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HABITAT PROTECTION IN EUROPEAN COMMUNITY LAW: EVOLVING CONCEPTIONS OF A BALANCE OF INTERESTS

*André Nollkaemper**

1. Introduction

The Habitats Directive of the European Community (EC)¹ may offer an important contribution to the protection of the last undisturbed nature areas that are left in Europe. One determinant of the practical effect of the Directive will be how its exception clauses will be applied. While the Directive contains strict obligations to protect sensitive and unique nature areas, Article 6(4) allows Member States, under certain conditions, to invoke an exemption and as yet to build roads, railroads, or other infrastructural projects in such areas. As the provision is drafted in unintelligible language, its scope and meaning remain uncertain, however.

In 1995, the Commission of the European Communities adopted two Opinions that to some extent clarify Article 6(4). In these Opinions, the Commission approved two sections of a planned motorway in Germany that is expected to cause adverse effects on natural sites in the Valley of the Rivers Recknitz and Trebel and the Valley of the River Peene.² European Community law recognizes these areas as special conservation areas for wild birds and priority natural habitats.³ In this article I will examine these Opinions. In addition to clarifying Article 6(4), these Opinions are among the few authoritative decisions of Community institutions that shed light on how Community

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¹ Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna, OJ EC 1992, L 206/7 (hereinafter: Habitats Directive).

² Opinion on the planned A20 motorway in Germany which will intersect the Trebel and Recknitz Valley pursuant to Article 6(4) of Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna, OJ EC 1995, C 178/3 (hereinafter: Opinion on the Trebel and Recknitz Valley); Opinion on the intersection of the Peene Valley by the planned A20 motorway pursuant to Article 6(4) of Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna, OJ EC 1996, L 6/14 (hereinafter: Opinion on the Peene Valley).

³ Art 1(d) of the Habitats Directive defines priority natural habitat types as 'natural habitat types in danger of disappearance . . . and for the conservation of which the Community has particular responsibility'.

law seeks to unite the objectives of habitat protection and expansion of infrastructure.⁴ The analysis provided in this article shows that Article 6(4) of the Habitats Directive has proceduralized pre-existing substantive protection of protected areas. The Commission's Opinions take only a soft glance at how Member States use their discretion. It is recommended that the procedure of Article 6(4) is further elaborated if the objective of the Habitats Directive is not to be endangered. The article will pay separate attention to the relationship between habitat protection and the Community's policy on trans-European networks—a network of roads and railroads of grand proportions designed to improve the economic cohesion of the Community. These networks may traverse some of the few remaining undisturbed habitats in the Member States.⁵ The Commission's approval of the German highway was in part based on the Community's prior decision to make the road part of the trans-European Networks—showing that by implementing its policies on trans-European networks the Community can influence the balance struck under the Habitats Directive.

2. Background and Contents of the Opinions

Germany has planned 17 transportation projects that will fill in missing links between the former and the new German Länder and encourage economic development in the new Länder. The motorway A20 ('Baltic Sea motorway') is the largest of these projects with a length of approximately 300 km. It will create east-west links and connect the Baltic Sea ports Rostock and Stralsund. The German government has given top priority to the A20 in order to boost the economy and reduce unemployment in Mecklenburg-Western Pomerania.⁶

The A20 will intersect two protected areas in Germany: the Trebel and Recknitz Valley and the Valley of the River Peene. Both areas are breeding and resting areas for rare and endangered birds. Germany had notified these areas to the Commission in conformity with the Birds Directive.⁷ Both areas also belong to the European network of specially protected areas, 'Natura 2000', established under the Habitats Directive.⁸ Moreover, these areas include fenland, bogland and residual alluvial forests which the Habitats Directive classifies as priority areas: natural habitats in danger of disappearance 'for the conservation of which the Community has special responsibility'.⁹

⁴ The Habitats Directive entered into force in May 1994. These are the first two Opinions issued pursuant to art 6(4) of the Habitat Directive, that provides for a procedure in which the Commission gives an opinion on planned projects that cause harm to habitats; see further *infra*. The European Court discussed certain aspects of the Habitats Directive for the first time in Case 44/95, *Regina*, n.y.r. It has ruled many times, however, on Council Directive 79/404/EEC of 2 April 1979 on the conservation of wild birds, OJ EC 1979, L 103/1 (hereinafter: Birds Directive). The cases relevant to habitat protection of birds are discussed below.

⁵ See *infra*, section VI.

⁶ The rate of unemployment in Mecklenburg-Western Pomerania in October 1995 was 15.2%, as compared to 9.2% in Germany as a whole. Opinion on the Peene Valley, para 1.3.

⁷ Art 4(1) of the Birds Directive requires that Member States classify the most suitable territories in number and size as special protection areas for the conservation of birds listed in Annex I.

⁸ Art 3(1) of the Habitats Directive provides that a European ecological network of special areas of conservation shall be set up to enable natural habitats and species' habitats to be maintained and/or restored at a favorable conservation range. Areas that were designated under the Birds Directive automatically are part of Natura 2000.

⁹ Art 1(d); Annex I, paras 53.3; 44.A1 to 44.A4; and 44.3.

The A20 would cause considerable harm to both areas. This would bring its construction in potential conflict with the Habitats Directive. The Directive obliges Germany to avoid 'deterioration' of the habitats as well as 'disturbance of the species for which the areas have been designated'.¹⁰ Also, the Directive states that the project is permitted only after the authorities have ascertained that it will not 'adversely affect the integrity of the site concerned'.¹¹ Germany could only evade a conflict with the Habitats Directive by invoking Article 6(4). This allows Germany to pursue the projects if three conditions would be fulfilled. First, Germany must take adequate compensatory measures. Second, it may undertake the project only when no alternatives are available. And third, it may only do so 'further to' an Opinion from the Commission.¹² Germany found that no alternative solutions had existed, had planned compensatory measures and proceeded to ask the Commission for an opinion on the compatibility of the two projects with the Habitats Directive.

