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General Report

**National road planning and
European environmental legislation
- A case study -**



General Rapporteur: Prof. Dr. Rüdiger Rubel,

**Judge at the Federal Administrative
Court of Germany**

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Introduction

For its 20th colloquium, the Association has selected a subject that is distinguished by a high degree of topicality and has a special dynamic:

- Threshold values for particulate matter are being exceeded in many European conurbations. This gives rise not just to a wide range of questions relating to the protection of the rights of the individual but also raises questions about road planning in these areas.
- The enactment of the Aarhus Convention and the directives originating from it will have far-reaching consequences for information, public involvement and legal procedures in connection with infrastructure planning.
- In its most recent judgments, the ECJ has set new standards for the protection of FFH sites and for wildlife conservation.

These examples show that the topicality and dynamic are primarily the result of European legal considerations. The influence that European law has on road planning regulations and specialized planning law may come as something of a surprise at first, as these deal with spatial matters for which European authority – aside from relating to the development of trans-European networks – is not immediately apparent. However, European law's influence on national planning law arises from the European Community's environmental provisions, which supplement the standards set by specialized national planning regulations.

The increased influence of European law is not restricted to the provisions of substantive law. It also affects administrative procedures and the protection of rights by the courts, not least because road planning is so strongly procedure-oriented, with the result that procedure-heavy European law is particularly well-suited to influencing it. The result can, depending on the form of national law, be that grave ruptures can occur in the system. Dealing with this may perhaps be the task of national government, but national courts will certainly have to be involved in individual cases. This task is highly challenging, but it also opens up the opportunity to find new solutions which benefit from looking at practice and experience in other European states, and this is what this General Report aims to facilitate.

The General Report of the 20th Colloquium of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union is based primarily on the National Reports compiled by the member institutions under the title “National Road Planning and European Environmental Legislation – a case study.”

The case and the questionnaire are based on a draft by the colloquium’s host, the Federal Administrative Court of Germany, and deal with a range of legal problems encountered in planning a motorway. In addition to examining the planning procedure, public consultation and processes for the judicial review of planning consent, the reports also investigate the consequences of the European Fauna-Flora Habitat, Bird Protection, Ambient Air and EIA Directives.

Special thanks must go to the national rapporteurs at this stage (appendix). Their reports are outstandingly logical, also for non-native jurists, and have facilitated the compilation of this General Report greatly.

Where for reasons of clarity national specifics could not be given or given only in highly shortened form in the following, footnotes refer to the relevant location in the National Reports.¹

The General Report is oriented closely to the structure of the questionnaire. However, Questions 8 and 9 (on the consequences of and remedies for planning deficiencies) are dealt with immediately after the account of court proceedings (Questions 3 to 6 in the questionnaire) on account of the close relationship between their content.

The first section of the report comprises a comparison between national road planning procedures. The second section focuses on legal process in planning decisions. The third section examines in detail the consequences of European environmental legislation on national planning law.

¹ The National Reports are available on the Association’s website (http://193.191.217.21/en/home_en.html).

Questionnaire

Case

Your State is planning a new motorway. The projected traffic routing

- runs through the territories of several municipalities,
- passes by a residential area,
- continues across farmland,
- runs through a birds sanctuary in the sense of the EU-“Birds Directive”
(*Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds - Official Journal L 103, 25/04/1979 P. 0001 - 0018*)
- and ends in a nature protection area which is home to a significant number of endangered species and - moreover - is eligible for designation as a special area of conservation in the sense of the EU-“Habitats Directive”.
(*Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora - Official Journal L 206, 22/07/1992 P. 0007 - 0050*)

Moreover, there is an increased risk that the emissions of the projected motorway will exceed the limit values of the EU-“Ambient Air Directive”.

(*Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air - Official Journal L 163, 29/06/1999 P. 0041 - 0060*)

When the planning decision is made public the following plaintiffs decide to take legal action:

- 1) An inhabitant of the residential area who is afraid of unbearable traffic noise and air pollution.
- 2) One of the municipalities which has divergent project plans for its territory.
- 3) The national environment agency which is of the opinion that the motorway will seriously affect the environment.
- 4) A farmer who will lose parts of his farmland.
- 5) A national association for the protection of the environment which is of the opinion that the motorway constitutes a serious threat to the environment in general and to the species listed by the “Habitats Directive” in particular.
- 6) An association for the protection of the environment of your neighbouring state which is afraid of transboundary pollution.

Questionnaire

1) Administrative consent procedure:

Please give a short outline (no specific details) of the administrative consent procedure applying to project planning in your national legal order (procedural steps, time-limits, competent authorities, involvement of lobby groups and technical experts).

2) Public involvement:

- a) Is there any public involvement and/or hearing of individually affected parties during the administrative consent procedure ?
- b) If yes, at which stage(s) of the procedure and in which form ?
- c) Do affected parties lose their right to challenge the planning decision before the courts if they do not make use of this form of public involvement ?

3) Judicial process:

Please give a short outline (no specific details) of the judicial process applying to project planning decisions (pre-trial proceedings, time-limits, competent courts, appeal, interlocutory injunctions).

4) Standing:

- a) Do all of the above-listed plaintiffs have standing before your national courts ?
- b) If not, which are the reasons for their exclusion ?

5) Scope of claims:

Are the above-listed plaintiffs only allowed to claim infringements of their individual rights (e.g. illegal expropriation of farmland, pollution of their private property) or may they claim infringements of public interests (e.g. adverse effects on the environment) or the unlawfulness of the planning decision in general (e.g. because of procedural deficiencies) as well ?

6) Scope of judicial review:

Do your courts review the lawfulness of a planning decision in every procedural and substantive respect or is the scope of judicial review restricted (e.g. to procedural aspects or clear and serious infringements of national or Community law) ?

7) EU environmental law:

Which decision will your court take, if

- a) the environmental impact assessment prescribed by Community law has not or not duly been carried out in connection with the project in question ?
- b) the project adversely affects a natural habitat which is eligible for designation as a special area of conservation in the sense of the EU-“Habitats Directive” but has not yet been transmitted to the Commission ?
- c) the project adversely affects a natural habitat which has been transmitted to the Commission as being eligible for designation as a special area of conservation but which has not yet been placed on a Commission list ?
(Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora - Official Journal L 206, 22/07/1992 P. 0007 - 0050)
- d) the project adversely affects a birds sanctuary in the sense of the EU-“Birds Directive” ?
(Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds - Official Journal L 103, 25/04/1979 P. 0001 - 0018)

- e) the project is likely to exceed the limit values of the EU-“Ambient Air Directive” (esp. those for PM10/ particulate matter) ?
(Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air - Official Journal L 163, 29/06/1999 P. 0041 - 0060)

8) Consequences of procedural and substantive deficiencies of the planning decision:

- a) Are there - in your national legal order - any procedural and/or substantive deficiencies which regularly render a planning decision completely void ?
- b) For which kinds of rulings does your national legal order provide in this case (e.g. cassation of the planning decision or declaratory ruling establishing its nullity) ?
- c) For which kinds of rulings does your national legal order provide if the planning decision has only minor deficiencies/ is not completely void (e.g. modification of the planning decision by imposing additional requirements such as noise barriers, speed limits or reforestation) ?
- d) Which rulings are likely to be given in the cases of the above-listed plaintiffs ?

9) Remedy of deficiencies

May procedural or substantive deficiencies of the planning decision be remedied during the judicial process ? If yes, on which conditions ?

I. Road planning procedures in the member states of the European Union: similarities and differences

1) Question

The question relating to road planning procedures was framed as follows:

1) Administrative consent procedure:

Please give a short outline (no specific details) of the administrative consent procedure applying to project planning in your national legal order (procedural steps, time limits, competent authorities, involvement of lobby groups and technical experts).

2) Public involvement:

a) *Is there any public involvement and/or hearing of individually affected parties during the administrative consent procedure?*

b) *If yes, at which stage(s) of the procedure and in which form?*

c) *Do affected parties lose their right to challenge the planning decision before the courts if they do not make use of this form of public involvement?*

2) Administrative consent procedure

In almost all EU member states, administrative consent procedures are dependent on the importance, size and environmental impact of the project. In federal states such as **Austria** and **Germany**, the procedure depends on whether the project is to be carried out on the national federal level or on the regional state level.² Similarly, the regions in **Belgium** each have their own planning legislation.³

National planning legislation frequently allows simplified or accelerated procedures in the case of smaller projects without significant impact on the environment and landscape. However, the case study of a motorway construction project normally causes considerable environmental impact and is subject to a comprehensive planning procedure in all member states. Despite the many detail variations in national legisla-

² The National Reports of both of these states refer only to *federal* trunk roads.

