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Balancing Environmental Risks and Socio-Economic Benefits of Alternatives: A General Principle and its Application in Natura 2000

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1 Introduction

Environmental oversight commonly assesses the environmental effects of activities and strives to minimize risks by imposing conditions on the operation of activities or even suppressing them. Environmental protection is however not the only standard of checking. Within administrative discretionary margins or in disguise of definite rules, environmental protection concerns have frequently been weighed against non-environmental concerns, such as the costs of environmental protection measures and the welfare gains from the utilization of the environment. Likewise, when assessing risks and benefits, different options (or alternatives) have often been considered.[1] Since more recently such balancing of environmental risks and socio-economic benefits in relation to alternative options (BERSEBA) has increasingly been introduced as an official requirement of environmental protection standards. US law has pioneered this where alternatives testing was introduced as a requirement of EIA already in the National Environmental Policy Act of 1969, and cost-benefit-analysis was prescribed for any major rule by Executive Order of 1981.[2] Since then EC law has gradually followed suit. Here are some examples:

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1 While, for instance, Norwegian law allows for broad administrative discretion thus preventing the courts from review (see H.-Chr. Bugge, Norway, Environmental Law Suppl. 74, *International Encyclopedia of Laws*, Kluwer 2011, No. 878) and hence from building up legal doctrines of BERSEBA, German law rather fetters the discretionary margins of authorities thus encouraging the development of sometimes very ambitious judge-made legal constructs.

2 See on the development of regulatory impact analysis during the Reagan and Clinton administrations CRS Report for Congress, Risk Analysis and Cost-Benefit Analysis of Environmental Regulations, 94–961 ENR, accessible at http://ncseonline.org/nle/crsreports/risk/rsk-5b.cfm#24. For specifications in the environmental protection area see US Environmental Protection Agency, Guidelines for performing regulatory impact analysis, December, 1983 (cont.)

– An EIA must show what alternatives to the proposed project were tested and why they were rejected (Art. 5(3) Directive 85/337/EEC, as amended; Art. 5 Directive 2001/42/EC);

– Member States may derogate from the obligation to ensure good surface water quality if the environmental and socio-economic needs served by water uses cannot be achieved by a significantly better environmental option not entailing disproportionate costs (Art. 4(5) Directive 2000/60/EC);

– If in a Natura 2000 area a project causes significant adverse effects, it can exceptionally be authorized if there are no alternative solutions or, in the absence of alternatives, the adverse effect is outweighed by an overriding public interest (Art. 6(4) Directive 1992/43/EC);

– A derogation from the obligations to protect endangered bird species is permissible for reasons of interests of public health and safety, air safety and prevention of serious damage to crops, «where there is no other satisfactory solution» (Art. 9 Directive 2009/147/EC);

– The production, marketing or use of dangerous chemicals can be restricted taking into account «the socio-economic impact of the restriction, including the availability of alternatives» (Art. 68 (1) Regulation (EC) 1907/06);

– The production and marketing of certain immanently dangerous chemicals can only be authorized if either their health or environmental risk is adequately controlled or outweighed by socio-economic benefits and if there are no suitable alternative substances or technologies (see Art. 60 (2) – (4) Regulation(EC) 1907/06);

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2 cont. (Reprinted March, 1991), accessible at http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0228A-1.pdf/$file/EE-0228A-1.pdf (visited 1 June 2011). Note that the US nomenclature reverses the definitions of costs and benefits as suggested in this article. Benefits are defined as the avoidance of health and environmental risks, and costs as the «value of goods and services lost by society resulting from the use of resources to comply with and implement a regulation, and from reductions in output» (op. cit. p. M 10). The difference can be explained by the different perspectives: US law departs from the regulation and looks at its (environmental risk abating) benefits and (socio-economic) costs, while the examples cited above depart from the activity and look at its (environmental) risks and (socio-economic) benefits.