In an Opinion that reportedly caused some internal strife,¹³ on 27 April the Commission concluded that the deterioration caused by the crossing of the Trebel and Recknitz Valley was acceptable. Initially, the Commission planned to give a negative opinion on the crossing of the River Peene. Germany thereupon submitted a new plan for that portion of the highway. The Commission approved the new plan for the crossing of the River Peene on 12 December 1995.

The Commission's reasoning in both Opinions is comparable. The Commission focuses primarily on the availability of alternatives. It concludes that a less damaging crossing of the Valley of the Trebel and the Recknitz and of the Peene does not exist.¹⁴ Considering socio-economic impacts, the Commission noted that in view of the high unemployment in Mecklenburg-Western Pomerania, 'imperative reasons of overriding public interest' justify the deterioration of the areas.¹⁵ The Commission supported its conclusion with the fact that the Community itself has recognized the need for economic development in the region. Mecklenburg-Western Pomerania is recognized as an Objective 1 area under the Regulation on the Structural Funds,¹⁶ and the A20 is part of the trans-European networks.¹⁷ The Commission concluded that for these reasons an east-west link 'has to be created' in Mecklenburg-Western Pomerania in order to link it with central regions of the Community.¹⁸

3. The Broader Perspective: Balancing Interests in Nature Protection Law

The development of European Community habitat protection law shows similar patterns as pre-existing national and international laws. It has made a worthwhile

¹⁰ Art 6(2).

¹¹ Art 6(3).

¹² Art 6(4).

¹³ 'Spat Over Motorway Construction Programme in East Germany', European Report, 22 April 1995, available in LEXIS/Nexis, News Library.

¹⁴ Opinion on the Trebel and Recknitz Valley, para 4.5; Opinion on the River Peene Valley, para 4.1.

¹⁵ Opinion on the Trebel and Recknitz Valley, paras 4.2-4.6; Opinion on the River Peene Valley, para 4.2.

¹⁶ 'Objective 1 area' refers to the first objective of Community action through the Structural Funds: to 'promote the development and structural adjustment of regions whose development is lagging behind'. See art 1(1) of Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial institutions, OJ EC 1993, L 193/5.

¹⁷ Council Decision 93/629/EEC of 29 October 1993, OJ 1993 L 305/11. See further *infra* section VI.

¹⁸ Opinion on the Trebel and Recknitz Valley, para 4.3; Opinion on the River Peene Valley, para 4.2.

attempt to protect valuable habitats against pressures from agriculture, houses, roads, railways and other activities that are deemed economically relevant. But the A20 Opinions underscore that in the final analysis all nature protection laws are vulnerable when economic stakes are high.

All European states have legislation in place and have accepted international obligations to protect nature against pressures of economic development. One need not question good intentions, and there is no doubt that the drafters of these laws have attempted to increase the weight accorded to nature protection in the balancing process with economic interests. States have developed a variety of procedural safeguards (including environmental impact assessments) to secure that nature protection interests are taken into account. As yet, however, such laws have not been able to avert the ongoing degradation of nature. In the Netherlands, a European state often hailed for its environmental policies, nature protection laws have not been able to prevent the endangerment of 50% of all species in the Netherlands.¹⁹ This is symptomatic of trends in Europe²⁰ and the world over.²¹

Reserving land for absolute protection has been a key strategy for halting environmental degradation.²² For instance, although United States' national parks are vulnerable through lack of enforcement capabilities and external threats,²³ they are protected by legislation that prohibits in absolutist terms building of highways. States have recognized that in years to come, more areas should be accorded absolutist protection.²⁴ However, experience is not hopeful. Examples abound where formal statutory barriers to the balancing of environmental and economic interests turned into dead letters or were amended to create the desired flexibility so that development could continue.

The economic and political mechanisms that undermine absolutist protection were illustrated in the aftermath of the United States Supreme Court case *TVA v Hill*.²⁵ The Supreme Court upheld an absolutist interpretation of Article 7 of the Endangered Species Act²⁶ and disallowed a dam to endanger the snail darter, an endangered species, no matter what the opportunity costs were. Dissatisfaction with this absolutist interpretation induced the US Congress to accord more weight to the dam and to amend the Endangered Species Act. This Act now requires designation of critical habitat after taking into account economic impact.²⁷

¹⁹ R.J. Bink, et al, 2 *Toestand van de Natuur* 211 (1994).

²⁰ Nicos Geogiades, *The Current State of, and Trends in the Conservation of Biodiversity in Europe and the Contribution of the Bern Convention*, in Proceedings of Symposium on 'The United Nations Conference on Environment and Development (UNCED), the Convention on Biological Diversity and the Bern Convention: The Next Steps, Council of Europe Doc T-PVS(94)14 36 (1994) (discussing the loss and degradation of habitat loss in Europe).

²¹ Agenda 21, 'Report of the United Nations Conference on Environment and Development', para 15.3, UN Doc A/CONF 151/26, Annex II (1992) (stating that 'Despite mounting efforts over the past 20 years, the loss of the world's biological diversity . . . has continued').

²² Of course, setting aside areas from greater society is not enough, and altering economic and land-use patterns throughout states is necessary to ensure the survival of wild species and their ecosystems; see World Commission on Environment and Development, 'Our Common Future' 159 (1987) (noting that the historical approach of establishing national parks that are somehow isolated from the greater society has been overtaken by a new approach to conservation of species and ecosystems that can be characterized as 'anticipate and prevent').

²³ See John Freemuth, 'Islands under Siege. National Parks and the Politics of External Threats', (1991) (discussing external threats (such as air pollution) that endanger ecosystems in national parks).

²⁴ E.g. art 8(a) of the Convention on Biological Diversity, Rio De Janeiro, 5 June 1992, 31 ILM 822 (1992).

²⁵ United States Supreme Court 1978, 437 US 153.

²⁶ 16 USC § 1531 et seq.

