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The European Commission's Opinions under Article 6(4) of the Habitats Directive

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Abstract

The contribution examines the Opinions which the European Commission has issued so far under Article 6(4) of Directive 92/43 (Habitats Directive). It examines Member States' reasoning for justifying the application of Article 6(4) of the Habitats Directive in the light of the European Court of Justice rulings, and comes to the conclusion that probably not one of the cases submitted would have been accepted by the Court.

Keywords: Commission Opinions, Article 6(4), Habitats Directive 92/43, compensation measures, impact assessment

1. Introduction

The Habitats Directive 92/43[1] has the objective to provide for a comprehensive protection of EU natural habitats and of wild fauna and flora. It obliges Member States, among other measures, to designate the natural habitats of wild fauna and flora which are, in the opinion of the designating Member State, of Community interest. The Commission shall, on the basis of these national lists, establish a list of habitats of Community interest; the Member States then have to designate the habitats included in these lists as special areas of conservation.

Article 6(3) of Directive 92/43 determines that any plan or project likely to have a significant effect on a special area of conservation 'shall be subject to appropriate assessment of its implications for the site in view of the site's

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1 EEC Directive 92/43 on the conservation of habitats and of wild fauna and flora, [1992] EU OJ L206/7. Hereafter quoted as the 'Habitats Directive'.

conservation objectives'. Such a plan or project may normally only be agreed to, where the responsible authorities have ascertained that it will not adversely affect the integrity of the site. Article 6(4) then continues:

> If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.
> Where the site hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

This provision has a history. During the Council discussions of the Commission's proposal for a Habitats Directive, the Court of Justice delivered its judgment in case C-57/89.[2] That case dealt with the question of whether Member States were allowed to impair a special protection area under Article 4 of the Birds Directive 79/409,[3] though Article 4 did not provide for such a possibility. Germany argued that the work which was intended to be executed in the special protection area of the Leybucht was necessary to protect the human population against floods from the North Sea. The Court stated:

> . . . the power of the Member States to reduce the extent of a special protection area can be justified only on exceptional grounds. Those grounds must correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive. In that context the interests referred to in Article 2 of the directive, namely economic and recreational requirements, do not enter into consideration . . . the danger of flooding and the protection of the coast constitute sufficiently serious reasons to justify the dyke works and the strengthening of coastal structures as long as those measures are confined to a strict minimum and involve only the smallest possible reduction of the special protection area.

When Member States discussed, in Council, the impact of this judgment on the future Habitats Directive, they considered that the restrictions imposed by the Court went too far. They thus introduced into Article 6 the possibility,

2 Case C-57/89 *Commission v Germany* [1991] ERC I-883.
3 EEC Directive 79/409 on the protection of wild birds, [1979] EU OJ L103/1.

under certain conditions, of impairing a designated habitat for economic and social reasons. For priority habitats, though, they inserted the provision that the Commission had to give an opinion on the matter beforehand.

Opinions are instruments in Community law which are, together with recommendations, expressly mentioned in Article 249 of the EC Treaty as instruments of EC policy. They are not binding. 'Opinions' are also given by the European Parliament, by Advocates General in cases pending before the Court, by the Economic and Social Committee or the Committee of the Regions. In practice, the Commission very rarely issues an opinion, as such opinions have less weight than, for example, a proposal for a directive or a regulation, which the Commission also has power to make. Member States and Community institutions are free to follow an opinion. Theoretically, the Commission could start proceedings under Article 226 EC Treaty against a Member State which has not followed its opinion in a specific case. However, this has never happened in environmental matters (or indeed elsewhere). As opinions are not binding, they cannot, under Article 230(4) EC Treaty, be challenged in Court, by, for example an environmental organisation or an individual.

Commission opinions may be published in the Official Journal, though this is not a condition for their validity. In practice, Commission opinions are rarely published in this way. They are, though, included in the Commission 'Register of Commission Documents'[4] which contains documents—COM, C and SEC documents—produced since 1 January 2001.

This article will briefly examine the interpretation given to the provisions of Article 6(4) of Directive 92/43 by the Court of Justice and the Commission (2). It will then present the different opinions given by the Commission under Article 6(4) (3) and examine to what extent these opinions comply with the requirements of the Directive and the Commission's guidance on the interpretation of the legal provisions (4). Some concluding remarks will then be added (5).

2. The Interpretation of Article 6(4) of the Habitats Directive

In 2000, the Commission published a booklet *Managing Natura 2000 Sites: The Provisions of Article 6 of the Habitats Directive 92/43/EEC*.[5] In 2001, it published

4 Europa Register of Commission Documents <http://ec.europa.eu/transparency/regdoc/registre.cfm?CL=en > accessed 31 October 2008.

5 EEC Directive 92/43 on the provisions of Art 6 of the Habitats Directive. Hereafter: Booklet 2000; <http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision.of.art6.en.pdf > accessed 31 October 2008.

methodological guidance on Articles 6(3) and (4).[6] And, in 2007 it published a guidance document on Article 6(4)[7] which intended to 'further develop and replace' the section on Article 6(4) of the booklet of 2000.[8]

These documents are intended to be used at national, regional and local level. They aim to ensure a coherent application of the Directive's provisions and thereby contribute to the establishment and sound management of the network Natura 2000, which was set up by the Habitats Directive. Hereafter, only some of the provisions of the guidance documents will be commented upon, to the extent that they are helpful for interpreting Article 6(4) of the Habitats Directive.

As a general remark, it can be observed that the Habitats Directive tries to ensure that habitats which come under its Article 6 are not significantly affected by plans or projects. Therefore, such plans or projects shall normally not be authorised (Article 6(3)). The provisions of Article 6(4), which provide for compensatory measures, constitute an exception to those of Article 6(3) and must therefore be interpreted restrictively.[9]

2.1 The Impact Assessment

The first issue to examine, in the context of Article 6(4), is whether a plan or a project is likely to have a significant effect on the site concerned within Article 6(3) of Directive 92/43. Whenever the responsible authorities consider it probable that there might be a significant effect, they have to make an assessment. Such a probability or risk[10] exists if it cannot be excluded, on the basis of objective information, that there will be significant effects.[11] In this regard, any reasonable scientific doubt as to the absence of adverse effects on the integrity of the site must be removed.[12]

6 EEC Directive 92/43 on the Commission's assessment of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of Arts 6(3) and (4) of the Habitats Directive 92/43/EEC (November 2001). Hereafter: Methodological guidance 2001; <http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/natura_2000_assess.en.pdf> accessed 31 October 2008. The guidance had been prepared by the Impacts Assessment Unit of Oxford Brookes University.

7 EEC Directive 92/43 the Commission, Guidance document on Art 6(4) of the 'Habitats Directive' (January 2007). Hereafter: Guidance document 2007; <http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf> accessed 31 October 2008.

