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The European ecological network "Natura 2000" and its derogation procedure to ensure compatibility with competing public interests

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Abstract

Natura 2000 network covers over 18 percent of the land area in the European Union. All proposals for development affecting these sites must be previously assessed for their implications for the site's conservation objectives. In cases where it cannot be ascertained that there is no adverse effect on the integrity of a Natura 2000 site, the proposal for development can now only be approved within the scope of a derogation assessment pursuant to Article 6(4) of the Habitats Directive 92/43/EEC[1] (HD). This article explores the requirements for an approval for derogation. In addition to the decisions of the European Court of Justice (ECJ)[2] and the European Commission guidelines on this issue, this article focuses, in particular, on the comprehensive German Federal Administrative Court (BVerwG)[3] decisions on this matter, which has had to assess a substantially greater number of cases to date, and provides a critical discussion on this in relation to the conservation aims of the Habitats Directive.

1 Council Directive of 21.5.1992 on the conservation of natural habitats and of wild fauna and flora, OJEU no. L 206 of 22.7.1992, p. 7 *et sqq*.

2 All ECJ decisions can be located based on their case number and can be freely accessed under: curia.europa.eu/juris/recherche.jsf?language=en.

3 From 2002 onwards, BVerwG decisions can be located based on their case number and can be freely accessed under: http://www.bverwg.de/entscheidungen/entscheidungen.php. References to the locations of earlier decisions are provided in this article.

Keywords
European Union (EU), Natura 2000, appropriate assessment, impact assessment, derogation procedure, Article 6(4) Habitats Directive, Birds Directive, imperative reasons of overriding public interest (IROPI), assessment of alternatives, compensatory measures, coherence, case law, ECJ, Germany, BVerwG

1. Introduction

The ecological network "Natura 2000" constitutes the common European heritage and, in 2017, covers over 27,500 sites that protect more than 789,000 km² of the terrestrial area in the EU (approx. 18.15%) and around 395,000 km² of European marine territory. It contains the Sites of Community Importance (SCIs) brought into being by Article 4 HD and the Special Protection Areas (SPAs) in Article 4 of the Birds Directive 79/409/EEC[4] (BD) (newly codified in Directive 2009/147/EU[5]).[6] It is designed to maintain or restore a favourable conservation status for the protected habitat types and species (Article 3 HD, similar to Article 2 BD), including SPAs and birds (*cf.* Article 2 no. 1 a) Environmental Liability Directive 2004/35/CE[7]). In addition to the designation and management of these sites, under Article 6(3) HD, those plans and projects, which are not directly connected with or necessary to the management of the site, but likely to have a significant effect on the integrity of a Natura 2000 site must be the subject of an appropriate assessment. In accordance with ECJ case law, authorisation for such proposed developments may be given only on condition that the competent authorities – once all aspects of the plan or project have been identified which may, independently or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site.[8] This means that no reasonable scientific doubt remains as to the absence of such effects. These strict requirements are mitigated by the option for a derogating authorisation in favour of other public interests in line with Article 6(4) HD. Among other legislation, the derogation arises from the European Principle of Proportionality[9] pursuant to Article 5(4) of the Treaty on European Union (TEU).

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4 Council Directive of 2.4.1979 on the conservation of wild birds, OJEU n. L 103 of 25.4.1979, p. 1 *et sqq*.

5 Directive on the conservation of wild birds, adopted by the European Parliament and Council on 30.11.2009, OJEU no. 20 of 26.1.2010, p. 7 *et sqq*.

6 European Commission 2017, p. 8 *et seq*.

7 Directive on environmental liability with regard to the prevention and remedying of environmental damage, adopted by the European Parliament and Council on 21.4.2004, OJEU no. L 143 of 30.4.2004, p. 56 *et sqq*.

8 e.g. ECJ, adjudication of 26.4.2017 – C-142/16, margin numbers 33; adjudication of 15.5.2014 – C-521/12, margin number 20 *et seq*.; adjudication of 11.4.2013 – C-258/11, margin number 41; adjudication of 7.9.2004 – C-127/02, margin number 41–49, 56–59.

9 *cf.* ECJ, adjudication of 14.4.2005 – C-441/03, margin number 27; BVerwG, adjudication of 23.4.2014 – 9 A 25.12, margin number 48; BVerwG, decision of 5.9.2012 – 7 B 24.12, margin number 7, 12.

If the assessment under Article 6(3) HD comes to the conclusion, that adverse effects on the integrity of a Natura 2000 site cannot excluded without reasonable scientific doubts, a project or plan can therefore be still authorised, if the conditions for derogation are fulfilled.

In cases of priority natural habitat types or priority species of Annex I and II of the Habitats Directive, an exemption is only justified by considerations associated with human health and public safety or has beneficial consequences of primary importance for the environment or further to an opinion from the Commission. It is not just the appropriate assessment,[10] but also the derogation assessment that requires comprehensive investigation and raises diverse legal and practical questions.[11] The European Commission has produced guidance and memoranda[12] to aid Member States in their application of Article 6 HD. In 2012, the Commission published the second summary report on the implementation of Article 6(4) HD from 2007–2011, with a focus on the first subparagraph. The report notes that the improvement in the quality of the information – provided by only six Member States – is still not enough with respect to the project's estimated potential adverse effects (including cumulative impacts), the mitigation measures, the assessment of alternatives, the justification with imperative overriding public interest and the possible effectiveness of the compensatory measures.[13] In the Fitness Check 2016 these problems still remain.[14]

The European Commission also commissioned an evaluation study to investigate how the appropriate assessment is used in the Member States.[15] In this study, the authors *Sundseth* and *Roth* only touched briefly on the use of the derogation procedure in Article 6(4) HD. They determined inconsistent use in the EU in relation to this:

According to both the online surveys and the structured interviews, it seems that the derogation procedure under Article 6.4 is rarely used. The Commission's own statistics seem to indicate the same trend. In addition only 20 Commission Opinions have been issued under Article 6.4 in the last 20 years and all but one of these was positive. It also varies from one country to another, with countries like Germany tending to use it more often than others.

There may be several reasons for the limited use of Article 6.4: solutions are found through mitigation in Article 6.3, good alternatives are available, IROPI [author: imperative reasons of overriding public interest] test not fulfilled, compensation measures too expensive or onerous….

But there does also seem to be an aura of fear about the use of Article 6.4 that it will lead to considerable delays and extra expenses. Some countries seem to try to push everything through under Article 6.3 to avoid having to use 6.4. and may fudge the differentiations between mitigation measures and compensation measures, either deliberately (to speed up

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10 see *Möckel* Nature Conservation 2017.

11 Milieu, IEEP and ICF 2016, p. 104 *et sqq.*; European Commission 2012a; European Commission 2001; *Jackson* Journal of Environmental Law 2014, 495 *et sqq*.

12 can be accessed on http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm

13 European Commission 2012b.

14 Milieu, IEEP and ICF 2016, p. 104 *et sqq.*

15 *Sundseth/Roth* 2013.

the process) or because of a basic lack of understanding of the differences between the two (which in turn can be due to the fact that the Article 6.4 procedure is so rarely used so there is little practical experience to guide them) or because there is a lack of political will to take the Article 6.4 route.

Another reason might be (mentioned occasionally in the literature but not raised explicitly during the structured interviews) that a number of Natura 2000 habitat types and species, are extremely difficult to compensate because of their inherent nature.[16]

The fact that the European Commission has only issued 20 opinions in line with Article 6(4) subparagraph 2 in the past 24 years since the Habitats Directive was enacted, of which 14 affected Germany, is also indicative of minimal use of the derogation procedure.[17] From a German perspective, these statements by *Sundseth* and *Roth* on the derogation procedure therefore appear surprising, as derogating authorisations are commonly issued in Germany in cases where a plan or project has been determined to be incompatible and this practice is not the exception, but the rule. Decisions of the BVerwG are largely responsible for this, as the court interprets the requirements for a derogating authorisation such that projects that are in the public interest are regularly permitted, if necessary after a second attempt, with improved justification and compensatory measures to ensure the overall coherence of Natura 2000. This case law is highly advantageous to planning certainty and realisation of proposals for development, especially for large infrastructure projects like motorways, railway lines and airports,[18] but associated with not insubstantial disadvantages for the Natura 2000 site in question, the entire network and the aims of the Habitats Directive and Birds Directive, in spite of the measures to ensure coherence. Such compensation measures must be stated in the permission with a high probability of effectiveness, but must not be realised before the implementation of the project or plan. Coherence measures in Germany therefore often compensate for the negative effects of a proposed development only after a lengthy period of time, as e.g. replacement habitats must first develop and be colonised by the desired plant and animal species.[19] This approach harbours risks, because, although many things are possible from a technical and logistical perspective, the development of habitat structures and species can nevertheless not be planned or predicted with a one hundred percent guarantee due to the complexity of ecosystems.[20] Certain invasive interventions, for example cutting through Natura 2000 sites, may possibly ultimately be mitigated with specific measures (e.g. with green bridges, tunnel systems). The protection of the integrity of Natura 2000 sites therefore continues to be

16 *Sundseth/Roth* 2013, p. 63.

17 European Commission, European Commission Opinions relevant to Article 6 (4) of the Habitats Directive, http://ec.europa.eu/environment/nature/natura2000/management/opinion_en.htm (accessed on 2.5.2017). See also *McGillivray* 2015, p. 101 (109 *et sqq*.).

18 see assessment of the German Minister of Environment and Nuclear Safety, cited in *Sundseth/Roth* 2013, p. 28.

19 *cf. McGillivray* 2015, p. 101 (106 *et sqq*.).