²⁷ 16 USC § 1533(b)(2).

This case is not merely an isolated incident. Commentators rightly have noted that stark 'road block' prohibitions have a potent ability to effectuate their terms, but that 'strict prohibitions are not always rational when applied in the realities of a complex world. Inevitably there will be circumstances in which they may require modification. In every case there will be regulated and affected parties who argue strongly for eliminating the roadblock, or opening it up with a variety of discretionary or bureaucratic flexibility devices'.²⁸ This observation is also applicable to nature protection laws in the EC. These laws increase the weight of nature protection against threats of infrastructure projects and other economic policies and go a long way to erecting roadblocks for some areas and species—but, as evidenced by the Opinions discussed here, they include flexibility devices that may not be able to prevent Member States from building a highway with detrimental effects in two areas that the Community considers as 'natural habitat types in danger of disappearance' and 'for the conservation of which the Community has particular responsibility'.²⁹

4. Protection of Nature Areas Under the Birds and Habitat Directives

For some years after the initiation of European Community environmental policy in 1972, nature's only protection was the protection offered by directives on water and air pollution.³⁰ Whether wildlife habitats were protected or traversed with new roads was left to Member States. Nature protection now is firmly established as an objective of Community policy.³¹

4.1. The Birds Directive

In 1979, the Community took a first step towards mitigation of Member States' discretion in protecting habitats with the adoption of the Birds Directive. The Birds Directive requests Member States to designate the most important bird habitats to ensure the survival and reproduction of birds. In doing so, Member States may take economic interests into account, but may not prioritize these over requirements for bird conservation. Article 2 provides that:

Member states shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, *while taking account of economic and recreational requirements*, or to adapt the population of these species to that level. (emphasis added).

²⁸ Z.B.J. Plater, R.H. Abrams and W. Goldfarb, 'Environmental Law and Policy: Nature, Law and Society' 666 (1992).

²⁹ Art 1(d) of the Habitats Directive.

³⁰ See for an overview of the development of EC nature protection law and a summary of the relevant parts of the Community's environmental action programs: Ludwig Krämer, 'The Interdependence of Community and Member States Activity on Nature Protection within the European Community', 20 *Ecology L Q* 25 (1993).

³¹ Nature protection is within the scope of Community powers as defined in Article 130r and 130s; see Ludwig Krämer, 'EC Treaty and Environmental Law' 42 (2nd edn, 1995).

The wording indicates a prioritization. Economic and recreational requirements are of secondary importance. They need to be taken into account, but cannot override ecological requirements.³²

This prioritization certainly holds for 175 bird species in Annex I. For these species Member States have to take 'special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution' and shall classify the most suitable territories as special protection areas for the conservation of these species.³³ The two areas where the A20 is planned had been classified as such areas. Before the amendment of the Birds Directive by the Habitats Directive (see below), these protection areas received firm protection. Member States were obliged to 'take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds in so far as these would be significant having regard to the objectives of the article'.³⁴

This provision did not necessarily establish a roadblock that prohibits the building of a road in a protected birds area. But it was sufficiently protective to make Member States reluctant to designate areas,³⁵ even though the Court has made clear that the criteria for designation of special protection areas are of an objective nature and cannot include economic consideration.³⁶

For the habitats that *had* been designated, Article 4(4) provides virtually cost-oblivious protection. The real teeth of Article 4(4) became visible after the Judgment of Court in Case 57/89 '*Leybucht*',³⁷ in which the Court had to examine the legality of construction of a dike in an area that was designated as birds habitat. The Court interpreted Article 4(4) restrictively and accorded habitats of birds listed in the Directive near absolutist protection. It held that significant pollution, deterioration and disturbances can be justified only on exceptional grounds that correspond to a general interest that is 'superior to the general interest represented by the ecological objective of the directive'. The economic considerations mentioned in Article 2 are not to be taken into account.³⁸ This formulation does not close the door for economic considerations: after all these could be part of the 'superior general interest'. But the Court's application of this consideration to the facts, in which it concluded that to take account of the economic interests of fishermen was 'in principle incompatible with the requirement of the provision'³⁹ suggests that Article 4(4) provides a cost-oblivious protection that does not allow room for exceptions for economic reasons.⁴⁰ Only the protection

³² Wouter P.J. Wills, 'The Birds Directive 15 Years Later: A Survey of the Case Law and a Comparison with the Habitats Directive', 6 *J Envtl L* 219, 226 (1994).

³³ Art 4(1).

³⁴ Art 4(4).

³⁵ Ludwig Krämer, 'The Open Society, Its Lawyers and its Environment', 1 *J Envtl L* 1 (1989), reproduced in *ibid*, 'Focus on European Environmental Law' 277, 284 (1992). See also *ibid*, at 199 (noting that in 1989 France had only classified 20 protected areas whereas expert studies had indicated 150 areas should have been designated. The Netherlands classified 7 out of 75, and Great Britain and Spain 7 out of 75).

³⁶ See Case C-355/90, *Commission of the European Communities v Spain*, [1993] ECR I-4221, para 27. Case 44/95, *supra*.

³⁷ *Commission v Germany* [1991] ECR I-883.

³⁸ *Ibid*, paras. 21-22. That art 2 does not constitute an autonomous derogation from the general system of protection established by the Directive was also pointed out in Case 247/85, *Commission v Belgium*, [1987] ECR 3029, para 8; Case 262/85, *Commission v Italy*, [1987] ECR 3073, para 8; Case C-57/89, *Commission v Germany*, [1991] ECR I-924, para 22. But see the Opinion of the Advocate-General in the last of these cases, who argued that the Directive did allow for some balancing of interests; [1991] ECR 903. See Wills, *supra* note 32 at 226-27.

³⁹ Para 24.