– New plant protection products that contain certain immanently dangerous substances may not be approved if for the envisaged uses an authorized plant protection product, or a non-chemical control or prevention method, already exists which is safer for the environment (Art. 50(1)(a) Regulation (EC) 1107/09);

– Wherever the law requires best available techniques this entails the consideration of alternative technologies not entailing excessive cost (e.g. Art. 2 No 12 EC Directive 2008/1);

In addition to EU law and its transformation into Member State (MS) law BERSEBA examples can also be found in genuine MS law not triggered by EU law. For instance, in German planning law the different planning tools – spatial plans (Raumordnungspläne), zoning plans (Bebauungspläne) and project development approvals (Planfeststellungen) – are all subject to the requirement of fair balancing of the affected interests. Initially, the balancing concerned only a single variant,[3] but later on alternatives had to be included in the assessment.[4] Today, testing appropriate alternatives are a core object of judicial review of planning decisions.

A further version of BERSEBA can be found in the so-called encroachment regime (Eingriffsregelung) in German nature protection law. The concept is applicable to any significant alteration of nature and landscape. It establishes an entire cascade of checking:[5] Firstly, it has to be assessed whether any adverse effects of the project can be avoided. Here, project variants are sought that intrude less into nature. The project *in toto* cannot be put into question at this stage, and the scope of alternatives is confined to those at the same location. As a second step the adverse effects found unavoidable must be compensated either by remediation near the spot (Ausgleichsmaßnahme) or by restitution, possibly farther away (Ersatzmaßnahme). As a third step the remaining damage must be weighed against the importance of the project; if it is weightier than the project, the latter is impermissible. If it is less grave some compensation in cash must be paid.

3 BVerwG, ruling of 12 December 1969 – IV C 105.66, BVerwGE 34, 301 (309); ruling of 5 July 1974 – IV C 50.72 (Floatglas), BVerwGE 45, 309 (315); ruling of 14 February 1975 – IV C 21.74 (B 42), BVerwGE 48, 56 (57).

4 BVerwG, ruling of 30 May 1984 – 4 C 58.81, BVerwGE 69, 256 (263); ruling of 22 March 1985 – 4 C 15.83, BVerwGE 71, 166 (171); decision of 20 December 1988 – 7 NB 2.88, BVerwGE 81, 128 (136).

5 § 15 BNatSchG (Federal Nature Conservation Act).

The plurality of BERSEBA forms among sectors suggests an in-depth analysis. This will be done by considering common structures and individual deviations of BERSEBA concepts. Subsequently, based on an exemplary case, the specific brand as established in the EU Natura 2000-regime will be explored in more detail.

2 Structures and variants

One can speak of three types of environmental regulation of which BERSEBA represents the third and most complex. Taking a hypothetical law on licensing activities as illustration, they can be characterized as follows:

- Environmentalist approach:
  «If a project is environmentally safe, an authorization will be given»;
- Balancing approach:
  «If a project causes (net[6]) environmental risks and the socio-economic (net[7]) benefits are preponderant, an authorization will be given»;
- Balancing approach including alternatives:
  «If Alternative A has a better score concerning environmental risks and socio-economic benefits than Alternative B, an authorization will be given for A»;

The third type can be represented as a matrix where the numbers indicate an exemplary case[8]:

	Environmental (net) risk	Socio-economic (net) benefits of project	Score
Alternative A	– 3	+ 2	– 1
Alternative B	– 1	+ 2	+ 1

6 «Net» risks means that any environmental protection gains of a project shall be deducted from the environmental damage caused by the project.

7 «Net» benefits means that any environmental protection costs caused by the regulation of the project shall be deducted from the economic gain of the project.

8 The numbers shall indicate an example such as the effects of a new highway or other project.

This means that a decision-maker may take various project alternatives into account, determine the ratio of environmental risks and socio-economic benefits, and select the one with the best ratio.

In a more elaborate version BERSEBA has the following common structure:
- to determine the goal of a particular use of the environment;
- to examine whether the use is in accordance with the goal;
- to inquire into alternatives for achieving the goal, and
- to select the variant that exerts the smallest impact on the environment but still allows to roughly achieve the goal.

