. 36.

This jurisprudence of the CJEU established for SCI is also relevant to SPAs.

The above principles are in line with and complementary to those set in the previous Commission notes on the subject. In summary, de-designation of Natura 2000 sites or parts of sites is lawful only under certain circumstances:

a) a proven, genuine scientific error

b) natural developments

c) as a consequence of an application of Art.6(4) of the Habitats Directive

The technical correction of borders, in view of the improvement of the cartographic description of the site, that do not correspond to any real change on the ground will be considered in a separate form.

a) Scientific errors – summary of conditions to be met for de-designation

i. It can be scientifically proven that the area was not of value for habitats/species of EU-interest[13] for which the Natura 2000 site was initially proposed for designation.

ii. It can be scientifically proven that the area has not become in the meantime important for habitats/species of EU-interest – not only the ones for which the Natura 2000 site was initially proposed for designation but also others (even if not yet mentioned in the standard data form).

iii. The area is not necessary for the integrity of the site (e.g. is not a buffer zone, a forthcoming restoration area or providing other important functions)

iv. It does not have a substantial interest, including a potential to help achieving the objectives of the Nature directives, both at national level and EU level, by e.g. providing important areas for restoration or recreation of habitat types or habitats.

The mere fact that land that does not hold a habitat type listed in Annex I of the Habitats Directive or a habitat of a species listed in Annex II of the Habitats Directive/referred to in Article 4 of the Birds Directive or that that species has not been recorded for a certain time, does not *per se* constitute a reason for de-designation. Such land might have other functions that are required to achieve the site's conservation objectives, is required for the integrity of the site and/or might have substantial interest, including a potential to help achieving the objectives of the Nature directives, both at national level and EU level.

b) Natural developments - summary of conditions to be met for de-designation

Natural developments are those that are not man-made (or global phenomena that cannot be mastered only locally such as climate change) and whose negative impact on

[13] Annex I habitat types/ Annex II species' habitats for sites under the Habitats Directive, Annex I bird species or migratory species habitats for sites under the Birds Directive.

habitats/species of EU interest cannot be prevented and lead to a situation where a site can definitively no longer contribute to the conservation of natural habitats and of the wild fauna and flora of EU interest. For example, the washing away of a breeding island by the sea or the loss of habitats by sea-level rise would fall under this category. It should be noted however that such developments go beyond the normal (regular and often necessary) natural dynamics sites might face. Should such natural developments occur that justify a de-designation of a site or parts of a site, it should be assessed in how far the impact of such losses could be balanced by proposing a new site(s) or by enlarging a site(s).

What cannot be regarded as natural developments are situations were habitats and species deteriorate through man-made activities (inside or outside of Natura 2000 sites) or through the absence of adequate management (e.g. of semi-natural grasslands).

c) Consequence of a correct application of Art.6(4) of the Habitats Directive

In cases were the whole or part of sites are irreversibly lost for any positive contribution to the objectives of the nature directives based on a correct application of Article 6(4), de-designation can be justified. It is recalled that the correct application of Article 6(4) requires Member States to take adequate compensation measures (see relevant guidance documents on http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm), which can include the designation and management of a new site.

3. Justifications to be provided by Member States proposing de-designation of sites or parts of sites

Proposals for de-designation must be justified case-by-case and require sound and conclusive scientific evidence capable of proving that the above required conditions are met.

Therefore, together with a revised Natura 2000 database, a Member State will have to submit a file for each site or part of a site proposed for de-designation. Such a file shall clearly identify the proposed changes and provide evidence based on solid technical / scientific information and surveillance of the site under consideration.

Mere claims about fulfilment of the conditions presented above that are not evidence-based would result in the proposed changes not being further considered in the update of the Union Lists (for SCIs/SACs) and in a negative opinion on SPAs modifications (see section 4 below).

This file should include:

1. A comparison between the new site information (SDF and shapefiles/maps) and the original one (at time of site proposal for SCI and site classification for SPA) or in subsequent modified versions, as described in the latest submission of the Natura 2000 database.
2. Additional detailed information that can show the situation/value of the area under consideration at the time of designation, its evolution over time and its current status. In particular, spatial information in the form of maps of habitat types, of habitats of species, species occurrence, maps from management plans as well as aerial photos, satellite imagery, etc. capable of proving a scientific error or a natural development. Furthermore, information from inventories and monitoring of the site. All this information should be of good quality.