8 Commission, Guidance document 2007 (n 7) 1.

9 Commission, Booklet 2000 (n 5), 44; Guidance document 2007 (n 7), s 1.2.1.

10 Case C-127/02 *Waddenvereniging* [2004] ECR I-7405, [43]: 'the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.'

11 Ibid, [44].

12 Ibid, [59]; Case C-239/04 *Commission v Portugal* [2006] ECR I-10183, [20].

If there is no significant effect of the plan or project, Article 6(4) is of course inapplicable. However, Article 6(4) does not only apply to those plans or projects that are realised within the protected site; it is sufficient that the effects of the plan or project are felt inside, even where the plan or project is realised outside the site.[13]

In order to determine whether there is likely to be a significant effect, an appropriate assessment has to be made, according to Article 6(3) of Directive 92/43. The three Commission documents frequently refer to the Environmental Assessment Directive 85/337 and the Court of Justice also uses that Directive as a reference,[14] though the objective of the assessment in Directive 85/337 and the assessment under Article 6(3) of Directive 85/337 is different: Directive 85/337 only refers to some projects; furthermore, it requires an assessment of a project on the environment in general, while the assessment under Article 6(3) is site-specific and must examine whether a plan or project adversely affects the integrity of the natural site in question: 'assessments carried out pursuant to Directive 85/337 or Directive 2001/42 cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive'.[15] The Commission documents give detailed indications on which considerations should be taken into account for the assessment; they mention, in particular, the necessity to identify *all* potential impacts, including cumulative impacts, to use the best available techniques and methods, to discuss the most effective mitigation measures in order to avoid, reduce or cancel the negative impacts and to use the best possible indicators for ensuring the biological integrity of the Natura 2000 network.[16]

2.2 Absence of Alternative Solutions

Where it cannot be excluded with scientific certainty that a plan or project will have a significant adverse impact on a site,[17] the Commission recommends considering a thorough revision and/or withdrawal of the proposed plan or project. This so-called *zero option* which is not expressly mentioned in Article 6, *should be observed especially* in the case of effects on priority habitats or species listed in Annex I of Directive 79/409. The Commission is of the

13 The Commission, Booklet 2000 (n 5), 36, gives the example of a drainage project located outside a site which affects a wetland.

14 EEC Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, [1985] EU OJ L175/40. In case C-127/02 (n 10), the Court used the definition of 'project' of Directive 85/337 for the interpretation of this term in Art 6; furthermore, it used other provisions of Directive 85/337 to interpret Art 6.

15 Case C-418/04, *Commission v Ireland* [2007] ECR I-10947, [231].

16 Commission, Guidance document 2007 (n 7), s 1.3.

17 See Court of Justice, Case C-127/02 (n 10), [59]; similarly case C-418/04 (n 15), [226].

opinion that the competent authorities 'have to . . . demonstrate' the need of the plan or project concerned.[18]

Where the zero option is not chosen, the responsible authorities shall examine whether there are alternatives to the plan or project. The wording of Article 6 seems to require that there is a complete absence of alternatives. The Court of Justice, though, nuanced this requirement by stating that alternatives which 'cannot be ruled out immediately' would have to be examined;[19] this means that an alternative solution which can be ruled out immediately, need not be further explored by the authorities. In practice, thus, the Court did recognise that not *all* alternatives to a plan or project need be examined.

The Commission's publications are remarkably discreet on the question of which alternatives are to be studied. The Guidance document of 2007 indicates that all *feasible* alternatives have to be analysed which could concern alternative locations or routes, different scales or designs of development or alternative processes.[20] The Commission does not explain what it understands by 'feasible' alternative; it states, though, that the realisation of the plan or project in another region or even in another Member State could constitute an alternative solution.[21] It also states that 'other assessment criteria, such as economic criteria, cannot be seen as overruling ecological criteria'.[22] This means in clear terms that an alternative solution may not be rejected because it would be more expensive than the original plan or project.

Theoretically, for each plan or project, there might exist hundreds of alternatives. It simply does not make sense to ask for an examination of all of them, with an environmental impact assessment made for each of them.[23] Therefore, in substance, the notion of 'absence of alternative solutions' in Article 6(4) has to be read as meaning 'absence of reasonable alternative solutions'.[24]

18 Commission, Guidance document 2007 (n 7), s 1.3.1.

19 Court of Justice, Case C-239/04 (n 12), [38].

20 Commission, Guidance document 2007 (n 7), s 1.3.1.

21 Commission, Methodological guidance 2001 (n 6) 33. This issue which could concern large infrastructure projects, such as ports, airports, pipelines, etc, will be discussed in more detail below.

22 Commission, Guidance document 2007 (n 7), s 1.3.1; the same remark was already made in Booklet 2000 (n 5) 44.

23 See Court of Justice, Case C-239/04 (n 12), [38]: 'it is not apparent from the file that those authorities examined solutions falling outside that Special Protection Area… although, on the basis of information supplied by the Commission, it cannot be ruled out immediately that such solutions were capable of amounting to alternative solutions… even if they were, as asserted by the Portuguese Republic, liable to present certain difficulties'.

24 This wording corresponds to the wording of the Espoo Convention on environmental impact assessment in a transboundary context of 25 February 1991, which requires the examination of 'reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative' (Appendix II(b)). The Espoo Convention was ratified by the EC on 24 June 1997 and is thus, according to Art 300(7) EC, binding on the EU institutions and on the Member States.

2.3 Imperative Reasons of Overriding Public Interest

Until now (summer 2008), there is not yet any Court decision that defines the term of imperative reasons of overriding public interest within Article 6(4). In the Commission' view, 'projects that lie entirely in the interests of companies or individuals would not be considered to be covered'.[25] The Commission suggested balancing the interests of conservation against the interests of realising the plan or project and pointed out that one of the objectives of Directive 92/43 was to preserve and protect the 'Community's natural heritage';[26] for this reason, a public interest could only be overriding when it was a long-term interest; short-term economic interests could not justify an impairment of a habitat. Thus, the plan or project had to be indispensable

> within the framework of actions or policies aiming to protect fundamental values for citizens' lives (health, safety, environment); within the framework of fundamental policies for the State and society; within the framework of carrying out activities of an economic or social nature, fulfilling specific obligations of public service.[27]

In its methodological guide of 2001, the Commission held that plans or projects could be considered to be justified by imperative reasons of overriding public interest where there was a 'demonstrable public or environmental need', which was specifically targeted at 'improving public health and/or safety' or 'safeguarding human life and property'. The need for such plans or projects had to be supported by evidence, and the need had to be overriding. And the Commission concluded:

> Projects or plans that ensure only the interests of companies or individuals are not covered by imperative reasons of overriding public interests. An examination of these public interests should only take place, when it has been established that there is an absence of alternative solutions.[28]

While the above information stems from the earlier guidance, it should be noted that the 2007 Guidance document essentially repeats the considerations of the two previous communications, without adding substantially new comments.[29]

25 Commission, Booklet 2000 (n 5) 45.
26 See in this regard Directive 92/43 (n 1), Recital 1: 'the conservation of natural habitats and of wild fauna and flora are an essential objective of general interest pursued by the Community'; Recital 4: 'the threatened habitats and species form part of the Community's natural heritage'.
27 Commission, Booklet 2000 (n 5) 45.
28 Commission, Methodological guide 2001 (n 6) 15.
29 Commission, Guidance document 2007 (n 7), s 1.3.2.