If one projects this framework into the overall logic of balancing interests, then BERSEBA appears as a method to resolve a conflict between two interests, namely the utilization and the preservation of the environment, by looking for an optimal solution (alternative) that as far as possible satisfies both interests.

There is concern about whether the introduction of risk-benefit weighing does not entail a clandestine devaluation of environmental protection. The fact that cost-benefit analysis was introduced in the times of neo-liberal «Reaganomics» as a requirement for any regulation would support such concern.[9] On the other hand, if it is true that risk-benefit considerations often occur under disguise, bringing it into an official calculus might call it to clear and solid justification.

There may be reason for differentiation between areas where BERSEBA is appropriate and where it is not. In particular, if the possible damage is grave – for instance because of serious harm to human health – any weighing with socio-economic benefits may be excluded. In other cases where the likelihood of damage is uncertain, a different brand of BERSEBA may be applied. This becomes clear if one distinguishes between two kinds of risk-benefit analysis: a risk-tolerant variant that would allow for average harm if it is outweighed by benefits, and a risk-averse variant according to which only residual risks can – and must – be outweighed by benefits. The first kind is demonstrated by chemicals legislation, where if the risk of a chemical is not adequately controlled or intrinsically very high, an authorization may nonetheless be granted if the socioeconomic benefits outweigh the risk to human health or the

9 N. Ashford, The legacy of the precautionary principle in US law. The rise of the cost-benefit-analysis and risk assessment as undermining factors in health, safety and environmental protection, in: N. de Sadeleer (ed.), *Implementing the Precautionary Principle*, London (Earthscan) 2007, pp. 352–378.

environment (and if there are no suitable alternative substances or technologies).[10] An example of the second variant can be found in the law on genetically modified organisms (GMOs). If an environmental risk assessment establishes that the risk of environmental damage is minimal, the law might nevertheless require that the release of the GMO shall be disallowed if it does not entail a benefit, such as the subsequent non-use of pesticides, the use of less water and chemical fertilizers, etc. Thus, a minimal residual risk by GMOs to certain parts of the environment could become acceptable, if the overall environmental performance of agriculture were to be improved.

It is a further problem of the weighing of interests that the socio-economic and environmental interests lack a common denominator: How should one, for instance, weigh the destruction of a biotope against the loss of employment? The problem is exacerbated if the weighing shall be done in monetary terms. Fortunately none of the mentioned legal applications of BERSEBA do require this, and wisely so, because hitherto economists have not been able to come up with valid methods of monetizing intangible goods.[11] Practical decision-making is entitled to use qualitative language.

Depending on the sectoral legislation, any private interests (such as the production or marketing of products) or solely public interests may find recognition as project purposes. A public interest is normally required, when it is unavoidable that environmental assets have to be sacrificed in order to allow a utilization interest to be pursued. In the German law on plan approval for infrastructure projects (such as roads, airports, pipelines), such sacrificed interests are, for instance, those of the nearby living people who will be exposed to the emissions or other nuisance from the project. In plant protection law, it is the ecosystem that is impaired because target organisms are killed and non-target organisms may unavoidably also be damaged. By contrast, a private interest may qualify as preponderant in cases where the environmental damage caused is less significant. Considering the possibility of different degrees of socio-economic benefits and environmental risks leads to a sophisticated pattern of weighing: the more serious the risk the more serious the benefit must be if the risk shall be accepted.

Concerning the role of alternatives in BERSEBA it should first be noted that

10 The admission of «not adequately controlled» substances in cases of overriding private interests in the REACH concept is in my opinion incompatible with the requirement of a high level of protection under Art. 114 TFEU.

11 See further F. Ackerman, L. Heinzerling, *Priceless. On Knowing the Price of Everything and the Value of Nothing*, New York (The New Press) 2004.

«alternatives testing» is a rather smart instrument, since it prevents the premature focus on a particular project variant thus triggering the search for more appropriate solutions.[12]

There are however differences between the individual forms of the assessment of alternatives. These can be grasped with regard to two of its main characteristics: the definition of project purpose and the scope of alternatives.