20 ECJ, adjudication of 15.5.2014 – C-521/12 – Briels, margin number 32; adjudication of 21.7.2016 – C-387/15 and C-388/15 – Vlaams Gewest, margin number 52-56.

the most important measure for achieving and safeguarding favourable conservation status for the habitat types and species in Annexes I and II HD.[21] The aims of Article 2 and 3 HD must thus be considered in the application and interpretation of Article 6(3) and (4) HD. For SPAs, the validity of Article 6(3) and (4) HD is beneficial for projects and plans as the exceptional reasons explicitly mentioned in Article 6(4) HD are more wide-ranging than exemptions under Article 4(4) BD.[22] In this case, the ECJ only recognises exemption due to outstanding public reasons like the protection of human life and health or public safety, but not for social or economic interests, as outlined in Article 6(4) HD.[23]

The requirements of Article 6(4) HD are not so often subject of ECJ decisions and in the English literature.[24] This article therefore sets out to explore the derogation procedure in more detail. Its interpretation by the ECJ and the information provided by the European Commission will be taken into consideration, insofar as available. Given the well-advanced experiences in Germany, the focus will, nevertheless, be on the interpretation in this country, particularly by the BVerwG. This interpretation will be introduced based on the individual conditions in Article 6(4) HD and will be the subject of a critical discussion within the meaning of the objectives of the Habitats Directive and Birds Directive.

2. Overview of the requirements of Article 6(4) HD

If a project or plan must be prohibited in accordance with Article 6(3) HD, the responsible authority may overrule this and authorise a proposed development under the standard conditions given in Article 6(4) HD. Article 6(4) HD is a manifestation of the Principle of Proportionality under European Community Law in Article 5(4) TEU as well as of the aims of sustainable development within the meaning of Article 11 of the Treaty on the Functioning of the European Union (TFEU).[25]

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21 European Commission 2015b, p. 16 *et sqq*.; European Commission 2015a p. 5 *et seq*.; EEA 2015, p. 119 *et sqq*.

22 *cf.* ECJ, adjudication of 11.7.1996 – C-44/95, margin number 37; BVerwG, adjudication of 18.7.2013 – 4 CN 3.12, margin number 29 *et seq*.; adjudication of 17.1.2007 – 9 C 20.05, margin number 129. More detailed in *Möckel* JEEPL 2014, 392 (402 *et sqq*., 405 *et sqq*.).

23 ECJ, adjudication of 28.1.1991 – C-57/89, margin number 22 *et sqq*.; adjudication of 2.8.1993 – C-355/90, margin numbers 19 and 45; adjudication of 18.12.2007 – C-186/06, margin number 37. Following BVerwG, adjudication of 16.3.2006 – 4 A 1075.04, margin number 550; adjudication of 1.4.2005 – 4 C 2.03, margin number 40.

24 *cf. McGillivray* 2015, p. 101 *et sqq*.; *Jackson* Journal of Environmental Law 2014, 495 *et sqq.; McGillivray* Journal of Environmental Law 2012, 417 *et sqq*.; *Clutten/Tafur* 2012, 167 *et sqq*.; *Krämer* Journal of Environmental Law 2009, 59 *et sqq*.; *Unnerstall* European Environment 2006, 73 *et sqq*. See also reviews in *Sundseth/Roth* 2013, 101 *et sqq*. and *Blicharska et al.* Biological Conservation 2016, 110 *et sqq*.

25 *cf.* ECJ, adjudication of 11.9.2012 – C-43/10, margin number 136 *et seq*.

The conditions for a derogation are:

- The plan or project must be carried out for imperative reasons of overriding public (IROPI), including those of a social or economic nature.
- There is no alternative solution.
- The Member State takes all compensatory measures required to ensure that the overall coherence of the Natura 2000 network is protected.

Counter to the view of the European Commission,[26] imperative reasons of overriding public interest are to be determined and weighed up based on the sequence laid down in Article 6(4) HD (German version)[27] and § 34(3) of the Federal Nature Conservation Act (BNatSchG) prior to the assessment of alternatives as these simultaneously constitute the benchmark for the assessment of alternatives (see 4).[28] Furthermore, a derogating authorisation requires a full appropriate assessment in line with Article 6(3) HD.[29] The potential damage to the site must be precisely identified, because the weighing up against the imperative reasons of overriding public interest, the search for less harmful alternatives and the determination of the compensatory measures require the qualitative and quantitative extent of the affects to be ascertained exactly.[30] In cases where these conditions are fulfilled, the decision on the derogation can nevertheless be taken at the discretion of the responsible authority.[31] This also includes the initiation of the derogation procedure. However, the authority and developers essentially have no discretionary power and scope for judgement in relation to the question of whether the requirements are fulfilled.[32]

In their form as an exemption, Article 6(4) HD and the requirements specified therein are to be narrowly interpreted.[33] The interpretation and application of Article

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26 European Commission 2012a, p. 7 *et seq*.

27 In the English, French and Spanish versions, however, the alternatives are mentioned first.

28 see also ECJ adjudication of 11.9.2012 – C-43/10, margin number 114; adjudication of 26.10.2006 – C-239/04, margin number 34.

29 settled ECJ case law, adjudication of 14.1.2016 – C-399/14, margin number 56 *et seq*.; adjudication of 15.5.2014 – C-521/12, margin number 36; adjudication of 11.4.2014 – C-258/11 margin number 35; adjudication of 16.2.2012 – C-182/10 margin number 74 *et seq*.; adjudication of 24.11.2011 – C-404/09, margin number 109, 157.

30 cf. ECJ, adjudication of 15.5.2014 – C-521/12 – Briels, margin number 36; adjudication of 24.11.2011 – C-404/09, margin number 109; BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 392.

31 *cf.* ECJ, adjudication of 4.3.2010 – C-241/08, margin number 72; adjudication of 26.10.2006 – C-239/04, margin number 25; adjudication of 21.7.2016 – C-387/15 and C-388/15 – Vlaams Gewest, margin number 63.

32 BVerwG, adjudication of 9.7.2009 – 4 C 12.07, margin number 15; adjudication of 6.11.2013 – 9 A 14.12, margin number 74; decision of 3.6.2010 – 4 B 54.09, margin number 9. Differing BVerwG, adjudication of 10.4.2013 – 4 C 3.12, margin number 19 for proposed developments for national defence.

33 settled ECJ case law, adjudication of 14.1.2016 – C-399/14, margin number 73; adjudication of 20.9.2007 – C-304/05, margin number 83; adjudication of 26.10.2006 – C-239/04, margin number 35.

6/4) HD must not endanger the aims of the Habitats Directive and the Birds Directive, mentioned in Articles 2 and 3 HD and Article 2 and 3 BD. The requirements cannot be circumvented, e.g. through an incorrect application of an appropriate assessment pursuant to Article 6(3) HD.[34] Conversely, the strict benchmarks developed by the ECJ for Article 6(3) HD must also be applied to paragraph 4.[35] Above all, the derogation assessment requires a full specialist conservation investigation and evaluation and consideration of the project-related adverse impacts on the site.[36] According to the BVerwG, a derogating authorisation shall only be granted if the greatest possible care is taken to protect the affected site.

Based on its derogating nature, Article 6(4) of the Habitats Directive establishes an avoidance rule that shall be strictly adhered to and cannot simply be breached at the expense of the integrity of the coherent system, as stipulated by Article 4 of the Habitats Directive, if this appears justifiable based on the pattern of rules for consideration given in German Planning Law, but can only be thrust aside if this is compatible with the concept of the greatest possible protection of the interests that are legally protected by the Habitats Directive (decisions of 27 January 2000 loc. cit. *p. 310 and of 17 May 2002 - BVerwG 4 A 28.01 - BVerwG decision 116, 254 <263>). These principles, developed for the assessment of alternatives, also apply to the assessment of imperative reasons of overriding public interest.*[37]

In the event that a proposed development is authorised in accordance with Article 6(4) HD, then its realisation is not prohibited based on Article 6(2) HD.[38] However, according to the ECJ, paragraph 4 is not an exemption in relation to paragraph 2.[39] Adverse impacts and non-planned deteriorations that are not authorised in the impact and derogation assessments must be prevented by Member States and their authorities according to Article 6(2) HD,[40] which ensures the same level of protection as Article 6(3) HD.[41] The prohibition of deterioration and disturbance also intervenes when the conditions for derogation have lapsed or the impact or derogation assessments were not undertaken in full and correctly.[42]

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34 ECJ, adjudication of 11.4.2013 – C-258/11, margin number 33 *et sqq*.

35 *cf*. ECJ, adjudication of 11.4.2013 – C-258/11, margin number 32-37.

36 *cf*. ECJ, adjudication of 11.9.2012 – C-43/10, margin number 114, 117; adjudication of 15.5.2014 – C-521/12 – Briels, margin number 35 *et seq*.; BVerwG, adjudication of 1.4.2015 – 4 C 6.14, margin number 28.

37 BVerwG, adjudication of 9.7.2009 – 4 C 12.07, margin number 15. similar to BVerwG, decision of 3.6.2010 – 4 B 54.09, margin number 9; adjudication of 6.11.2013 – 9 A 14.12, margin number 79.

38 ECJ, adjudication of 3.4.2014 – C-301/12, margin number 34; adjudication of 24.11.2011 – C-404/09, margin number 122 *et sqq*., 154 *et seq*.

39 ECJ, adjudication of 11.4.2013 – C-258/11, margin number 32.

40 *cf*. ECJ, adjudication of 24.11.2011 – C-404/09, margin number 122.

41 ECJ, adjudication of 14.1.2016 – C-399/14, margin number 52; adjudication of 15.5.2014 – C-521/12, margin number 19

42 *cf*. ECJ, adjudication of 14.1.2016 – C-399/14, margin number 68 *et seq*.; 74-78; adjudication of 7.9.2004 – C-127/02, margin number 37; final applications by Advocate-General *Sharpston* on ECJ, adjudication of 14.1.2016 – C-399/14, margin number 65 and by Advocate-General *Kokott* on ECJ, adjudication of 7.9.2004 – C-127/02, margin number 57.

