**AVOSETTA MEETING**
**'WEIGHING ENVIRONMENTAL RISKS AND SOCIO-ECONOMIC BENEFITS IN VIEW OF ALTERNATIVE SOLUTIONS'.**

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## PART A: Balancing environmental and 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.)*

1.1. Most of the non-environmental criteria to be balanced in adjudication decisions are set out in Spanish EIA legislation. Other pieces of legislation refer to different criteria, town and country planning concerns, economic matters and the like. This is the case of rules considering the construction of roads or harbours. However, it should be observed that relevant legislation mainly employs rather general language when considering these interests. In reality, performing and environmental impact assessment involves *per se* analysing aspects that are not "environmental" in a *stricto sensu* understanding of the word. Thus, art. 1 of Royal Legislative Decree 1/2008, which is the key statute on the matter, provides that an EIA must assess the impact of a given project "on the human being", which could at first sight open the door to a wide variety of socio-economic factors. Art. 7.1 of the said statute provides also that the impact of the project on "the human population" must be accounted. On the other hand, Royal Decree 1131/1988, of 30 September, supplements Royal Legislative Decree 1/2008. Article 8 of that regulation defines in a rather thorough way all the different elements and ingredients that must be identified by the project promoter when he performs the environmental impact report (*estudio de impacto ambiental).* However, there is no explicit mention to "socio-economic benefits" as such that the project may trigger: for instance, creation of jobs, security, economic growth, regional development. So, it can be well identified by the promoter, but the law does not require a structured identification.

1.2. Accordingly, one could argue that the Spanish system (at least in the EIA sector) does not require the balancing of non-environmental factors <u>at the EIA stage, but outside it</u>. The weighing of non-environmental factors can be openly taken by the licensing agency (which usually is different from the environmental agency,[1] for instance the ministry of infrastructures for the case of a high speed train). Even more, non-environmental factors may appear as the only ones that justify the project. There is then a potential struggle between the licensing agency and the environmental one, a conflict that Spanish legislation describes nicely as a "controversy" (controversia). This dispute has to be solved at the council of ministers

[1] However, both belong to the same Administration; Constitutional Court Judgment 13/1998.

level, or at the government level in the case of an Autonomous Community granting the permit or consent.

1.3. This decision-making scenario thus depicts in a rather Manichean way the institutional role of the environmental and the licensing agencies, the first one overprotecting environmental interest (over non-environmental considerations), the latter favouring economic and social considerations (over "time consuming" environmental screening), the struggle being decided on political grounds. This perspective arrives to pure psychodrama when the environmental agency acts at the same time as a licensing agency (for example, in the case of transfer or river waters, a project that must be approved and evaluated by the Ministry of the environment). However, it should be noted that the Autonomous Communities are entitled under Article 149(1)(23) of the Spanish Constitution to give priority to the environment over other interests. Accordingly, if the environment agency comes to the conclusion that a project should not be executed due to its negative repercussions on the environment that decision may have binding effect on the licensing agency (e.g., Law 3/1998, on the protection of the environment of the Basque Country; decision of 23 March 2006, concerning the construction of a windmill).

1.4. Last but not least, non-environmental criteria may be held under the Aarhus Convention since, arguably, participation rights open new grounds for discussion, not only environmental one.

2. *Do only provable and factual risks and benefits count, or are public perceptions considered relevant in considering risks and benefits?*

2.1. The answer to this question largely depends on the meaning and scope of "count" and "perceptions".

2.2. Public perceptions, i.e., subjective ones, do not usually count although they may be taken into account. Environmental legislation is mainly based on factual risks, particularly in the field of EIA. Public perceptions may have a role to play in cases concerning noise or odour pollution or landscape matters: (a) because fundamental rights, e.g., privacy or physical integrity (Directive 96/82, on major industrial accidents), may be affected (e.g., Article 8 ECHR; Article 18 of the Spanish Constitution); or (b) because the legislation expressly takes into account subjective criteria, e.g., aesthetic values and their perception. In any case, it is the wording of the norm that has to set out the playing field, e.g., disturbance to neighbours, or noise emission limits.

