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The Overriding Public Interest. Investing Versus Environmental Protection

To prevent the negative consequences of man's impact on the environment[1] law takes upon itself to balance the need for economic expansion and protection of natural resources. Such state of equilibrium was defined by law as a "state of balance in mutual interactions between human beings, the animated nature and the habitats created by the elements of inanimate nature is a given area"[2]. Environmental protection is viewed as science or a social movement[3]. In the scientific sense "it is based on biological sciences, in particular, ecology, and on chemistry, geography, geology, hydrobiology"[4]. It is also of interest to legal sciences. Laws governing the environmental protection are very dynamic and they enjoy support by the society. This, undoubtedly is the result of educating and promoting environment-friendly behaviors.

At the national level the environmental law includes the Constitution[5], subconstitutional environmental law[6] including the most important one: the Environmental Protection Act of 2001[7]. At the Community level, the environment is protected by primary[8] and secondary law (directives,

1 "Environment" consists not only of "all conditions affecting biological entities like organisms, population or communities", P. Więckowski, *Ekologia ogólna*, Oficyna Wydawnicza Branta, Bydgoszcz 1998, p. 430. It also is "a collection of material things and energy along with their mutual interactions and their effect on the subject of the environment, and also as a collection of the interactions and effects themselves"; M. Górski (ed.), *Prawo ochrony środowiska*, Warsaw 2009, p. 25.

2 Art. 3 sec. 32 of the Act – Environmental Protection Law of 27 April 2001, Journal of Laws of 2001, No. 62 item 627.

3 J. Strzałko, T. Mosso-Pietraszewska (eds.), *Kompendium wiedzy o ekologii*, Warsaw–Poznań 1999, p. 363.

4 Ibidem, p. 363.

5 Cf. Art. 5, 31, 68, 74 and 86 of the Constitution of the Republic of Poland.

6 Including : the Conservation of Natura Act of 1991, the Forest Act of 1991, Water Law of 2001, the Inspection for Environmental Protection Act, the Geological and Mining Act of 1994, the Animal Protection Act of 1997, the Act introducing the Environmental Protection Act, The Waste Act of July 2001 and other acts.

7 Journal of Laws No. 62, item 627.

8 The following acts were crucial for the environmental protection: the Single European Act ,OJ L No. 169/1987, the Maastricht Treaty , OJ C No. 191/1992, the Amsterdam Treaty and the Treaty of Nice.

regulations, decisions, opinions and recommendations). Some of them are directly binding and some require further implemented into national law[9]. Of utmost importance is the European network of protected areas – Natura 2000. It "was introduced into Polish legal system as implementation of two Community directives: the Birds Directive[10] and the Habitats Directive[11]. The Natura 2000 Ecological Network is important for at least two reasons: first, it is a relatively new form of protection, and second, it creates many controversies and anxiety on the part of investors[12].

2

Basic regulations concerning Natura 2000 sites are contained in a specialized act concerning conservation of nature. The relationship between these two acts would be best understood by comparing the meaning of "conservation of nature" and "environmental protection" often viewed as synonyms. "Conservation of nature" has a longer tradition than "environmental protection". The latter first came to be used in the 1960s, whereas the origin of the former goes back to the 19th century[13]. According to the normative approach, the "conservation of nature constitutes part of the environmental protection activities. (...) The Nature Conservation Act is a *lex specialis* in relation to the Environmental Protection Act", which provides a general framework[14]. This because nature is one of the elements – besides water, climate and air – of the environment. Therefore, "since modern environmental protection originated from protection of nature, the environmental protection law originated from the nature conservation law"[15]. Thus, it is clear that Natura 2000 sites should function under the Nature Conservation Act.

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9 The environmental protection law system can be divided into several categories, for more see J. Stochlak, *Polskie prawo ochrony środowiska. Uwarunkowania, zmiany, stan*, Instytut Ochrony Środowiska, Warsaw 2002, pp. 46–91.

10 Council Directive of 2 April 1979 on the conservation of wild birds No. 79/409/EEC, OJ EC 1979 L 103/1, as amended.

11 Council Directive on the conservation of natural habitats and of wild fauna and flora No. 92/43/EEC, OJ EC 1992 L 206/7, as amended. More in: B. Wierzbowski, B. Rakoczy, Prawo ochrony środowiska, Lexis Nexis, Warsaw 2010, p. 264.

12 U. Michałow, M. Radko, *Realizacja inwestycji a sieć Natura 2000 – działania minimalizujące*, "Technika Transportu Szynowego" 2008, No. 5–6, p. 42.