The selection of alternatives can be left subjectively to the developer, or it can follow from objective criteria. For instance, Directive 85/337 on environmental risk assessment confines the assessment to alternatives chosen by the developer. By contrast, Directive 2001/42 on strategic environmental impact assessment speaks of «reasonable» alternatives. This objective language is of course less inclined to misuse by developers.

As for the scope of alternatives that are to be checked, usually the (private or public) interest in the use of nature serves as criterion for the decision about what project variants have to be considered. This intricate question will be further explored in the context of nature protection law, as follows.

3 Alternatives testing in EU nature protection law

3.1 The case of the deepening of the river Elbe

A living case shall be presented as a reference for subsequent illustration of more theoretical questions. The Free and Hanseatic City of Hamburg plans to adjust the fairway of the Lower and Outer Elbe between the North Sea and Hamburg harbour for container ships with a draught of 14.5 meters. For this purpose, it applied to the competent authorities for an official approval of plans.[13] A decision is still pending (June 2011).

It is not contested between the parties that the proposed deep dredging will significantly harm a number of sites protected under Directive 92/43/EEC (Habitats Directive). This means that the project is basically prohibited, but may by dint of exception nevertheless be admitted when passing the derogation test under Art. 6(4) of the Directive. Accordingly, it has to be examined whether the project is necessary for imperative reasons of overriding public interest, or whether there are alternative solutions which avoid or diminish the emerging harm.

12 See G. Winter, *Alternativen in der administrativen Entscheidungsbildung: Zugleich ein Beitrag zu einer Grundpflicht ökologischer Verhältnismäßigkeit*, Düsseldorf 1997, pp. 26 f.

13 The application documents are available from http://www.fahrrinnenausbau.de.

On the part of the project developers, it is argued that it is in the public interest to protect the competitiveness of the port of Hamburg for container ships. Their draught has constantly increased and requires a deepening of the fairway. Alternatives are not available.

On the part of the objectors, the necessity of the project is questioned: Container ships become wider and longer but hardly deeper. Furthermore, only a fraction of container ships would actually reach a draught of more than 13.5 meters – the size served by the presently permitted dredging. Regarding potential alternatives, it is argued that a deepening could be reduced or would even be unnecessary, if the German North Sea ports cooperated better. The incoming large container ships could in the deep-water ports at the North Sea coast unload parts of their cargo and have it further transported by smaller ships (so-called trans-shipment). Thus made lighter the container giants could deal with the existing depth of the Elbe. The draught could even be reduced further, if the ships' speed were to be reduced.

Sedes materiae for deciding the case is Art. 6(4)(1) Habitats Directive which states:

> 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.

If priority natural habitats and species are concerned, the scope of overriding public interests is reduced substantively as well as procedurally under Art. 6(4) (2) Habitats Directive.[14] However, an assessment of alternatives has still to take place in such cases.

In general and also in the given case, a number of points remain to be clarified: what is meant by public interest; when are reasons of public interest imperative, and what kinds of alternatives have to be considered. However, beforehand it must be clarified in what sequence these aspects should be assessed.

14 Related problems can unfortunately not be discussed in this context.

3.2 the sequence of assessment

When reviewing plan approvals, courts commonly first assess the public interest and then the available alternatives.[15] Such sequence is also indicated in § 34 (3) (no. 1) and (no. 2) of BNatSchG. In its Guidance Document, however, the Commission starts with the assessment of alternatives.[16] In the relevant literature, it is also argued that one should begin with assessing alternatives.[17] The wording of Art. 6(4) of the Habitats Directive is inconclusive in this respect because the German version goes from public interests to alternatives while the English and French versions take the opposite direction. I believe for logical reasons the public interest should be determined first, because it sets the criteria for the selection of those alternatives that have to be assessed and potentially have to be given primacy. Without such criteria the assessment of alternatives remains without any clear foundation – unless, one takes as standards not the public interest but the project purpose as defined by the developer, which is, however, erroneous as will be shown.[18]

Furthermore, in practice and in the relevant literature it is not always clear whether the assessment of the necessity of a project or plan constitutes a separate step in the assessment procedure. In most cases, it is combined with the determination of the public interest. A separation is at any rate indicated for those cases in which the determination of the public interest is problematic or there are doubts whether a project satisfies the assumed public interest. These questions often arise in road construction cases when the need for new traffic lines is checked and the traffic forecasts signalling an increase of traffic are disputed.