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?*

3.1. The public interest is a matter for the representatives of the citizens to define, e.g., Parliaments or the EU legislature. In the adjudication arena, identifying whether a given project serves the public interest is a matter for the competent agency. Hence, there is not a universal and everlasting notion of public interest. Public interests are defined by reference to goods or values the legislator aims to protect, be it the environment, the public domain, public health, forestry, tranquillity and the like. Thus, every sectoral piece of legislation tries to advance a specific "public interest" (for instance, the protection of the shoreline). The problem then comes when there is a conflict between the different specific public interests protected by the different rules. In fact, Spanish legislation also protects public interests that may overrule other interests, even the protection of the environment, as held by a Constitutional

[2] One key factor used by courts in disentangling this clash of values concerns identifying how large or general the interest protected are. Thus, when a city council has attempted to declare the town as a "nuclear free" area, this public interest has faded in the face of the public interest of securing energy supply, advanced by the State administration. Although it is a rather extreme case, Law 29/1998 (jurisdiction of administrative law courts, Article 105(2)) empowers the public authorities to compulsorily purchase a right held by a court's judgment if there is (i) a likely risk of war, (ii) repercussions on the territory or (iii) clear and present danger for fundamental rights of third parties.

3.2. Public interests are usually balanced against private ones, e.g., when imposing limitations to protect the public domain, or when carrying out a public infrastructure (Spanish Supreme Court judgment of 29 March 2006). Public health is also a public interest usually safeguarded in noise cases, e.g., bars *versus* the protection of the home (Supreme Court Judgments of 16 November 2009; 31 May 2007, among others).

3.3. On many occasions the legislator does not specify different types of public interest. He merely refers to the "public interest", as broad concept, without any further reference, e.g., Noise Law 37/2003 and the exceptions to the prohibition to grant development consent in areas already subject to levels exceeding noise quality objectives; EIA legislation concerning habitats also provides a clear example. Courts are under a duty to strike a balance between contrasting interests when grating interim measures. However, the definition of public interest has different perspectives since on certain occasions diverse public interests may collide, e.g., Natura 2000 *versus* the construction of a jail; the construction of a dam to guarantee water supply for citizens (priority interest in Spanish water legislation) *but also for* agriculture and industry *versus* the habitats of the Iberian lynx (a highly endangered species supposedly supported by the EU and Spain); the use of an airport versus the protection of neighbourhood (Supreme Court judgment of 13 October 2008, Madrid-Barajas airport).

3.4. Public interests as a whole must also be viewed in constitutional terms. The environment is not regarded as a (subjective) right in the Spanish Constitution but as a guiding principle.[3] Therefore, it is first for the legislator to bring flesh to that bone. This also means that he enjoys discretion as to how to balance the environment with other interests, e.g., the extraction of minerals (Constitutional Court Judgment 64/1982). The Court has therefore held that the reduction of certain protection areas for birds, in order to allow the carrying out of a dam, was acceptable even though the law under scrutiny had set aside a previous court ruling that had in effect impeded the execution of the project.[4] Other cases, however, have put the environment over other interests, e.g., property, by declaring that the legislator may impose limitations on the use of that right (Constitutional Court Judgment 179/1989). This approach also coincides with the ECHR, e.g., *Matos and Silva v. Portugal*, judgment of 16 September 1996; *Friend and Countryside Alliance v. UK*, Inadmissibility Decision of 24 November 2009).

3.5. In cases concerning the construction of windmills where the supply of energy and the protection of the environment, e.g., birds, usually collide, the Spanish Supreme Court (judgments of 30 April 2008; 11 October 2006, among others) has held that any conflicts must be solved in the light of the rule setting out the priority interest,

[2] This judgment may not be applicable in Natura 2000 sites.
[3] Article 45 (Chapter III of Title I). Fundamental rights are set out in Chapters I and I of the same Title.
[4] See also *Gorraiz Lizarraga v. Spain*, judgment of the ECHR of 27 April 2004.

provided both interests cannot jointly be achieved or reconciled. Public authorities must justify why certain interests prevail over others. Otherwise, their decisions may be quashed. Therefore, adaptation of windmill projects to the particular characteristics of an area where the presence of birds has been documented comply with the aforementioned principles.