⁴⁰ See also Case 44/95, *supra* note 4, paras 29-31; Case 355/90, *supra* note 36, para 19.

of the people against floods was accepted as a sufficiently serious reason to allow disturbance of the protected area.⁴¹

This suggests that would the A20 road have been planned before the adoption of the Habitats Directive, Article 4(4) of the Birds Directive as interpreted by the Court most likely would have prohibited the building of the road. This absolutist interpretation of Article 4(4) confronted Member States with a future in which undertaking infrastructure projects in designated birds areas might have become difficult—a prospect frightening to many Member States. Reluctancy in the designation of areas was no longer sufficient (and in any case unlawful) and now Member States aimed to negotiate an exception recognized in substantive law. Their target was the Habitat Directive which had some time had been on the negotiation table and which was to amend Article 4(4) of the Birds Directive.⁴² The attempt to reduce the absolutism of the Birds Directive was successful.⁴³ It was this flexibility that proved decisive in the A20 case.

4.2. The Habitats Directive

The Habitats Directive nonetheless by no means is an instrument favorable to economic development. It substantially broadens the scope of the Birds Directive and covers all flora and fauna and all natural habitats deemed worthy of protection.⁴⁴ The Directive aims to 'maintain or restore, at favorable conservation status, natural habitats and species of wild flora and fauna of Community interest'.⁴⁵ To this end it envisages that a coherent European network of special areas of conservation ('Natura 2000') shall be set up.⁴⁶ Member States shall contribute to Natura 2000 by designating special areas of conservation.⁴⁷

The Habitats Directive provides for a strong protection for designated areas. Plans or projects that can result in the deterioration of natural habitats and the habitats of species shall be avoided.⁴⁸ Projects not directly connected with or necessary to the management of the site are permitted only after the authorities have ascertained that it will not 'adversely affect the integrity of the site concerned'.⁴⁹ These obligations apply to all areas that were designated under the Birds Directive.⁵⁰ One could argue

⁴¹ Case 57/89, para 23. See Wils, *supra* note 32 at 233.

⁴² Art 4(4) of the Birds Directive has now been replaced by the substantive obligations of the Habitats Directive. Art 7.

⁴³ Ludwig Krämer, 'European Environmental Law. Casebook' 230 (1993); David Baldock, note to '*Commission of the European Communities v Federal Republic of Germany*', 4 *J Envtl L* 139, 144 (1992); Case 44/95, *supra* note 4, paras 37-8.

⁴⁴ The Habitats Directive builds on the Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 1979, UKTS 56 (1982). Whereas substantively the Bern Convention and the Habitats Directive are largely similar, an important difference is the stronger enforcement procedures in EC law.

⁴⁵ Art 2(2).

⁴⁶ Art 3(1).

⁴⁷ Art 3(2) jo art 4. The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to the Birds Directive; see Habitats Directive art 3(1).

⁴⁸ Art 6(2).

⁴⁹ Art 6(3).

⁵⁰ The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to the Birds Directive; see Habitat Directive art 3(1). As note above, the substantive obligations of the Birds Directive, that were given a radical meaning by the Court in the *Leybucht* case, have upon entry into force of the Directive been replaced by the substantive obligations of the Habitats Directive. Art 7.

over the terms 'deterioration' and 'integrity', but there is no doubt that if the Habitats Directive would not include exemptions, the A20 could not be built.

But the Habitats Directive *does* contain exemptions that grant Member States a right to build infrastructure projects in protected areas. For one thing, Member States have the final word in determining which areas within their territory are designated under the Habitats Directive and thus are conceived by its obligations. Member States' designation of special conservation areas follows on a prior adoption by the Commission of a list of sites of Community importance.⁵¹ Member States determine which areas are listed on the Commission's list (and thus: which areas it has to designate in its national law as special areas of conservation).⁵² This does *not* apply, however, to bird conservation areas—these remain subject to the procedure of the Birds Directive that contains objective criteria and leaves limited discretion to Member States.⁵³

For areas that are listed, Article 6 provides for a protection that is strong, but not absolutist. Article 6(4) provides:

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 States shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

Where the site concerned hosts a priority natural habitat type and/or 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 contains two different regimes. For *all* special protection areas, social and economic interests can only be invoked to justify a decision to build a road if they constitute 'imperative' public interest reasons of overriding, if no alternative solutions exist, and if the adverse effects are adequately compensated.⁵⁴ For priority natural habitats (that were at issue in the A20 case) a separate condition applies: social and economic interests associated with a road can only be considered 'further to an opinion from the Commission'.

The room that Article 6(4) leaves for a balancing of interests is the most important difference between the Habitats Directive and the Birds Directive. Whereas under the Birds Directive as that applied before its amendment by the Habitats Directive, Germany arguably would not have been allowed to build the road, the exceptions in Article 6(4) created enough room to justify the decision to do so. From the point of view of nature protection, the Habitats Directive may appear to be a step back compared to

⁵¹ Art 4(2). This list has to be drawn up 2 May 1998. Member States have another six years to establish, in their national laws, these areas as special conservation areas. Art 4(3).

⁵² The Commission's list is drawn from the lists submitted by Member States. Art 4(2). In exceptional circumstances (involving 'areas essential for the maintenance of natural habitat types in the Communities' that a Member State had failed to include in its national list) the Commission can propose to list such an area. If the Member State does not agree, the Council can decide to list the area. But it can only do so acting unanimously and the Member State thus ultimately has a veto. Art 5(3). At the time of writing, Denmark was the only Member State that had complied with its obligation to submit lists of areas, see World Wide Fund for Nature, 'Spotlight on the Habitat Directive' (1995).

⁵³ See *supra* note 36.

⁵⁴ In this respect the Habitats Directive follows the Court's ruling in Case 57/89, in which the Court noted that while in principle art 4(4) does not allow for the interests of fishing vessels to be taken into account, this was different because there were 'offsetting ecological benefits'. (para 26)

the Birds Directive.⁵⁵ Whether it will matter in terms of actual nature protection is less certain. Possibly, without the exemption Member States would be more reluctant to designate areas under the Habitats Directive.