The decision on the derogation is subject to full verification by the courts.[43] In this process, the timing of the decision for authorisation is critical to the legal evaluation.[44] Accredited conservation organisations are to be involved in the process and these organisations have the right to subject this decision to a court examination pursuant to Directive 2003/35/EC, Articles 6 and 11 of Directive 2011/92/EC and Articles 24 and 25 of Directive 2008/1/EC as the derogating authorisation is not enforced by law, but only by a corresponding decision taken by the authorities.[45]

3. Imperative reasons of overriding public interest (IROPI)

A derogation is only permissible based on Article 6(4) subparagraph 1 HD if the proposed development is required due to imperative reasons of overriding public interest, including those of a social or economic nature. The public interest must significantly outweigh the conservation interests. This requires weighing up of the "imperative reasons of overriding public interest" against the equally public interest in the "integrity of the Natura 2000 site".[46] In contrast to the usual specialist planning considerations between all competing concerns in the field, this weighing-up process is restricted to the two conflicting interests and must follow the specific legal provisions of the Habitats Directive. The basis for this is a bottom-up evaluation and weighing up of the two issues under consideration that is open to scrutiny and based on the individual circumstances of the case – differentiating between adverse impacts due to construction of the facility and the facility itself , as necessary.[47]

Diverse public interests come into consideration as possible reasons.[48] However, the public motivation must be a fundamental cause that a project pursues, meaning that associated subsidiary purposes do not meet the requirements.[49] Purely private interests are not permissible. Based on the ECJ, developments proposed by private companies only fulfil the conditions stipulated in Article 6(4) HD, "where a project, although of a private character, in fact by its very nature and by its economic and social

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43 *cf.* ECJ, adjudication of 14.1.2016 – C-399/14, margin number 55-57; BVerwG, adjudication of 17.1.2007 – 9 A 20.05, margin number 110 *et sqq*. and headnote 19.

44 BVerwG, adjudication of 23.4.2014 – 9 A 25.12, margin number 74; adjudication of 12.8.2009 – 9 A 64.07, margin number 52 with further references. *cf.* ECJ, adjudication of 14.1.2016 – C-399/14, margin number 60 *et seq*.

45 *cf.* BVerwG, adjudication of 1.4.2015 – 4 C 6.14, margin number 16–31 and headnote; adjudication of 18.12.2014 – 4 C 35.13, margin number 30, 53

46 *cf.* ECJ, adjudication of 15.5.2014 – C-521/12, margin number 36; adjudication of 16.2.2012 – C-182/10, margin number 75; adjudication of 11.9.2012 – C-43/10, margin number 114, 121.

47 *cf.* ECJ, adjudication of 14.1.2016 – C-399/14, margin number 57; BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 390; adjudication of 9.7.2009 – 4 C 12.07, margin number 13–17. Practical example e.g. VGH, Mannheim, decision of 24.3.2014 – 10 p 216/13.

48 *cf.* ECJ, adjudication of 11.9.2012 – C-43/10, margin number 122.

49 *cf.* BVerwG, adjudication of 27.1.2000 – 4 C 2.99, JURIS, margin number 39.

context presents an overriding public interest and it has been shown that there are no alternative solutions."[50]

The ECJ has hereby taken action against solid private interests being disguised as for the common good. In exceptional cases, infrastructure for the establishment or expansion of a company may fulfil these conditions.[51] The BVerwG recognises mainly airports that are operated in Germany by private companies.[52]

Due to Article 6(4) HD it must be differentiated hereafter between sites with and without priority habitat types and species.

3.1 Sites without priority habitat types and species

According to the European Commission, "imperative reasons of overriding public interest" also include the fact that the proposed development proves "essential" to fulfilling weighty interests for the common good and that the authorities must provide evidence for its actual requirement.[53] Contrary to common practice even of the European Commission, this excludes only politically desirable proposed developments without any actual necessity for the common good, as well as less weighty public interests.[54] The ECJ arguments also run along these lines, even if they are less concrete.[55] The BVerwG in Germany is less strict on this point:

In this respect, based on settled case law, the presence of practical constraints that cannot be avoided by anybody is not required; Article 6(4) of the Habitats Directive simply presumes governmental handling that is guided by reason and a sense of responsibility, whereby, however, public interests that are of lesser importance are excluded, such as leisure-related needs in sites with priority species (decisions of 17 January 2007 - BVerwG 9 A 20.05 - BVerwG decisions (BVerwGE) 128, 1 margin number 129 and of 28 March 2013 BVerwG 9 A 22.11 margin number 99 with further references).[56]

The proposed development must simultaneously be shown to be suitable to achieving the public aims without any reasonable doubt. The expectation that, for example, a motorway, navigable waterway or an expansion of an airport will increase the economic power of a region and reduce unemployment must therefore to be expected to a high degree based on recognised forecasting methods. Simple hope is therefore insufficient. If the BVerwG only makes the same demands as for the general justifica-

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50 ECJ, adjudication of 16.2.2012 – C-182/10, margin number 77.

51 ECJ, adjudication of 16.2.2012 – C-182/10, margin number 76.

52 BVerwG, decision of 3.6.2010 – 4 B 54.09.

53 European Commission 2012a, p. 7, 9; *Winter* NuR 2010, 601, 604 *et seq*.

54 see *McGillivray* Journal of Environmental Law 2012, 417 *et sqq*.; *Clutten/Tafur* 2012, 167 *et sqq*. See also the fundamental criticism of the usual weighting of economic and ecological public interests (*Bastmeijer* 2016, p. 387 (400 *et sqq*.)).

55 *cf*. ECJ, adjudication of 11.9.2012 – C-43/10, margin number 121.

56 BVerwG, decision of 6.11.2013 – 9 A 14.12, margin number 72. Similar to BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 389.

tion for planning submissions with regard to the accuracy of forecasting (are the facts completely ascertained and the prediction method correctly used),[57] then this will "essentially" do neither justice to the importance of Natura 2000 and the distribution of risk in relation to uncertainty laid down in Article 6(3) p 2 HD (where scientific doubt in relation to insignificance counts against the proposed development[58]), nor to the legal requirement of "imperative reasons". However, according to the BVerwG, based on the derogating nature of Article 6(4) HD, not all proposed developments that fulfil the requirements for the justification for planning submissions are given a special weighting "per se".[59]

A detailed justification is required in each case to establish what gives rise to significance in relation to weighting. Recognised criteria include:[60]

- the European or constitutional weighting of the purpose being pursued (*cf.* Article 6(4) subparagraph 2 HD, Article 3(1)-(3) TEU, Article 11 TFEU),[61]
- the level of the actual or forecast requirement for the planned proposed development (e.g. traffic demand for a road or easing of traffic congestion in a town),[62]
- the uncertainties in relation to forecasting that are associated with the proposed development,[63]
- the urgency for the proposed development,[64]

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57 BVerwG, adjudication of 9.7.2009 – 4 C 12.07, margin number 17; decision of 14.4.2011 – 4 B 77.09, margin number 42–45.

58 explicitly, ECJ, adjudication of 11.9.2012 – C-43/10, margin number 112. See also ECJ, adjudication of 14.1.2016 – C-399/14, margin number 43 f., 48 *et seq*.; adjudication of 15.5.2014 – C-521/12, margin number 20 *et seq*.; adjudication of 11.4.2013 – C-258/11 – Sweetman et al., margin number 29–41; adjudication of 7.9.2004 – C-127/02, margin number 41–49, 56–59.

59 BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 391; adjudication of 9.7.2009 – 4 C 12.07, margin number 15 and headnote 2.

60 *cf.* European Commission 2012a, p. 9.

61 *cf.* European Commission 2000. High weighting is therefore given to human health, public safety and conservation of the environment (e.g. reduction of CO_2 emissions (BVerwG, adjudication of 23.4.2014 – 9 A 25.12, margin number 76)).

62 BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 329 *et seq.* In contrast, a proposed development that first wishes to stimulate demand, for example, to promote economic development, has a lower weighting (BVerwG, adjudication of 9.7.2009 – 4 C 12.07, margin number 19), but may, correctly, actually not be necessary.

63 'The greater the extent of the uncertainties, the lower the weighting of the public interest in the proposed development and the more concrete and binding the objectives in support of the proposed development must be if it is still to be allocated high weighting in spite of the uncertain demand.' (BVerwG, decision of 22.6.2015 – 4 B 59.14, margin number 30. Similar BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 392; adjudication of 9.7.2009 – 4 C 12.07, margin number 17; decision of 14.4.2011 – 4 B 77.09, margin number 42–45).

64 BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 329.

- whether or not the aims pursued with the proposed development are prescribed by legally or politically, whereby statutory provisions carry greater weight,[65]
- the level of substantiation for the aims and purposes that are given[66] and
- the long-term nature of a public purpose that is being pursued, whereby short-term purposes, e.g. in the case of an accident, may carry greater weight.

During the process of weighing up, it must be noted that the weight of the public interests that support the proposed development is reduced by other competing public interests. For example, this is the case when a motorway or coal-fired power station may well be desired for reasons of boosting the economy or supplying energy, but simultaneously contravenes European and national obligations on climate protection and emission control, or other sustainability objectives.[67]

The BVerwG adjudicated as follows on the weight of interests in the integrity of the site:

The weighting that is to be applied to interests in integrity in the weighing-up process is critically dependent on the extent of the adverse impacts (…). Both a qualitative and a quantitative evaluation of the adverse impact are required. A differentiated assessment is crucial, in which the importance of the Site of Community Importance to the Natura 2000 network must be considered on European, national and regional scales (…). Adverse impacts on a Site of Community Importance may be allocated variable weighting, for example, when there is only minor exceeding of the threshold of significance, if there is pressure due to the site having suffered previous damage, the proposed development only affects a relatively small portion of the site or only impacts on one area that is of low-level importance to the networking of the coherent system, Natura 2000. In addition to the extent of the adverse impact, other decisive factors include the importance of the habitats and species that are affected and their conservation status, the level of threat to the affected habitat type or species and the dynamics of their development (…). The appropriate assessment forms the basis for the evaluation. This provides information on the type and scope of significant impacts that have been determined and pressure on the site due to previous damage.[68]

According to the German Federal Administrative Court (BVerwG), the question remains open as to whether the intended compensatory measures for ensuring coherence

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65 for inclusion in planned requirements, such as the German Federal Transport Infrastructure Plan or the plan for the Trans-European Transport Network (e.g. BVerwG, adjudication of 6.11.2013 – 9 A 14.12, margin number 70; adjudication of 8.1.2014 – 9 A 4.13, margin number 70; adjudication of 28.3.2013 – 9 A 22.11, margin number 102), for land-use planning (BVerwG, adjudication of 6.11.2013 – 9 A 14.12, margin number 70; adjudication of 9.7.2009 – 4 C 12.07, margin number 22).