³ The National Report is based on planning legislation in "Région wallonne".

tions, this planning procedure comprises the following four phases in almost all the member states:

- Phase 1:** Incorporating plans for a new motorway into a superordinate development plan
- Phase 2:** Administrative procedures for concrete planning and approval of the motorway project
- Phase 3:** Expropriation
- Phase 4:** Construction

Phase 1: Inclusion of a planned new motorway link in a superordinate development plan

All member states have superordinate plans for the development of transport infrastructure which define the need for new trunk roads on the national or regional level, and/or identify specific terrain for possible road construction projects. The realization, form and legal consequences of the planning instruments are very differently regulated in the individual national legal systems. In some cases, the preliminary action is accomplished by parliamentary act, in some cases by ministerial order, and in some cases by administrative steps taken by regional decision makers. Almost all development plans have one thing in common, however: they are drawn up in collaboration with environmental agencies, experts, regional and local representatives and, in some places, the public. They look a long time into the future and constitute only an approximate plan. At the time that the development plans are being drawn up, it is generally not foreseeable if, when, and in what form the road links they contain will actually be built.

The following regulatory instruments exist in the member states:

In **Austria** and **Germany**, new trunk roads are first incorporated in a corresponding federal act after preliminary administrative work and a strategic environmental assessment. In **Denmark**, the first planning stage is also in the form of a parliamentary act called a “projekteringslov”.

In **Greece**, the environment ministry draws up the so-called "Plan général d'aménagement du territoire et de développement durable" in co-operation with a special planning commission consisting of representatives from ministries and the regions, specialists and experts from officially recognized environmental organizations. The plan, which must be approved by legislators, includes the general planning for the whole national territory and is given more specific form in the subordinate "schémas directeurs" and "plans d'occupation des sols".

In the Netherlands, the development of the transport infrastructure is set out – also by law – for a 20-year period in the "National Traffic and Transport Plan." Similarly in **Portugal** there is the national "Plan Routier National."

In **Finland**, the **Czech Republic**, **Malta** and **Cyprus**, however, "Regional Plans" or "Local Development Plans" form the basis of trunk road planning.

Estonia follows the same path with its "Country Plans" which are specified in "Comprehensive" and "Detailed Plans." The initiative for these plans lies with the government, county governors and municipalities.

New road projects in **Luxembourg** are included in the "programme directeur sectoriel – Transports" or a "plan d'occupation du sol" which are issued in the form of a "règlement grand-ducal" and supersede contradictory municipal plans. In the case of major projects, parliamentary consent is required.

The realization of a road project in **Belgium** is dependent on its inclusion in a "plan de secteurs." If this does not occur, the plan must first be modified by the government in a relatively complex process that encompasses not just a thorough environmental impact assessment but also the participation of various regional authorities,⁴ the affected municipalities, the public and possibly the EU Commission.

In **Italy**, road construction projects must first receive budgetary consent from the "Comité interministériel de la programmation économique" (CIPE) and be included with details of the finance modalities in the so-called "Document de programmation économique financière" before further planning can take place.

⁴ "Commission régionale de l'aménagement du territoire" (CRAT) and "Conseil wallon de l'environnement pour le développement durable" (CWATUP)

Phase 2: Administrative procedures for concrete planning and approval of the motorway project

a) Route planning

The second planning phase begins in most states with the process of deciding which routing the motorway should take after the examination of various alternatives (**Denmark, Germany, Netherlands, Portugal, Poland, Finland, Italy, Luxembourg, Slovenia, Spain, Sweden, Czech Republic, Hungary**). In some cases, this comprises an independent administrative and legislative process (**Denmark, Netherlands, Hungary**), and in some cases it is an integrated part of the whole planning procedure. In general, the decision is made based on a broad comparison of the advantages and disadvantages of the individual alternative routings, and requires the completion of a (strategic) environmental impact assessment. In **Italy**, however, preliminary approval of the routing is granted based upon a fairly detailed project draft by the project developer.

b) Information gathering

Next begins the phase of detailed information gathering, consultation, co-ordination and evaluation with reference to the favored route. At this stage, the planning authority has gathered all the data necessary for it to make a comprehensive evaluation of the favored route, particularly with reference to the necessity of the project in terms of the economy and infrastructure, the project's cost framework, its environmental impact, the civil engineering requirements and the property and pollution issues. In this connection, consultations are held with the relevant ministries and authorities, especially in the regions and/or municipalities affected, experts and – in some states – recognized environmental organizations.

The environmental impact assessment with public involvement as prescribed by Community law normally takes place either before or during this planning stage, in so far as it has not been already carried out in sufficient detail during the earlier drawing up of the superordinate development plan. At the end of the data-gathering phase, the public in most states is also given a second chance to examine the details of the planning and raise objections (see Item 1.3 below for more details).

When the necessary information (including the results of the public consultation) are to hand, the planning authority is required to weigh the various concerns carefully

and comprehensively before either rejecting or – in modified form as necessary – approving the planned project.

The individual states have very varied names for the administrative decision which ends the consent procedure and permits the start of construction; in the following, these various terms will be gathered together in the terms “plan consent” or “planning decision.” These plan consents must generally be grounded thoroughly and in writing. All states require them to be made public for them to become effective.

The application for the approval of a road construction project – if necessary – generally takes place before the information and consultation phase, whereby the project developer normally has to present comprehensive data along with the application. Regarding environmental consequences, this obligation arises out of, among other things, Art. 5 of the Council Directive on the assessment of the effects of certain public and private projects on the environment (85/337/EEC, hereafter: EIA Directive) in combination with the relevant national law.

In all states, the start of the motorway planning consent procedure is announced by publication in the national “official journal,” in the press, or by notices displayed in the municipalities affected.

c) Competence

Responsibility for trunk road planning is organized very differently in the member states. It depends on the national administrative structure as well as on the size and importance of the project in question. In some states, the responsibility lies with the specific ministries or with an inter-ministry planning commission, while it is located on the regional level in others. In **Malta**, planning is undertaken by an independent administrative authority (“Malta Environment and Planning Authority”). In **Denmark, Luxembourg and Slovenia**, the executive is centrally involved in preparing and carrying out the planning decision, but the true plan consent takes the form of a parliamentary act or directive, with the result that the term “administrative procedure” can only be very conditionally used with reference to these states. However, in **Slovenia**, the environmental approval is given in the form of an administrative act which is prior to the consent act and which can be challenged in the administrative courts.

Greece makes differentiates according to the importance of the project. An adminis-

trative act is used in the case of normal infrastructure projects, whereas consent by law is possible in the case of projects of national importance. This option was used especially during the preparations for the 2004 Summer Olympic Games.

Of particular interest in this connection is the situation in **Poland**. A terminable special law is effective at the present time which notably simplifies road planning. It places temporary restrictions on requirements for public involvement, notification and publications, sets shorter time limits for decisions and appeals, and facilitates provisional enforceability of planning decisions. These regulations will apply until 2007 with the aim of accelerating the urgently necessary improvement of transport infrastructure in Poland.

In some states, the planning, hearing and consent authorities are independent of one another. For example, in France, public consultation (the “enquête publique”) is carried out by an independent “commissaire-enquêteur” or inquiry commission, while the consent (“déclaration d’utilité publique”) is in the competence of the prefecture, the ministry or – in the case of projects of national importance – the Conseil d’Etat.

In the federal republics of **Austria** and **Germany**, competence is divided between the federal and constituting state authorities depending on the area of law affected.

In Spain and Italy, where the final competence lies is fundamentally dependent on the position of the affected regions: If the regions are in agreement with the project, the minister responsible decides; if not, the council of ministers makes the decision.

In some states, separate consent regarding certain areas of law – such as environmental law, forestry law, water law, pollution law etc – must be obtained from the relevant authorities before the planning authority may make its final decision. In other states, the planning authority consults with the various special authorities and grants consent in their name, obviating the need for obtaining separate authorizations.

d) Environmental Impact Assessment

Independently of this, the environment ministries and/or the specific authorities in every country play a critical role as they are responsible for assessing the project in terms of environmental law which – particularly in view of the mandatory conditions imposed by Community law – frequently decides whether a project can be approved

and, if so, in what form. The assessment, description and evaluation of the environmental consequences of a project follow a similar path in all member states; this is undoubtedly a reflection of the fact that the EIA directive has now been enacted across the EU.

In most of the states the environmental impact assessment prescribed by Community law is a separate process and concludes with an independently contestable consent in terms of environmental law. In other states, the EIA is integrated into the planning procedure and can only be contested as part of the final planning decision.

In all states, however, the proper execution of the environmental impact assessment (including the prescribed public consultation and the involvement of any neighboring states affected) is a mandatory pre-condition for the final consent to the project (see also below, Item III). The scope of the assessment depends on whether conservation areas as defined in Community law are affected.

e) Final decision

In all states, the final decision on the whether and how of the plan is made after all the significant concerns are carefully weighed, whereby the planning authority generally has considerable powers of discretion. The condition for this, however, is that the authority fully investigates the concerns, takes account of them in its decision and weights them proportionally.

Worth mentioning at this point is that the planning processes in some states define fixed periods within which responses and decisions must be made. If these periods are exceeded, the authority or party entitled to make a response is understood to have agreed (**Italy, Portugal, Malta**) or certain procedural steps become invalid and must be repeated. In **France** for example, the “déclaration d’utilité publique” must be issued within one year of the end of the public consultation, or an “enquête publique” must be held once more. The standard decision periods range between 8 weeks (**Ireland**) and 12 months (**Austria**).

The content, form and legal consequences of the consent are similar in most states. In almost all states, the consent regulates the project comprehensively, including en-

vironmental protection measures and engineering details.