5. Review of the Exception Procedure

The Azo is the first case in which the Commission had applied Article 6(4). The Opinions offer some insights into the scope and meaning of Article 6(4), and in any case into the Commission's interpretation of that article. Below I will dissect the procedure of Article 6(4) and the Commission's construction thereof by distinguishing four questions: (A) do the expected economic benefits fall within the scope of Article 6(4); (B) does the proposed project achieve the expected benefits; (C) are the detrimental effects proportional to the expected benefits; and (D) does the project employ the least-drastic means?

5.1. Are the expected benefits within the scope of Article 6(4)?

The objective of the advisory procedure is to let the Commission examine whether a Member State may invoke 'imperative reasons of overriding public interest' to justify projects in priority natural habitats. What could such reasons be? It has been argued that social-economic interests could never be invoked to justify projects under Article 6(4), second paragraph.⁵⁶ The Commission held otherwise, and concluded that the interest of economic and social cohesion in Germany justify the adverse effects of the Azo. The conclusion that the interests covered by the second paragraph of Article 6(4) can be of a social and economic nature is correct. 'Other imperative reasons' is an open-ended category. It appears that the Council deliberately has created an exception that was cut off by the Court.⁵⁷ The result is that the only difference between a project that causes adverse effects on 'normal' protection areas (covered by the first paragraph of Article 6(4)) and a project that causes adverse effects on priority natural habitats (second paragraph) is that in the latter case a Member State requires a non-legally binding opinion from the Commission.

5.2. The means-end test: will the project achieve the expected benefits?

To what extent does the Commission actually examine whether the proposed project will bring the economic and social benefits, the 'overriding public interest' that Article 6(4) refers to? The Opinions suggest that the Commission does not take a hard look at this question. The Commission unquestioningly accepted the decision of the German Parliament that the road was needed for the development of the eastern Länder. From a political point of view, this may have been a wise move. A strict inquiry into the question what the benefits of a road will be, and how 'imperative' such benefits are

⁵⁵ J.H. Jans, *De Toekomstige Natuurbeschermingswet en het Europese Recht*, in 'Naar een nieuwe Natuurbeschermingsrecht', Publikaties van de Vereniging voor Milieurecht 28 (1994).

⁵⁶ Chris Backes, 'Implementatie van de Habitat-Richtlijn in het Nederlandse natuurbeschermingsrecht', *Milieu en Recht* (1995), pp 216-21 at 217.

⁵⁷ Wils, *supra* note 32 at op pp 232-3.

for the Member State concerned, might yield the same result as the interpretation of the Birds Directive in the *Leybucht* case—raise hurdles that make Member States reluctant to bring areas under the Habitat Directive. The Commission must walk a thin line between interpreting and applying the requirements of Article 6(4) strictly, and pursuing a legal policy that does not undermine the commitment of Member States to the Habitats Directive. Still, it is important to note that not any reason that is invoked can qualify as an 'imperative reason of overriding public interest'. The argument that a highway improves social and economic cohesion is plausible but certainly not undisputed.⁵⁸ Moreover, within the margins of inevitable uncertainty of economic analysis, this is a matter reviewable by Community institutions and national courts. I will not comment on the validity of the Commission's conclusion on this point. But it needs emphasis that as a general matter, the Commission should closely examine the relationship between the reasons invoked and the purported objective, so as to prevent the procedure of Article 6(4) turning into a formality where any reason can be an imperative reason of overriding public interest.

The possibilities for denying that the reasons for constructing the A20 were imperative were limited. In its policies on structural funds and trans-European networks, the EC had already recognized that the link was of prime importance; therefore, it had already affirmatively answered the question whether the Baltic Sea highway would have a positive effect on 'economic and social cohesion'.⁵⁹

5.3. Does Article 6(4) require a balance of interests?

A separate question is whether Article 6(4) requires Member States (and institutions that review Member States' policies) to balance the economic and ecological interests. Two interpretations are conceivable. First, one could argue that whether a reason is of 'overriding public interest' should be considered apart from the nature and magnitude of the effects on an ecosystem. There would then be no balance of interests between the importance of the public interests and such effects. Proportionality would only be part of the legal decision-making as part of the least-drastic means test, discussed below. Second, one could argue that whether an interest is indeed 'overriding' can only be considered in connection with the interests that actually are overriding—the interests of the area concerned. In this approach, that I believe is the better and textually more plausible approach, Article 6(4) would involve a balance of interests. A project that is of great economic public interest but involves only minor adverse effects to the protected area in question should be treated differently than a project with marginal economic public interests but important detrimental effects on ecological values. This balancing test (that could be considered as a broader proportionality test) would be separate from the narrow proportionality tests involved in alternatives-analysis and compensation, discussed below.

The Opinions leave it somewhat unclear whether the Commission indeed has adopted this second interpretation. The Opinions juxtapose the expected ecological effects with the hoped for social and economic benefits and concluded with a seeming

⁵⁸ See, with references: François Meienberg en Matthias Schickhoer, 'Missing Greenlinks. Examination of the Commission's Guidelines about Trans European Networks and Proposal for an Ecological Restructuring' 18–21 (1995).

⁵⁹ See section VI, *infra*.

automatism that the benefits justify the costs. We do not have to disagree with this conclusion in this particular case to question the somewhat obscure line of reasoning that should support that conclusion. It would improve clarity and open-up the process for criticism if the interests were to be balanced in a more explicit and structured manner. It remains to be seen whether, in subsequent practice, the Commission and courts that may be involved in interpreting Article 6(4), will indeed explicate the balance of interests that seem hidden in the Article.

5.4. The least-drastring means test

The fourth test the Commission applies is whether Germany had chosen the least damaging alternative. This test, that is directly related to the proportionality test, contains three elements: first, the choice of alternatives, second, the application of mitigating measures, and, third, the application of compensatory measures.