2.4 Compensatory Measures

In a remarkable contrast to its short remarks on the 'imperative reasons' and the 'overriding public interest', the Commission was, in its 2007 Guidance, very detailed as regards compensatory measures which were discussed over more than 10 pages. It declared that compensatory measures 'aim to offset the negative impact of a project and to provide compensation corresponding precisely to the negative effects on the species or habitat concerned'.[30] The information about them must enable the Commission to appreciate the manner in which the conservation objectives of the site in question are pursued in the particular case. Of particular interest is the statement on the timing of the compensation measures:

> All necessary provisions, technical, legal or financial, necessary to implement the compensatory measures must be completed before the plan or project implementation starts, so as to prevent any unforeseen delays that may hinder the effectiveness of the measures.[31]

The 2007 Guidance document does not indicate that the Commission will monitor compliance with the compensatory measures. The information should just 'enable the Commission to appreciate the manner in which the conservation objectives of the site in question are pursued in a particular case', though 'it is not the Commission's role . . . to suggest compensatory measures, or to validate them scientifically'.[32]

3. The Commission's Opinions Under Article 6(4) of the Habitats Directive

Under the heading 'Guidance', the Commission has published on the internet the Opinions which it has issued under Article 6(4) of the Habitats Directive.[33] At present, there are 10 such Opinions. This is not a complete list of all Opinions issued so far, as at least one Opinion on the A-20 motorway in Germany[34] is missing. Whether other Opinions were issued by the Commission is not known. Though the Commission's Opinions can, since 2001, also be found on the above-mentioned Commission's register,[35] it cannot be excluded that some Opinions are not put onto this register. This might

30 Ibid, s 1.4.1.
31 Ibid, s 1.5.6.
32 Ibid, s 1.7.
33 Europa, European Commission Document Register, <http://ec.europa.eu/environment/nature/natura2000/management/guidance.en.htm> accessed 31 October 2008.
34 Commission Opinion (EC) of 27 April 1995 [1995] OJ C178/3.
35 See n 4, above.

apply to Opinions which the Commission decided not to make public and which bear the remark 'shall not be published'.

There might also be cases where a Member State should have asked for an Opinion of the Commission under Article 6(4) of the Habitats Directive, but omitted to do so. An example of this last situation is found in the judgment of the Tribunal Superior de Justicia de Madrid regarding the enlargement of the road M-501. The Court found that the Spanish authorities should have asked the Commission for an Opinion, but had omitted to do so. For that reason, the Court quashed the permit and ordered the original state of the site to be re-established.[36]

In the first case on which the Commission gave an Opinion, the Trebel and Recknitz valley intersection, the Commission stated: 'if an opinion from the Commission is required, the national authorities may not agree to the project before such an opinion is given'.[37] This remark was not repeated in any of the later documents or Opinions. It raises, though, the question whether the authorisation of a plan or project leads to the nullity of the authorisation when the Commission, in cases of Article 6(4), should have been asked for an Opinion, but in fact had not been asked. The Court of Justice has decided that, where a Member State only has to notify the Commission of a specific measure, the omission to do so does not lead to the nullity of the national measure taken; in contrast, where the Member State's notification leads to a Community procedure, it signifies that this Community procedure is an essential part of the national procedure. In the latter case, the omission to notify therefore leads to condemnation of the national measure.[38]

The binding provision in Article 6(4) of the Habitats Directive to ask for a Commission Opinion is clearly the institution of a Community procedure, even if this procedure is not elaborated in detail. As the requested Opinion concerns part of Natura 2000, the Community's natural heritage, nothing would, for example, prevent the Commission from asking the opinion of other Member States or the public, before it issues an Opinion. The judgment of the Tribunal Superior de Justicia de Madrid is therefore correct. Only when the sanction of omitting to request the Commission's Opinion is the nullity of the authorisation of the plan or project, can Article 6(4) deploy its full effet utile.

The Commission's Opinions concerned the following cases.[39]

36 Tribunal Superior de Justicia de Madrid, Sentencia 169, judgment of 14 February 2008. This judgment is under appeal.

37 Commission (n 7), s 2.3.

38 See on the one hand, Court of Justice, Case C-194/94 *CIA Security International* [1996] ECR I-2201 (notification with monitoring procedure); and on the other hand Case C-380/87 *Cinisello Balsamo* [1989]ECR I-2491 (notification without monitoring procedure).

39 Quotations are taken from the different documents on the internet (see n 4, above).

3.1 Intersection of the Trebel and Recknitz Valley by a Motorway (Germany)[40]

Germany wanted to build a motorway along the Baltic Sea which linked Lübeck to Stralsund und Szeczin (Poland). The motorway was to cross the Trebel and Recknitz Valley which hosted some relevant habitats. Germany made an environmental impact assessment which concluded that these habitats, among them priority ones, would be significantly affected by the motorway.

As regards alternative routes, the Commission stated, 'A less damaging crossing of the valley of the Treble and Recknitz is not possible. Alternative solutions . . . therefore do not exist'. The Commission considered the following aspects as imperative reasons of overriding public interest: the region of Mecklenburg-Vorpommern, where the motorway was to be built, had high unemployment. Its proportion of the gross national product was below German average. The region was supported by the EC Structural Funds. The motorway in question was part of the trans-European transport network. And the German Government and Parliament had both given top priority to the construction of this motorway.

In its correspondence with the Commission, Germany had 'described' measures as 'possible compensatory areas'. It had not indicated concrete compensation measures.[41] The Commission nevertheless gave a positive Opinion under Article 6(4), 'if all necessary compensation measures are taken'.

3.2 The intersection of the Peene Valley by a Motorway (Germany)[42]

This Opinion concerned the same motorway as under Section 3.1 above. This motorway was also to cross the Peene river and affected a protection area in the river valley, which 'hosts the biggest and, as far as fauna and flora is concerned, the richest alluvial alkaline fens in Northern Germany'. The whole area hosted priority bog woodland and residual alluvial forests. With the exception of four settlements, large stretches of the valley are unused by man.

The German Ministry of Transport instructed the regional authorities to study a specific route. 'The alternative routes . . . could no longer be considered by the authorities of Mecklenburg-Western Pomerania, the affected region. The Commission, however, has to ensure . . . that adverse effects on a site are only accepted in the absence of alternative solutions.' The Commission briefly examined three alternative routes. It concluded that the route chosen by

40 Commission Opinion (EC) 96/15 of 18 December 1995 [1996] OJ L6/14.

41 Commission (n 40): 'The Commission has noted the compensatory measures as described in the German Transport Ministry's letter of 30 October 1995, foreseeing and furthering the creation or restoration of seven different habitat types in an area of nearly 100 hectares in the Peene valley between Jarmen and Loitz.'