The above-suggested sequence corresponds also with the concept of Advocate General Kokott, when she states:[19]

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15 See, for instance, BVerwG, ruling of 9 July 2009 – 4 C 12.07 (Airport Münster/ Osnabrück), BVerwGE 134, 166 (171 ff.).

16 European Commission, Guidance Document on Article 6(4) of the 'Habitats Directive 92/43/ EEC, 2007, nos. 1.3.1. and 1.3.2.

17 *Gellermann*, Natura 2000: Europäisches Habitatschutzrecht und seine Durchführung in der Bundesrepublik Deutschland, Berlin, Wien 2nd ed. 2001, pp. 89 ff.

18 See point 3.5 below.

19 Opinion of the Advocate General in Case C-239/04, marg. no. 46. The Guidance Document (*supra* fn 16, no. 1.2.1) interprets this remark erroneously as if the sequential order of the examination were not determined. However, the Advocate General discusses only the assessment of alternatives in detail, because the Commission had in Case C-239/04 only criticized the assessment of alternatives.

The decisive factor is therefore whether imperative reasons of overriding public interest require the implementation of specifically that alternative or whether they can also be satisfied by another alternative with less of an adverse effect on the SPA.

3.3 PUBLIC INTEREST

The requirement that an overriding public interest has to be given distinguishes the assessment of alternatives in the Natura 2000 regime from other variants outlined above where private interests suffice. The reason for this high burden of outweighing environmental risks is the particular sacrifice that the project demands: the harming of extremely valuable nature. The latter is particularly protected by the Natura 2000 network and thereby gains priority status. Only in exceptional cases, which have to be defined narrowly,[20] i.e. only if particular reasons exist, is nature allowed to be harmed.

The interest concerned must first of all be a public one, which is difficult to differentiate from private interests, since private interests can also be public interests.[21] Examples of extreme cases are not hard to find. For instance, coastal protection against storm flood is clearly a public interest, while the construction of a private marina is clearly a private one. In the grey area between these two extremes, additional criteria are helpful: The private generation of profit becomes a «public» interest, if it generates a relevant number of jobs but not if a widely automatized facility is concerned (like the landing of gas), which serves at best fiscal interests.

The public interest can have a regional affiliation, which should however not be too narrowly construed, because otherwise the scope of alternatives would become too restricted. For instance, if an airport shall be constructed, not the municipality in which the airport will be located should define the public interest (otherwise there would be no alternative), but the wider region. On the other hand, the public interest should also not be construed too generally, since the scope of alternatives would then become boundless. Ultimately, the practical judgement of the judicature is required here. Indications can be gained by asking for the «problem» that has emerged and that demands a solution.

20 ECJ, ruling of 26 October 2006, C-239/04 (Commission v Portugal), marg. no. 35.

21 For the practice of the Commission in the classification of public interests, see L. Krämer, The European Commission's opinions under Article 6(4) of the Habitats Directive, in 21 *Journal of Environmental Law* (2009), p. 82, who has critical remarks on the ease with which the Commission defines socio-economic interests as public, imperative and overriding.