3. A site-based explanation describing the reasoning for de-designation relating to all habitat types and species of EU-interest[14] relevant for the site, also mentioning their status and trends. The description shall also answer following questions:
    - Has the area proposed for de-designation hosted features of EU-interest at the time of designation – permanently or occasionally?
    - Has the area envisaged for de-designation in the meantime gained new importance for any feature of EU-interest?
    - What kind and frequency of monitoring / surveillance is carried out in the site of concern? What is the quality of available data?
    - Is the area proposed for de-designation of any other value (has it any other function) for the conservation of the habitat and species of EU-interest and the integrity of the site in case of partial de-designation:
        - Is the area of potential use as restoration area – does it have restoration potential for any features of EU-interest?
        - Is it considered as a buffer zone, stepping stone or as a corridor between different parts of the site? Is it of importance to guide visitors or control any other direct pressures to the site?
        - Does it have any other substantial interest in achieving the objective of the nature directives, both at national level and EU level?
    - How has the site (or part of site) been managed since its initial designation? The provision or link to existing or previous management plans as background documents is recommended.
    - For the case of natural developments: describe the characteristics of the natural development, the changes it has brought about and explain whether measures have or could have taken to avoid a deterioration or loss of the EU-interest feature(s) in the site (or part of site).
    - For the case of 'consequences of an Art.6(4) procedure': provide a summary of the appropriate assessment (and the full version if this has not been already transmitted to the Commission), the justification for each of the conditions set in Article 6(4) and the compensatory measures taken.

4. An explanation of the impact of the situation described above on the Natura 2000 network in your Member State as a whole on national or biogeographic level. As the site/area envisaged for de-designation has contributed to the coherence and sufficiency of the national network for the features of EU-interest it holds (or supposedly held), an assessment of the situation is requested discussing also the potential need for adding another site(s) or expanding existing sites as replacement. Therefore for each of the proposed changes, a detailed analysis is needed of the potential impact on sufficiency of the remaining network of sites in terms of protection of the habitats and species for which the sites or parts of sites proposed for de-designation were initially selected, including in light of their conservation status at national biogeographical level.

[14] Annex I of the Habitats Directive habitats and Annex II of the Habitats Directive species habitat for SCIs; Annex I of the Birds Directive and/or migratory species for SPAs.

In assessing the validity of changes, the Commission will also take into consideration any relevant scientific references (e.g. IBAs, scientific literature, etc.)

4. Procedure for de-designation of sites or parts of sites

Under both nature directives the Commission shall be consulted prior to any de-designation of sites or part of sites taking effect in a Member State. The information described above needs to be provided as well as possible responses to additional questions in order for the Commission to ensure that the conditions as set by the CJEU are fulfilled and all necessary proof is available[15]. It should be taken into account that as such procedures are of an exceptional nature, the assessment of the material might take some time.

For SCIs, de-designation is carried out following the same procedure as for adding a site to the list[16]. This means a full Natura 2000 database is submitted to the Commission in the usual way but supplemented by the information described above. The changes become effective only after they are reflected in the Union List, after verification from the Commission of the respect of the above conditions.

For SPAs, while the Commission does not officially intervene in the procedure leading to the initial classification of the SPAs, it needs to verify the information sent by the Member States in light of the above criteria to confirm that the changes are legally acceptable. Therefore, also for SPAs Member States should refrain from legally enacting changes to the network before the green light from the Commission.

Member States authorities shall safeguard the values of the sites and part of sites that are proposed for de-designation, pending the verification by the Commission. This applies both to SCIs and SPAs.

[15] It is recalled that the CJEU made Implementing decision 2015/72 (eighth update of the list of SCIs in the Atlantic biogeographical region) invalid as the Commission could not, lawfully, rely on the existence of an initial scientific error in order to place the Haringvliet site on that list without including the Leenheerenpolder (Judgement of the Court of Justice in Case C-281/16, paras 40 and 41).

[16] Judgement of the Court of Justice in Case C-301/12 (Cascina Tre Pini), para 26.