The Commission made the availability of *alternatives* the core of its analysis in the Opinions. Under Article 6(4), any Member States may undertake projects only if no alternative solutions exist that violate Articles 6(2) and 6(3). The task of review of this provision is a complex one. The Commission has to wrestle itself through a highly complicated matter to understand why a Member States chooses the alternative it does. It has to explicate assumptions, analyze methodologies, reject contradictory data and support conclusions in a manner that will be reviewable by courts.⁶⁰

While the Commission only takes a soft glance at the question whether the reasons are imperative, it takes a harder look at the availability of alternatives. Illustrative is that the Commission made an on-site visit to the Peene Valley to examine the alternatives.⁶¹ In the first opinion, the Commission agreed with Germany that no better alternative existed for the crossing of the Valley of the Trebel and Recknitz.⁶² In contrast, the Commission was not initially convinced that no alternatives existed for the crossing of the River Peene, and so induced Germany to choose a less harmful alternative. The A20 case suggests that the procedure of Article 6(4) fulfilled its function: facing a negative opinion, Germany eventually proposed an alternative that was less harmful than the original route.⁶³

The importance that the Commission attaches to alternatives-analysis is of a wider importance. Analysis of alternatives is a key element of environmental impact assessments.⁶⁴ Up until now the Commission has not attempted to supervise the quality

⁶⁰ See for an analysis in the context of US environmental law: William H. Rodgers, Jr., 'A Hardlook at Vermont Yankee: Environmental Law Under Close Scrutiny', 67 *Geo L Rev* 669, 705-706 (1979).

⁶¹ Although the EC Treaty does not expressly provide for on-site visits, there is no doubt that this is an implied competence of the Commission; see Gerd Winter, 'Der Säbelschnäbler als Teil fürs Ganze', 1 *Natur und Recht* 21, 23 (1992).

⁶² As noted above, the Commission accepted the need to build the road almost as a given, and apparently did not consider the zero-alternative: not building the road at all. Analysis of the zero-alternative is related to the examination whether the reasons that are invoked to pursue the project are sufficiently 'imperative' and the public interests sufficiently 'overriding'.

⁶³ The Commission concludes that the original proposal would have directly affected bog woodland (a priority type of habitat) over a stretch of 150 meters. The approved route would not directly effect any priority habitats. Opinion on the River Peene, paras 3.2 and 3.4.

⁶⁴ Art 5(1) of Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, OJ EC 1985, L 175/40. At present no cases exists in which the EC Court has examined the scope of that duty. See generally: Robert V. Pervical et al., 'Environmental Regulation, Law, Science and Policy' 1061 (1992) (noting that analysis of alternatives arguably is the most important part of environmental impact assessment-law).

of environmental impact assessments conducted pursuant to the EC Directive on environmental impact assessment.⁶⁵ Environmental impact assessments for projects that are covered by Article 6(4) of the Habitat Directive now will be supervised by the Commission. This can be step towards a more comprehensive review of application of environmental impact assessments.

Another aspect of a least-drastring-means test is the need to take *mitigating measures*. If Article 6(4) does justify a project in priority natural habitats, it is desirable that the Member State concerned takes all necessary measures to prevent harmful effects. Examples are integrating roads into the landscape; limiting the effects of cutting up land; providing sound protection and noise-reducing surfacing; or laying on underpasses.

Are such mitigating measures obligatory? The Habitats Directive does not expressly refer to the need for mitigation. However, arguably Article 6(2) requires that the effects of infrastructure projects be mitigated as far as possible. Deterioration of quality is only permitted to the extent that it can be justified by imperative reasons of overriding public concern—any deterioration that may be prevented without undermining these reasons should be prevented. Thus, Member States are obliged to apply the least damaging alternative that can be reviewed by the Commission (or the Court).⁶⁶ In the Opinion on the Trebel and Recknitz Valley the Commission was silent on this issue. In the River Peene case, the Commission noted that Germany proposed mitigation measures, including noise barriers, mitigation of the light attraction and measures to retain oil run-offs.⁶⁷ The language of the Opinion is imprecise⁶⁸ and it is unclear to what extent the Commission actually examined the adequacy of the mitigation measures.

Just like in case of alternatives-analysis, in case of mitigating measures there is an overlap between the Habitats Directive and the Directive on Environmental Impact Assessment. For projects that are covered by the EIA-directive, like the Baltic Sea Highway, Member States already should have examined the possibilities to mitigate harmful effects.⁶⁹ The EIA-directive, however, does not make such mitigating measures obligatory—it is a purely procedural requirement. The Habitats Directive transforms this procedural obligation into a substantive requirement, and thereby makes application of mitigating measures reviewable.

A third aspect of the least-damaging alternative test is that under Article 6(4), exceptions may only be granted if the Member State concerned takes all *compensatory measures* necessary to ensure the overall coherence of Natura 2000. The test is of considerable importance, particularly for priority natural habitats. After all, these are nature areas in danger of disappearance⁷⁰—the ecological characteristics often are difficult to imitate. Although developers may easily develop a laundry list of ecological compensation measures to justify infrastructure works in a conservation area, the

⁶⁵ See for an older analysis that still seems applicable: Ludwig Kramer, 'The Implementation of Environmental Laws by the European Economic Communities', 34 *German YB Int L* 9, 40 (1991).

⁶⁶ In Case 57/89, the Court examined the German activities against the test that they not cause disturbance beyond what is necessary, para 27.

⁶⁷ Para 4.3.

⁶⁸ Para 4.3 states that 'protective measures will be taken', and elsewhere states that 'additional appropriate measures have to be taken in order to retain potential oil run-offs'. It is not clear if the later phrase is a condition imposed by the Commission or only reflects that Germany planned to take such measures.

⁶⁹ Art 5(2) of the EIA-Directive.