66 Lesser weighting is therefore allocated to the very general aim of 'the economic development of a region' (recognised, e.g. in BVerwG, adjudication of 6.11.2013 – 9 A 14.12 margin number 70; adjudication of 8.1.2014 – 9 A 4.13, margin number 70; adjudication of 28.3.2013 – 9 A 22.11, margin number 102)

67 Annex II EU Commission Decision 406/2009; Annex I NEC Directive 2001/81/EC

68 BVerwG, adjudication of 9.7.2009 – 4 C 12.07, margin number 26. Similar, e.g. to BVerwG, adjudication of 12.3.2008 – 9 A 3.06, margin number 154, 164 *et seq*.; adjudication of 28.3.2013 – 9 A 22.11, margin number 99.

are to be considered to have a reducing effect when weighing up the effects of a proposed development.[69] Militating against this is the fact that compensatory measures are not considered in the appropriate assessment.[70] These measures are designed to conserve the coherence of the Natura 2000 network and not the integrity of the affected site[71] and they also constitute an independent condition in the decision on the derogation in line with Article 6(4) subparagraph 1 HD. Conversely, previous damage in the site may decrease the extent of the adverse impact of a project or plan and thereby reduce the weighting for the interests in integrity.[72]

To date, the overriding imperative reasons that have been recognised in case law include: drinking water supplies and agricultural irrigation;[73] transport demands, in particular in cases where a statutory demand has been determined and a road forms part of the trans-European network, as well as in cases of easing of congestion;[74] interests in relation to national defence, including the exercises required for this, also in the case of priority natural habitat types or species[75]; protection from noise pollution;[76] expansion of an airport into an intercontinental airport, if the forecasts support the demand.[77] The allocation of overriding weight in cases of infrastructure for private administrative centres has been rejected;[78] as is the case for exclusively defined objectives in spatial planning;[79] and for the objectives of decentralising transport by air and strengthening the competitiveness of regions where a new airport could be situated.[80]

3.2. Sites with priority habitat types and species

Article 6(4) subparagraph 2 HD exacts higher demands of weighting for "imperative reasons of public interest" if priority natural habitat types or priority species occur at the site, which must be given higher levels of protection. Priority habitat types and species are only designated (with an "*") in Annexes I and II of the Habitats Directive

69 *cf.* BVerwG, adjudication of 28.3.2013 – 9 A 22.11, margin number 100; adjudication of 6.11.2013 – 9 A 14.12, margin number 71; adjudication of 23.4.2014 – 9 A 25.12, margin number 77. Affirmative BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 407; adjudication of 9.7.2009 – 4 C 12.07, margin number 28–30; decision of 3.6.2010 – 4 B 54.09, margin number 21, if they also make a reasonable contribution towards the integrity of the affected site.

70 *cf.* ECJ, adjudication of 15.5.2014 – C-521/12 – Briels, margin number 28-33.

71 *cf.* BVerwG, adjudication of 9.7.2009 – 4 C 12.07, margin number 27.

72 *cf.* BVerwG, adjudication of 9.7.2009 – 4 C 12.07, margin number 31.

73 ECJ, adjudication of 11.9.2012 – C-43/10, margin number 122.

74 e.g. BVerwG, adjudication of 6.11.2013 – 9 A 14.12, margin number 69 *et seq.*; adjudication of 23.4.2014 – 9 A 25.12, margin number 74 *et sqq*.

75 BVerwG, adjudication of 10.4.2013 – 4 C 3.12, margin number 19

76 BVerwG, adjudication of 23.4.2014 – 9 A 25.12, margin number 86.

77 BVerwG, adjudication of 9.7.2009 – 4 C 12.07, margin number 17 *et seq.*, 23.

78 ECJ, adjudication of 16.2.2012 – C-182/10, margin number 78.

79 BVerwG, adjudication of 9.7.2009 – 4 C 12.07, margin number 22.

80 BVerwG, adjudication of 9.7.2009 – 4 C 12.07, margin number 19.

and not in the Birds Directive, meaning that no priority birds exist. Derogations can therefore not be justified for these sites in every case that is in the public interest.[81] However, according to the European Commission,[82] the BVerwG[83] and parts of the German literature,[84] Article 6(4) subparagraph 2 HD does not apply in cases where priority habitat types or species are present, but will definitely not be adversely affected.

Article 6(4) subparagraph 2 HD limits the reasons to public interests that are associated with human health and public safety or have beneficial consequences of primary importance for the environment. These public interests are also of overriding importance based on European agreements and German Constitutional Law (*cf.* Articles 11, 45(3), 52(1), 114(3) TFEU). Nevertheless, in spite of these cases being mentioned specifically, assessment of an individual case cannot be dispensed with as approval of the proposed development is still dependent on its weighting and requirement on a case by case basis.[85] All other reasons of public interest can only be considered if the responsible authority has obtained an opinion from the Commission.

Based on the higher level of protection demanded in these cases, both the other reasons and the three stated interests are to be narrowly defined.[86] For example, safeguarding of the drinking water supply is related to the protection of human health according to the ECJ, but this does not pertain to agricultural irrigation.[87] Measures associated with protection from epidemics, catastrophes, emergency services and flooding are also to be regarded as justifiable.[88] Public safety comprises the protection and defence of the civilian population, including military training areas and exercises.[89] The BVerwG states that a motorway may also be justified for reasons of protecting human health and public safety if it results in a significant reduction in traffic on A-roads passing through built-up areas as the population is then better protected from nitric oxide and road safety is increased.[90] It must be noted with reference to the beneficial consequences of primary importance for the environment that not every proposed development with positive effects on the environment justifies derogations, especially

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81 *cf.* ECJ, adjudication of 14.4.2005 – C-441/03, margin number 27.

82 European Commission 2000, p. 53; European Commission 2012a, p. 25.

83 BVerwG, adjudication of 9.7.2009 – 4 C 12.07, margin number 8 *et seq*.; adjudication of 12.3.2008 – 9 A 3.06, margin number 152. In contrast, BVerwG, adjudication of 27.1.2000 – 4 C 2.99, JURIS, margin number 34.

84 *Ewer*, in: Lütkes/Ewer, BNatSchG, 2011, § 34 margin number 65; *Meßerschmidt* 2014, § 34 margin number 197 *et seq*.

85 *cf.* BVerwG, adjudication of 27.1.2000 – 4 C 2.99, JURIS, margin number 37–40.

86 *cf.* ECJ, adjudication of 11.9.2012 – C-43/10, margin number 123-128; BVerwG, adjudication of 27.1.2000 – 4 C 2.99, JURIS, margin number 36.

87 ECJ, adjudication of 11.9.2012 – C-43/10, margin number 126.

88 *cf.* ECJ, adjudication of 28.2.1991 – C-57/89, margin number 8; BVerwG, adjudication of 27.1.2000 – 4 C 2.99, JURIS, margin number 37.

89 *cf.* BVerwG, adjudication of 10.4.2013 – 4 C 3.12, margin number 1 *et seq*., 19.

90 BVerwG, adjudication of 6.11.2012 – 9 A 17.11, margin number 66 *et sqq*.

when it does not necessarily have to be located in or in the vicinity of a Natura 2000 site if other locations or options are available (e.g. renewable energy plants).[91]

An opinion from the European Commission is to be obtained before a decision on the derogation is taken if none of the specifically mentioned reasons favour a proposed development. This procedural involvement serves the purpose of ensuring special protection of priority habitats and species and should put the Commission in the position to undertake its own evaluation of the potential adverse effects. According to the BVerwG, it must therefore be provided with comprehensive information.[92] Nevertheless, according to the BVerwG, the opinion issued by the Commission, whether it is positive or negative in relation to the proposed development, is not binding for the authorising body, which is why there is also no requirement for a court assessment of its veracity according to the BVerwG.[93] This does, indeed, agree with the wording in Article 6(4) subparagraph 2 HD. Nonetheless, the meaning and purpose of the opinion would be defeated if the authorising body were permitted to simply overrule in cases of a negative opinion. After all, the European Commission is the guardian of the Natura 2000 network and thus fulfils a special function (*cf.* Article 4(2), (9) and (17) HD).[94] The opinion should also prevent authorisations of proposed developments that do not comply with European Law only subsequently being revoked by infringement proceedings in accordance with Article 258 TFEU, while priority habitat types and species in the relevant site may already have incurred negative effects and possibly even irreversible consequences. An opinion that rejects the proposed development may therefore only be overruled in cases of a clear error of judgement by the Commission. However, up to now, the European Commission only exerts little control through its mainly authorising opinions.[95]

In the presence of a positive opinion or an erroneous rejection, reasons of public interest within the meaning of Article 6(4) subparagraph 1 HD may also justify interventions in the interests of the integrity of the Natura 2000 site.[96] However, based on the BVerwG, higher demands are to be made on the weighting of the reasons in such cases:

*The protective system classifies its priority elements as in need of greater protection than non-priority elements (*cf. *…). From the perspective of proportionality, this results in 'only a limited number of such imperative reasons' appearing suitable for justifying an adverse impact on priority habitat types or species (*cf. *ECJ, decision of 14 April 2005 – adjudication C-441/03 – Summary of Decisions 2005, I-3043 margin number 27). Public interests, that can surface in a variety of guises, that are of lesser importance are thus excluded a priori (e.g. leisure-related needs of the population; see ECJ, decision of 28 February 1991 – adjudication C-57/89 – Summary of Decisions 1991, I-883 margin number 22). Imperative*

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91 *cf. Schumacher/Schumacher*, in: Schumacher/Fischer-Hüftle, BNatSchG, 2011, § 34 margin number 99; *Gellermann*, in: Landmann/Rohmer, Umweltrecht, 2016, § 34 BNatSchG margin number 46.