In **Luxembourg**, however, the compensation and replacement measures required by environmental law are regulated by a supplementary “règlement grand-ducal.”

Publication of a comprehensive written grounding of the consent is mandatory everywhere where the decision does not take the form of an act. For more information on the degree to which objections from the public must be dealt with in this reasoning, see the following point (Item I.3 below).

In **France, Germany, Italy, the Czech Republic, Finland and Sweden**, the consent automatically includes the assessment that the project is in the majority interest and/or is for the greater public good, thus providing the legal basis for the subsequent expropriation proceedings.

The validity of the consent is limited in some states; the length of validity varies between 2 and 10 years.

Finally, all states require the consent to be made public for it to become effective.

Phases 3 and 4: Expropriation and construction

As Phases 3 and 4 can no longer be considered as part of the planning process in the strict sense, only a few National Reports give detailed information on these points.

In **France**, expropriation is achieved via an “arrêté de cessibilité” from the prefecture in combination with a court order.⁵ In **Hungary**, the regional administration is responsible, while in **Poland** the special law mentioned above currently allows the procedure to be simplified temporarily, thus allowing land to be expropriated more quickly.

The expropriation procedure in **Denmark** has a special function; the so-called “Expropriation Commission” is an independent administrative authority and is responsible not just for the acquisition of the land required for the road construction but also over-

⁵ For details of the French expropriation proceedings, see p. 5 ff. of the National Report.

sees the detail planning of the project.⁶ This peculiarity is a result of the fact that, as already mentioned, the planning consent in **Denmark** takes the form of an act of parliament that outlines the main components of the plan but does not go into detail.

As far as construction is concerned, the only thing to be mentioned is that several states include conditions in the consent designed to protect the environment from damage by excess vibration and emissions.

In the **Czech Republic**, the project developer must obtain a building permit before construction begins.

3) Public involvement

All EU states possess procedures anchored in law for public involvement in the planning process. This is largely due to the fact that all of the states have adopted the EIA directive, which makes public involvement mandatory.

a) When

In some states, plans are made public by exhibition or by announcement in the press as soon as the superordinate development plan is completed. Affected or interested parties can examine the plans and raise objections as necessary.

Within the actual consent process, however, most EU states provide two phases of public involvement: the first is part of the environmental impact assessment, and the second takes place shortly before the conclusion of the consent proceedings and relates to the whole project.

The public in **Belgium** and **Malta** have their first opportunity to give their opinion on the environmental consequences even before the compilation of the environmental impact assessment. This means that those in charge can be made aware of potential problems and even alternative plans before the assessment takes place, and can react accordingly.

In the **Netherlands**, the degree of public involvement depends on the type of proceeding. If expanded proceedings are being carried out (and this is generally the case with motorway construction projects), there are two public involvement phases;

⁶ For details, see p. 1 f of the Danish National Report.

otherwise there is only one.

Germany, Luxembourg, Hungary and Slovenia limit public involvement to one phase as a rule. In **Hungary** and **Slovenia**, it takes place as part of the process for granting environmental permission, which precedes the actual consent process. In **Germany**, the environmental impact assessment is integrated into the consent procedure, and so there is a combined public involvement phase which makes the results of the EIA as well as the planning documents accessible to the public. The case is similar in **Luxembourg** where the main hearing on the choice of route takes place on the basis of a comparative environmental impact assessment.

b) Procedure

The way public involvement is to be conducted is guided largely by the provisions set out in the EIA directive and is thus broadly the same in all EU states.

After announcements in the press, environmental information and/or substantive planning documents as defined in the EIA directive are exhibited in the municipality or prefecture, and remain open to inspection by interested members of the public, environmental organizations and citizens' action groups for a specific period of time. In some states, parties affected by expropriation and non-resident property owners are individually informed about the time and place of the exhibition (**Belgium, Estonia, Latvia, Germany**).

The length of the exhibition – for large-scale projects – varies between 15 days (**Malta**), one month (**France, Greece, Luxembourg, Germany, Finland, Spain**) and six weeks (**Austria**) or 45 days (**Belgian** “permis d’urbanisme”).

In **Poland**, there is only limited public involvement at present on account of the special law already mentioned. Objections from affected parties may be addressed in writing to the “Marshall of Voivodeship” during the consent procedure or may be made to the planning authority within 14 days of the publication of the planning decision.

As a rule, the planning authority is responsible for carrying out the public consultation. Some states have a separate hearing authority, however, (e.g. **Germany**, where responsibility is governed by state law) or specialized institute (e.g. **Portugal**: Institut de Promotion de l'Environnement) that is charged with this part of the planning process. In **France**, public involvement is the responsibility of the independent "commissaire-enquêteur" or inquiry commission. In certain cases defined in law and including motorways, a "Commission du débat publique" is also convened which oversees the project even during the information gathering phase and ensures that all the substantive documents are accessible to the public.

c) Possible forms

During or after the exhibition of the planning documents objections may be raised in written form or officially recorded by the municipal authority. As a rule, anybody can take advantage of this right, i.e. it is not restricted to members of the public directly affected by the planned project.

The period for raising objections is in most states identical with the exhibition period. However, in the **Netherlands** it ends six weeks and in **Germany** two weeks after the start of the exhibition. **Italy** allows as long as 60-days. In **Lithuania**, objections may be raised at any time outside the formal phase of public involvement.

In addition to written objections, some states also offer their citizens the opportunity to participate in a public hearing during which project developers and the authorities discuss the project with affected parties and/or objectors, and attempt to find an amicable settlement (**Austria, Germany Estonia, Luxembourg, Malta, Netherlands, Sweden Slovakia, Slovenia, Czech Republic, Hungary, United Kingdom – and Denmark** during the expropriation process.)

In **Belgium**, there is a regulation that applies in this situation which states that every affected group of more than 25 individuals must nominate a representative who participates in the public hearing on behalf of the group.

In **France**, the decision to hold a public hearing is at the discretion of the prefect and/or the "commissaire-enquêteur."

These forms of involvement also generally apply for environmental organizations, citizens' action groups and similar interest groups. In **Germany**, however, recognized environmental groups are explicitly involved by having the environmentally relevant planning documents sent directly to them. The periods for raising objections are separately defined.

d) Evaluation

After the expiry of the period for raising objections, the correct and valid objections submitted are evaluated and duly processed. The procedures here are very different across the EU. As a rule, the hearing authority compiles a report on the results of the public consultations which details both the way the consultation ran and the individual objections. On the other hand, however, the planning authority is not constrained in all states to respond to each objection individually.

Objectors receive an individual, founded response or appropriate notification in **Lithuania, Cyprus, Finland and Estonia**. In the **Czech Republic**, the affected property owners and municipalities receive the same.

Germany discusses the individual objections in the grounding of the consent and this is sent to the objectors.

In **Belgium, France and Slovenia**, the discussion of the objections is in a general form and is included in the consent itself, which is then publicly announced.

Participation in the public consultation process is non-compulsory in all EU member states. In a few states, however, the affected parties and their objections can only be heard in later court proceedings if they have raised their objections in due time and form within the public consultation process.

Foreclosure is similarly regulated in **Poland** (for environmental organizations), **Austria** (for private parties and environmental organizations), **Germany** (for private parties, environmental organizations and municipalities) and **Malta**.

Finland and **Slovenia** have no foreclosure rules applying to public involvement, but emphasize that superordinate planning acts (**Finland**) or definitive consents arising from the preceding EIA (**Slovenia**) cannot be challenged in later court proceedings

against the consent.

In **Lithuania**, a very late assertion of objections can be cause for doubt about the interest in invoking the protection of the courts. In contrast, **Greece** points out that early submission of well-founded objections is advantageous in that it raises the pressure on the authorities to give reasoned decisions and thus leads to more levels of judicial review.

In the other states, participation or non-participation has no effect, negative or positive, on the affected party's legal status in court. In **France** for example, this is justified as follows: objections raised during the hearing process serve only to inform the planning authorities, are not binding, are not discussed in detail and certainly do not have to be responded to individually.

II. Judicial process applying to planning decisions; a Europe-wide comparison

1) Question

The question relating to judicial process was framed as follows:

3) Judicial process

Please give a short outline (no specific details) of the judicial process applying to project planning decisions (pre-trial proceedings, time-limits, competent courts, appeal, interlocutory injunctions).

4) Standing:

- a) Do all of the above-listed plaintiffs have standing before your national courts?*
- b) If not, which are the reasons for their exclusion ?*

5) Scope of claims:

Are the above-listed plaintiffs only allowed to claim infringements of their individual rights (e.g. illegal expropriation of farmland, pollution of their private property) or may they claim infringements of public interests (e.g. adverse effects on the environment) or the unlawfulness of the planning decision in general (e.g. because of procedural deficiencies) as well ?

6) Scope of judicial review:

Do your courts review the lawfulness of a planning decision in every procedural and substantive respect or is the scope of judicial review restricted (e.g. to procedural aspects or clear and serious infringements of national or community law)?

