Questionnaire

Avosetta Meeting on

'Weighing environmental risks and socio-economic benefits in view of alternative solutions',

Dublin 11/12 June 2010

I. Introduction

Environmental control commonly assesses the environmental effects of activities and strives to minimise risks by imposing conditions on the operation of activities or even forbidding activities. More or less under disguise and depending on national legal cultures, environmental protection criteria have frequently been weighed against other ("non-environmental") criteria, such as the abatement costs and socio-economic benefits of the activity. Likewise, when considering how to manage the activity by conditions or even forbidding them, different options (or alternatives) have frequently been considered. Such practices have been common on the level of rule-making as well as in planning law where administrative discretion is broad, but – it appears - less so on the level of adjudication where legislation often prescribes rather conclusive criteria which are exclusively aimed at health and environmental protection.

Recently non-environmental criteria and alternatives testing have been introduced into environmental law more openly and systematically. The US law has pioneered this. Alternatives testing was introduced as a requirement of EIA already in the early eigthies, and risk-benefit analysis as a general requirement of regulation (but not adjudication) was established under the Reagan administration. Since then EU law has gradually followed suit.

Here are some examples:

- An EIA must show what alternatives to the proposed project were tested and why they were rejected (Art. 5 (3) Directive 85/337/EEC, as amended; Annex I h Directive 2001/42/EC)
- The production, marketing or use of certain dangerous chemicals can be restricted if the risk is not outweighed by socio-economic benefits (See Art. 68 (1) Regulation (EC) 1907/06: "Any such decision shall take into account the socio-economic impact of the restriction, including the availability of alternatives.")
- The production and marketing of certain dangerous chemicals can only be authorised if either their health or environmental risk is adequately controlled or outweighed by socio-economic benefits (see Art. 60 (2) – (4) Regulation(EC) 1907/06)
- The placing on the market of pesticides can only be authorised if no "unacceptable risk" is caused (Art. 4 (1) (v) EEC Directive 1991/414, as amended). Under the planned Pesticides Regulation new pesticides can only be authorised if it can be shown that they are safer than those presently on the market (Art. 48 Commission Proposal Com(2008)93)
- Wherever the law requires best availabe techniques this entails the consideration of alternative technologies (e.g. Art. 2 No 12 EC Directive 2008/1)
- If in a Natura 2000 area a project causes significant adverse effects it can exceptionally be authorised if there are no alternative solutions or, in the absence of alternatives, the adverse effect is outweighed by an overriding public interest (Art. 6 (4) EC Directive 1992/43)

- The drafting of a flood risk management plan involves the weighing of risks and benefits (Art. 7 (3) Directive 2007/60/EC)

Putting these often still tentative approaches into a structure one may speak of a development from a simple to a more sophisticated model of licencing criteria:

- Traditional structure:
  If a project is environmentally safe => authorisation

- Structure including balancing with non-environmental criteria:
  If a project causes environmental risks and the socio-economic benefits are preponderant => authorisation

- Structure including balancing and alternative testing:
  If Alternative A has a better score concerning environmental risks and socio-economic costs than Alternative B => authorisation for Alternative I

This can be represented in a matrix:

	Environmental risk of project or product	Socio-economic benefits of project or product
Alternative A		
Alternative B		

In practical effect a decision-maker may take various project alternatives into account, determine the ratio of environmental effects and effects on non-environmental criteria, and select the one with the best ratio.

The goal of the questionnaire is to collect comparative material on experiences on the MS level. The questionnaire lists some core problems you should have in mind when browsing your domestic law, legal practice and academic debates. Of course, you do not have to respond to all of questions. You are also free to concentrate on that sectoral law(s) which is/are most significant and familiar to you. For instance, you may fully concentrate on general EIA law, on planning law, on nature protection law, or the law controlling the placing on the market of products such as pesticides, toxic chemicals or GMOs, etc. We realize that answering a questionnaire of this nature can take time especially if the subject area is not core to your research activities. We certainly do not expect you to feel you must devote more than a couple of days to this task, but please do the best you can.

There will be two introductory presentations on the EU legal framework (projects and products) to which you can refer, but when presenting the national situation please have the EU law background in mind (such as, for example, if you talk about national jurisprudence on alternatives of projects within Natura 2000 areas, relate this to Art. 6 (4) Directive 92/43/EC).

We suggest a concentration on adjudication in individual cases, i.e. do not include general rule-making. In addition to reporting on the legal situation, please present court cases or important administrative decisions in some detail showing how the law is applied. Please include also information on academic debates, if you consider them significant.

From experiences made on MS level we may be able to draw a more fundamental conclusion on whether the trend towards considering non-environmental criteria and alternatives better ensures environmental protection, or will only serve as a disguise for reducing protection standards.

II. Questionnaire

I. Balancing with non-environmental criteria

1. What kinds of non-environmental criteria are to be considered in particular contexts - EIA, SEA etc etc ? (e.g. socio-economic benefits or costs? More specific concerns such as jobs, regional development, satisfaction of consumer demands, scientific progress, etc.)
2. Do only provable and factual risks and benefits count, or are public perceptions considered relevant in considering risks and benefits?
3. If the benefit must be one in the public interest, how is public interest defined? Give examples. What interests do not count, what do count as being in the public interest?
4. If the benefit may be private what is considered legitimate: economic profit? Employment generation? Service for consumers?
5. How is the benefit calculated? In qualitative language or in monetary terms? In what way?
6. Is environmental risk calculated in cost terms in order to allow comparison with benefits? If so, how is it calculated? Is there a practice of monetarizing intangible goods?
7. Are mitigation and compensation measures counted as reducing environmental risks, or do they come in at a later stage of risk management?
8. When risks and benefits are balanced is it ensured that no benefits may outweigh serious environmental damage/significant environmental pollution?
9. Who bears the burden of proving socio-economic benefits, the operator, the competent adminsitrative body or third parties, if the benefit of the project is difficult to assess?
10. Do opponents have standing in administrative proceedings and before administrative courts to argue that the non-environmental criteria were not properly applied (e.g. because the benefits of projects were overestimated)?

II. Alternatives

1. What is the scope of alternatives that must be tested?
   a) Only those the operator would legally be able to perform? Only those which it would be practicable to ask the operator to perform? Or even those other persons including the state would be more suited to perform?
   b) Only those voluntarily considered by the operator, or those required by objective criteria?
   c) Is there a difference made between alternatives within a project (e.g. different routes for a planned road) and alternative projects (e.g. high speed train vs. regional airport)? If so, how is “project” defined?
   d) Are projects defined as those meeting the operators narrow objective, or also those which would serve a broader goal?
   e) Only those which are not more costly than the project proposed by the operator?

f) Must the zero alternative be considered?

2. Must the environmental effects of the alternatives proposed be as thoroughly checked as that of the proposed project?
3. Do opponents have standing in administrative proceedings and before administrative courts to argue that certain alternatives were not (adequately) considered?
4. What reasons have been raised to challenge the fair balancing of alternatives?

III. General questions

1. What is your overall assessment of experiences with balancing environmental risks with socio-economic benefits in relation to alternatives?
2. Would you suggest another way of how to structure the risk-benefit calculus?