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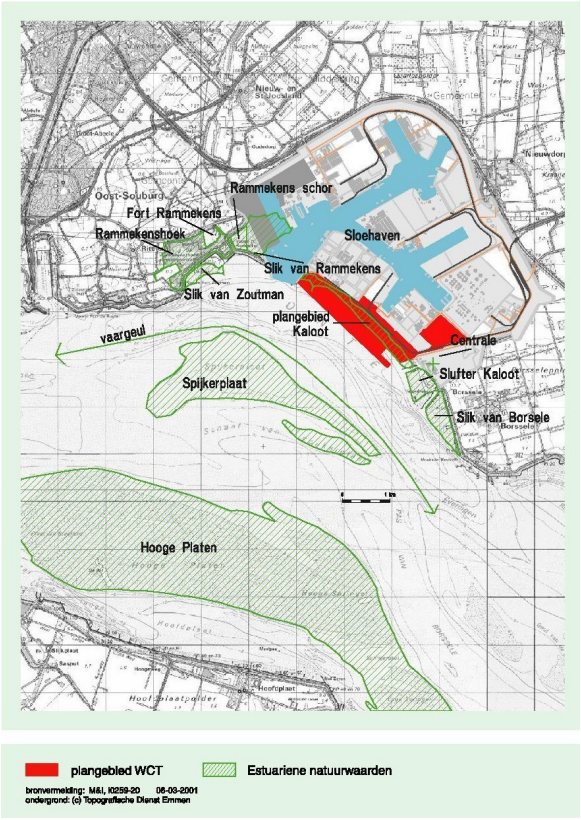
Alternatives and Article 6(4) Habitats Directive

Article 6(4), first paragraph, Habitats Directive reads:
"If, in spite of a negative assessment of the implications for the site ***and in the absence of alternative solutions***, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.
[…]"

Leading case in the Netherlands:[1]

- Council of State 17 July 2003, LJN: AH9872 (*Westerschelde Container Terminal*)



The case concerned a planning decision to extend and broaden the harbour of Vlissingen-Oost for a new container terminal. Adjacent is the *Westerschelde ((Scheldt Estuary)* a Natura 2000 site. On of the legal issues was which alternatives should have been taken into account, according to Article 6(4) Habitats Directive by the provincial authorities. The objective of the planning decision was, according to the planning authority, to strengthen the economic structure of the region. With respect to the alternatives the planning authority took the following question as lead: "How can we make it possible that the harbour *Vlissingen-Oost* can a play a role in the growing market for container transport and tranform from a 'industrial-harbour' to a more 'complete harbour'? Alternatives falling outside the question were not being taken into account. In particular, alternatives outside the region were not being taken into

[1] See also: *Article 6 Habitats Directive, A comparative law study on the implementation of Art. 6 Habitats Directive in some member states. Rechtsvergelijkend onderzoek implementatie artikel 6 Habitatrichtlijn*, Ch. W. Backes, A.A. Freriks, A.G.A. Nijmeijer, 2006, ISBN 90-78325-04-6. Available, partly in English, at: http://www.uu.nl/NL/faculteiten/rebo/organisatie/departementen/departementrechtsgeleerdheid/organisatie/onderdelen/centrumvooromgevingsrechtenbeleid/publicaties/Documents/rapportart.6habitatsdirective.pdf

account. Nor did they looked into other activities in the region which could strengthen the economic infrastructure of the region. Alternative locations for the container terminal were also not taken into account. And finally, the possibility of other other activities (than building a container terminal) in the *Vlissingen-Oost* harbour which could strengthen the position of the harbour, were not looked into.
In a landmark judgment the Dutch Council of State ruled that, in view of the text of Article 6(4) Habitats Directive, that in assessing alternatives the protection of the Natura 2000 site should be prepondarant in the sense that plans and projects which could have a lesser negative impact on the Natura 2000 site should be part of the decision-making process. That means that alternative locations for the project or alternative methods which can produce the same results should be taken into account. Subsequently the Council of State ruled that the search for alternatives was conducted too narrowly and annuled the planning decision because it violated Article 3:2 of the Dutch General Administrative Law Act.[2]

At policy level this case law is now, more or less, translated in a guideline (for local and regional authorities) from the Ministry of Agriculture and Nature Conservation.[3] There are some interesting, more general, observations:

- the alternatives to be taken into account must be decided on a case by case approach only (there are no *per se* alternatives for all cases)
- alternatives can be: different locations, different methods, adjustment of the objectives of the project, zero-option
- decisions on alternatives should be made explicitly and must be fully reasoned
- introduction of the concept of 'reasonable alternatives': the alternative must make it possible that the devoloper is *reasonably* capable to attain its objectives with the plan or project
- acknowledgement of the fact that formulating the objectives of a plan/project can significantly influence the scope of alternatives
- in assessing alternatives the protection of the Natura 2000 site should be prepondarant; economic criteria may not have precedence over ecological criteria
- if there is an alternative, the proposed project/plan cannot continue, either at all or only after a change (in general). Or can continue only 'for imperative reasons of overriding public interest'.