8) Consequences of procedural and substantive deficiencies of the planning decision:

- a) Are there - in your national legal order - any procedural and/or substantive deficiencies which regularly render a planning decision completely void?*
- b) For which kinds of rulings does your national legal order provide in this case (e.g. cassation of the planning decision or declaratory ruling establishing its nullity)?*
- c) For which kinds of rulings does your national legal order provide if the planning*

decision has only minor deficiencies/ is not completely void (e.g. modification of the planning decision by imposing additional requirements such as noise barriers, speed limits or reforestation)?

d) Which rulings are likely to be given in the cases of the above-listed plaintiffs?

9) Remedy of deficiencies

May procedural or substantive deficiencies of the planning decision be remedied during the judicial process? If yes, on which conditions?

2) Judicial process in the member states

On Question 3): Judicial process

a) Administrative preliminary proceedings

In some EU states planning decisions may be required to be examined internally the authority before being submitted to the courts. The cause for this generally takes the form of an objection or a complaint submitted to the next highest authority or to the ministry responsible.

In **Estonia**, **Lithuania** and **Cyprus**, this applies for the consent; in **Latvia** it applies for the consent and the environmental impact assessment. The period for objections is one month in each case.

Slovenia and **Belgium** allow complaints to be made against the environmental consent. In **Belgium**, the plaintiff (but only the plaintiff) may have the “permis d’urbansime” re-examined internally by the administration. In **Austria**, an appeal may be made to the minister responsible or the provincial government in the case of decisions made by the head of the provincial government (*Landeshauptmann*) or the provincial administration.

In **Sweden**, affected parties may appeal to the government and likewise an appeal can be made within the authority in **Greece**.

With the exceptions of Cyprus, Belgium and Greece, utilization of this internal revision procedure is a mandatory prerequisite for a later action in court.

In **Poland**, appeal may be made to the Minister of Transport and Construction. On account of the special accelerating law already mentioned, this legal option is open for a shortened period of 14 days only. The ministry must make its decision within 14 days; again due to the accelerating law, the decision is not delivered individually but is merely announced publicly. The same regulations apply for objections to the “construction permit.”

Of particular interest is the review procedure in **Ireland**, the only EU member country which has an independent third party appeal system, the so-called “An Bord Pleanála.” Appeal may be made to this institution by the petitioner or by any third party; however leave must be granted beforehand. The deadline for the appeal to be made is 4 weeks. The “An Bord Pleanála” then carries out a quasi-judicial revision of the planning decision, with a hearing if requested. The decision of the “An Bord Pleanála” carries considerable weight and even the courts can overturn it only under exceptional conditions.

The preliminary procedure is similarly important in **Malta**. Any affected party who submits an objection in due time and form may make an appeal to the Planning Appeals Board. The plaintiff may also demand a revision of the decision by the planning authority itself. The revision process incorporates a hearing to which all the objectors may be invited. The Board may overturn the original consent or may make changes to its contents. The courts may review the Board’s decision afterwards, but the review is confined to points of law.

b) Legal process

Legal process in the narrow sense takes very different forms, both in terms of jurisdiction and levels of review.

In most states, appeals against planning decisions fall within the jurisdiction of the administrative courts (**Austria, Czech Republic, Estonia, Spain, Finland, France, Greece, Germany, Italy, Latvia, Lithuania, Netherlands, Poland, Sweden, Luxem-**

bourg).

In states with no specialized administrative courts, the unitary court system is then responsible (**Denmark, Ireland, Malta, Slovakia, Hungary, United Kingdom**), whereby administrative legal proceedings are sometimes heard by specialized courts or judges. Legal process in **Slovenia** is split: appeals against the environmental consent are heard by administrative courts, while appeals against the planning consent act are in the jurisdiction of the constitutional court.

There are multiple levels of review in **the Czech Republic, Estonia, Finland, Italy, Ireland, Latvia, Lithuania, Luxembourg, Poland, Spain, Slovakia, Slovenia** and **the United Kingdom** (for more information on possibilities for appeal against the court of first instance ruling, see e below).

In **Greece, Belgium, the Netherlands, Malta** and **Sweden**, proceedings against planning decisions are heard in the both first and last instance by the Conseil d'État, the Supreme Administrative Court (**Sweden**) or the Court of Appeal (**Malta**). In other words, these states offer no opportunity for appeal or review. In **Cyprus**, the Supreme Court (single judge) is also the court of first instance, but in matters of especial significance there also exists the possibility of an internal appeal heard by a panel of five judges.

In **Finland**, the jurisdiction depends on which authority granted the planning consent. If it was a decision by the Road Administration, then the regional administrative courts are responsible in the first instance; if the consent was granted by the competent ministry, then the Supreme Administrative Court is the court of first and last instance. In **France**, the local administrative court is responsible for small projects, the Conseil d'État for projects which have consequences stretching beyond the boundaries of the court's area of jurisdiction.

For transport projects on the territory of the old **West Germany** (the so-called "old Länder"), there are two levels of view. On the territory of the old **East Germany** (the "new Länder"), a temporally limited acceleration law makes the Federal Administrative Court the court of first and last instance.

Also in states with specialized administrative courts, rulings on the level of compensation for expropriation (in **Malta** also regarding the legality of the expropriation itself) are contestable only before the civil courts.

c) Time limits

Deadlines for appeal are calculated in all states from the moment the consent is publicly announced or served (in the case of obligatory preliminary proceedings, from the moment of service of the notification of a decision on the objections), and are as follows:

- **15 days** (Malta)
- **20 days** (Lithuania)
- **4 weeks/ one month** (Finland, Germany, Poland, Latvia, Estonia, Slovenia)
- **6 weeks** (Austria, Netherlands, United Kingdom)
- **60 days/ 8 weeks/ two months** (Belgium, Czech Republic, France, Greece, Ireland, Slovakia, Spain)
- **75 days** (Cyprus)
- **3 months** (Luxembourg – but appeal deadline only 40 days, Portugal, Sweden)
- **6 months** (Denmark against decision by Expropriation Commission)
- **No deadline** (Slovenia for constitutional complaints against the planning act)

d) Proceedings

As not all National Reports give details of court proceedings, the following will point out only some special features.

In **Finland**, **Sweden** and **Austria**, planning matters are chiefly dealt with in written proceedings. A court hearing is held only exceptionally or at special request.

In **Finland**, **Belgium** and **Italy**, proceedings against consents are to be given priority treatment. In **Italy** shortened deadlines apply to this end. The average duration of proceedings through two instances there is 18 months.

There are also deadlines for decisions in **Lithuania** (two months), the **Netherlands** (12 months) and **Poland** (two months). In **Belgium**, the parties have response deadlines of 60 days each (30 days in accelerated proceedings) and there is an administrative deadline of 6 months for the rapporteur which, because of the caseload on the courts, is only

seldom observed.

In Ireland, leave to appeal is required, and this is only granted when the court is convinced that the planning decision was not lawful.

Belgium, Sweden and France advise explicitly that preparatory measures are not separately contestable but may be reviewed only incidentally in connection with an appeal against the consent concluding the process.

e) Appeal

As already mentioned, not all states have multiple levels of review for suits against planning decisions. A court of appeal is naturally superfluous in those states where the councils of state or supreme courts function as courts of first and thus also of last instance. In the other states, the following systems of appeal exist:

Cyprus: Appeal to a bench consisting of 5 judges of the Supreme Court

Czech Republic: Cassation complaint to the Supreme Administrative Court

Finland: Appeal to the Supreme Administrative Court (only for consents granted by the Road Administration: for decisions by the Ministry of Transport and Communication, the Supreme Court is the first and last instance)

Germany: Review by the Federal Administrative Court (only for transport projects in the "old Länder")

Ireland: Appeal to the Supreme Court (leave must be granted by the High Court: only given when the case is especially significant)

Italy: Appeal to Conseil d'État

Latvia: Appeal to regional administrative court, cassation to the Supreme Court

Lithuania: Appeal to the Supreme Administrative Court

Poland: Cassation to the Supreme Administrative Court

Slovakia: Appeal to the Supreme Court

Slovenia: Appeal to the Supreme Court

Spain: Cassation

Luxemburg: Appeal to the "cour administrative"

Estonia: Appeal to the district court, cassation to the administrative law chamber of the Supreme Court (leave must be granted)

United Kingdom: Appeal to the Court of Appeal, also to the House of Lords in cases of especial significance (leave must be granted)

f) Interlocutory injunctions

Interlocutory injunctions are possible in **Austria, Belgium Cyprus, Estonia** (also ex officio), **Finland, France, Greece, Germany, Ireland** (although leave to appeal granted in the main proceedings can also have a staying effect), **Italy, Latvia, Lithuania, the Netherlands, Portugal, Sweden, Slovakia, Slovenia, Spain, Hungary and the United Kingdom.**

In all states, the granting of an injunction staying execution is dependent on the following:

- well-founded doubts regarding the lawfulness of the contested decision
- the occurrence of irreparable or at least serious damage
- urgency

If the contested consent is manifestly unlawful, the standard of proof for the likelihood and intensity of possible damage is generally set at a low level. Conversely, where the legal position is open, the standard of proof required is higher. In deciding on the urgency, some states also carry out an independent weighing up of the public interest as balanced against the individual interest of the plaintiff regarding the staying of execution.