3.6. In another case concerning the declassification of a flora species to ease the construction of a harbour in the Canary Islands (Tenerife), the High Court of this Autonomous Community gave priority to the protection of the species *versus* the apparent socioeconomic benefits derived from the new harbour when granting interim relief (judgment of 15 June 2009). It should be noted that the Commission had accepted those socioeconomic reasons as proper exceptions under Article 6(4) of the Habitats Directive in a previous opinion.[5]

3.7. Public authorities must preserve certain territories from urbanisation, e.g., because they contain environmental values deserving protection or because those areas have previously been declared as protected zones (Spanish Supreme Court Judgments of 3 July 2009; 25 March 2010). This is also reflected in Law 5/2007, concerning the network of National Parks. These Parks cannot include any lands subject to urbanisation.[6]

3.8. The public interest may also be difficult to dissociate from the private one. In Natura 2000 cases unemployment rate is one of the factors to bear in mind when determining whether an Article 6(4) exception may be invoked (e.g., A-20 motorway in Germany; a mine in the same country guaranteeing 4.000 direct jobs and around 6.000 indirect ones). Is it possible to include within that notion the interest in maintaining an installation vital for the population of a location, e.g., if it is the only (main) industry (e.g., a shipyard)? Directive 92/43 (and also the Commission) assumes that only public interests can count. However, it is not always easy to draw a diving line since most of the time they are clearly intertwined. The Spanish Supreme Court has rejected broad allegations concerning the existence of a "serious unemployment problem" as justification for authorising a project affecting a Natura 2000 site (judgment of 29 November 2006). In other cases, e.g., dredging works to let the launching of ships from a shipyard located in a biosphere reserve, the Spanish Supreme Court has held that those works were basically carried out for the benefit of the shipyard and that that the latter should bear their cost (judgment of 4 May 2010).

3.9. A further matter present in Natura 2000 cases (and also in EIA and IPPC cases) is the "scope" of public interests, e.g., transfrontier ones. Theoretically speaking, Natura 2000 is a European network; the maintenance of its coherence affects the whole network. Therefore, other interests should be balanced against the interest of the whole (European) network. This matter has largely been neglected by Spanish courts, e.g., Orders of 13 July 2009 and of 15 October 2009, respectively, regarding the construction of a jail next to a Natura 2000 site containing an Annex IV.a) species (the only one in the whole region affected by the project) without an EIA. The Court rejected the request to grant interim relief by holding that there was no serious risk to the environment and that the need to solve already overcrowded jails outweighed the protection of species and habitats.

*4. If the benefit may be private what is considered legitimate: economic profit? Employment generation? Service for consumers?*

4.1. Please read the answer to the previous question.

[5] ec.europa.eu/environment/nature/natura2000/management/docs/art6/granadilla_es.pdf.

[6] This rule applies to future National Parks since existing ones do comprise municipalities.

4.2. Broadly speaking, all the interests mentioned in this question are legitimate, taking into account that: (a) socio-economic policies are also the responsibility (and the duty) of government; (b) the freedom of commerce and the right to economic prosperity is also recognised in the legal order

5. *How is the benefit calculated? In qualitative language or in monetary terms? In what way?*

5.1. Approaches can either be abstract or specified in quantitative terms. This matter also depends on those challenging decisions adopted by the public authorities since the rules do not employ mathematical equations, save in the case of the calculation of levies, e.g., due to discharges into the aquatic environment. Therefore, it is for them to put forward relevant calculations regarding costs and benefits before the courts in order to sustain their case.

5.2. Public interests may outweigh private ones simply because society as a whole or the interest of the State is more relevant that private ones, town planning rules *versus* the right to obtain planning permission; the construction of an infrastructure *versus* the protection of untouched portions of land. This is particularly apparent in cases regarding the execution of projects affecting either the territory or local interests. Interim measures in these cases consider the monetary viewpoint, e.g., whether the halting of a project affecting the environment may embrace important delays and costs for public budget and whether this may hamper the public interest. Broadly speaking, these assessments are abstract but they certainly depend on the data put forward by the parties in the case.

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?*

6.1. Again, EIA law represents an illustrative example. Environmental studies must reflect environmental costs by resorting to scientific methodologies. However, risk is not only assessed in cost terms but also in the light of its likelihood of occurrence. Criminal law, for instance is based on this approach (Article 325 of the Spanish Criminal Code and subsequent case law, e.g., Spanish Supreme Court judgment of 25 May 2004, among others). There is not need to adopt a cost approach in order to conclude that an activity poses a risk for the environment and therefore is to be regarded as a criminal offence.