In the given case, it is clear that the sustainment of the port of Hamburg constitutes a public interest as infrastructure for the regional and international transport of goods and as a source of regional employment. In other cases, especially the extension of major motorways, one could question whether an increased transportation demand caused by motorized private transport nowadays represents *per se* a public interest.[22]

Furthermore, the interest has to be of an overriding nature. Remarkably, the German Federal Administrative Court (Bundesverwaltungsgericht – BVerwG) recently made clear that the weight of the public interest has to be assessed separately from its being a public interest at all.[23] However, the Court enters difficult territory here. Principles for the density of judicial review still have to be developed in that regard. For the construction of airports, the BVerwG accepts, for instance, the structural aim «to foster the decentralization of air traffic and to achieve an increase in the competitiveness of the region.»[24] However, it does not give its view on alternative concepts, which aim to support the feeder service provided by the railway in order to tackle the overall transregional environmental problems of air traffic. If one gets involved in re-assessing the weight of public interests – and this is unavoidable – the plan approval authority should be asked to refrain from bold and simple postulates; it has to endeavour to be precise and to refer to the relevant expert debate.

In the given case, the weight of the public interest has also to be qualified critically. The port of Hamburg has certainly significant regional importance as part of the infrastructure and an engine of employment; however this public interest does not stand alone but in a zero sum relationship with other competing ports: the strengthening of the port of Hamburg can come at the expense of other ports. The situation is similar when weighing the international function of the port of Hamburg. This function is doubtlessly given, especially with regard to supplying Scandinavia and Central and Eastern Europe. But it has again to be stressed that the strengthening of the port of Hamburg (partly) ousts other ports. If the rules of the market and the principle of competition were to apply, no one could argue against the mutual competition for business opportunities. However, the erecting of infrastructure (like the

22 The further increase of motorized private transport (MPT) reaches a tipping point where it comes to be rather harmful than beneficial due to the part it plays in climate change, air pollution, noise and fragmentation of nature. Due to the achieved level of infrastructure, the construction of new motorways should be seen as being in the public interest only, if other reasons exist, apart from the mere need induced by MPT, especially reasons of health protection and protection against noise.

23 BVerwGE 134, 166 (173).

24 BVerwGE 134, 166 (175).

deepening of the Elbe) is no market event, rather it comes in a twofold sense at the cost of public authorities: through the investment of public funds and the sacrifice of public natural resources. This is the reason why competition is not the appropriate principle for decisions about the extension of infrastructure.[25] Ultimately, these are the reasons why the weight of the public interest in the deepening of the Elbe although significant is nevertheless somewhat limited.

With regard to the burden of proof, it has furthermore to be said that the burden does not rest with the authorities but with the developer due to the exceptional character of the derogation assessment.

3.4 The necessity of a project

For the approval of a project, Art. 6(4) of the Habitats Directive requires overriding public interests; this means that the project must be necessary in order to satisfy a public interest. If the necessity is not given, e.g. because the assumed public interest can be satisfied without the project, the project is inadmissible.[26] If the necessity is affirmed, the project is still not finally accepted; it rather has to stand the test of whether there are less harmful alternatives. In the case of road construction, the necessity test has to assess whether, given that the satisfaction of increased transportation needs is assumed to be in the public interest, one actually has to reckon with an increased number of transportation entities. In the case of the deepening of the Elbe, it can be doubted whether the progress in ship technology indeed leads to ever bigger draught or rather to increased width and length; and, if the former is the case, whether such ships would actually call at Hamburg – and even under full load.[27] It is once more the burden of the applicant to prove this matter.

3.5 Alternatives

What kind of interest is at stake is of decisive significance for the selection of those variants that have to be assessed. In order to identify this interest, first a distinction has to be made between the project purpose and the public interest. In the case of

25 However, competition is called for when services in the port itself are concerned.

26 In the Commission Guidance Document (fn. 16, no. 1.3.1) it is rightly stated – in a run-up to the examination of alternatives, which is not considered from the perspective of legal doctrine: «The competent authorities have to analyse and demonstrate first the need of the plan or project concerned. Thus, the zero option should be considered at this stage.» However, the term «zero option» is prone to create some confusion. If the project is unnecessary, it is simply inadmissible (due to its adverse effects on a Natura 2000 site).

27 Cf. above ch. II. 1.

the deepening of the Elbe, the project purpose is to allow passage to ships with a bigger draught, while the public interest is to strengthen the port as a significant regional and international infrastructure as well as a regional engine of employment.