France has a restrictive approach to interlocutory injunctions. However, injunctions are awarded there when serious mistakes have been made during the public consultation process or when the environmental impact assessment has not been carried out.

The length of summary proceedings in **Portugal** is 15 days (20 in the case of summary proceedings with documentation disclosure), in the **Netherlands** two to three weeks, and in **Belgium** 45 days. **Belgium** notes, however, that this deadline is rarely observed in large scale projects, but the country also has proceedings “d’extrême urgence” that allow an immediate hearing and a decision, of a temporary nature if necessary, in cases involving imminent danger.

In addition, the court of first instance in **Belgium** can stay the preliminary plan in response to a request by the specialized authorities, the “procureur du Roi” or recognized environmental organizations, when significant environmental damage can be expected

or when the public consultation process was faulty. This judicial process is, however, used sparingly.

In **Greece**, a panel of three judges usually rules, but in especially urgent cases the President of Section can issue a summary injunction on his or her own.

Danish procedural law does not permit interlocutory injunctions in any form. Summary process is used only exceptionally and only to protect against violation of Community law.

On Question 4): Standing

In almost all EU states, standing depends on the plaintiff's ability to demonstrate that his or her rights or legally protected interests are immediately affected. Some states also concede special standing to municipalities, associations, not-for-profit institutions, ombudsmen etc which must, however, be expressly defined in law. A constitutionally-anchored "actio popularis" which gives anyone the right to claim against state action regardless of personal involvement exists only in **Portugal**. The precondition is a fear of detrimental affects on public health, quality of life, the natural environment or the cultural heritage.

In **Lithuania**, in exceptional cases defined in law public concerns such as the protection of the environment also fall under the heading of "personal interests" regarding standing.

a) Residents and property owners affected by expropriation

Of the plaintiffs in the theoretical case used as the basis of the questionnaire, it is only the farmer threatened with expropriation who has clear standing in all national legal orders (in **Malta** however, not as part of the review the consent but in separate proceedings before the regular courts). The residents affected by noise pollution have standing in most states, but this frequently has additional conditions attached, such as the violation of emissions laws or the demonstration of danger to health, life and limb. In **Sweden**, one of the items protected by the European Convention on Human Rights must be affected. Noise-affected property owners in **Poland** have standing, but not tenants.

Residents in the **Czech Republic** have standing only when the motorway can be clearly demonstrated to produce unreasonable emissions after it has been opened. The consent to the plan does not constitute an infringement of personal rights.

b) Municipalities

The municipality whose planning sovereignty is infringed by the planned motorway construction in the theoretical case has in principal standing in **Austria, Denmark, Ireland, Spain, Germany, Finland, France, Greece, Italy, Latvia, Lithuania, Malta, the Netherlands, Portugal, Spain, Slovakia, Slovenia⁷, Hungary, Estonia and the United Kingdom**. The municipality's chances of success have become very poor. For the municipality to have standing in **Belgium**, it must have made full use (unsuccessfully) of its rights to block the plan during the administrative proceedings. In **Poland**, the municipality only has standing when it owns property affected.

In other states, standing is predominantly denied on the grounds that national planning has automatic priority over municipal planning (the **Czech Republic, Poland, Cyprus, Luxembourg** – in the latter however, the case has yet to arise).

Conversely, in **Sweden** a municipal planning project precludes the construction of a motorway by the state, with the result that there is no need for the municipality to have standing.

c) Environmental authorities

National environmental authorities have standing in a few states only as they are generally also the approving authority or, being part of the state administration, have no legal rights themselves.

Standing is granted in **Portugal** in exceptional cases if the position of a public authority has not been sufficiently represented during the planning consent procedure, as it is in Estonia, Ireland, Italy, Latvia, Lithuania, Finland, the Netherlands and the United Kingdom in cases when the affected authority would otherwise be prevented from carrying out its responsibilities. In **Sweden** in this case, an appeal may be made to the government, but not a claim in the strict sense.

⁷ The following remarks apply in Slovenia only to an administrative claim against an environmental consent. A constitutional complaint is the only recourse against a consent in the form of an ordinance. Special conditions apply in this case.

d) Domestic environmental organizations

Domestic environmental organizations now have standing in almost all EU states. In states where this is the case, this is generally a new regulation resulting from the enactment of the EIA Directive (Art. 10 a) and/or the Aarhus Convention⁸.

Legal standing for environmental organizations is frequently dependent upon special – sometimes legal – recognition of the organization (**Austria, the Czech Republic, Germany, France, Greece, Ireland, Italy, Latvia, Portugal, Spain, Hungary, Estonia, Luxembourg, Belgium, Slovakia, United Kingdom**).

This recognition is usually dependent upon the organization being not-for-profit, having statutes dedicating them to environmental protection and having a permanent structure and/or a certain minimum number of members (**Austria, Denmark in the most recent legal practice, Finland, Germany, Ireland, Italy, Latvia, Lithuania, Slovakia, Hungary**).

In **Belgium**, association's aim must be clearly different to the public interest in protecting the environment as well as from its members' individual interests. When organizations bring actions against planned projects, the principle of proximity applies, i.e. only those local organizations which have a particularly close interest in the specific project as a result of their statutes have standing. This may result in no organization being "responsible" for some projects.

In some states, environmental organizations have limited standing. In **Germany, Poland** and **Slovenia**, participation in the preceding administrative process is a prerequisite for standing, and the standing applies only to matters concerned with environmental law. In the **Czech Republic**, organizations may claim the infringement of their rights of consultation. These rights come into existence when an organization registers itself as a participant within eight days of the beginning of the administrative procedure. However, Czech environmental organizations may not raise objections during legal proceedings.

Environmental organizations currently have no legal standing in **Sweden**, but changes to legislation are being prepared as a result of the ratification of the Aarhus

⁸ UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

Convention. According to a ruling by the Supreme Court in **Lithuania**, standing arises immediately from the Convention. **Cyprus** has yet to grant environmental organizations legal standing. **Malta** cannot make any concrete response to the question on standing for organizations on account of a lack of case law.

e) Foreign environmental organizations

Foreign environmental organizations have standing in only a few states. They have the same rights as domestic organizations in **the Czech Republic, Greece, Latvia, Poland, Portugal, Spain, Estonia and the United Kingdom**.

Standing is granted in **Austria** on condition that notification was carried out according to Art. 7 EIA Directive in the latest amendment, that the environmental consequences of the planned project affect that part of the environment for which the foreign organization is claiming and that the organization would be able to take part in the proceedings in the neighboring state.

In **Finland**, organizations from the neighboring Scandinavian states may have legal standing under a special international treaty on environmental protection signed in 1974. In the **Netherlands, Italy and Sweden**, the issue has not yet arisen. However, in cases of significant violation or where Community law expressly confers consultation rights on the neighboring state, legal standing could conceivably be granted in these states.

Ireland, Cyprus, Slovakia and Slovenia point out that in the case of transboundary emissions, their national legal orders grant legal standing not to foreign environmental organizations but to the neighboring state affected. This standing arises from the international "Convention on the Long Range Transboundary Air Pollution" of 1979. However, **Slovakia** would refer the question of whether a foreign environmental organization is to be granted standing to the European Court of Justice.

Several states add that their national legal orders grant standing to other institutions apart from the ones given as examples.

In **France**, legal practice regarding standing is very generous. Claims may be made against consents by, among others, the "chambres de commerce" as well as the tenants and leaseholders of property affected by expropriation. In **Poland and Slovakia**,

the ombudsman and the prosecutor also have legal standing, as does the “Ministère Public” in **Portugal**.

On Question 5): Scope of claims

The right to complain does not cover all procedural and substantive planning deficiencies in all states. In **Austria, Cyprus, the Czech Republic, Italy, Denmark, Lithuania** and **Slovenia**, individual persons can only claim infringement of their individual rights (e.g. health, life, limb, property, lack of public involvement) and not infringement of public interests (e.g. environmental protection and conservation). **Poland** takes a middle course: infringement of public interests may be claimed by individual plaintiffs but the planning decision is only annulled when the infringement of the public interest is shown to lead directly to an infringement of the individual's rights.

Germany differentiates between plaintiffs affected by emissions and plaintiffs affected by expropriation. A resident fearing an unreasonable burden from emissions may claim only the infringement of his/her rights. A plaintiff threatened with expropriation, however, is entitled to claim against the planning decision from any possible procedural or substantive aspect. The grounds for this are that expropriation may only take place for the greater public good and must thus be based upon a planning process that is lawful as a whole.

As already seen in connection with standing, in some states environmental organizations may claim infringement of environmental concerns only (**Austria, Greece, Germany, Poland, Slovenia**). In the **Czech Republic**, they are currently permitted to claim infringement of their right to be involved in the administrative process; objections on substance are not allowed. However, the **Czech Republic** is currently considering removing this restriction as part of the process of enacting the Aarhus Convention.

The right of municipalities to claim in **Austria** is restricted to environmental concerns, in **Greece** and **Germany** to the infringement of individual rights. In **Malta**, the municipalities have no planning sovereignty, but they are permitted to claim in all other as-

pects.