13 J. Sommer (ed.), *Prawne formy ochrony przyrody*, SGGW–AR, Warsaw 1990, p. 8.

14 J. Ciechanowicz-McLean (ed.), *Polskie prawo ochrony przyrody*, Difin, Warsaw 2006, p. 11.

15 J. Stochlak, op. cit., p. 65.

Art. 6 of the Natura Conservation Act lists ten forms of conservation. They cover a specific object (area, facility, species) and declared it as protected by a normative act and subjected to special legal regime. In this regime actions posing a threat are prohibited, sometimes under the penalty of imprisonment[16]. In addition to national parks, reserves, landscape parks, protected landscape areas, monuments of nature, documentation entities, ecological land, nature and landscape complexes and complexes designated for conservation of species of plants, animals or mushrooms. Art. 6, sec. 5, item 1 invokes Natura 2000 sites. Specific rules of conservation are set out in Articles 25–39.

There are several public authorities trusted with supervision, coordination or performance of tasks related to governing of and functioning of the European ecological network. The minister for the environmental designates protected areas by an ordinance, in consultation with the ministers of agriculture, rural development and water management. The ordinance, apart from indicating the name, location, a map of the area, the purpose and object of the protection, designates the authority empowered to supervise so established site. Such authority is to prepare a draft protection plan for the site within five years from its establishment, upon consultation with respective local councils. In addition, the supervising authority prepares and submits to the environment minister an evaluation of the level of protection as set out in a plan (every six years in case of special protection areas for habitats and every three years for special protection areas for birds).

Formally, under Art. 32, not a supervisory authority, but the minister is vested with supervisory powers to issue recommendations and guidelines, demand information and supervise the implementation of protection plans. Thus the authorities indicated by the minister in an ordinance have to report to him in compliance with Art. 17 of the Habitats Directive. If a Natura 2000 site is situated in a forest managed by the State Forests Enterprise "State Forests", conservation is effected by a forest district ranger responsible for the area in accordance with Natura 2000 protection plan. The latter has to be taken into account in the forest management plan. A district authority (*wojewoda*) is responsible for coordinating Natura 2000 sites, but the scope and instruments of coordination are far from clear. The fundamental

[16] W. Radecki, *Ustawa o ochronie przyrody. Komentarz*, Difin, Warsaw 2008, p. 65.

powers of a *wojewoda* are regulated in Articles 33–35a. They include issuing permits (by directors of maritime authorities in case of a sea area) to implement plans or projects which may affect natural habitats, plants or animal species. Simultaneous compensatory arrangements have to be made.

4

Natura 2000 was founded on the Birds and Habitats Directives. Its purpose is to maintain the natural heritage, in particular natural habitats and species that are valuable or endangered. Council Directive 79/409/EEC on the conservation of wild birds protects species indigenous to member states, except Greenland. It applies to birds, eggs, nests and habitats. It regulates, in particular, trading in and catching of birds, counteracting certain ways of killing birds and their capture; it provides for protection areas to preserve, maintain and re-establish biotopes (environments which along with biocenosis form the ecosystem) and habitats. The five annexes specify its provisions.
Directive 92/43/EEC gives priority to the biological variety to be effected through by protecting natural habitats and wild flora and fauna in member states, without prejudice to their economic, social and cultural requirements as well as regional and local characteristics. Its preamble declares that *it is necessary to designate special areas of conservation in order to create a coherent European ecological network. Art. 3 stipulates that a coherent European Ecological Network of special areas of conservation shall be set up under the title Natura 2000, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II.* (...)[17] *the Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC*[18]. Art. 6 of the Habitat Directive "sets out the framework for site conservation and protection, and includes proactive, preventive and procedural requirements. It is relevant to special protection areas under Directive 79/409/EEC, as well as to sites based on Directive 92/43/EEC. The framework is a key means of achieving the principle of environmental integration and ultimately sustainable development"[19].

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[17] Directive 92/43/EEC contains five annexes, including, lists of habitat types and plant and animal species for which special protection areas will be created, and criteria for the selection of areas qualifying as special protection areas.

[18] Thus, if special bird protection areas are established in accordance with the Birds Directive, they will be subject to the regime of special protection areas according to the Habitats Directive.

