THE GEOGRAPHICAL SCOPE OF THE PROTECTION REGIME OF THE 'NATURA 2000' SITES IN SPAIN

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1. The Geographical Scope of the Obligation to Avoid Significant Deteriorations or Disturbances in the 'Natura 2000' Sites.

The Art. 6.2 of the Royal Decree 1997/1995, of 7th December, *on the conservation of natural habitats and of wild fauna and flora* (RD 1997/1995 hereinafter) is a literal transposition of the art. 6.2 of the Habitats Directive. Thus, the geographical scope of the obligation therein established is literally limited to the perimeter of each Natura 2000 site designated by the Autonomous Community where it is placed. Nevertheless, a teleological interpretation of the terms "appropriate steps" included in the art. 6.2 of the Habitats Directive (like the European Commission reminds) leads to consider that the geographical scope of the obligation issuing from the Art. 6.2 of the Habitats Directive is still operative outside the sites[1]. This kind of interpretation has been incorporated in the Law (by the Art. 20 *quater* .4 of the Natural Protected Areas Law 4/1989, of 27th March), inasmuch the competent authorities are also obliged to adopt the measures needed to avoid the deterioration or pollution of the external habitats of the SPAs. A shortcoming of this new provision is that it applies only to the SPAs, forgetting the SACs and requiring the interpretation above proposed[2].

a) The Territorial Scope of the Marine Areas.

The Art. 10.1 of the Natural Protected Areas Law allows the designation of marine areas within the continental shelf as natural protected areas, as well as Natura 2000 sites. The State Administration and some Autonomous Communities have designated as National Park (Cabrera Isles), Natural Parks and Reserves ca. 106.000 hectares in the Balearic and the Canary Islands, Valencia and Galicia, Ibiza salt flats, Tabarca Island, Columbretes Isles, etc.). Several littoral Natura 2000 sites have been already designated, but any marine site yet.

In accordance with the Arts. 132.2 of the Spanish Constitution and 3 of the Coastal Law 22/1988, of 28th July, the shoreline of the sea (including beaches, marshes, meadows, mudflats, etc.), the territorial sea and the natural resources of the Economic Exclusive Zone

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[1] See AGUDO GONZÁLEZ, J.: *Incidencia de la protección del medio ambiente en los usos del suelo*, Bosch, Barcelona, 2004, p. 375.

[2] Nevertheless, the Autonomous Communities are also sensitive to this problem: see, i.e., the art. 3.b) and d) of the Aragonese Decree 34/2005, of 8th February, on technical regulations for the aerial electric lines, according to which the Departament of Environment must declare as "highly dangerous" any aerial electric transport line placed (i) inside the perimeter of a SPA and within a perimetral band of 1,5 km., (ii) in especially sensitive core areas of the Natural Protected Areas and SACs and (iii) in other areas placed outside the above mentioned areas if a danger for the birds has been statistically or scientifically remarked.

and the Continental Shelf is public land owned by the State[3]. Nevertheless, and according with the Constitutional Court Decisions 149/1991, of 4th July, and 102/1995, of 25th June, the State ownership does not grant full environmental competences to the State Administration, in so far those competences are shared with the Autonomous Communities according to the Art. 149.1.23 of the Spanish Constitution.

Thus, the Art. 21.1 of the Natural Protected Areas Law attributes to the Autonomous Communities the competence to designate and manage the Natura 2000 sites placed inside their territory, "without prejudice of the State competences regarding the territorial sea". This latter statement recalls the competence of the State Administration to execute the international agreements and conventions, in accordance with the Art. 110 of the Coastal Law[4]. The State Administration is responsible for the designation, monitoring and protection of the sea environment, according with the Barcelona Convention, the Convention for the Protection of the Marine Environment of the North-East Atlantic and the Recommendation of the European Parliament and of the Council of 30 May 2002, concerning the implementation of Integrated Coastal Zone Management in Europe (2002/413/EC)[5]. In absence of a specific attribution of environmental competences regarding the sea, and recalling the competences of the Autonomous Communities on fisheries placed within the "inner waters" (the prolongation from the shoreline until the territorial sea straight baselines), the littoral Natura 2000 sites are likely to be designated and protected -until the limits of the "inner waters"- by the Autonomous Community concerned, whereas the designation and protection of the marine Natura 2000 sites fall under the competence of the State Administration[6].

The delimitation of the protected marine sites follow the applicable international regulations on delimitation of marine areas, thus the delimitation of a surface perimeter comprises the sea-bed (usually, the most valuable element) and subsoil of the marine areas. Consequently, the perimeter determines the extension of the protection measures, although these measures should extend beyond the perimeter if need be, in accordance with the interpretation above mentioned.

b) The Territorial Scope of the Management Plans and Compensations.

The territorial scope of the management plans and compensations whatsoever is limited to the perimeter of the Natura 2000 site, although it should extend beyond said perimeter if need be, in coherence with the interpretation above mentioned. In any case, this is an unforeseen question in the Spanish Law.

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[3] 12 and 200 nautic miles respectively, according with the Territorial Sea Law 10/1977, of 4th January and the Economic Zone Law 15/1978, of 20th February.

[4] State competences detailed in the Art. 7 of the Royal Decree 1477/2004, of 18th June, that establishes the administrative structure of the Ministry of Environment.

[5] See, in relation with the *Specially Protected Areas* and the *Specially Protected Areas of Mediterranean Importance* to be declared and managed under the Barcelona Protocol (1995), GARCÍA URETA, A.: *Espacios Naturales protegidos. Cuestiones jurídicas en la Ley 4/1989, de 27 de marzo*, IVAP, Oñati, 1999, pp. 210-211, and CALVO CHARRO, M.: *Escritos de Derecho ambiental*, Tirant lo blanch, Valencia, 2004, p. 324.