Broad rights to claim procedural and substantive infringements – at least for individual plaintiffs – exist in **Denmark, Finland, the United Kingdom, France, Greece, Ireland, Malta, Portugal, Spain, Hungary, Sweden, Belgium, Latvia, the Netherlands** and – although restricted to planning law – in **Estonia**.

The so-called "Théorie des opérations complexes" in **France** even permits the incidental revision of already definitive decisions where the contested consent is based on them.

On Question 6): Scope of Judicial Review

In so far as a right to claim exists, a comprehensive review from procedural and substantive standpoints takes place in the vast majority of states. This is mostly carried out ex officio.

There is an obligation to the claims and averments of the parties in **Denmark** (in decisions made by the Expropriation Commission⁹) and also to some extent in **Slovakia, Luxembourg, Italy and Sweden**. These last three states allow only manifest planning deficiencies to be reviewed ex officio. In **Slovakia**, only the investigation of procedural rights infringements and of the necessity of seeking a preliminary ruling from the European Court of Justice can be made without a claim. The **Austrian Administrative Court** is bound to the statement of affairs made by the planning authority, i.e. it cannot institute an investigation of the facts of its own when a deficiency in the previous investigation is found, and must return the case to the planning authority. The situation is similar in **Malta** where the Court of Appeal reviews only the judicial aspects, which are themselves limited to those points discussed by the Planning Appeals Board in the appeal notification.

However, the scope of judicial review is also limited in the other states where the planning authority may make decisions based on forecasts and/or has room for weighing up or discretion in making its decision. In such cases, the lawfulness of the

⁹ The actual consent takes the form of an act and can thus be reviewed only in terms of its compatibility with constitutional and community law.

decision is reviewed, but not the expediency, whereby questions of political or economic significance are not taken into consideration. The courts merely check that the authority has observed its discretion, has respected all the concerns affected in its decision and has balanced them against each other according to the principle of appropriateness without being influenced by arbitrary or unrelated considerations.

In the case of decisions based on forecasts and with questions of a purely technical or scientific nature (growth of traffic, emissions, environmental protection etc.), the courts restrict themselves to reviewing plausibility only. It is confirmed that a recognized procedure was chosen and that no clear irregularities occurred. In **Portugal**, decisions based on forecasts are excluded from judicial review.

On Question 8): Consequences of procedural and substantive deficiencies of the planning decision

a) Magnitude of planning deficiencies

The only planning deficiencies that always render a planning decision void or annul it in all states are the omission of the environmental impact assessment or violations of peremptory Community law.

The following deficiencies also normally result in annulment in the following states:

- consent granted by authority with no jurisdiction (**Austria, Germany, Estonia, Spain, Hungary**)
- insufficient observation of consultation rights of recognized and registered conservation organizations (**Czech Republic**)
- non-disclosure of substantive information during public consultation phase (**France, Belgium, Sweden, Latvia, Lithuania**)
- nonconformity with superordinate plans or provisions set by superior authority/court (**Lithuania, Hungary**)
- disregard of negative environmental impact assessment (**Portugal**)
- criminal offences (**Estonia, Hungary**)
- violation of principle of legal hearing (**Malta**)

All states stress that only substantial deficiencies result in annulment. These are mostly deficiencies for which the concrete possibility exists that they had conse-

quence for the planning process. Minor deficiencies are insubstantial. This applies to deficiencies in procedure, form or weighing up as well as failures in the investigation of the facts or the environmental assessment.. Omissions in the consultation of specialized authorities, municipalities, experts or the public are only substantial if they have had a real effect on the affected party's involvement.

b) Range of rulings open to the courts

If a substantial deficiency is determined, most court procedures annul the planning consent or law, or declare it void. In **Denmark**, the project is declared to be not realizable. However, **Denmark** also points out that no action has yet been successfully brought against a consent, which are in the form of a law, and as such the requirements for and consequences of such a decision are hard to predict.

In **Portugal**, there also exists – besides annulment and voiding – the option of declaring the project to be not realizable. In contrast to simple annulment, this ruling permits comprehensive discussion of the project and is not restricted to individual aspects of its unlawfulness.

Some states also allow a partial annulment if it does not affect the substantive content of the contested administrative process (**Belgium, France, Ireland, Lithuania, Germany, Greece, Latvia, Portugal**).

On the other hand, the courts in the majority of states are forbidden to impose conditions on the authority or to modify the plan themselves. This is normally the result of the principle of the separation of powers which permits judicial review by the courts but grants them no authority to make decisions.

It is only in **Finland** and **Ireland** that the judge may make minor modifications at his or her own discretion. Conditions may be imposed in **Estonia, Lithuania** and **Germany**. They take the form of an instruction to the authority (e.g. to expand noise abatement or environmental compensation measures). In **Germany**, the principle applies that the plan should be retained as far as possible, i.e. relatively minor deficiencies should only lead to annulment if the planning decision when they cannot be remedied via a supplement to the plan or an additional procedure. Until they are

remedied, the plan is declared to be “non-executable.” In Malta, the Planning Appeals Board and not the court has the authority to issue conditions.

The “All or Nothing Principle” applies in all other states, whereby the authority is normally permitted to re-grant the consent but avoiding the deficiencies.

In the **United Kingdom**, the ruling may contain suggestions for improvements that the administration can use for its guidance.

c) Court rulings in the example case

Most National Reports do not make concrete predictions of the ruling in the example case as the statement of affairs contains only a few details.

In **Italy, Estonia, Belgium, Slovenia, Portugal, the Netherlands, Sweden, Hungary and Lithuania**, the annulment of the consent is probable on account of the violation of mandatory EU environmental law. This is also true in **Germany** for the claims of the environmental organization and the farmer. The residents affected by emissions, on the other hand, have legitimate claim to supplementary conditions being imposed to protect them from emissions, while the municipality would have a claim only if its planning sovereignty was genuinely and unreasonably infringed upon. In **Hungary, Lithuania** and **Malta**, the municipality would also be unsuccessful as national planning either has priority over municipal planning, or municipalities have no planning sovereignty (**Malta**). In **Slovakia**, the claims of the municipality, the residents and the domestic environmental organization would probably be successful. The farmer threatened with expropriation would lose, however, as there is a public interest in the expropriation of his land.

On Question 9: Remedy of planning deficiencies

Regarding the question of whether and how planning deficiencies can be remedied, a differentiation must be made between remedy effected by the court itself and the remedy of deficiencies by the administration.

Direct or indirect remedy *by the court* – by means of the imposition of conditions on or modification of the consent – takes place in only a few states for reasons already

detailed (see explanation on Question 8 above).

The administration in most states can, on the other hand, expand, modify, reverse or review its decision at any time – i.e. also during judicial proceedings – and thus correct mistakes. However, the scope of this ability to make corrections and the judicial-procedural reaction to such changes vary from state to state.

Such corrections – sometimes after indication by the court – are unproblematic in the **Czech Republic, Denmark, Belgium, Luxembourg, Italy, Spain, and Hungary** (whereby **Hungary** points out that a correction may not oppose the acquired rights or the good faith of the beneficiary). At this point, the claim is withdrawn or the proceedings are discontinued. The **Belgian Conseil d'Etat** automatically carries ongoing proceedings over into the new planning decision if there have been no significant changes made or if deficiencies continue to exist. In the other states, new proceedings must be initiated against the new administrative act if necessary.

In **Germany**, there are only certain procedural and formal deficiencies that may be remedied before the conclusion of the last instance of fact. In particular, these are the supplementation of the grounding for a planning consent and the delayed hearing of involved parties or authorities.

In **Finland** and **Slovenia**¹⁰, minor deficiencies can also be remedied by supplementing the grounding or repeating parts of the process. In **Estonia**, a planning consent can be corrected ex nunc. It then remains in force, but the plaintiff may change the claim and then have the lawfulness of the original planning reviewed and claim for damages as appropriate.

The same applies in principle in **Sweden**, whereby the Swedish National Report points out that remedying planning deficiencies is extremely complicated and therefore often not practicable (e.g. when public consultation process must be repeated). In Sweden, the responsible bodies, i.e. the government and the approving authority, are not parties in the court proceedings, but they regularly have the opportunity to respond during the proceedings, so that deficiencies in the grounding can generally be corrected.

¹⁰ in administrative proceedings against the environmental consent (not however in a constitutional complaint against the planning act)

Portugal differentiates according to the type of action. In actions for rescission, there is an ex tunc review. The circumstances and legal position at the time of the decision by the authority are decisive, thus ruling out a remedy. In actions for declaratory judgment or performance, the court can take into account any remedies made up until the end of the last proceedings of fact. In **the Netherlands**, any review of a planning decision is ex tunc, meaning that remedy is impossible in principle. However, legal practice allows a certain amount of supplementation to the weighing up grounding.

Remedy is unusual in the **United Kingdom**, where a new consent is normally granted after the conclusion of the proceedings. In **Malta**, planning deficiencies are largely corrected by the Planning Appeals Board.

Remedy is inadmissible in **Austria, Cyprus, Latvia, Lithuania** and **France**, whereby latest legal practice in France allows the authorities a period for corrections in the case of procedural and formal deficiencies.