6.2. As to the grant of value to intangible goods, this is a matter for the parties to determine in most cases since Spanish law does not set out quantitative criteria. For instance, in non-contractual liability cases the calculation of damages is mainly done according to market values and to common criteria employed in similar cases, e.g., insomnia due to persistent noise if a public authority did not order the cessation of the activity causing the noise.[7] However, this criterion may not by itself provide clear-cut guidance in other cases. Arguably, Directive 2004/35 (Law 26/2007) opens new grounds for Spanish authorities concerning prevention and remediation measures. The same happens in Natura 2000 cases. Overall, there is a wide margin of appreciation as Criminal Law reflects. This is also noticeable in the case of administrative fines since public authorities are also under the duty to impose compensation charges for any damages caused to the environment (or to other public

[7] See the landmark ECHR case *Moreno Gómez v. España*, of 16 November 2004.

goods). In principle, compensation should be subject to the rule 1:1 but the criteria for carrying out relevant calculations are usually absent in the law.[8]

7. *Are mitigation and compensation measures counted as reducing environmental risks, or do they come in at a later stage of risk management*?

7.1. Compensation measures are to be taken into account when defining and assessing risks. Again, EIA legislation requires the developer, e..g., a public authority, to compensate for likely damage to the environment. This may be beneficial in the sense that environmental concerns are taken into account at the first stages of risk analysis. However, it may also camouflage the real impacts of an activity since those in charge of the assessment may finally conclude that there is no risk *provided* compensation measures are adopted.[9] This approach is also adopted by the Commission when considering Natura 2000 projects in its opinions, concluding that the overall coherence of the network may not be affected provided the measures are timely adopted,[10] e.g., construction of a dam in Hornachuelos mountain range (Córdoba, Spain).[11]

7.2. A further matter concerns the meaning of "compensation". The Spanish Supreme Court has held that in Natura 2000 sites compensation measures (Article 6(3) and (4) of the Habitats Directive) cannot be equated to measures required by general environmental rules, e.g., reforestation of previously cut trees (4:1) or the acquisition of land for environmental purposes (judgment of 29 November 2006). This coincides with the approach adopted by the Commission, according to which compensation must go beyond the equation 1:1.

*8. When risks and benefits are balanced is it ensured that no benefits may outweigh serious environmental damage/significant environmental pollution?*

8.1. The answer to this question depends on the meaning and reach of "benefits". This is mainly done in assessment cases and also when granting or rejecting interim measures. Likely positive benefits derived from a project cannot be taken into account in order to exclude it from assessment (Case C-142/07, *Ecologistas en Acción v, Ayuntamiento de Madrid*).

8.2. Assessment legislation does not hamper approval of costly projects, even in environmental terms, save in the case of the Habitats Directive (unless and exception under Article 6(4) is duly invoked).

*9. Who bears the burden of proving socio-economic benefits, the operator, the competent administrative body or third parties, if the benefit of the project is difficult to assess?*

9.1. This is a key matter. Under EIA rules (Habitats Directive) it is for the public authority to justify the adoption of an exception (e.g., under Article 6(4) of Directive 92/43) to authorise the execution of project notwithstanding a negative assessment.

9.2. Nevertheless, nothing precludes the developer (e.g., private company) from invoking those socio-economic benefits before the public authority to support his case.

[8] See, however, point 7.2 below.

[9] This is allowed by Law 42/2007, on the natural patrimony and biodiversity, Article 45(5)(third paragraph).

[10] The crux of the matter, however, is that certification of timely actions is left to the future and nothing guarantees that they will be verified.

[11] ec.europa.eu/environment/nature/natura2000/management/docs/art6/labrena_en.pdf

However, private interests cannot be taken into account by the authority when invoking the corresponding exception albeit this cannot always be done.

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*)?

10.1. Theoretically, and under the common procedural rules, this is possible, either in the context of an administrative appeal (under the general law on administrative procedure, Law 30/1992, of 26 November 1992) or of a judicial challenge to agency decision (under Law 29/1998 concerning judicial control of administrative action). However, it is generally understood –and applied by courts- that, whenever there is a case of complex balancing of conflicting interests, the administrative agency enjoys a large remit of discretion (Spanish Supreme Court Judgment of 8 April 2008). In general, courts grant deference to the "policy choice" or the "actual weighing" of contradictory, protected values. Only when the applicant can demonstrate that the agency ignored any environmental concern, or when the administrative decision can clearly not be grounded on the facts and materials produced at the environmental assessment stage, or that the decision is arbitrary or clearly not sound, can the court reverse the agency decision (Spanish Supreme Court Judgment of 8 April 2008).