42 See n 34, above..

Germany was the least damaging. It again saw the overriding public interest in the high rate of unemployment in the region, which was almost double the rate in the old German Länder. The proportion of the gross national product in the region was considerably lower than the German average. The region's development was specially promoted by the EC Structural Funds. Furthermore, the A-20 was part of the trans-European road network, and the German Government and Parliament had both given top priority to the construction of the road. 'An alternative solution has not been found'.

The Commission noted a number of mitigation and compensation measures[43] announced by the German Government and gave a positive Opinion on the project.

3.3 Building of a Private Airport (Mühlenberger Loch) (Germany)[44]

In October 1999, Germany requested a Commission Opinion on the project to enlarge an existing industrial plant in order to complete the production of a jumbo passenger airline, the Airbus A3XX.[45] The extension was to be located on 171 hectares of an existing bird protection area which had, furthermore, also been designated by Germany as a wetland of international importance under the Ramsar Convention of 1971 and as a site of Community importance under the Habitats Directive. The site hosted several habitats and species covered by both Directives 79/409 and 92/43, as well as a threatened priority plant species.

Germany produced an impact assessment which showed that the site would be significantly affected by the extension. It informed the Commission that 'based on cost-effectiveness considerations and functional requirements' there was no alternative location. The Commission noted that Germany had not completed its site proposal for Natura 2000, that there were 'infringement procedures underway' and had announced the designation of further, compensatory sites, in particular, for the priority plant species. 'For the time being and in the absence of such proposals, the Commission is not in position to assess the relevance of the compensation in view of the Natura 2000 network.' The Commission also stated:

> The German authorities have demonstrated that the project is of outstanding importance for the region of Hamburg and for northern

43 See Commission (n 42): 'The Commission has noted the compensatory measures described in the German Transport Ministry's letter of 20 September 1994, in particular the area at the edge of the valley between Trittlewitz and Demmin or of the 'Tollenseetal' as possible compensatory areas.'

44 Commission, C(2000) 1079 of 14 April 2000. The document which was published online (see n 4, above), is obviously not the final document.

45 Eventually to become the A380.

> Germany as well as the European aerospace industry. The project will generate an important number of highly qualified new jobs that will counterbalance the considerable loss of jobs in the region. The project will have a positive impact on the competitiveness of the European aeronautic industry. It will contribute to the technological advance and foster the European co-operation in the aviation business.

With these arguments, the Commission gave a positive Opinion on the project.

3.4 Creation of a New Industrial and Commercial Area at Trupbach (Germany)[46]

Germany wanted to create a new industrial and commercial area within a former military training area at Trupbach (Siegen) which was proposed, as a protected area, under the Habitats Directive. The impact assessment for the project concluded that it would lead to a large scale destruction of the protected habitat types. Mitigation measures could not avoid this negative impact.

The Commission looked into preparatory papers of the German authorities and found that '*at least*' three additional areas—next to two others identified by Germany—could be considered as possible alternative sites for the project.

The German authorities based their argument on the fact that there were imperative reasons of overriding public interest, with an overall deficit of industrial areas in the district of about 158 hectares. They did not propose compensatory measures. The Commission considered that not all possible alternatives had been explored.

> Moreover, the search for alternative sites for industrial and commercial development must not be limited by the boundaries of local municipalities. Alternative sites in neighbouring municipalities and intercommunal sites could also provide additional space for industrial settlement in the region. Disadvantages resulting from such alternatives, e.g. with regard to taxation revenue, cannot justify to ignore them. It is the responsibility of the Member State concerned to resolve such difficulties.

The Commission also doubted the existence of imperative reasons. Instead of creating one new industrial area, it would have been possible to develop several smaller areas with no significant disadvantages for the economic development of the region, including as regards the employment situation. Therefore, the Commission gave a negative Opinion on the project.

46 Commission, C(2003) 1303 of 24 April 2003.

3.5 Enlargement of the Rotterdam Port (the Netherlands)[47]

The Dutch authorities planned the enlargement of the Rotterdam port within the context of general economic planning. The enlargement concerned some 3.200 hectares of land and was to serve mainly for the petrochemical industry, container goods and distribution. Three Natura 2000 zones were significantly affected by the project, among them a priority zone of 19.5 hectares. The Dutch authorities examined two alternatives to the project. The first consisted of making better use of existing space on land. Here, one option was abandoned because of too high investment costs in the hinterland and because there was not really appropriate space for the industries in question; the other option was abandoned, because 'of too large a potential for conflicts with ecological, social and security interests'. The second alternative, consisting of winning new land from the sea was not presented by the Commission, which limited itself to comment on the option that was finally chosen by the Dutch authorities. The reader is thus not in a position to understand why the chosen option was the best one.

As regards the imperative reasons of overriding public interests, the following arguments were raised: Rotterdam harbour is a cornerstone of the Dutch economy; the enlargement was necessary to maintain its competitive position with regard to Hamburg and Le Havre; Rotterdam harbour is an important point in the trans-European transport network; the harbour is a project of Community importance; and the project provides an optimal balance between the human areas and the environmental zones in the Rotterdam area.

The Dutch authorities announced a number of compensatory measures[48] which the Commission considered satisfactory. It gave a positive Opinion on the project, as it did not expect long-term negative impacts on Natura 2000.

3.6 Extension of a Coal Mine at Haniel (Germany)[49]

Germany wanted to extend an existing coal mine that would largely destroy two priority habitats. The German authorities argued that there was no alternative, as no other coal mine in Germany offered similarly favourable geological infrastructure conditions. Closing the mine would result in the direct loss of 4400 jobs in mining, and a further 6000 jobs in up-stream industries and downstream services. Coal mining was part of Germany's long-term energy policy which aimed at security of energy supply. The extension

47 Commission, C(2003) 1308 of 24 April 2003. The document carries the words (in the Dutch language) 'shall not be published'.

48 These concerned the creation of a new habitat for dunes of about 100 hectares, fishing restrictions in a marine habitat and a creation of an equivalent habitat for a specific plant.

49 Commission, C(2003) 1304 of 24 April 2003.

would allow it to maintain its leading position in European mining and coal energy technologies. Germany offered compensatory measures[50] which would be progressively realised.

The Commission accepted Germany's arguments as to the absence of alternative solutions; it did not look into the question of alternatives itself. As regards the overriding public interest, the Commission argued that coal mining was not competitive in Germany and Europe; thus, the workers would lose their job anyway and it might be better to use the money saved by closing the mine to retrain and relocate the workers. The security of energy supply was not threatened, as the mine only contributed 1% to Germany's energy needs (10% of its coal needs), and enough coal was available on the world market. Finally, the leading role in European mining and coal energy technologies was 'unlikely to require the extension of a single specific mine'.

Despite these arguments, the Commission accepted that the short-term negative effects[51] of a refusal to extend the mine constituted imperative reasons of an overriding public interest. As it was satisfied with the compensatory measures, it thus gave a positive Opinion on the extension.