⁷⁰ Art 1(d) of the Habitats Directive.

specific characteristics of a special conservation area may be difficult to rebuild elsewhere.⁷¹

In the present case the Commission took only a soft glance at the adequacy of compensation. Germany had proposed several compensation measures including the creation or restoration of seven different habitat types in an area of nearly 100 hectare in the Peene Valley.⁷² The Commission did not enter into a substantive examination of the adequacy of compensation. This is not surprising. The uncertainties involved in assessing the adequacy of compensation in terms of size, reasonableness and ecological results of projects that will only be undertaken in the future are considerable. Also in national law compensation analysis has not come beyond an experimental stadium, and it is an activity with regard to which the Commission has had no experience.

It is worth emphasising, though, that the Commission is mandated and arguably obliged to review the adequacy of compensation. If Germany would fail to implement the compensatory measures it had announced—the Commission then clearly will have a case under article 169 of the EC Treaty. For the nature area involved that may make little difference—the concrete will be there and the first cars will drive through what used to be alluvial forests.

5.3. Status and timing of the opinions

An Opinion of the Commission is not legally binding. Article 6(4) does not make formal approval by the Commission a precondition for Member States' approval of a project. The wording of Article 6(4) is comparable to Article 37 of the Euratom Treaty. In Case 187/87, the Court concluded that opinions pursuant to Article 37 are not legally binding.⁷³ Lack of legally binding force does not make application of Article 6(4) a matter of auto-interpretation by Member States, however. If the Commission gives a negative opinion and a Member State would nonetheless pursue the project, the Commission may bring the matter to the Court on the grounds of failure to comply with Articles 6(2) and/or 6(3). The EC Court then would have to examine whether the reasons invoked by the Member States justified an exception. The non-legal effect of the Opinion in Community law also does not prejudice its effects in national law—a negative opinion may help a person to bring a legal action before national courts against the decision granting authorization.⁷⁴

In the A20 case some controversy arose over the question whether Member States should wait with a final decision until the Commission has given its Opinion.⁷⁵ This question should be answered in the affirmative. Article 6(4) stipulates that where the

⁷¹ Baldock, *supra* note 44 at 143 (noting that trade-offs of this kind are being proposed on a growing scale by developers, and that these often represent a net deterioration from a nature conservation point of view). See also Ch. Backes, 'Juridische Bescherming van Waardevolle Gebieden' 384 (1993) (quoting the Rat der Sachverständigen für Umweltfragen (a German advisory body) that noted that true compensation is rarely possible in view of the long periods needed for recreation of conditions).

⁷² Para 4.3. See also para 4.5 of the Opinion on the Recknitz and Trebel Valley.

⁷³ Case 187/87, *Saarland v Minister for Industry* [1988] ECR 5013.

⁷⁴ Arguably, affected individuals can invoke art 6(2) and 6(3) for their national courts.

⁷⁵ Germany asked for the Commission's opinion on 31 August and 8 September 1994. The Commission collected information until late December. With a letter of 11 January, the German Government informed the Commission of its intention to decide on the route. It stated that the absence of a Commission decision implied that the Commission had left the choice for the route to Germany. With a letter of January 20 Germany decided on the route. In reply to a request of the Commission to suspend the decision, Germany stated that it did not consider itself obliged to suspend the decision. Para 3.2 Opinion on the Trebel and Recknitz Valley.

site concerned hosts a priority natural habitat type, a Member State may only 'raise considerations'⁷⁶ relating to imperative reasons of overriding public interest 'further to an opinion from the Commission'. The ordinary meaning of the term 'further to' suggest that the opinion of the Commission has to precede such a decision. On this point too a comparison can be drawn with Article 37 of the Euratom Treaty.⁷⁷ The guidance which the Commission can give to the Member States concerned is of great importance and the opinion of the Commission should be brought to the notice of that Member State before the issue of any authorization. The Commission's opinion has no real chance of being examined in detail and having any effective influence on the attitude of the state concerned unless it is issued before the adoption of a final decision.⁷⁸ The River Peene opinion evidences the potential beneficial effects of an Opinion preceding final national decision-making. The threat of a negative opinion made the German Government think twice about alternatives, and to adopt a less damaging route. Also, knowledge of the Commission's opinion may be of use for the purpose of enabling any person concerned to assess the merits of a possible legal action against a formal decision to build to road.⁷⁹

6. Protected Habitats and Trans-European Road Networks

An interesting aspect of the A20 case of much wider significance is that the A20 is part of the trans-European road network.⁸⁰ This network is to consist of 'high quality roads' with a total length of 65,000 km. The trans-European road network is a part of what eventually should become a multimodal transport network incorporating rail, road, air, sea, and inland waterways transport.⁸¹ The Commission considers improved transport-infrastructures an important element of the internal market that is relevant to the social and economic cohesion and economic growth and employment in the Community.⁸²

While transport projects are to be undertaken at national levels, the Community is actively to contribute to such projects.⁸³ It has established guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-

⁷⁶ The drafting ('raise considerations') is imprecise. It must be assumed that what is meant, in connection with the first sentence, is that member states may not decide on a project for imperative reasons of overriding public interest.

⁷⁷ This requires that Member States shall provide the Commission with such data relating to any plan for the disposal of radioactive waste as will make it possible to determine whether the implementation of such plan is liable to result in the radioactive contamination in another Member State. In Case 187/87, *supra* note 73, the Court considered that in the light of the important objective of art 37, the guidance which the Commission can give to the Member States concerned is of great importance and that the opinion of the Commission should be brought to the notice of that Member State before the issue of any authorisation).

⁷⁸ *Ibid*, para 18.

⁷⁹ *Ibid*, paras 13-18.

⁸⁰ The trans-European road network was provisionally laid down in Council Decision 93/629 on the creation of a trans-European road network, OJ 1993 L 305/11. This Decision provided for an outline plan for a trans-European road network that is shown on maps annexed to the decision (art 1). This map contains the A20.

⁸¹ COM(93)701 def.

⁸² White Paper on Common Transport Policy, COM(92)494. Transport networks also figure prominently in the White Paper on 'Growth, Competitiveness and Employment'.