10.2. The key factor here is that courts perform a control of "legality", but not of the policy choice performed by the agency. Thus, whenever the laws and regulations have been duly followed, whenever the agency states in a thorough way the reasons for reaching the decision, whenever the environmental and non environmental factors appear to have been dully taken into consideration in a "balanced" decision, there is little room for striking down or for "quashing" an agency decision that grant a permit despite the environmental effects of the project.

**PART B.- Balancing 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*?

1. Spanish legislation mainly refers to all *available* or *feasible* alternatives, which may very well be interpreted as "reasonable". For instance, Article 7.1(b) of Legislative Decree 1/2008 (mentioned earlier) provides that the project promoter must provide "an explanation of the main alternatives that have been considered, as well as a justification of the main reasons for the solution that has been selected, taking into account the environmental effects". On the other hand, Royal Decree 1131/1988 (also mentioned earlier), devotes the whole Art. 8 to the analysis of the different alternatives that are "technically feasible", and at art. 10 it says that the promoter must identify all the relevant environmental aspects, for every alternative considered.
2. Alternatives must be examined on a case by case approach, the public authorities enjoying a margin of appreciation in this respect. Nevertheless, proportionality may modulate a strict demand of any alternatives, e.g., if they are extremely expensive or impracticable for the developer.

*b) Only those voluntarily considered by the operator, or those required by objective criteria?*

1. First, it is for the operator to define the range of alternatives in his assessment of the project. However, the public authorities are under the duty to consider whether all practicable ones have in effect been considered. If the project promoter has clearly skipped a feasible alternative, the environmental agency must sent back the environmental report to the promoter, ordering him to take into consideration this alternative.
2. On the other hand, administrative courts are also entitled to quash a decision granting development consent if the range of alternatives is negligible, poor or insufficient in the light of the environmental values concerned or on the studies previously carried out (see e.g., Case C-304/05, *Commission v. Italy*; Spanish Supreme Court judgment of 22 September 2009).

*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?*

1. The difference between those two types of alternatives is already enshrined in EIA legislation albeit it is doubtful whether public authorities examine absolute alternatives as the ones mentioned in the question, e.g., high speed train *versus* airport, this kind of appraisal being made at a political level. However, once the decision has been adopted it is difficult that the assessment may lead to a different conclusion, e.g., a change of infrastructure.
2. The zero alternative is required under Natura 2000 rules but may also be considered under Directives 85/337 and 2001/42. This affects the global consideration of the project (or plan) but also the different alternatives to either sections of the whole project.
3. As regards the definition of "project", reference must be made to Directive 85/337. However, the Spanish Supreme Court has upheld the definition of project set out in Spanish environmental assessment legislation, according to which a project corresponds to the "technical documents" describing it. Arguably, this contradicts the broad notion of the Directive (Article 1). It should be observed that Member States are not allowed to redefine EU concepts already included in relevant EU legislation, e.g., Case C-142/07, *Ecologistas en Acción v. Ayuntamiento de Madrid*, since this is beyond their powers.

*d) Are projects defined as those meeting the operator's narrow objective, or also those which would serve a broader goal?*

This question is somewhat unclear, e.g., "narrow objective". It is for the operator to define the project he wants to execute. Public authorities are under the duty to control whether that definition may hide a more complex project, e.g., to avoid the carrying out of an assessment.

*e) Only those which are not more costly than the project proposed by the operator?*

1. If it is a private operator then it is for him to define the project. Public authorities may not interfere with a private decision.

2. If it is a project funded with public levies then economic assessments must be carried out. This does not avoid later redefinition of projects that may modify its dimensions or characteristics.