92 BVerwG, adjudication of 23.4.2014 – 9 A 25.12, margin number 87.

93 BVerwG, adjudication of 23.4.2014 – 9 A 25.12, margin number 87.

94 *cf.* European Commission 2012a, p. 27.

95 critical e.g. *McGillivray* 2015, p. 101 (109 *et sqq.*) and *Krämer* Journal of Environmental Law 2009, 59.

96 on recognition practice European Commission 2012a, p. 9 *et seq*.

*reasons of overriding public interest must generally at least fulfil the strict demands of common good given in Article 14(3) first sentence of German Constitutional Law (*cf. *decision of 16 March 2006 – BVerwG 4 A 1075.04 – BVerwG decision (BVerwGE) 125, 116 margin number 566 on Article 16(1) character c) of the Habitats Directive). In addition, in order to achieve the level required by Article 6(4) subparagraph 2 of the Habitats Directive, similarly weighty interests in the common good must be pursued through the proposed development, as have been explicitly mentioned as examples by the Council in Article 6(4) subparagraph 2 of the Habitats Directive (decision of 17 January 2007* loc. cit. *margin number 129; Hösch, German Environmental and Planning Law (UPR) 2010, 7 <8* et seq.*>; more closely probably Frenz, UPR 2011, 100 <103> and Günes/Fisahn, EurUP 2007, 220 <227>).*[97]

4. Assessment of alternative solutions

No alternative solutions are permitted to exist based on Article 6(4) subparagraph 1 HD and evidence for this must be provided according to the ECJ.[98] Based on the specific protection of integrity in Natura 2000 sites, this assessment of alternatives cannot be compared with assessments of alternatives, for example, in the strategic environmental impact assessment due to Articles 5(1) and 9(1) character b) of the Directive 2001/42/EEC on the Strategic Environmental Assessment.[99] Rather more, it contains an avoidance rule that must be strictly adhered to (see 2).

The question arises as to what a notable alternative can be. The Habitats Directive remains silent on this. In Germany, the legislature has therefore defined an alternative more closely in § 34(3) no. 2 of the Federal Nature Conservation Act, in the sense that it must be reasonable and the purpose that is being pursued by the project can hereby be achieved in a different location, with or without a lower adverse impact. This definition was further embellished by the BVerwG:

If the objective of the project can be realised in a location that is more favourable based on the conservation concept of the Habitats Directive or the intensity of the intervention can be reduced, then the project proponent must make use of this option. The developer shall not be granted any room for manoeuvre of any kind. In contrast to the specialist planning assessment of alternatives, the Habitats Directive statutory assessment of alternatives does not form part of a planning consideration. The authority is granted no scope for judgement in relation to the comparison of the alternatives. […] The requirements for the exclusion of alternatives increase progressively in relation to how suitable they are to the realisation of the aims of the proposed development, without leading to obvious - without reasonable doubt - disproportionate adverse impacts. What is therefore decisive in this matter is

97 BVerwG, adjudication of 23.4.2014 – 9 A 25.12, margin number 73.

98 ECJ, adjudication of 26.10.2006 – C-239/04, margin number 36.

99 *cf.* BVerwG, adjudication of 9.7.2009 – 4 C 12.07, margin number 15; decision of 3.6.2010 – 4 B 54.09, margin number 9.

whether imperative reasons of overriding public interest demand the realisation of exactly this alternative, or whether these reasons can also be fulfilled with a different alternative (final applications by the Advocate-General Kokott on adjudication C-239/04 – summary decisions 2006, I-10183 margin number 43, 46).[100]

The responsible authority is also under the obligation to fully assess the alternatives on its own motion and is not permitted, for example, to limit this assessment to the alternatives considered by the developer without conducting its own assessment, as the Natura 2000 impact assessment, overall, is an official assessment and authorisation procedure.[101]

However, settled BVerwG jurisdiction imposes four restrictions on what are essentially strict standards for assessment:

1. the alternative must not result in a different project,
2. it must be realisable and proportionate,
3. it shall not have a significant adverse impact on public interests and
4. it must be more advantageous to the Natura 2000 network.[102]

The high levels of protection of the integrity of Natura 2000 sites and the coherence of the network that demand the greatest possible levels of care are to be considered with reference to the scope of these four conditions. Therefore, only weighty reasons can justify the exclusion of an alternative solution.[103]

In the case of proposed linear developments (e.g. roads, railways), the search for alternatives must not be limited solely to the planning corridor, i.e. the course of the route most suited to the aims of the proposed development from a transport perspective.[104] This can, for example, be carried out based on a broad environmental impact assessment that is composed of a spatial sensitivity analysis and a comparison of variants.[105] In this process, according to the BVerwG, a summary appraisal of the potential for adverse impacts is sufficient for routes outside the planning corridor.[106] Even in the

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100 BVerwG, decision of 3.6.2010 – 4 B 54.09, margin number 9. Settled case law, e.g. BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 410; adjudication of 6.11.2013 – 9 A 14.12, margin number 74; adjudication of 12.3.2008 – 9 A 3.06, margin number 170; adjudication of 17.5.2002 – A 28.01, BVerwGE 116, p. 254 (262). Exception in the case of national defence (BVerwG, adjudication of 10.4.2013 – 4 C 3.12, margin number 19).

101 *cf.* ECJ, adjudication of 26.10.2006 – C-239/04, margin number 36–40.

102 settled case law, e.g. BVerwG, adjudication of 6.11.2013 – 9 A 14.12, margin number 74 *et seq.*; adjudication of 23.4.2014 – 9 A 25.12, margin number 78; adjudication of 6.11.2012 – 9 A 17.11, margin number 70.

103 *cf.* BVerwG, adjudication of 28.3.2013 – 9 A 22.11, margin number 105.

104 *cf.* ECJ, adjudication of 26.10.2006 – C-239/04, margin number 36–40; BVerwG, decision of 28.11.2013 – 9 B 14.13, margin number 15; adjudication of 6.11.2013 – 9 A 14.12, margin number 75.

105 BVerwG, adjudication of 6.11.2013 – 9 A 14.12, margin number 88.

106 BVerwG, decision of 28.11.2013 – 9 B 14.13, margin number 15; adjudication of 6.11.2013 – 9 A 14.12, margin number 75.

case of proposed developments with a fixed location (e.g. airports), an assessment must be carried out on whether a different location offers an alternative solution.[107]

4.1. No other project

In detail, the BVerwG states:

However, only those changes shall be regarded as an alternative that do not touch upon the identity of the proposed development. An alternative can no longer be referred to as such in cases where this results in a different project, where the aims pursued in a permissible manner by the developer can no longer be realised. An expectation of curtailment to the degree of fulfilment of these aims is the only reasonable option. In contrast, a planning variant does not need to be considered if it cannot be realised without giving up independent partial aims that are being pursued through the proposed development (…).[108]

An alternative that results in a different project is therefore not an alternative that needs to be considered. In the prevailing view in Germany this shall apply, in particular, to system or concept alternatives and abandonment (so-called zero-option).[109] According to the BVerwG, alternatives that are associated with material compromises in relation to the degree of fulfilment of the aims are dismissed, whereby this depends on the individual case as the boundaries are fluid.[110]

But the subjective notions of the developer and the proponent's weighting of different partial aims are not relevant to the question of when a different project is present.[111] This also applies to proposed developments with a fixed location, such as airports and seaports.[112] What are decisive are the imperative reasons of public interest

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107 BVerwG, decision of 3.6.2010 – 4 B 54.09, margin number 9.

108 BVerwG, decision of 3.6.2010 – 4 B 54.09, margin number 9. Settled case law, e.g. BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 410; adjudication of 6.11.2012 – 9 A 17.11, margin number 70; adjudication of 17.1.2007 – 9 A 20.05, margin number 143.

109 so e.g. BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 418 *et seq.*; *Gellermann*, in: Landmann/Rohmer, Umweltrecht, 2016, § 34 BNatSchG margin number 36; *Mühlbauer*, in: Lorz et al., Naturschutzrecht, 2013, § 34 BNatSchG margin number 22. Other opinion European Commission 2012b, p. 7, 9.

110 e.g. BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 414 *et seq*. For example, for the BVerwG, an A-road is no longer an alternative to an intercity motorway (BVerwG, adjudication of 8.1.2014 – 9 A 4.13, margin number 73), which is not a convincing argument, given the potential for standards of construction with four lanes and no crossings that are also possible for A-roads.

111 *Winter* NuR 2010, 601 (605). *cf.* BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 411, but restricting to public aims named by the developer; BVerwG, adjudication of 6.11.2013 – 9 A 14.12, margin number 78 *et seq*. in relation to the question of whether an urban motorway actually constitutes a different project to an intercity motorway; BVerwG, adjudication of 23.4.2014 – 9 A 25.12, margin number 80 in relation to bypasses with three to four lanes instead of a motorway; BVerwG, adjudication of 9.7.2009 – 4 C 12.07, margin number 34 *et seq*. in relation to short-haul airports instead of intercontinental airports.