⁸³ Art 129b of the EC Treaty states that the Community 'shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures'.

European networks.⁸⁴ In addition, the Community may support the financial efforts of Member States for projects of common interest.⁸⁵

The eventual contents of the TENs policy remains uncertain. However, the list of projects envisaged for completion⁸⁶ sketches a gloomy picture of transport networks flooding European landscapes in the coming years. Implementation of the TENs policy inevitably will lead to environmental effects in the form of land take (destruction of vegetation and biotops); restriction of animal mobility; increase in exhaust gasses; increase in noise that may interfere with species interests; and a variety of other environmental effects (spray water, drains, dust) in the vicinity of roads. These effects may run counter to the Community's environmental policy, not only in the sphere of habitat protection (as is the case in the Baltic Sea highway), but also in the sphere of control of air pollution and carbon dioxide emissions.⁸⁷

The implementation of the TENS-policy and the integration of environmental concerns therein pursuant to Article 130r(2) of the EC Treaty is a matter which cannot be commented upon in the present article. However, it is noteworthy that the TENs policy may have a direct effect on the construction of Article 6(4) of the Habitats Directive. Approval of a TEN-project by the Community may, as evidenced by the Opinions in the A20 case, provide evidence that a project is of overriding public interest, and possibly also that the project can indeed achieve the envisaged benefits. It seems, therefore, that implementation of the TENs policy should in any case satisfy two conditions to ensure consistency with the Habitats Directive.

First, the Community will carefully have to assess the environmental consequences of the overall Ten projects as well as the consequence of specific projects.⁸⁸ Up till now this has not been done. With the first TENs projects already being identified and supported, the Commission is only now undertaking to analyze environmental impacts. The effects of the A20 were identified in a German impact assessment. It would have been opportune for the Community, before giving the certificate of approval, to consider these effects itself, and to think twice before approving a project that runs counter to its own policies on habitat protection.

Second, TENs policies have to comply with the substantive requirements of Community law, including the Habitats Directive.⁸⁹ Notwithstanding the loophole of Art-

⁸⁴ Decision 1692/96 on Community guidelines for the development of the trans-European transport network. OJ 1996, L 228.

⁸⁵ Art 129c. With a view to implement this provision, the Council has adopted Council Regulation (EC) No 2236/95 of 18 September 1995 laying down general rules for the granting of Community financial aid in the field of trans-European Networks, OJ EC 1995, L 228/1.

⁸⁶ A proposed list of priority projects was annexed to the Amended Proposal for a European Parliament and Council Decision on the Community guidelines for the development of the trans-European transport network, OJ EC 1995, C 97/1.

⁸⁷ Doc SEC(91)1744 'A Community Strategy to limit carbon dioxide emissions and to improve energy efficiency'.

⁸⁸ Current line of thoughts now consider so-called strategic environmental impact assessments, that cover both short and long terms and regional and global effects. See Institute for European Environmental Policy, 'The 1996 Inter-Governmental Conference: Integrating the Environment into other EU Policies' 19 (1995) (proposing that art. 129c of the EC Treaty be amended to make TENs projects dependent upon prior strategic EIAs).

⁸⁹ Most of the relevant legislation provides expressly that the Community should comply with relevant Community legislation; see e.g. art 8 of Regulation 1164/94 establishing the Cohesion Fund (OJ EC 1994, L 130/1), stating that all projects should comply with Community objectives concerning environmental protection. Likewise, art 7 of Regulation 2236/95 on financial rules for the granting of Community aid states that projects financed under the Regulation shall comply with Community law and Community policies in relation to environmental protection.

icle 6(4), when strictly interpreted the Habitats Directive provides an important roadblock to future transport networks. However, this roadblock only fulfills its function if the Community examines compatibility of TENs with the Habitats Directive *before* approving particular TENs projects. This would integrate the conditions of the Habitats Directive in the decision-making on TENs. The way the Commission has proceeded in the A20 case—first approving TENs and only thereafter examining the compatibility with the Habitats Directive by considering the TENs status of a project as a given—puts the cart before the horse.⁹⁰

7. Conclusion

The interpretation of Article 6(4) will not remain an issue of academic interest. The perceived need for more roads and railroads is too big and Europe too small. This Article suggests that the procedure for review of the application of Article 6(4) will need considerable strengthening and elaboration if the objectives of the Habitats Directive are not to be imperilled.

The Habitats Directive does not impose absolute barriers to infrastructure projects. In particular cases, including the Baltic Sea Highway, the building of roads through priority habitats may be justified and lawful. However, it is imperative that the Community institutions (and national courts) interpret the conditions for such a conclusion restrictively in order to safeguard the objectives of Directive.

The two Opinions concerning the Baltic Sea Highway only are an introduction to the legal questions that will arise once the European Court of Justice or national courts will have to examine compliance with Article 6(4) of the Habitats Directive. However, the Opinions have alerted us to at least three points. First, Article 6 is a poor piece of legislation that, unless strictly interpreted, contains big loopholes for major infrastructural projects in vulnerable areas. Second, application of Article 6(4) can be helped by a further development of standards for review in European law, in particular a rationality test (is a proposed project reasonably capable of achieving a purported objective); a proportionality test (do the expected benefits justify the adverse affects in priority habitats); and a least-damaging alternatives test. Third, the interaction between the Community policies on habitat protection and the trans-European networks forces the Community to reconsider what exactly it meant when it adopted the integration principle in the EC Treaty.

⁹⁰ In the A20 case, the fact that the A20 was not just a road planned by Germany, but a part of the trans-European network conceived at Community level was one consideration why the A20 would be of overriding public interest. The Opinions note that the A20 is part of the trans-European road network and is therefore important for the establishment of the international market and the strengthening of the economic and social cohesion of the Community. Opinion on the Recknitz and Trebel valley, para 4.3; Opinion on the River Peene Valley, para 4.2.