3.7 Construction of the Railway 'Botniabanen' (Sweden)[52]

Sweden had decided to construct the railway Botniabanen between Nordmaling and Umeaa which crossed and affected several habitats, among them at least one priority habitat. According to the environmental impact assessment which was produced by Sweden, these areas would be significantly affected.

Sweden examined two alternatives which

> would affect Natura 2000 interests to a very limited degree or not at all. These alternatives were, though, not favoured by the Swedish authorities, as the choice of these routes would lead to operation problems for the railway. The Swedish Government presented data which show that the alternative routes would not lead to higher investment costs, but that they would result in lower profit because of reduced income. The authorities affirm, based on these calculations that the selected route – despite its effects on the Natura 2000 site – is the only viable alternative.

50 Creation of a habitat for beeches and oak forests (125–150 hectares) and creation and improvement of alluvial forests, or optimisation of riverbeds.

51 See Commission (n 49): 'the Commission accepts the fears expressed by the competent authorities that an accelerated closer of the Prosper Haniel colliery could have in the short-term significant social and economic effects at the local and regional level'.

52 Commission, K(2003) 1309 of 24 April 2003. The Document carries the remark (in Swedish) 'shall not be published'.

The Commission accepted this reasoning. It stated:

> . . . these alternatives would lead to numerous problems for the operation of the planned railway. Among others the travel time would be prolonged by 10 to 20 percent and the transport operations be more complicated. This last aspect is based on the fact that Umeaa would remain a "dead-end station", instead of a through route station, that the transport services would have to be limited and that a number of agglomerations would suffer certain restrictions in transport connections.

The Swedish Government viewed the imperative reasons of overriding public interest in terms of the following: (1) the railway strengthens regional competitiveness, eliminates regional imbalances and ensures good transport quality; it is an important investment in Swedish infrastructure; (2) the project has an essential regional policy interest; it creates better conditions for cooperation between cities and regions in Northern Sweden; (3) it offers an environmentally friendly transport alternative in this thinly populated region; and (4) the railway must be efficient and functional, in the short- and long-term. The Commission accepted this reasoning without detailed comments.

Sweden was not able to offer specific compensatory measures, as the internal consultations were not yet finished. The Commission also accepted this. It therefore gave a positive Opinion on the project, while insisting that appropriate compensatory measure be decided and implemented.

3.8 Construction of the High-Speed Train (TGV) 'Est' (France)[53]

France wanted to construct the TGV 'Est', which was to link Paris with the East of France and with German cities. It declared the project to be of public utility. Part of the route was to cut thorough two habitats, one of them a priority habitat which would be significantly affected by the project.

As regards alternatives, the Commission Opinion does not state whether and to what extent France had examined alternatives. The Opinion mentions that an advantage of the chosen line was that it was close to existing railway lines and that work on one line was already under way. France argued that there was a lack of options to link the existing lines in another way; the Opinion does not discuss this argument.

With regard to the imperative reasons of overriding public interest, the Opinion states that the project of the TGV Est 'was viewed favourably in the EC Council of Ministers of December 1990' and that, in 1994, the TGV Est was chosen by the EC as a priority project of the trans-European network.

53 Commission, C(2004) 3460 of 17 September 2004.

France announced a number of mitigation and compensatory measures.[54] The favourable Opinion which the Commission issued expressed the expectation that these measures would be finally decided and then executed.

3.9 Construction of the La Brena II Water Reservoir (Spain)[55]

Spain wanted to build a new water reservoir, La Brena II, in order to increase the water flow in the Guadalquivir river. Indeed, its national water plan had considered that there would be a need of 3600 cubic hectometres (hm^3) for the river valley, whereas the Guadalquivir had a flow of only 3100 hm^3. The planned dam, concerning the Guadito river, a tributary of the Guadalquivir, was designed to reduce this deficit to 242 hm^3.

Spain produced an environmental impact assessment. It found that the water reservoir would significantly affect a habitat for the Iberian lynx, a highly endangered species. It considered the zero-alternative and the possibility of building the dam on another tributary river, but concluded that there was no suitable alternative; therefore, it asked for a derogation under Article 6(4).

The Commission considered the impact assessment and the examination of alternatives adequate and did not discuss it further. It also accepted the supply of water to regional agriculture and to people living in the Guadalquivir valley constituted an imperative reason of overriding public interest. In that it was reassured by the fact that Spain gave a guarantee that there would be no increase of irrigated areas in the Guadalquivir basin and the Commission's Agricultural Department had insisted that any increase in agricultural production in that basin 'correspond to a real market need'.

Spain committed itself to spend some €28 million on compensatory measures.[56] The Commission agreed to the measures, but asked for an execution 'in a timely manner' and for annual implementation reports.[57] With that, it issued a positive Opinion.

54 Preservation of the remaining salt meadows by means of a management agreement; restoration of the site and re-establishment of salt meadows; preservation of the exisiting habitat of the Nied Valley salt meadows; optimisation of the TGV route; precautionary measures during the working phase.

55 Commission, C(2004) 1797 of 14 May 2004. The Opinion contains the remark (in Spanish) 'shall not be published'.

56 In favour of the Iberian lynx: expropriation of 15 estates (2.134 hectares) and measures to increase prey species, habitat restoration and reforestation activities, restoration of groves, construction of refuges, monitoring; in favour of black vultures Bonelli's eagles and black storks: increase of prey species, habitat restoration, modification of dangerous power lines.

57 The Commission is entitled, under Art 284 EC, to request such information. Where a Member State does not comply with the request, the Commission may initiate proceedings under Art 226 EC.

3.10 Enlargement of Baden-Baden Airport (Germany)[58]

Germany wished to expand the airport Karlsruhe/Baden-Baden, because of increased air traffic. The enlargement would significantly affect several habitats, among them one priority habitat. Germany examined seven alternatives; two of them, which provided for an improvement of the existing airport without expansion, were not further considered. The others were essentially concerned with the placement or prolongation of the runway. Germany opted for a specific alternative. The Commission summarily examined this assessment and approved it.

The imperative reasons of overriding public interest were seen in the fact that the 'airport is an airport of common interest within the meaning of Decision 1692/96/EC and expansion of the airport is therefore in the public interest', and that there was an increase in passenger numbers. The only environmental advantage of the enlargement was considered to be that the airport would be equipped with a drainage system for rainwater, as rainwater had been seeping away until then. The Commission thus accepted that there were imperative reasons of overriding public interest.

Germany had proposed extensive compensatory measures, which were to restore and improve four existing habitats that would be affected by the loss of territory. The Commission examined these in detail, approved of them and thus gave a favourable Opinion, on the condition that the compensatory measures were executed in good time.