III. The consequences of European environmental legislation for national planning law

1) Question

The question on the consequences of European environmental legislation for national planning law was as follows:

7) Which decision will your court take, if

a) the environmental impact assessment prescribed by Community law has not or not duly been carried out in connection with the project in question?

b) the project adversely affects a natural habitat which is eligible for designation as a special area of conservation in the sense of the EU-“Habitats Directive” but has not yet been transmitted to the Commission?

c) the project adversely affects a natural habitat which has been transmitted to the Commission as being eligible for designation as a special area of conservation but which has not yet been placed on a Commission list?

(Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora - Official Journal L 206, 22/07/1992 P. 0007 - 0050)

d) the project adversely affects a birds sanctuary in the sense of the EU-“Birds Directive”?

(Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds - Official Journal L 103, 25/04/1979 P. 0001 - 0018)

e) the project is likely to exceed the limit values of the EU-“Ambient Air Directive” (esp. those for PM10/ particulate matter)?

(Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air - Official Journal L 163, 29/06/1999 P. 0041 - 0060)

2) Rulings of member states' courts

On Question 7a):

Ruling in case of deficient environmental impact assessment

Art. 4 (1) in conjunction with Annex I, (7b) EIA Directive makes an environmental impact assessment mandatory. All member states have either incorporated the directive into national law or assume that it has a direct effect. As a result, if the environmental

impact assessment is *not* carried out, the consent is annulled in all states.

In **Cyprus**, ignoring the results of a proper but negative EIA can also lead to the annulment of the consent.

If the environmental impact assessment is *deficient*, the legal consequences depend on the magnitude of the deficiency. In the case of significant deficiencies of the contents, annulment is normal as the possibility cannot be excluded that if the assessment had been carried out properly, the result of the planning consent procedure may have been different. However, the courts usually restrict themselves to reviewing the integrity, soundness and plausibility of the environmental impact assessment. The courts check that qualified, independent experts and recognized techniques were used, that the environmental impact study contains all legally required elements, and that no clearly deficient assessments were made. There is, however, no detailed expert review of bio-scientific evaluations.

Finland is currently drafting a law that will clarify the legal consequences of an insufficient environmental impact assessment for construction projects as defined in Annex I EIA Directive.

In **France**, the principle of proportionality also applies to judicial review of the environmental impact assessment: the larger and more environmentally influential a project, the more detailed must the assessment be, and also the more detailed the judicial review process.

The review process is particularly detailed in **Latvia**. The decision of whether and to what degree the environmental impact assessment should take place may itself be contested in the courts.

The development of environmental legal practice in **Greece** is also of interest: The Greek Conseil d'Etat has not fundamentally shaped national environmental law but has also continually increased the importance of environmental law in planning procedures.¹¹

¹¹ see p. 1-3, 22 ff. of the Greek National Report

It is a matter of debate in a number of member states whether annulment should result when no or insufficient assessment of the environmental impact takes place for a project as defined by Art. 4 (2) in conjunction with Annex II of the Directive. **Ireland** reports that it sees no room for annulment in this case, as the scope for investigation of Annex-II projects is at the discretion of the authorities.

In conclusion, it must be remembered that deficiencies in the environmental impact assessment are seen as infringements of the public interest in some states and claims can be brought only by certain plaintiffs, such as environmental protection organizations, municipalities or parties affected by expropriation (see Part II, on Questions 4 and 5 above).

On Question 7b):

Ruling when the project negatively impacts a site which is eligible for designation under the EU “Fauna-Flora-Habitat Directive” but which has not yet been communicated to the Commission, although it should have been

a) The “Dragaggi” ruling by the European Court of Justice

The background to Questions 7b) and 7c) is the ruling by the European Court of Justice on the protection regime applying to potential fauna-flora-habitat sites (hereafter “FFH sites”) in Case C-117/03 (Dragaggi)¹².

The starting point was a request to the ECJ from the **Italian** Consiglio di Stato for a preliminary ruling on whether the strict protection regime according to Art. 6 (2-4) FFH Directive applies from the moment a site with priority habitat and/or species is identified, or only from the moment when the Commission has finally established it as a site of community importance. According to Art. 4 (2) FFH Directive, the member states take the appropriate steps to protect such sites. According to the second subparagraph of Art. 6 (4), exceptions may only be made for reasons of health, public safety, environmental protection or other compelling factors of majority public interest after comment by the Commission. According to Art. 4 (5), an area is subject to the conditions of Article 6 as soon as it is entered into the list of areas of Community importance.

¹² Court judgment of 13 January 2005

The ECJ answered the request with special reference to the explicit wording of Art. 4 (5) as follows:

“On a proper construction of Article 4(5) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the protective measures prescribed in Article 6(2), (3) and (4) of that directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the directive, are on the list of sites selected as sites of Community importance adopted by the Commission of the European Communities in accordance with the procedure laid down in Article 21 of the directive.

In the case of sites eligible for identification as sites of Community importance which are included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types or priority species, the Member States are, by virtue of Directive 92/43, required to take protective measures that are appropriate, from the point of view of the directive’s conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level.”

The ECJ did not define more clearly in its *Dragaggi* ruling which national protection measures are to be taken. This aspect may be clarified by a request for preliminary ruling by the Bavarian Administrative Court pending at ECJ since 7 June 2005 as Case C-244/05.

b) Protection regimes in the member states

Protection of potential FFH sites currently varies considerably between the member states. In some states, there is as yet no supreme court ruling on the issue. This is the case especially in the **new member states**, but also in **Greece, Spain and Luxembourg**.

Some member states differentiate between potential FFH sites that are already included in national lists of proposals but which have not yet been communicated to the Commission, and sites that are not yet included in national lists.

The latter sites receive special protection only in **Austria, Germany, Slovenia, Poland, Estonia, Lithuania, the Netherlands, Portugal, Sweden and Belgium**. The protection regime arises partially out of national environmental law and partially out of the direct effect of Art. 6 FFH Directive. In the **United Kingdom**, consent is annulled if a potential protection site was not registered immediately as required. In this case, **Slovakia** suspends the administrative process until a decision is reached on whether the site is to be included in the national list. **Hungary, Greece and Spain** make no

concrete statements for lack of a supreme court ruling. **Hungary** considers protection possible, while **Spain** and **Greece** consider it at least not completely impossible. The same applies for **Italy**, where special protection for potential FFH sites is considered when the site in question is eligible for inclusion in the national list, or when its non-classification is the result of a deficient environmental impact assessment and there is sufficient confidence in the project developer for an annulment not to be necessary. The **Netherlands** and **Finland** point out that there are now no longer any unlisted sites in their territories.

In **Germany**, the protection of sites with priority species or habitats has until now been regulated by Art. 6 FFH Directive when the site in question was eligible for inclusion in the Commission list. Otherwise, steps were to be taken to ensure that registration is not made impossible by adverse effects caused.¹³

Estonia and **Sweden** go one step further and extend their protection regimes according to Art. 6 (2-4) FFH Directive to all sites that are home to priority species of habitats, independently of whether they are eligible for registration or not.

In contrast, potential FFH sites that are already included on national lists are subject to special protection in almost all EU member states.

The protection regime here results partially from the relevant national environmental regulations, and partially from community anti-frustration law according Art. 10 (2) EC Treaty in conjunction with Art. 6 FFH Directive, which obliges member states to refrain from making a delayed realization of a directive impossible. **Estonia** and **Ireland** apply the principles that the ECJ has developed for the protection of bird sanctuaries in an analogue way to potential FFH sites.¹⁴

Thus, in the case of sustained detrimental effects on a nationally listed site, most EU member states annul the consent.

Only **Denmark** assumes that a site normally has no need of protection before it is included in the Commission list and that there are therefore no grounds for claims.

¹³ Whether this differentiation can continue to exist in the light of the Dragaggi judgment is open to question, however.

¹⁴ ECJ ruling of 28 February 1991, Case C-57/89 (Commission/Federal Republic of Germany) And judgment of 2 August 1993, Case C-355/90 (Santoña)

On Question 7c):

Ruling when the planned project impacts a Fauna-Flora-Habitat site which has been communicated as eligible but has not yet been placed on the Commission list

As detailed above in connection with Question 7 b), special protection for potential FFH sites begins in almost all states when the sites are included in national lists. Logically, an increased standard of protection most definitely applies to sites that are not only included on national lists but have also been registered with the Commission. The only exception is – as already mentioned – **Denmark**.

Belgium also believes that, in addition to listed sites, sites subject to the conciliation procedure according to Art. 5 FFH Directive should also be afforded special protection.

On Question 7d):

Ruling when the planned project impacts on a site designated as a bird sanctuary under the terms of the EU “Bird Protection Directive.”

When a classified bird sanctuary suffers sustained negative impact, the annulment of the consent is the consequence on all states, including **Denmark**.

The level of protection for potential/actual bird sanctuaries varies, however.