Case law and prevailing scholarly opinion take the project purpose as standard. Accordingly, a judgement of the BVerwG concerning the airport Münster/Osnabrück states:

> One cannot still talk of an alternative if it leads to another project, since the legitimate aims of the project developer cannot be achieved anymore.[28]

Even partial aims are seen as binding and are meant to exclude entire alternatives from assessment:

> A planning variant which cannot be realized without the sacrifice of an independent partial aim of the project need however not be subject of considerations.[29]

Along the same line, § 34(3)(2) BNatSchG also refers to «alternatives for achieving the purpose intended by the project». Consequently, it follows that the project developer defines the project purpose, that the project developer must be able to implement the potential alternative, and that only internal project variants but no different projects have to be assessed. This includes that the zero variant is excluded from the assessment of alternatives.[30]

Against this interpretation, it can be objected that Art. 6(4) of the Habitats Directive establishes a relationship between the project or plan and the public interest. The satisfaction of the latter is conceived as the problem which the project or plan tries to solve but for which also «alternative solutions» can exist.

After all, the term «project aim» is not used in the Habitats Directive. If the project aim were decisive, Art. 6(4) Habitats Directive would roughly read like this: «A project has to be admitted, once no other alternative serves the project aim and the latter is of overriding public interest.» However, this is just not stated in the provision.

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28 BVerwGE 134, 166 (185). Permanent case law since BVerwG, ruling of 19 May 1998 – 4 A 9.97 (A 20), BVerwGE 107, 1 (14).

29 BVerwGE 128, 1 (66).

30 *Kerkmann*, in: *Kerkmann* (ed.), *Naturschutzrecht in der Praxis*, Berlin 2007, pp. 417 ff.

Hence, the interest in nature conservation is not placed in opposition to a project aim or project but to another public interest. Art. 6(4) of the Habitats Directive recognizes the exception that overriding public interests can exist. However, they can be realized with the help of different projects. While the prevailing opinion argues from the project towards public interests, according to the concept of Art. 6(4) of the Habitats Directive, this direction needs to be reversed and the argument needs to run from the public interest towards the proposed project or other projects.

The prevailing opinion perhaps assumes implicitly that the project developer has a subjective right of derogation. However, in planning permission law such a right is only recognized as a right to the fair exercise of planning discretion, hence not as a right to a certain result.[31] The discretion is wide because of the exceptional status of the derogation under Art. 6(4) of the Habitats Directive.

All this has implications for the given case: it would be a violation of Community law to determine the deepening of the Elbe as the project goal and only to admit internal variants, such as a relocation of the fairways.[32] Instead such solutions must also be assessed, which would be categorized as other projects by the prevailing opinion, namely the cooperation of the ports concerned and the environmentally friendly logistics of the transport of goods. Accordingly, the plan approval authority has to assess whether deeper ships – to the extent that they can at all be expected in relevant numbers – can be lightered before their passage through the Elbe.

Such cooperation would follow a general recent trend in port management and logistics, which moves away from the big gateway-harbours and instead establishes networks of transfer and production centres, which work on the basis of a regional and global division of labour and work in logistical cooperation.

In sum, there are indications that cooperation between the German North Sea ports would make a renewed deepening of the Elbe unnecessary or would reduce its planned scope. Whether this is really the case cannot be sufficiently answered here. According to the above-mentioned burden of proof, it would be the duty of the project developer (and not of the plan approval authority) to outline and prove that such appropriate cooperation is not possible.

31 BVerwG, ruling of 24 November 1994 – 7 C 25.93, BVerwGE 97, 143 (149).

32 It is utterly insufficient and a violation of the Habitats Directive if § 34 BNatSchG restricts the assessment of alternatives to alternatives at other locations. As a matter of course, also other ways of serving the public interest have to be considered.

3.6 interim summary

Summarizing the design of BERSEBA in the Natura-2000 regime the following structure of testing is suggested:

- What project and project objective is envisaged by the actor?
- Does the project objective fulfil a public interest? What public interest is at stake; is it of a public nature, and what is its weight?
- Is the project needed for satisfying the public interest?
- Are there alternative project variants or projects that while likewise serving the public interest cause lower environmental risks?