3.11 Construction of a New Port in Granadilla, Tenerife (Spain)[59]

Spain wanted to construct a new port in Granadilla, Tenerife, 'in order to respond to projected increase in maritime traffic'. Several habitats would be significantly affected, among them one priority habitat. Spain produced an environmental impact assessment which was published, quite lawfully, in summary form. It studied 'several alternatives, including the zero-option' and the expansion and development of the existing port of Santa Cruz. As regards the zero-alternative—in other words not to build the port—the Commission concluded that this would not be possible, because of the increase in maritime traffic. The development of the existing port in Santa Cruz would have a number of negative effects—no hinterland, no quarry in the neighbourhood, an increase in the transport imbalance between the North and the South of the island and no possibility of building a natural gas storage terminal—which excluded this option.

58 Commission, K(2005) 1641 of 6 June 2006. The Opinion contains the remark (in German) 'shall not be published'.

59 Commission, C(2006) 5190 of 6 November 2006.

The Commission concluded that Granadilla was the only appropriate site, for technical reasons. These 'included': the depth of the seabed at shore, the presence of a quarry, free adjacent land, transport connections with the hinterland and the proximity of port users. The Commission thus accepted the Spanish environmental impact assessment.

It saw the imperative reasons of overriding public interest in the fact that the project would 'promote economic and social development in the island of Tenerife and the surrounding region', due to increased maritime traffic, in particular, as regards container and dry bulk traffic.

Spain suggested a number of compensatory measures[60] which the Commission examined and which it found 'adequate, if they are executed in a timely manner'. It requested yearly reports from Spain and gave, overall, a favourable Opinion.

4. A Critical Look at the Commission's Opinions

4.1 Public Access to the Opinions

Overall, there are 11 known Commission Opinions that have been given under Article 6(4) of the Habitats Directive. It is to be noted that the first two Opinions were published in the *Official Journal*. In contrast to that, a number of the documents which were published only on the internet, carried the remark 'not to be published', though these were put on the Commission's register of documents. No criterion can be found as to why some Opinions should, but others should not, be officially published.

The Commission's practice raises the serious doubt, whether there have not been other Commission Opinions which were not even put on the internet—all the more, as the 1995 Opinion on the German motorway A-20 was not placed there.

Article 1 of the Treaty on European Union states that 'decisions are taken as openly as possible and as closely as possible to the citizen'. Considering this fundamental democratic principle of the European Union, the handling of transparency of the Opinions under Article 6(4) by the Commission is surprising. There are no serious reasons not to systematically publish the Opinions. There is no other way to gain and preserve the citizens' confidence that the European Union is based on the rule of law; and this observation is particularly relevant in the aftermath of the Irish referendum on the Lisbon Treaty.

60 These measures concerned the creation of four new sites of Community interest, and a monitoring programme for the turtle *Caretta caretta*.

In the protection of biodiversity, in particular of natural habitats and species of fauna and flora, the public authorities in Europe have, for decades, been dependant on the active cooperation of nature protection organisations, citizens and the public in general. Alongside professional activities, there is an immense input of voluntary work to preserve, protect and improve the quality of the natural environment. All Member States and the European institutions repeatedly recognised this contribution by citizens in encouraging environmental groups to participate in the collection of data, in advisory or regulatory groups, in asking them for information, assistance and support and in charging them with monitoring sites or species.[61]

The Opinions under Article 6(4) have the function of balancing the economic and/or social interest invoked by a Member State in order to impair a priority habitat, against the Community interest of maintaining the coherence of Natura 2000 and protecting the

'Community's natural heritage'.[62] There is, in summary, no reason, why an Opinion, adopted by the college of the European Commission after thorough preparation by its services, should not be publicly available.

4.2 Impact Assessment

When Member States want to authorise a plan or project which is likely significantly to affect a site that falls under Article 6 of the Habitats Directive, they must, before they give authorisation, first make an 'appropriate assessment of its implications for the site'. However, Member States' obligations do not end here. Indeed, according to Article 6(4), they may authorise such a plan or project only 'in the absence of alternative solutions'. This means that Member States have to prove that no alternative solution exists.[63]

For this reason, Member States will have to examine whether alternatives to the plan or project, while achieving the same objective, avoid the impairment of the protected habitat altogether or impair it less. And this obligation implies that they also make an appropriate assessment of the implication of the alternative solution on the alternative site.

61 See in this regard, in particular, the Aarhus Convention on access to information, participation in decision making and access to justice which the EC ratified by Decision 2005/370 (EC) [2005] OJ L124/1.

62 Directive 92/43 (n 1), Recital 4.

63 The Commission [Guidance document 2007 (n 7), s 1.3.1] expressed this in the following terms: 'All feasible alternatives, in particular, their relative performance with regard to the conservation objectives of the Natura 2000 site, the site's integrity and its contribution to the overall coherence of the Natura 2000 Network have to be analyzed. Such solutions would normally already have been identified within the framework of the initial assessment carried out under Article 6(3).' The Court of Justice limited itself, in Case C-239/04 (n 12) to request that the alternatives be 'examined', without further specifying this term.

An examination of the 11 Opinions of the Commission shows that impact assessments of alternative locations were only made in 3 out of the 11 cases;[64] where impact assessments were made in the other cases, they concerned the impact of the envisaged project at the projected location. And even in the three cases, one may argue about the specificity of these impact assessments: thus, in the Rotterdam Port case, an alternative was not further examined, because of the 'potential for conflicts with ecological, social and security interests'. Normally, one would consider that it is the objective of an impact assessment to find out about such conflicts. In the Botniabanen case, the impact of alternative solutions appears to have been examined in detail and alternatives were found which had no impact on the site; however, they were not chosen.[65] The reason given was of an economic nature, though the Commission had advised Member States that 'economic criteria cannot be seen as overruling ecological criteria'.[66] The Baden-Baden Airport case, finally, examined alternative solutions which all centred around the pre-selected location of the existing airport. This aspect will be discussed in more detail below.

In the cases of the A-20 motorway in Germany—cases 1 and 2, above—it seems that no environmental impact assessment was made for the project at all. The other projects or plans were subjected to such an impact assessment. In the La Brena II and the Granadilla Port case, the Spanish authorities published an environmental impact *declaration* which gave, in an annex, a summary of the environmental impact studies that had been made. Impact assessments for the other projects might have been made public locally and/or for a certain period of time; this could not be checked.

The Court of Justice requires an impact assessment of the alternatives, unless such alternatives can be excluded immediately, because they are, in my words, 'unreasonable'.[67] Using this criterion, the conclusion is that in practically all 11 cases, the Member State in question has not proven that there was no alternative to the suggested plan or project. Only in the Trupbach case (Section 3.4 above) did the Commission itself draw this conclusion.

64 This concerns the cases Rotterdam port (Section 3.5), Botniabanen (Section 3.7) and airport Baden-Baden (Section 3.10). It must be underlined, though, that the Opinions are rather vague on this question.

65 See Section 3.7.

66 Commission, Guidance document 2007 (n 7), s 1.3.1.

67 Court of Justice, Case C-239/04 (n 12) paragraph 38: 'it is not apparent from the file that Portugal examined solutions falling outside that SPA … although, on the basis of information supplied by the Commission, it cannot be ruled out immediately that such solutions were capable of amounting to alternative solutions within the meaning of Article 6(4) of the Habitats Directive, even if they were, as asserted by the Portuguese Republic, liable to present certain difficulties'; see also C Sobotta, 'Die Rechtsprechung des EuGH zu Art.6 der Habitat-Richtlinie' (2006) 17 Zeitschrift für Umweltrecht 359.