Germany, Spain and Ireland follow the ruling of the European Court of Justice¹⁵ and apply the **strict protection regime** of Art. 4 (4) Bird Protection Directive to potential bird sanctuary sites. This means that consent can be granted to the construction project only if overriding public welfare concerns, such as the protection of human life and health or the maintenance of public safety, make it necessary. A **change** to the less strict **protection regime** of the Fauna-Flora-Habitat Directive, which would allow the project according to Art. 6 (2), (3) and (4) FFH Directive, can only be made after the bird sanctuary has been formally and legally bindingly protected.

In **Estonia**, Art. 6 FFH Directive is the sole point of reference. In **Finland**, it is a mat-

¹⁵ ECJ, ruling of 28 February 1991, Case C-57/89 (Commission/Federal Republic of Germany), and ruling of 2. August 1993, Case C-355/90 (Santoña)

ter of debate whether the same standard of protection should apply for potential bird sanctuaries as for classified ones.

On Question 7e):

Ruling when the planned project is likely to exceed the limits of the EU “Ambient Air Directive” (especially for PM10/particulate matter)

The relationship between national road planning law and the provisions of the Ambient Air Directive has not yet been definitively resolved in most EU member states. There have also been hardly any supreme court judgments on the national enactment of the directive. The European Court of Justice has expressed an opinion on the Ambient Air Directive only in connection with the Inn Valley motorway in Austria, making it clear that measures designed to maintain ambient air quality must respect the principle of commensurability and not unreasonably restrict the free movement of goods and services.¹⁶

At the same time, however, it has been shown that the limits for PM10 especially have been significantly exceeded in almost all European conurbations as a result of existing transport infrastructure.

Thus the question of how far the observation of ambient and threshold values needs to be reviewed by the courts during the planning of new roads is of entirely practical significance.

There is general agreement among the member states that the effects of a project on ambient air quality must be ascertained as part of the environmental impact assessment and weighed up in the consent process. If the consent authority neglects to do this, the neglect constitutes a deficiency in the weighing up process that can alone lead to the annulment of the consent.

If it transpires that the project exceeds ambient air values for a long time and no adequate protection measures are possible, **Austria, Sweden, Cyprus, Denmark, Slovenia, Italy, Malta, Portugal, the United Kingdom, Slovakia** and **Belgium** consider an annulment. In **Finland**, the problem is solved by imposing conditions or by referring it back to the authority, which must then provide appropriate protection meas-

¹⁶ Ruling of 15 November 2005, Case C-320/03 (Commission/Austria)

ures. In **Ireland**, it is not at present clear how the courts will decide. However, the Irish transposing measure does not provide any concrete sanctions in the case of the limits being broken.

In **Estonia**, the project developer must apply for an “Ambient Air Pollution Permit” before the final planning consent is given, and this is granted only if the project does not cause the ambient values to be exceeded. The mere possibility that they will be exceeded is enough to cause the permit not to be granted, and this will result in planning consent not being granted in turn.

The conditions set by the directive have been realized in a similarly strict form in the **Netherlands** where the relevant values must be strictly observed by all public construction projects. This is problematic as the PM10-24-hour values are already being exceeded almost everywhere in the Netherlands, with the result that effectively consent should not really be granted to any projects at all. Some consents have been annulled because they infringe against the directive.

In **Germany**, the planning authority is required to investigate the effect of the construction project on the ambient air quality, but it is not required to ensure that the relevant values are observed. German ambient air plans envisage a graduated control mechanism that is designed to allow an infringement of the threshold values to be countered by a range of measures independently of the source of the emissions. This means that the annulment of the planning consent only comes into consideration after the project is realized and the ambient air values cannot in practice be observed using the means of ambient air planning.

The situation in **Spain** is similar; the mere threat that the values could be exceeded does not lead to the annulment of the planning consent. It is only when the road is opened to use and a real infringement is recorded that the state can implement graduated protection measures, providing that these do not disproportionately impair the free movement of good and transport services.

In the **Czech Republic**, the PM10 ambient values have not yet been incorporated into national law, so that court proceedings would have to first investigate whether

the Ambient Air Directive has a direct effect or whether a construction of national emission protection laws in conformance with the directive would be possible. Effectively, it is – according to the **Czech Republic** – a question to be decided from case to case of whether the infringement of the values will lead to an annulment of the planning consent, or whether the consent can be granted as an exception in the interest of the greater public good.

In **France**, the Ambient Air Directive has been transposed in its entirety, but there is as yet no legal regulation making the observation of the threshold values mandatory according to planning law. As a result, the issue of ambient air quality has rarely been dealt with in court proceedings against planning decisions. However, a change in legal practice seems to have been evolving recently.

Conclusion

Despite the influence of European environmental law, the member states of the European Union are still some distance away from achieving uniformity in road planning regulations. For this reason, it should come as no surprise that the various national legal orders produced differing solutions to the road planning case under discussion. Nonetheless, the national peculiarities cannot disguise the fact that there is a not insignificant amount of procedural and substantive common ground.

On the one hand, this common ground is the result of the very nature of the specialized planning process with which all national legal orders are confronted on account of the peculiarity of planning decisions, and for which each national order has found solutions which are similar at least. Road planning proves to be a complex, procedure-heavy operation everywhere that is preceded by a superordinate development plan and succeeded by other decisions such as expropriation, and this gives rise to a widespread desire to speed up and simplify the process. Fundamentally, the planner is given a generous amount of leeway, and this is reflected in the limitations applying to judicial review procedures. Judicial review procedures are also characterized by the fact that only substantive deficiencies which may affect the planning result are of consequence and can cause a complaint to succeed.

On the other hand, the common ground is also increasingly the result of the environmental conditions imposed by European law, especially those found in the Fauna-Flora-Habitat, Bird Protection and Ambient Air Directives. These conditions are mandatory for all member states. It is, however, worthy of note that different solutions result from the discussion of the road planning case in the various states. Where this is the result of different interpretation of EC regulations – such as which protection regime applies to “unlisted” FFH sites – the ECJ will have to ensure ultimate clarity. Other differences are the result of the latitude utilized by national authorities when enacting the directives, but they arise in particular out of the member states’ procedural autonomy and are thus an expression of the states’ independence of jurisdiction which takes the form of differing administrative and judicial structures and procedures. The development of the relationship between European and national law is probably a good indicator that this area of national autonomy is being subjected to

increasing pressure to conform to European practice.

This last aspect could point the way ahead for road planning regulations. In the case study, there are clear signs in a number of areas that the member states are concerned to accelerate and simplify road planning regulations, but the influence of European environmental law will put distinct curbs on this endeavor.

APPENDIX

Liste of national rapporteurs

GENERAL RAPPORTEUR	Prof. Dr. Rüdiger RUBEL		Judge - Federal Administrative Court
AUSTRIA	Mr. Leopold	BUMBERGER	Judge - Supreme Administrative Court
BELGIUM	Mrs. Simone	GUFFENS	Conseiller d'Etat - Council of State
CYPRUS	Mr. Takis	ELLIADES	Judge - Supreme Court
CZECH REPUBLIC	Mr. Jan M.	PASSER	Judge - Supreme Administrative Court
DENMARK	Mr. Jon	STOKHOLM	Judge - Supreme Court
ESTONIA	Mrs. Julia	LAFFRANQUE	Justice - Supreme Court
FINLAND	Mr. Pekka	VIHERVUORI	Justice - Supreme Administrative Court
FRANCE	Mrs. Claire	LANDAIS	Maître des requêtes - Council of State
GERMANY	Mr. Michael	EICHBERGER	Judge - Federal Administrative Court
GREECE	Mrs. Olga	PAPADOPOULOU	Maître des requêtes - Council of State
HUNGARY	Mr. Peter	DARAK	Judge - Supreme Court
IRELAND	Mrs. Ciara	RYAN	Judicial Researcher - Supreme Court
ITALY	Mr. Giuseppe	BARBAGALLO	President of Section - Council of State
LATVIA	Mrs. Jautrite	BRIEDE	Senator of the Administrative Matters Department - Supreme Court
LITHUANIA	Mr. Virgilijus	VALANČIUS	President - Supreme Administrative Court
LUXEMBOURG	Mr. Jean-Mathias Mr. Paul	GOERENS SCHMITT	Vice-President - Administrative Court Conseiller d'Etat - Council of State
MALTA	Mrs. Marse-Ann	FARRUGIA	Judicial Assistant and Legal Secretary to the Chief Justice - Courts of Justice
THE NETHERLANDS	Mr. Thijs G.	DRUPSTEEN	Councillor of State - Council of State
POLAND	Mr. Zygmunt Mr. Eugeniusz	NIEWIADOMSKI MZYK	Judge - Supreme Administrative Court Judge - Supreme Administrative Court
PORTUGAL	Mr. Fernando Manuel	AZEVEDO MOREIRA	Vice-President - Supreme Administrative Court
SLOVAKIA	Mr. Miroslav	GAVALEC	Judge - Supreme Court
SLOVENIA	Mr. Gorazd	KOBLER	Judge - Supreme Court
SPAIN	Mr. Manuel	CAMPOS SÁNCHEZ-BORDONA	Judge - Supreme Court
SWEDEN	Mr. Lars	WENNERSTRÖM	Justice - Supreme Administrative Court
UNITED KINGDOM	Sir Robert	CARNWATH	Lord Justice - Royal Courts of Justice