*f) Must the zero alternative be considered?*

Yes, Spanish legislation (State and Autonomous Communities) requires that the "zero alternative" be considered in the environmental assessment. For instance, Art. 8 of State Law 9/2006, on Strategic Environmental Assessment (incorporating Directive 2001/42), requires at Art. 8 that the report on environmental sustainability of the plan or program must include a consideration of the zero alternative. At the Autonomous Communities level, similar provisions may be found: Article 16 of Law 2/2002 of June 19, of the Autonomous Community of Madrid, clearly states that the environmental analysis of plans and programs must include a description of the zero alternative. So does Law 4/2008, of the Canary Islands, which also requires explicitly that alternative zero must be examined.

***2.-*** *Must the environmental effects of the alternatives proposed be as thoroughly checked as that of the proposed project?*

Yes, as mentioned *supra*, the project promoter must undertake a thorough environmental analysis for each of the alternatives that have been considered.

***3.-*** *Do opponents have standing in administrative proceedings and before administrative courts to argue that certain alternatives were not (adequately) considered?*

At this point it is possible to reproduce what has been said at point 10, Part A of this questionnaire, *mutatis mutandis.* Here, again, the role of the different alternatives in administrative adjudication is strictly connected with the legal regime of administrative discretion, and particularly with the scope of review that a court may apply in a likely legal challenge to the decision. Thus, if the agency has identified at least the most clear alternatives to the project, if the different impacts have been identified for each of them, the actual outcome of the balancing of the different alternatives remain in the domain of administrative discretion, and it is quite difficult for the applicants to get the decision quashed or reversed.

***4.-*** *What reasons have been raised to challenge the fair balancing of alternatives?*

See precedent reply

**PART C: General questions**

**1.** What is your overall assessment of experiences with balancing environmental risks with socio-economic benefits in relation to alternatives?

a) The overall assessment of the Spanish experience in this domain is that the balancing requirement is a legal constraint in agency adjudication. However, this obligation is depicted in a rather rough way and lacks precision. It has at least two different meanings: the procedural and the substantive one. For what concerns the first perspective, consideration of alternatives must be a necessary element of the decision-making process. There must be evidence in the administrative dossier that the agency did consider different alternatives, although the scope or the determination of those alternatives is not "enumerated" by the law. If, on the contrary, there was not such a

consideration of alternatives, then there is a flaw in the agency decision making process, and that may be a legal ground for judicial challenge.[12]

As regards the "substantive" component of the alternative requirement, the agency must provide a structured, sound and explicit reasoning on why did it chose a given alternative among those considered. If this does not happen, then one must support the claim that the decision is not supported by the facts, or that the agency final decision does "not address all the elements revealed by the procedure", as the Spanish law defines it. Then, again, that could be a ground for a legal challenge.

b) The impact of both perspectives in the domain of judicial control of administrative action is different. If the agency does not consider any alternative, it is a clear reason for quashing a decision on procedural grounds. However, a legal challenge based on the substantive aspect is hard to succeed, since the agency enjoys, as described earlier, a great remit for discretion and the court can not substitute the policy choice performed by the executive branch.
c) Most times, unfortunately, the consideration of alternatives is performed in a rather "routine" way, in order to fulfil a "formal" requirement, while the final choice on the actual alternative has been taken beforehand. No case is known where a court decided that a project should be performed following a different alternative than the one identified by the agency.

**2.-** *Would you suggest another way of how to structure the risk-benefit calculus?*

a) It is hard to encapsulate in a "mathematical" way the risk-benefit calculus, for there will always be ways for the agency to escape from this straitjacket.
b) On the other hand, it is hard to imagine that the law may identify and measure up in a "scientific" manner all the different ingredients of the administrative decision. It is then unavoidable to leave room for the agency to assess and appraise the different factor involved. The only way to limit agency discretion could be to increase the "procedural" aspects: for instance, the law may provide clearly that non-consideration of alternatives, or avoiding risk-benefit analysis will be a ground of illegality. In any case, may be it not just a problem of "structuring" the risk-benefit calculus, but structuring the scope of review of administrative action. If the legal system only allows the courts to perform a pure control of legality, and not a control of the reasonableness of administrative action, any formalistic re-structuring of risk-benefit analysis may not achieve the goal of ensuring "sound" environmental or licensing decisions.

[12] Having said that, environmental assessment some laws of the Autonomous Communities let the environmental agencies not to reach an express decision regarding the environmental repercussions of a project (or plan) by implicitly accepting the assessment performed by the developer, e.g., as regards alternatives (e.g., Law 6/2007 of Galicia).