3.7 the term «zero alternative»

In case law and the relevant literature assertions are often made about the admissibility or inadmissibility of including the zero variant into the calculus. They do not always increase comprehension, since they use the term in very different contexts, which require different treatment. The «zero alternative» describes a situation in which a project is altogether inadmissible and the *status quo ante* stays. This can be the case due to three reasons: first, the project aim does not correspond to a public interest; second, the project is not necessary to satisfy the public interest; and third, there are alternatives to the project which are less harmful. With regard to the first two reasons, the zero variant is undoubtedly provided for in nature conservation law.[33] It is only contested in the third context: If one assumes that only internal variants of a project have to be considered, one consequently rejects the possibility (and thus consideration) of the zero variant.[34] Contrastingly, if one believes that the assessment of other projects is required, this implies that if preference is to be given to another project this excludes the planned project and, hence, the zero variant stays as long as the other project is not initiated. In view of these different contexts in which the term is used, it is advisable to refrain from its use entirely and instead to talk about the inadmissibility of a project as a whole, because it is (*a*) not in an overriding public interest, (*b*) not necessary or (*c*) not without alternatives – if one follows the argument suggested here.

33 See, for the process of balancing interests in plan approval law, BVerwG, ruling of 15 January 2004 – 4 A 11.02, BVerwGE 120, 1 (4).

34 In this way, BVerwGE 128, 1, 66.

3.8 levels of planning

Against the concept that the scope of alternatives should include other projects it could be argued that the testing of other projects should better be treated at a higher level of planning. In general, this has to be agreed to. But for the planning of ports no higher level of planning exists in Germany. Although the German Federal Transport Network Plan considers the extension of Federal waterways,[35] it does not discuss the issues preceding the extension, namely what functions those ports are meant to have that demand the extensions of waterways. If this would be different, one could think of a tiering effect (Abschichtungswirkung) of the higher-level planning. However, at this higher level, an impact assessment under the Habitats Directive is required and, if necessary, a derogation assessment needs to be conducted, since the Federal Transport Network Plan would then qualify as a «plan» under the Habitats Directive.[36]

However, as long as a comprehensive plan of the extension and functions of ports is lacking, there is no other option than to include other projects in the BERSEBA.

3.9 transborder alternatives

Given the project alternative of a cooperation of ports suggested above, it would be beneficial to also integrate the ports of Rotterdam and Antwerp, and hence the entire so-called North Range of seaports. It is questionable whether such a dimension of transborder alternatives is required by the Habitats Directive. This question is of fundamental significance, for instance, for the construction of roads, since it is imaginable that a motorway in the proximity of a national border could be built beyond the border in order to spare a Natura 2000 site. Given that Natura 2000 is itself a transborder network, it suggests itself that those variants that harm the network should have a transborder aspect as well. Art. 6(4) of the Habitats Directive refers at least in general to alternative solutions and not to national alternative solutions. Such a reading runs counter to the traditional policy in port construction, according to

35 Federal Transport Network Plan 2003, sec. 7.4. Available from http://www.bmvbs.de/Anlage/original_15944/Bundesverkehrswege-plan-2003-Beschluss-der-Bundesregierung-vom-02.-Juli-2003.pdf (accessed 24 July 2010).

36 In this way, also Czybulka and Baumgarten, Das Netz Natura 2000 und seine Auswirkungen auf die Bundesverkehrswegeplanung und andere Infrastrukturplanungen, in: Czybulka (ed.), *Wege zu einem wirksamen Naturschutz: Erhaltung der Biodiversität als Querschnittsaufgabe*, Baden-Baden 2005, pp. 143 ff. at 144 f.

which each individual Member State maximizes her infrastructure as much as possible in order to outcompete the neighbouring state. From the view of the Habitats Directive, one could say that this policy becomes unacceptable once Natura 2000 sites are harmed.