4.3 Alternative Solutions

The examination of alternative solutions by Member States is also, in several regards, unsatisfactory. In the case of the A-20, as regards the Trebel-Recknitz intersection (Section 3.1 above), Germany appears to have made no examination of alternatives, and the Commission limited itself to stating that alternatives did not exist. In the case of the Peene Valley (Section 3.2 above), the Commission itself looked into alternatives and came to the conclusion that no alternatives existed. One may really wonder whether the Commission is itself equipped to examine in detail rather complex questions of town and country planning, or whether it should not better leave the proof of the absence of alternative solutions to the Member States, as requested by the Habitats Directive.

In the Mühlenberger Loch case (Section 3.3 above), Germany reproduced the Airbus company's argument that no reasonable alternative existed, and the Commission did not question its arguments. This is surprising. Indeed, the Mühlenberger Loch was located in Hamburg which was and is one of the wealthiest regions in the European Union, and where unemployment was and is one of the lowest in Germany and in Europe. The Hamburg region borders the region of Mecklenburg-Vorpommern, which had high unemployment rates and a low share of gross national product; the Commission had justified its positive Opinions in the two A-20 cases precisely with the unfavourable economic situation of this region. And while the higher tax generating potential of the Hamburg location appeared to play a decisive role in the German decision, in the Trupbach case (Section 3.4 above), the Commission had argued that the concern to obtain tax revenues could not be a reason to favour a specific location of a project, as arrangements on the tax revenue distribution could be made between the different local or regional authorities concerned. The absence of alternatives in the Mühlenberger Loch case was thus not reasonably examined.

No alternative was examined in the Haniel case (Section 3.6 above), in the TGV Est case (Section 3.8 above) and in the La Brena II and Granadilla Port cases (Sections 3.9 and 3.11 above).[68] The impact assessments examined the pre-selected location and Member States just affirmed that there was no alternative solution—which is not sufficient for the application of Article 6(4). The Commission should not therefore have accepted the Member States' requests for an approving Opinion.

68 For the La Brena II and Granadilla Port cases, see Boletin Oficiel del Estado (Spain) 1998, no 80, 11480 (La Brena II) and 2003, no 49, 7776 (Granadilla Port). In the Granadilla Port case, the situation of the existing port of Santa Cruz was examined—though it is unclear whether a complete environmental impact assessment was really made. In any case, no other location on Tenerife or another Canary island for a new port was examined.

The two Spanish cases and the Baden-Baden Airport case (Section 3.10)—and perhaps also some of the other cases—raise another problem: the choice of the location. In the La Brena II case, Spain did not apparently examine whether the reservoir could be built on another river. And in Granadilla, Spain did not examine whether a new port could be built at another place on Tenerife—or on another of the Canary Islands. And in the Baden-Baden Airport case, there was no question of using another airport—perhaps even in a border region of France. Of course, such an alternative location inevitably raises a mountain of concerns of local and regional interests, legitimate and less legitimate. Member States rather seem to fix themselves on a specific location and do not seriously wish to examine whether another location would better balance environmental and socio-economic interests.

In no case was there any discussion of whether a project could be replaced by an alternative project or option—for example to build a railway instead of a road.[69] The Commission raised some doubts in the Haniel case (Section 3.6 above) as to whether coal mining was really a technology with prospects and challenged the long-term advantage of the project; however, it satisfied itself with its short-term advantages. In the Mühlenberger Loch case (Section 3.3 above), there was no discussion whatsoever of whether the policy decision to bring parts of the Airbus plane from Toulouse for its final assembling in Hamburg, really justified the destruction of the habitat. The author's own opinion is that such a different option will, in exceptional circumstances, have to be examined. The object of the plan or project is normally determining, and it will only exceptionally be possible to ask a public or private investor to realise another project.

In no case was there an examination of the zero-alternative—in other words, the option of not realising the project at all. This might have been an issue for example in the La Brena II case (Section 3.9 above). Indeed, it is known that in Spain, low water prices for tourism and agricultural use (irrigation) and the almost complete absence of water recycling, contribute to high water consumption. An alternative to the construction of a water reservoir would have been another water management policy. Neither the Spanish environmental impact assessment declaration nor the Commission's Opinion touched on this topic.

The conclusion of all this is that the examination of alternatives and the environmental impact assessment for these alternatives are, in the context of Article 6(4) of the Habitats Directive, not really taken seriously by Member States. For them, the objective of the alternative examination is to see the original, normally political, decision on the project and its location confirmed,

69 This question is raised, though not answered, by N de Sadeleer and H Born, *Droit International et Communautaire de la Biodiversité* (Dalloz, Paris 2004), s 553.

rather than to examine with an open mind the options and to choose the least environmentally negative solution. The Commission has largely accepted this biased interpretation of Article 6(4), despite its own guidance documents for Member States, which state that only environmental factors should be taken into consideration.

4.4 Imperative Reasons of Overriding Public Interest

The Commission accepted in all but one case—the Trupbach case (Section 3.4 above)—that there were imperative reasons of overriding public interest to realise the project. In practically all cases, there was little discussion as to whether there was such an overriding public interest to realise the project exactly at the location chosen. For example, nobody would seriously contest that there is a public interest for France to construct the TGV Est, for Sweden to build a railway line to the North or for Germany to build the A-20 motorway. The question is rather, whether small parts of these projects had to be realised in a way that significantly affected priority protected habitats. These questions are not seriously discussed.

In the case of the Botniabanen (Section 3.7 above), the reasons for not choosing the alternative route were, according to the Opinion: (1) less profit for the railway (State-owned!); (2) the longer journey time for the train (10 to 20 minutes) for a distance of about 50 km; and (3) the city of Umeaa not becoming a through route station. Such arguments can, under no circumstances, be considered to be of *overriding* and *public* interest.

In the case of Mühlenberger Loch (Section 3.3 above), the competitiveness of the European aerospace industry, advantages for Hamburg and Northern Germany, the creation of new jobs and technological advance were put forward. All these arguments would, of course, also be true for realising the project at another place. They do not explain why the priority habitat had to be destroyed. And the reasons of cost effectiveness and functional requirements advanced by the Airbus Company are not able to justify a *public* interest, and certainly not an *overriding* interest and neither do they constitute imperative reasons. Rather, the arguments advanced were private economic interests.

The Commission had stated in its Guidance documents that projects which served purely private interests could not be considered to be of overriding public interest. It has to be realised, however, that any transport or industrial project, by contributing to the transport infrastructure, to the creation of jobs and to the strengthening of the (national or European) economy in general, has some implications for society. In view of this, it is not sufficient to invoke the imperative reasons of overriding public interest to justify such projects. Rather, there must be other, more *public* interests which are served by the project.