Alternatives and EIA
At our Stockholm meeting I mentioned that the Dutch government tabled a proposal for a so called 'Crisis and Recovery Act'. Its main purpose is to speed up decision-making procedures of some 70 major infrastructural works.The proposal has been been adopted by parliament and is now in force. According to Dutch EIA law there is duty to look into 'reasonable alternatives'. This provision has been scrapped (for project-EIAs).
With respect to to the concept of 'reasonable alternatives' the following can be noted.

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[2] "When preparing an order an administrative authority shall gather the necessary information concerning the relevant facts and the interests to be weighed."

[3] *Algemene Handreiking Natuurbeschermingswet 1998,* in particular p. 32-33. I will not burden you with the exact legal status of this document. For those who read Dutch, it is available at http://www.minlnv.nl/txmpub/files/?p_file_id=14853

- In selecting 'reasonable alternatives' the objectives of the developer are 'leading';
- 'reasonable alternatives' can also be deducted from the expected environmental consequences. Reasonable are those alternatives which have lesser significant effects on the environment.
- Solutions outside the compentce of the developer do not have to be researched into;
- Altough the financial costs may play a role, the selection of alternatives cannot be conducted on costs exclusively. Alternatives, for which it is *a priori* clear that they are not executable in view of their costs, are not reasonable.

Imperative reasons of overriding public interest in Dutch Law

Dutch case law is rather overwelming. I have a list of 114 judgments on this aspect of the Habitats Directive only. It may be clear that only a few aspects of that case law can be highlighted:

- Public interest means: general interest and and not private interest (or the interests of just a few individuals);[4]
- The improvement of the economic interests of the developer is not considered being a *public* interest.[5]
- Imperative reasons of overriding public interest needs to be 'demonstrated convincingly';[6]
- It must be unambiguously that, in the long run, the interests pertaining to the realisation of the project, outweigh the interests related to flora and fauna protection; [7] Evidence rest on the public authority/developer.
- Accepted interests: (regional) employment, harbour extensions for strenthening the regional economic infrastructure[8], building projects in view of local and/or regional housing demands[9], production of sustainable energy (windmills). But still, the courts in general will demand a convincing argument. For instance on employment: if the project only contributes a relative small number of workplaces in an area with low umemployment: no overiding public interest. [10] In short: not *any* improvement will be considered as sufficient. Also: a project of 17 windturbines project cannot be regarded necessary for imperative reasons of overriding public interest.[11]
- Court's are rather reluctant to accept that a project is necessary for imperative reasons of overriding public interest, when the search for alternatives is restricted or lacking. [12]
- The European Commission's Guidance document on Article 6 Habitats Directive is being referred to frequently.[13]

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[4] LJN: BB6530, Rechtbank Leeuwarden.
[5] LJN: AN9193, Rechtbank Haarlem.
[6] Raad van State 16 juli 2003, AH 9872.
[7] Raad van State 16 juli 2003, AH 9872.
[8] AH 9872.
[9] LJN: AH6955
[10] LJN: AN9193, Rechtbank Haarlem.
[11] LJN: BH4011, Raad van State.
[12] LJN: BH4011, Raad van State.
[13] http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf . See for instance LJN: AN9193, Rechtbank Haarlem

- The Dutch courts are happy to acknowledge and accept the European Commission's view in its Opinions expressed under Article 6(4), second paragraph of the Habitats Directive.[14]

Weighing environmental risks and socio-economic benefits; balancing of interests
It is virtually impossible even to try giving a comprehensive analysis on this issue, as far as it concerns Dutch environmental law. The following aspects, however, are of some relevance to this discussion.
First. Of major importance for this debate is the so called 'speciality-principle'.[15] Dutch administrative law is based on the principle that public authorities do not have *general* powers to promote the public interest, but only specific – objective-related – powers. This is expressed most clearly in the prohibition of *détournement de pouvoir* (abuse of power) in section 3:3 of the *Algemene wet bestuursrecht* (General Administrative Law Act, *Awb*), which states: 'An administrative authority shall not use the power to make an order for a purpose other than that for which it was conferred.' This means that when exercising a power an administrative authority will have to consider the purpose for which that power was conferred, which often emerges from the legislation conferring the power. In short, when exercising public law powers administrative authorities may not further public interests other than those with a view to which the power was conferred.
Second. The aforementioned implies that any balancing of interests has to take place whithin the "assessment frame" of the legislation. For environmental, for instance, this implies that an application for an environmental license may be refused only for reasons related to the protection of the environment.
Third. The questionnaire made clear that also the opposite situation may occur. Is it possible that a license may be granted if the socio-economic benefits outweigh environmental risks? The answer is, of course, that depends. By definition any balancing of interests by public authorities can be exercised only in the absence of mandatory standards. In other words, in case discretion is available to the public authority. According to Dutch law a permit ***must*** be refused, e.g., if BBT cannot be assured. Dutch environmental law contains a rather extensive set of standards, rules, etc. which needs **to be ensured** (*in acht nemen*). In those circumstances there is no room for offsetting these environmental standards against other 'benefits'. However, the degree of discretion vary. Some aspects do not need to be ensured, but **need to be taken into account**, or just have **to play a role** in the decision-making procedure. Depending on the discretion available, there is some room for other non-environmental aspects to take part in the decision-making procedure. However, even in that case the constraints of the *speciality principle* should be taken into account. In case of discretion available to the authorities, the general approach of the courts is to show deference to that discretion.

[14] AH 9872.
[15] Cf. my paper at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126507