112 BVerwG, decision of 3.6.2010 – 4 B 54.09, margin number 9 f.; *Winter* NuR 2010, 601 (606).

that favour the proposed development and their weight,[113] whereby political aims carry less weight than statutory aims.[114] In this respect, system alternatives - for example use of railway lines instead of constructing or expanding a road or dredging a river - should not be summarily excluded if the public interests that are being pursued (e.g. transport of people and goods between A and B) can be realised in a reasonable manner, without huge compromises, and significant adverse impacts on Natura 2000 sites can be avoided.[115] After all, in that case, a realisation of the proposed development in spite of adverse impacts on the site would certainly not constitute rational and responsible governmental handling and would not be "imperative" within the meaning of the BVerwG decisions presented in 4.1. Because of these reasons and contrary to the opinion of the BVerwG[116] the developer cannot restrict the public interests, which are to be taken as IROPI for the justification of a derogation and as the basis for the assessment of alternatives solutions in Article 6(4) HD.

Furthermore, compromises in relation to the degree of fulfilment of the aims are insignificant if the partial aims excluded in an alternative do not serve overriding public interests or only serve private interests in situations with mixed interests (e.g. airports). In cases where the proposed development will actually affect priority habitat types or species, non-realisable partial aims must serve the overriding important public interests given in Article 6(4) subparagraph 2 HD (see 3.2).

4.2. Realisable and not disproportionate

Alternatives that are not possible for statutory or actual reasons, or where the likelihood of realisation is highly uncertain, are purely theoretical alternatives and not admissible.[117] This can be the case, in particular for proposed developments with little flexibility in relation to their fixed location. However, certain difficulties do not exclude alternatives a priori.[118]

Furthermore, according to the BVerwG, alternatives that are associated with disproportionate costs are also excluded based on the principle of proportionality in Article 5(4) TEU:

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113 BVerwG, decision of 3.6.2010 – 4 B 54.09, margin number 9; Advocate-General *Kokott* in ECJ, adjudication of 26.10.2006 – C-239/04, margin number 46; *Winter* NuR 2010, 601 (605). Different BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 412.

114 *cf.* ECJ, adjudication of 15.5.2014 – C-521/12 – Briels, margin number 36; BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 411; adjudication of 28.3.2013 – 9 A 22.11, margin number 99, 111.

115 *cf.* Advocate-General *Kokott* in ECJ, adjudication of 26.10.2006 – C-239/04, margin number 43; *Winter* NuR 2010, 601, 605.

116 BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 411 *et seq*.

117 *cf.* BVerwG, adjudication of 28.3.2013 – 9 A 22.11, margin number 105; decision of 3.6.2010 – 4 B 54.09, margin number 6, 10; adjudication of 9.7.2009 – 4 C 12.07, margin number 16 and 33.

118 *cf.* ECJ, adjudication of 26.10.2006 – C-239/04, margin number 38.

The reasonable level of attempts at avoidance must not exceed any sensible relation to the gains that can thereby be achieved for nature and the environment. In this context, financial considerations may tip the balance. Whether the costs are disproportionate to the protective system laid down in accordance with Article 6 of the Habitats Directive shall, as always, be weighed up against the shared protected natural resources that are adversely affected. The guiding principle for this is provided by the severity of the adverse impact on the site, the number and importance of any habitat types or species that may be affected and the degree of incompatibility with the conservation aims.[119]

However, based on a recent ECJ decision, arguments relating to costs are essentially less important than the interests in integrity:

In consideration of the narrow interpretation of Article 6(4) of this Directive, which was referred to in margin number 73 of the above decision, the selection of alternative solutions shall therefore be prohibited from being based solely on the economic costs of such measures.[120]

In the disproportionate financial question, the financial power of the developer must therefore not be considered, something that is also often difficult to determine in the not uncommon case where the government is the proponent (e.g. road and rail construction) and might well be achieved in exceptional cases. Furthermore, the comparison must also not simply focus on the construction and maintenance costs of the project and the alternative. However, in some of its decisions, the BVerwG has approved the exclusion of alternatives due to higher construction costs, without the provision of any further justification or weighing-up.[121] The question of the level at which additional costs become disproportionate in either relative or absolute terms cannot be answered without making a comparison with the nature conservation gains made through an alternative in each individual case. According to the ECJ, even the demolition of a prematurely built installation is essentially not an alternative that is to be excluded.[122] According to the BVerwG, the work and time involved for a new approval or planning approval procedure also poses no obstacle.[123]

Quite rightly, the BVerwG stipulates that disproportionality must be assessed in relation to the achievable protection of the Natura 2000 network. However, this cost-benefit analysis also raises questions that are very difficult to answer as costs must be compared with non-monetary values in such cases. The Natura 2000 sites and their natural resources have no monetary value, rather more; only potential estimates can be made of their "cash" value.[124] It must be noted in this process that the protected habitat types and species are not only being protected for their own sake. On the

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119 BVerwG, adjudication of 27.1.2000 – 4 C 2.99, JURIS, margin number 31. Confirming, e.g. BVerwG, adjudication of 28.3.2013 – 9 A 22.11, margin number 105; adjudication of 6.11.2012 – 9 A 17.11, margin number 70.

120 ECJ, adjudication of 14.1.2016 – C-399/14, margin number 77.

121 BVerwG, adjudication of 17.1.2007 – 9 A 20.05, margin number 142; adjudication of 28.3.2013 – 9 A 22.11, margin number 110.

122 ECJ, adjudication of 14.1.2016 – C-399/14, margin number 68–75.

123 BVerwG, decision of 3.6.2010 – 4 B 54.09, margin number 7.

124 European Commissiom 2013b.

contrary, these habitat types and species and the Natura 2000 site in question, as well as the entire network, provide society with diverse ecosystem services,[125] for example, water purification and storage, carbon sequestration, an ecological balance between beneficial species and pests, or recreation in nature. This complex monetary assessment can generally not be carried out within the scope of an authorisation procedure as it requires comprehensive investigations and surveys.[126] The outcome would also only provide a relatively coarse estimate of its worth that was associated with uncertainty.

Given the difficulties associated with determining disproportionality, the exclusion of an alternative solely due to disproportionate costs should only be possible in rare, very clear cases, whereby further reasons should also militate against the alternative.[127]

4.3. No significant adverse impact on other public interests

According to the general weighting of the conservation interest in conjunction with other interests in Article 6(4) HD, the BVerwG excludes any alternatives that, contrary to the planned development, have a significant adverse impact on other public interests.[128] However, this far-reaching proviso must be limited due to the high level of protection of integrity in Natura 2000 sites. Not every public interest outweighs the interest in the protection of integrity - even in cases of a significant adverse impact. Rather, imperative reasons of overriding public interest must also be used as the sole basis in such cases (see 3.1). These imperative reasons manifest mainly in statutory regulations on protection or targets. Alternatives are therefore eliminated, in particular, when they would have a significant adverse impact on the interests listed in Article 6(4) subparagraph 2 HD - protection of human health, public safety and environmental protection. In contrast, other public interests that are not committed to statutes or general standards, such as promotion of the regional economy and improved transport links,[129] leisure-related needs[130] or purely transport-technical arguments,[131] do not limit the assessment of alternatives on principle. According to the BVerwG, the latter shall also apply to the site-independent conservation of species within the meaning of Articles 12-16 HD and Articles 5-9 BD, as the protection of a site constitutes the more specific protective system.[132]

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125 *cf.* Millenium Ecosystem Assessment 2005.

126 *cf.* TEEB 2011.

127 *cf.* BVerwG, adjudication of 23.4.2014 – 9 A 25.12, margin number 85.

128 BVerwG, adjudication of 23.4.2014 – 9 A 25.12, margin number 78; adjudication of 6.11.2013 – 9 A 14.12, margin number 74, 80; adjudication of 28.3.2013 – 9 A 22.11, margin number 105.

129 *cf.* BVerwG, adjudication of 23.4.2014 – 9 A 25.12, margin number 84; adjudication of 28.3.2013 – 9 A 22.11, margin number 102, 109, however, with this being allocated greater weighting.

130 BVerwG, adjudication of 6.11.2013 – 9 A 14.12, margin number 72.

131 BVerwG, adjudication of 6.11.2013 – 9 A 14.12, margin number 90.

132 BVerwG, adjudication of 6.11.2012 – 9 A 17.11, margin number 80.

4.4. More advantageous to the Natura 2000 network

The alternatives that are to be considered must be more advantageous to both the affected site and to the entire Natura 2000 network. This is the case if an alternative would not have a significant adverse impact on any of the Natura 2000 sites. If other Natura 2000 sites are also affected, then after the BVerwG an alternative is only more favourable if there are no adverse impacts on priority habitat types or species in these sites:

In the event that the solution issued with planning approval and a planning alternative both have an effect on Sites of Community Importance, then a coarse analysis shall be carried out and the decision shall be made solely on the basis of the severity of the adverse impact, based on the characteristics used for differentiation laid down in Article 6 of the Habitats Directive. The investigation shall therefore only focus on whether there is an adverse impact on habitat types in Annex I or on animal species in Annex II of the Habitats Directive and whether the habitat types that are adversely affected are classified as priority or non-priority. In contrast, the criteria for more detailed differentiation that must be noted when registering a site (Article 4(1) subparagraph 1 first sentence Habitats Directive in association with Annex III phase 1) shall not be considered in the comparison of routes; a differentiation within the stated groups based on the value and number of affected habitat types or species and the given intensity of the impact shall therefore not be repeated within the stated groups (…).[133]

In other words, the BVerwG states that an alternative is eliminated if priority or only non-priority natural resources are affected in the proposed variant and in the alternative solution.[134] In such cases, based on the court, the decision rests with the planning assessment and the authority is granted some scope within the assessment, in contrast to the statements cited above.[135]

This generalising coarse differentiation that does not consider the differences in severity of the adverse impacts on sites cannot be viewed as in compliance with the Directive.[136] A proposed development can have a highly variable impact on a Natura 2000 site, depending on its type, extent and duration, previous pressures on the site and the cumulative effects of other proposed developments, as well as the condition of the habitat types and species that are under protection. The following examples are highlighted:

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133 BVerwG, adjudication of 6.11.2013 – 9 A 14.12, margin number 75. Settled case law, e.g. BVerwG, adjudication of 28.3.2013 – 9 A 22.11, margin number 105; adjudication of 12.3.2008 – 9 A 3.06, margin number 170 *et seq*.