In the Haniel case (Section 3.6 above), the Commission argued that the public interest pleaded rather in favour of discontinuing coal mining in Germany, because of the lack of competitiveness of coal, the availability of cheaper coal on the market and the climate change problems raised by energy from coal sources. It then mentioned that the short-term dismissal of the workers would bring about disadvantages and accepted this as an imperative reason of overriding public interest—though it had explained shortly before that the money saved by closing the mine could better be used to retrain and relocate the workers. The Commission did not conduct any balancing between the short- and long-term effects of the measure, so that it is difficult to see where the *overriding* public interest is.

In the Baden-Baden Airport case (Section 3.10 above), the only reasons which were given was the increase in local air traffic and the fact that the airport had been listed in one of the EC's decisions as being of regional importance. It is difficult to see how these arguments can constitute imperative reasons of overriding public interest. In particular, the mentioning of a project in documents concerning the trans-European networks or the EC regional or transport policy may give some indication that it is important to realise a project. However, these documents do not and cannot give any reason why the project can only be realised at a specific place. It is difficult to understand why the Commission, in its Opinions, has never raised this issue.

Until now, the arguments have been discussed from a legal perspective. However, it is clear that all 11 cases also have a political aspect. In cases of Article 6(4) of the Habitats Directive, the Member States' Governments strongly intervene with the Commission in order to have a positive Opinion issued. In the Mühlenberger Loch case (Section 3.3 above), this issue had come into the open through subsequent judicial cases concerning access to documents.[70] However, in the cases of the motorway A-20 (Sections 3.1 and 3.2 above), the Rotterdam Port (Section 3.5 above), the Botniabanen (Section 3.7 above) and the Granadilla Port (Section 3.11 above) it is also general knowledge that political interventions were made at the highest national political level, in order to obtain the green light from the Commission on the project in question. This is also explained by the fact that most of the infrastructure projects were, at national level, severely contested by environmental organisations, nature protection groups, citizen associations, or scientists, who did not see the necessity of impairing or destroying a priority natural habitat. The support by the European Commission—or, conversely, the fact that the Commission did not

70 See cases T-168/02 *IFAW v Commission* [2004] ECR.II-4135; and C-64/05 *Sweden v Commission* judgment of 18 December 2007. In that case, it turned out that the German Federal Chancellor had written to the President of the EC Commission. Subsequently, the Commission had dropped its infringement procedure under Art 226 EC Treaty which it had started against Germany, and issued a positive Opinion.

support these opposing groups—was seen by the relevant Member States as a welcome factor in the political dispute on the different projects.

The political discussions at national level would make it all the more necessary to have the European discussion on the pros and cons take place in an open, transparent way. Therefore, they add to the argument, made above, that the Commission should systematically publish its Opinions under Article 6(4) of the Habitats Directive.

4.5 Compensatory Measures

In a number of the 11 cases mentioned above, compensation measures were *envisaged* or *announced*; in the Botniabanen case (Section 3.7 above), the Swedish Government declared itself unable to suggest any compensatory measures, because the internal consultations had not yet been finished—and the Commission accepted this. The information on compensatory measures is also vague or not existent in the cases of the Trebel and Recknitz Valley (Section 3.1 above), TGV Est (Section 3.8 above) and Mühlenberger Loch (Section 3.3 above). Occasionally the Commission requests, in its Opinion, to be sent annual 'implementation' reports.[71] However, the Commission itself does not publish any information in this regard. Therefore, the suspicion exists that Member States' information on compensatory measures may often be rather exaggerated in order to obtain a positive Opinion from the Commission.

It has been mentioned above that the majority of the projects which come under Article 6(4) of the Habitats Directive are contested at local, regional or even national level. Under these circumstances, it would be reasonable if the Commission were to publish—on the internet or in another appropriate form—the information which it obtains on compensatory measures, and if it also requested the Member States to publish the relevant information. After all, it is worth repeating again that Article 6(4) aims at the balancing of the European heritage of biodiversity interests against the interests of realising the project. And this balancing of interests is not an issue for administrations alone, but is of major interest to civil society and to the public. Furthermore, the monitoring of Article 6(4) which deals with the *European* Network Natura 2000, is an element which is of interest beyond the borders of one EC Member State.

Under the present practice, the information by Member States largely concerns compensatory measures which are promised, announced or envisaged. The Commission then keeps the information which it receives on the implementation of these measures, non-public; it does not monitor, whether the compensatory measures are effectively taken and are effective, and does

71 See for example the cases on La Brena II (Section 3.9) and Granadilla (Section 3.11).

not take action against Member States which do not take the measures to which they committed themselves. This practice does not really make sense—in particular, because in a considerable number of its Opinions, the Commission makes its Opinion dependent on the timely and effective taking of compensatory measures.

5. Concluding Remarks

The general conclusion on the 11 cases is that there is hardly one which completely lives up to the requirements of Article 6(4) of the Habitats Directive and the Commission's own guidance documents.[72] In my opinion, not one of the positive Commission Opinions would, with the reasoning made, successfully survive scrutiny by the Court of Justice.

The cases which were decided so far—better: which have been made public so far—clearly demonstrate that the Commission Opinions under Article 6(4) of the Habitats Directive are at the cross-point between ecological and economic/social considerations. Article 6(4) is a legal provision which tries to ensure a balance between diverging interests. To make this legal provision more operational, several options could be envisaged. The worst option would be to delete the Commission's participation in the decision-making process which would mean, in practice, the idea of abandoning the joint EC protection of European natural heritage.

Throughout this contribution, the option which was favoured was an increase in transparency. Member States' requests for an Opinion of the Commission should be made public, in the same way as the Commission's Opinions themselves. The alternative solutions should be examined much more seriously. The compensatory measures should be discussed in public, their implementation should be monitored and the question of whether a partial impairment of a habitat—which is part of the 'Community natural heritage'—is really and effectively compensated, should be closely controlled.

And the Commission would not lose, but rather win credibility, if it were to take a position that was more along the line of the 'rule of law'—in other words if it were to strictly apply Article 6(4) of the Habitats Directive. How can local, regional and national authorities, private investors and economic operators be persuaded to apply Article 6 and follow the Commission's guidelines, if the Commission itself does not set an example and apply this provision? The rule of law is for everybody; and letters, visits or telephone calls from

72 This also applies to the Trupbach case (Section 3.4), where the Commission gave a negative Opinion. Indeed, Germany had not even suggested compensatory measures, and so that the question—of whether there was an imperative reason of overriding public interest—was not relevant.

prime ministers or members of national governments are nothing more than protectionist lobbyism.

The environment has no voice of its own. Transparency and public discussion are a very effective means to preserve, protect and improve the quality of the environment.[73] It is not reasonable that the European and national administrations keep discussion on European habitats and their partial or complete impairment non-public. This only favours lobbyism, mental corruption and decisions which are, in the long term, neither good for the environment nor for society as such.

73 See in this regard Recital 9 of the Aarhus Convention which, as mentioned (n 61), was ratified by the EC: 'in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns'.