[6] GARCÍA URETA, A.: *Espacios Naturales protegidos. Cuestiones jurídicas en la Ley 4/1989, de 27 de marzo*, IVAP, Oñati, 1999, pp. 238-239, considers that the Autonomous Communities are competent to protect *any* marine areas –including the Barcelona Convention areas-, except for the National Parks.

2. The Geographical Scope of the Obligation to Assess the Impacts of Projects and Plans threatening the 'Natura 2000' Sites.

The Arts. 6.3 and .4 of the RD 1997/1995 are a literal transposition of the art. 6.3 and .4 of the Habitats 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 accordance with the applicable rules State basic law and the additional protection rules Autonomous Communities, 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 Autonomous Communities 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 called for a public hearing.

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 competent Public Administration shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. If need be, the Autonomous Communities shall inform the Ministry of Environment of the compensatory measures adopted, and the Ministry shall forward this information to the European Commission through the appropriate means. 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 to other imperative reasons of overriding public interest. In this latter case, a previous opinion from the European Commission shall be obtained".

The legal framework of the assessment of the impacts inside the 'Natura 2000' sites is not exhausted in RD 1997/1995, inasmuch the Spanish common regulation of the Environmental Impact Assessment -Royal Legislative Decree 1302/1986, of 28th June, which contains the consolidated text of the Environmental Impact Assessment Law- applies to these environmental procedures in any case. Nevertheless, a new additional provision has been added to the Environmental Impact Assessment Law, extending the common regulation thereof to the procedure of the Environmental Assessment of the State Government's plans and projects *likely to have a negative effect on the sites* under the art. 6.3 of the RD 1997/1995. This last amendment was not necessary so far, in so far the transposition was fully achieved (although not at a legal level yet).

A shortcoming of this new additional provision is that it applies only to the State Government's plans and projects to be developed on a Natura 2000 site, due to the shared jurisdiction of the Autonomous Communities to enact their own regulations on this matter. Thus, the environmental assessment of plans or projects falling under the competence of the Autonomous and/or local authorities may be regulated by the Autonomous Communities, although the Environmental Impact Assessment Law (the) must be considered the common -and subsidiary- regulation.

There is not a definition of the "plan and programme" term in the Spanish Law, although the different species of plans and programmes fall under the Arts. 6.3 and .4 of the RD 1997/1995 and the fourth additional provision of the Environmental Impact Assessment Law, that remit to the definition contained in the Art. 2 of the Directive 2001/42/EC of the European Parliament and of the Council of 27th June, *on the assessment of the effects of certain plans and programmes on the environment*. A wide notion of "plan and programme" comprehends any territorial and urban planning instruments whatsoever, as well as any other sectorial, infrastructural plans (energy, water, public works, etc.), and especially agricultural plans (mainly the "compulsory land consolidation", *concentración parcelaria*).

3. The Specific Protection Instruments outside the 'Natura 2000' Sites.

In accordance with the art. 19 of the Natural Protected Areas Law, the perimeter of every Natural Protected Area designated by Law may be surrounded by a 'Peripheric Protection Area' (buffer zone), in order to prevent ecological or landscape impacts coming from outside. The Law itself must establish the necessary limitations, if appropriate. Also, the regulations of every single Natural Protected Area may include the delimitation of a 'Socio-economic Influence Area' to support the maintenance of the Area and to compensate the affected populations socially and economically, in accordance with the type of limitations imposed in the Natural Area. The 'Socio-economic Influence Areas' shall cover the territory of any town and/or municipality hosting the Natural Protected Area and/or its Peripheric Protection Area. Such provisions do not apply to the Natura 2000 sites.

Also, the Art. 20 *quater* .5 of the Natural Protected Areas Law 4/1989, of 27th March states that "Outside the SCAs, the competent bodies shall also strive to avoid pollution or deterioration of the habitats". This is a vague and simple provision that does not establish any specific interdiction and/or authorization mechanism.

Finally, there are no specific mechanisms of impact assessment applicable outside the Natura 2000 sites. Nevertheless, any plan and/or project to be developed outside a site but likely to have a significant impact on the habitats and/or species located inside the site may be subject to an environmental impact assessment procedure, by virtue of the annexes of the Environmental Impact Assessment. The geographical scope of the obligation to assess the impacts of the projects and plans on the Natura 200 sites is larger than the perimeter of the sites, without prejudice of the above proposed teleological interpretation, although in practice this *criterium* does not apply.

4. Court Decisions about the Geographical Scope of the Protection Regime for the 'Natura 2000' Sites and about the Application of Specific Mechanisms.

An environmental NGO, the *Coordinadora de Organizaciones de Defensa Ambiental,* challenged the Art. 13.2 of the RD 1997/1995, for not having included in its Annex II the «Canis Lupus» species living in the south of River Duero. The Supreme Court (Decision of 15th March 1999) stated that the provision challenged infringed the range of derogations allowed by the Habitats Directive, and annulled it.

The Aragonese Court of Justice has adopted a recent decision on 5th April 2005 regarding the geographical scope of the SPAs. In this case, an environmental NGO «Asociación Plataforma Jalón Vivo» challenged the delimitation of a SPA made by the Autonomous Administration of Aragon, and simultaneously lodged a complaint with the European Commission because they considered that the perimeter delimitated did not comply with IBA 93 (Hoces del Jalón). The Commission decided that not further action should be taken during the national lawsuit, but this fact did not affect the issue. The Court stated that the Aragonese Administration had not motivated with ornithological criteria the restriction of the perimeter of the SPA. Furthermore, the Court obliged the Autonomous Administration to issue a new delimitation of the SPA identical to the IBA 93. This decision has been appealed before the Supreme Court.