134 *cf*. BVerwG, adjudication of 8.1.2014 – 9 A 4.13, margin number 72; adjudication of 6.11.2013 – 9 A 14.12, margin number 87; adjudication of 28.3.2013 – 9 A 22.11, margin number 107.

135 BVerwG, adjudication of 23.4.2014 – 9 A 25.12, margin number 84, 86; decision of 9.12.2011 – 9 B 44.11, margin number 7.

136 similar to *Gellermann*, in: Landmann/Rohmer, Umweltrecht, 2016, § 34 BNatSchG margin number 37.

- loss of land in the site due to construction works and installations, resulting in the destruction of, or adverse impacts on, types of habitat and habitats and territories occupied by some species,[137]
- effects of cutting through the site or barriers within the site as well as in relation to habitats or populations outside the site, especially in the case of roads, railway lines and waterways, but also e.g. in the case of larger scale wind power plants or opencast mining,[138]
- risk of collisions due to, for example, the operation of roads and railways or wind energy systems,[139]
- changes to the water balance in the landscape through, for example, a reduction in the groundwater level or changes to/diversions of water bodies to make space for, e.g. roads or railways, mines, energy production, drinking water production or agriculture,[140]
- emission of noise, vibration, light and compounds within or into the site from the outside, such as nitrogen emissions from roads, power plants or agricultural land or chloride emissions from roads due to winter salting.[141]

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137 *cf.* only ECJ, adjudication of 11.4.2013 – C-258/11, margin number 37 *et sqq.*; adjudication of 24.11.2011 – C-404/09, margin number 97 *et sqq.*; adjudication of 14.1.2016 – C-141/14, margin number 63 *et sqq.*; BVerwG, adjudication of 23.4.2014 – 9 A 25.12, margin number 67 *et sqq.*, 71 *et sqq.*; adjudication of 28.3.2013 – 9 A 22.11, margin number 71 *et sqq.*

138 ECJ, adjudication of 20.5.2010 – C-308/08, margin number 25; adjudication of 24.11.2011 – C-404/09, margin number 146 *et sqq.*, 166 *et sqq.*; adjudication of 14.1.2016 – C-141/14, margin number 59, 75; BVerwG, decision of 23.1.2015 – 7 VR 6.14, margin number 16, 27; adjudication of 14.7.2011 – 9 A 12.10, margin number 93; adjudication of 14.4.2010 - 9 A 5.08, margin number 33.

139 ECJ, adjudication of 20.5.2010 – C-308/08, margin number 37–52; BVerwG, decision of 23.1.2015 – 7 VR 6.14, margin number 27; decision of 7.2.2011 – 4 B 48.10, margin number 6.

140 ECJ, adjudication of 15.5.2014 – C-521/12, margin number 12, 23; adjudication of 13.12.2007 – C-418/04, margin number 256 *et seq.*; BVerwG, adjudication of 12.3.2008 – 9 A 3.06, margin number 97 *et sqq.*

141 Nitrogen: ECJ, adjudication of 15.5.2014 – C-521/12, margin number 12, 23, adjudication of 11.9.2012 – C-43/10, margin number 98 *et sqq.*; BVerwG, decision of 5.9.2012 – 7 B 24.12, margin number 7 *et sqq.*; adjudication of 23.4.2014 – 9 A 25.12, margin number 26 *et seq.*, 45 *et seq.*; adjudication of 29.9.2011 – 7 C 21.09, margin number 41; adjudication of 14.4.2010 – 9 A 5.08, margin number 87; decision of 26.11.2007 – 4 BN 46.07, margin number 11; adjudication of 12.3.2008 – 9 A 3.06, margin number 107 *et sqq.*; adjudication of 17.1.2007 – 9 A 20.05, margin number 101 *et sqq.* Chloride: BVerwG, adjudication of 3.5.2013 – 9 A 16.12, margin number 36 *et sqq.*; adjudication of 14.7.2011 – 9 A 12.10, margin number 78. Noise/vibration: ECJ, adjudication of 24.11.2011 – C-404/09, margin number 146 *et sqq.*, 166 *et sqq.*; BVerwG, adjudication of 18.12.2014 – 4 C 35.13, margin number 34, 43 *et seq.*; adjudication of 28.3.2013 – 9 A 22.11, margin number 84, 88 *et seq.*; adjudication of 6.11.2012 – 9 A 17.11, margin number 45; adjudication of 23.4.2014 – 9 A 25.12, margin number 51. Light/optical disturbance: BVerwG, adjudication of 28.3.2013 – 9 A 22.11, margin number 74–76; adjudication of 23.4.2014 – 9 A 25.12, margin number 51.

Article 6(4) subparagraph 1 HD gives no indication that the differentiated assessment of the effects of a proposed development as stipulated in Article 6(3) HD is now to be irrelevant to the examination of alternatives.[142] The latter point would also contravene settled case law,[143] whereby a full appropriate assessment is an indispensable condition for a derogating authorisation. The ECJ has now expressly emphasised that neither potential deterioration and disturbance, nor possible advantages that may arise from them, can be disregarded during the search for an alternative.[144] It follows from the meaning and purpose of the appropriate assessment overall, and from the nature of the derogation assessment as an exception provision, that significant impacts on Natura 2000 sites and on the coherence of the network must be kept as low as is possible. The BVerwG refers to this as "the concept of the greatest possible level of care" (see 2). The resultant obligatory instruction for a careful investigation in individual cases[145] must also apply to the derogation assessment.[146] Purely practical reasons, such as the avoidance of further appropriate assessments, do not justify a watering down of the strict protection of integrity, so long as the scope of the assessment for alternatives does not reach the threshold of disproportionality. This is hardly likely to apply to purely procedural costs.[147] Furthermore, alternatives do not need to be investigated in depth for their Natura 2000 compatibility if they have already been eliminated for the other reasons given above or the results of their screening already indicate that severe adverse impacts are to be expected. On principle, the result must therefore also provide a full comparison of the severity of the adverse impacts on Natura 2000 sites during the assessment of alternatives.[148]

5. Compensatory measures

Pursuant to Article 6(4) subparagraph 1 HD, all necessary compensatory measures are to be taken to ensure that the global coherence of Natura 2000 is protected. European law on the conservation of natural habitats is designed to achieve a good conservation status for the selected species and habitat types in their natural areas of distribution

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142 In contrast, in the case of an alternative being financially disproportionate, the BVerwG recognises 'the severity of the adverse impact on the site, the number and importance of any habitat types or species that may be affected and the degree of incompatibility with the conservation aims' as criteria for assessment (BVerwG, adjudication of 28.3.2013 – 9 A 22.11, margin number 105). Probably similar to the necessity for demolishing a proposed development built prematurely (BVerwG, decision of 6.3.2014 – 9 C 6.12, margin number 47).

143 see footnote 29.

144 ECJ, adjudication of 14.1.2016 – C-399/14, margin number 74.

145 *cf.* only ECJ, adjudication of 15.5.2014 – C-521/12, margin number 27.

146 as stated in BVerwG, adjudication of 6.11.2013 – 9 A 14.12, margin number 79. *cf. Winter* NuR 2010, 601 (603 *et sqq.*).

147 *cf.* BVerwG, decision of 3.6.2010 – 4 B 54.09, margin number 7.

148 *cf.* ECJ, adjudication of 11.9.2012 – C-43/10, margin number 114; European Commission 2012a, p. 7.

across the entire European Union. In this process, the Natura 2000 sites are important keystones for the green infrastructure that is to be expanded in the EU.[149] These sites are designed to represent the species and habitat types that are to be conserved at an adequate level and also to safeguard migration within the European Community.[150] Migration between sites is an essential prerequisite for guaranteeing healthy populations in the long term and allowing shifts in the natural areas of distribution in times of climate change. Taken together, representative status and migration constitute the most important functions of a coherent European ecological network of special protected areas, as demanded by Article 3(1) HD.

In accordance with Article 6(4) subparagraph 1 HD, the safeguarding of this coherence constitutes a condition for authorisation and is not simply a legal consequence.[151] The costs are essentially to be borne by the developer, whereby government subsidies are possible.[152] The specifications for the selection of sites based on Article 4(1) and (2) HD also serve as the benchmark in such cases.[153] This requires the identification of all adverse impacts associated with the proposed development.[154] Compensatory measures can be implemented in the affected Natura 2000 site, in a different Natura 2000 site or outside and can also involve the creating of new habitats, if the measures take place in the same biogeographical region.[155] Strictly in line with the commission guidance documents, the BVerwG demands the following with reference to content:[156]

The organisation of the compensatory measures to ensure the coherence shall be functionally tailored to dealing with the specific adverse impact that triggered the requirement for such measures. This process shall document the affected habitats and species in comparable dimensions, refer to the same biogeographical region in the same Member State and plan functions that are comparable to those based on which the original site was selected (…). Measures include the restoration or improvement of the remaining habitat or the new creation of habitat that is to be incorporated into the Natura 2000 network (…). Compensatory measures to safeguard coherence do not necessarily have to be implemented in the

149 European Commission 2013a, p. 10.

150 *Kettunen et al.* 2007, p. 38 *et sqq*.

151 *cf.* ECJ, adjudication of 11.9.2012 – C-43/10, margin number 114, 119, 130-133, 128; adjudication of 15.5.2014 – C-521/12 – Briels, margin number 34; adjudication of 26.10.2006 – C-239/04, margin number 34 f.; BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 418; adjudication of 17.1.2007 – 9 A 20.05, margin number 148 and headnote 22.

152 European Commission 2012a, p. 23.

153 European Commission 2012a, p. 13 *et seq*.

154 ECJ, adjudication of 11.9.2012 – C-43/10, margin number 144, 130 *et seq*.; adjudication of 24.11.2011 – C-404/09, margin number 109; BVerwG, adjudication of 23.4.2014 – 9 A 25.12, margin number 88.

155 *cf.* ECJ, adjudication of 15.5.2014 – C-521/12, margin number 38; European Commission 2012a, p. 14; BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 418–422, adjudication of 12.3.2008 – 9 A 3.06, margin number 199; adjudication of 6.11.2012 – 9 A 17.11, margin number 85 *et sqq*.; *Ureta* JEEPL 2007, 84 (89, 96); to the Swedish practise see *Persson/Larsson/Villarroya* Nature Conservation 2015, 113 *et sqq*.

156 European Commission 2000, p. 49 *et sqq*.; European Commission 2012a, p. 11 *et sqq*.

immediate vicinity of the adverse impact; rather more, the replacement of the loss that the site will suffer in relation to its function for the biogeographical distribution of the affected habitats and species is sufficient (…).[157]

From a temporal perspective and different to mitigation measures in the appropriate assessment, the implementation of compensatory measures is generally sufficient if left until the proposed development is realised - even if the functional losses are only compensated for in the long term - so long as this does not result in the threat of irreversible damage.[158] However, depending on the type of adverse impact and the compensatory measures that are planned, it may also be advisable to introduce or render effective the required measures based on function prior to the start of the project.[159]

The assessment of whether or not a measure is suitable must be based exclusively on specialist conservation standards, whereby, in this case – unlike for mitigation measures– a high probability of effectiveness based on the current state of scientific knowledge[160] is sufficient.[161] The authority undertaking the examination grants the BVerwG scope for judgement in the selection of measures.[162]

However, compensatory measures cannot in principle already be required by other statutory obligations without the proposed development, due to in this case there will be no supplementary compensation of the adverse impacts caused by the project or plan.[163] Compensation measures must replace these impacts and, rather more, provide added value in comparison to existing European Member State obligations. In Germany, national compensatory obligations pursuant to §§ 15(2), 30(3) of the Federal Nature Conservation Act (BNatSchG) that are related to proposed developments can thus also be compensatory measures.[164] However, in accordance with Article 6(1) HD, legally required conservation measures are excluded.[165] The distinction between conservation measures and compensatory measures for coherence is, however, difficult in practise as conservation measures in the sense of Article 6(1) HD not only includes

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157 BVerwG, adjudication of 6.11.2013 – 9 A 14.12, margin number 93. Settled case law, e.g. BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 418–420, adjudication of 6.11.2012 – 9 A 17.11, margin number 82; adjudication of 12.3.2008 – 9 A 3.06, margin number 199 *et seq*.

158 BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 419; adjudication of 6.11.2013 – 9 A 14.12, margin number 93; adjudication of 12.3.2008 – 9 A 3.06, margin number 200.

159 BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 419; decision of 14.4.2011 – 4 B 77.09, margin number 29. This demanding *Therivel* Environmental Impact Assessment Review 2009, 261 (Fig. 2 at p. 263).

160 *cf.* to the practical challenges *McGillivray* 2015, p. 101 (106 *et sqq.*).

161 BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 420; adjudication of 6.11.2013 – 9 A 14.12, margin number 94; adjudication of 12.3.2008 – 9 A 3.06, margin number 201.

162 BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 421; adjudication of 6.11.2013 – 9 A 14.12, margin number 94; adjudication of 12.3.2008 – 9 A 3.06, margin number 202.

163 BVerwG, adjudication of 6.11.2012 – 9 A 17.11, margin number 88.

164 cf. Milieu, IEEP and ICF 2016, p. 106.

165 European Commission 2012a, p. 11 *et seq*.; BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 422; adjudication of 8.1.2014 – 9 A 4.13, margin number 74; adjudication of 6.11.2012 – 9 A 17.11, margin number 82.

maintenance measures but, due to Articles 1(lit. l), 2(2), 3(1) and 10 HD, also restoration measures and measures to improve the connectivity and coherence of the network.[166] Furthermore, based on Article 10 HD, Member States are generally required to promote the coherence of the Natura 2000 network which includes, in particular, the conservation and restoration of landscape elements that contribute towards creating the network. If we thus take a broad approach to our understanding of compulsory conservation measures, then hardly any scope remains for suitable qualitative and quantitative compensatory measures. The value-added principle must therefore not be taken to be absolute and without exception, to ensure that the developer is not obviated of its duty to compensate the impacts of the proposed development. Within the meaning of making a clear and thus practicable distinction, only those conservation measures should be excluded that are clearly intended as necessary in declarations on protected sites and the associated management plans.[167] In cases of doubt, a compensation measure for coherence is permissible as it does not constitute an intervention, but always improves the condition of the Natura 2000 network.[168] According to the BVerwG[169] the authority should have a margin of discretion about the allocation.

The following individual compensatory measures are among those that are recognised by the BVerwG:[170] the new designation of a Site of Community Importance;[171] expansion of existing sites[172] or the new creation or development of affected habitat types and habitat areas for species in other areas, e.g. through reducing the intensity of land use, alteration or transformation of land and forestry areas within or outside and adjacent to the site.[173]

6. Conclusion

In line with Article 2(3) HD and the Principle of Proportionality mentioned in Article 5(4) TEU, the derogation procedure in Article 6(4) HD helps to align economic and social interests with conservation interests. To enable developments judged to be of

166 *cf.* ECJ, adjudication of 15.5.2014 – C-521/12 – Briels, margin number 28-33; BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 422 *et sqq.*; *Trouwborst* 2016, p. 219 (242 *et sqq.*).

167 *cf.* BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 423; *Dolde/Lange* VBlBW 2015, 1 (4 *et seq.*).

168 i.e., a coherence measure is better than a conservation measure that, while it has been planned, is never realised due to a lack of, e.g., financial resources.

169 e.g. BVerwG, adjudication of 9.2.2017 – 7 A 2.15, margin number 421.

170 *cf.* European Commission 2012a, p. 11 *et sqq.*

171 BVerwG adjudication of 6.11.2013 – 9 A 14.12, margin number 101; decision of 14.4.2011 – 4 B 77.09, margin number 29 *et seq.*

172 BVerwG, adjudication of 28.3.2013 – 9 A 22.11, margin number 112; adjudication of 23.4.2014 – 9 A 25.12, margin number 88.

173 BVerwG, adjudication of 6.11.2012 – 9 A 17.11, margin number 85 *et sqq.*; adjudication of 23.4.2014 – 9 A 25.12, margin number 88; adjudication of 6.11.2013 – 9 A 14.12, margin number 103 *et seq.*

imperative reasons of overriding public interests and without an alternative solution, Article 6(4) HD allows projects and plans, even if the assessment under Article 6(3) HD comes to the conclusion, that adverse effects on the integrity of a Natura 2000 site cannot excluded without reasonable scientific doubts. In these cases, the conservation interest is restricted to ensure the overall coherence of Natura 2000. Thus, on the one hand, compensatory measures become of high practical importance in Article 6(4) HD and must be sufficiently secured. On the other hand, the application and interpretations of Article 6(4) HD must not be stretched, but must be narrow, in order to achieve the overarching goals of the Habitats Directive, pronounced in Article 2, in ensuring the integrity of each Natura 2000 site and maintaining or restoring favourable conservation status of natural habitats and species of wild fauna and flora of Community interest within the biogeographic regions. The derogation procedure should not become the norm for projects and plans containing risks of significant effects on the integrity of sites. The general rule in Articles 6(3) HD is that such projects and plans are not allowed.

The intensive legal discussion and the comprehensive case law in Germany with regard to Article 6(4) HD are meaningful as the ECJ has as yet had little opportunity to enter into the individual requirements for a derogating authorisation. In particular, the BVerwG decisions in relation to this, which are well disposed towards proposed developments, have weakened the Natura 2000 appropriate assessment. The outcome of this is that derogating authorisations have become standard in Germany for governmental infrastructural development that is actually incompatible with conservation objectives. In spite of the more or less secured compensatory measures to ensure the overall coherence of Natura 2000, the resultant economic and social advantages contrast with the substantial disadvantages for the conservation aims in the affected Natura 2000 sites. Overall, all the smaller and greater derogations endanger the goals of the Habitats Directive. This raises significant doubts about the conformity of the German interpretation to the Directive. It remains incomprehensible why the European Commission does not include these conformity doubts in their actual infringement procedure against Germany from 2014, initiated due to insufficient designation of Natura 2000-sites.[174] However, this is in line with its own broad permission practices, as specified in its opinions based on Article 6(4) subparagraph 2 HD. Stricter ECJ decisions, as already given in Article 6(3) HD, could result in correction of the German decisions, as an ever greater number of German court proceedings also come before the ECJ.[175] Other Member States should therefore not adopt the German interpretation without hesitation.

Due to the precautionary principle and importance of Natura 2000 sites, the common heritage Article 6(4) HD should be applied restrictively as an exemption and

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174 *cf.* Reminder of the European Commission from 27.2.2015, no. 2014/2262.

175 for reasons including because the BVerwG and the Higher Administrative Courts of the Länder are increasingly submitting questions to the ECJ (*cf.* most recently, e.g. in the case of ECJ, adjudication of 14.1.2016 – C-399/14).

must not become the standard. In this sense, the conditions for a derogation must be interpreted strongly, such that:

1. Imperative reasons of overriding public interest, which require the proposed development, must be essential to fulfilling weighty interests for the common good and actually necessary and they project or plan must be suitable to achieving the public aims without any reasonable doubt.

2. There are no reasonable alternatives, including system alternatives, alternative sites and the zero-option, by which the overriding public interest in the project or plan (e.g. regional development, employment, transportation of persons or goods from A to B) could also be reached without greater sacrifices for Natura 2000.

3. Adequate compensatory measures with a high probability of effectiveness are being taken and monitored for their effectiveness – both primarily at the cost of the developer – to preserve the overall coherence of Natura 2000, whereby the differentiation to conservation measures should not be so strict that no possibilities for compensatory measures remain.

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