[19] *Managing Natura 2000 sites. The provisions of Article 6 of the "Habitats" Directive 92/43/EEC*, document prepared by Environment Directorate-General services of the European Commission, http://ec.europa.eu/environment/natura/natura2000/management/docs/art6/provision_of_art6_pl.pdf, p. 9.

The concept of overriding public interest was further developed in sections 2 and 4 of Article 6.

According Art. 6(3) to "any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation" (...). It is clear that an obligation to assess the implications of a project was imposed both on public authorities and on investors. A necessary condition accompanying an investment process is that "in the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public". Thus the Directive specifies strict investment prerequisites, where investment depends on the initial assessment of its environmental impact. It also requires public consultation.

Art. 6(4) allows for an exception from the above principle, since "if, in spite of a **negative assessment of the implications** (bolding added by J.Ch.) "for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic natura, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected". Compensatory measures should be presented by a member state to the European Commission. The remaining provisions of Art. 6(4) specify when the encroachments into Natura 2000 sites are allowed. They stipulate that "where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised" in order to implement the investment are "those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest".

The provisions of Art. 6(3) and Art. 6(4) were incorporated in the Nature Conservation Act almost literarily[20]. The wording of Art. 34 of the

[20] The obligation of implementation was imposed in Art. 23 of the Directive which stipulated, among other things, that "Member States shall bring into

Act is almost identical with that of Art. 6 of the directive[21]. Poland is mandated to achieve the goals set by directives but "the choice of form and methods is left to the discretion of national authorities"[22]. It reflects on the weight attached to these provisions by the Polish authorities.

6

Any departure from the general principle of non-intrusion into the Natura 2000 sites, provided for by both the Habitats Directive and national law must by justified by the imperatives characterizing the overriding public interest. The latter is, on the one hand, a prerequisite of any interference in the European Ecological Network, and on the other hand, it remains far from clear. It makes interpretation difficult and gives rise to controversies, discouraging public and private investors. Therefore, in order to specify the concept of the overriding public interest it is necessary to refer to the opinions of the European Commission, to Community law and to analyze the case law of the European Court of Justice, the only institution authorized to give the final interpretation of the Habitats Directive.

7

Art. 6(4) of the Habitats Directive invokes the concept overriding public interest in two paragraphs.

"If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic natura, the Member State shall take all

force the laws, regulations and administrative provisions necessary to comply with this Directive within two years of its notification".

[21] Art. 34. 1. If it is required by the overriding public interest, including reasons of social or economic nature, and if there are no alternative solutions, a *wojewoda* responsible for the area, and in sea areas, a director of a relevant maritime office, may permit the implementation of a plan or project that may adversely affect natural habitats and plant and animal species for the protection of which a Natura 2000 site was established, ensuring the performance of actions to compensate for natura necessary to ensure coherence and proper functioning of Natura 2000 sites, subject to sec. 2.
2. In case of a priority habitat or a species the permit, referred to in sec. 1, may be granted only:
1) to protect human health and life;
2) to ensure public safety;
3) to obtain favorable results of utmost importance for natural environment;
4) for purposes resulting from the imperative reasons of overriding public interest, after an opinion of the European Commission has been obtained (the Nature Conservation Act of 2004, Journal of Laws of 2004 No. 92, item 880, as amended).

[22] A. Wróbel (ed.), *Wprowadzenie do prawa Wspólnot Europejskich (Unii Europejskiej)*, Kantor Wydawniczy Zakamycze Cracow 2004, p. 121.

compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted".

"Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest".

In the above text the concept of public interest is preceded by the adjective "overriding" for a a reason. It served to emphasize that "the public interest must be overriding. Then, it is clear that not every kind of public interest of a social or economic natura is sufficient when balanced against the interests protected by the directive"[23]. It reasonable to assume that "a public interest can only be overriding if it is a long-term interest; short-term economic interests or other interests yielding short term benefits [are not] sufficient to out-weight the long-term conservation interests protected by the directive"[24].

In the first paragraph of Art. 6(4) the imperative reasons are relatively specific, since the reasons of a social or economic natura were at least generally indicated. It was further specified in section 2 invoking fundamental civic values such as human health, public safety and environmental protection. The list is certainly open as indicated by the expression "or (...) other imperative reasons of overriding public interest".

In 1999 the German government asked the Commission for an opinion on the expansion of the plant of Daimler Chrysler Aerospace Airbus Gmbh (DASA) in Hamburg-Finkenwerder. The expansion was claimed to be necessary for a new passenger aircraft Airbus A380. The project was to be situated in part of the Mühlenberger Loch area[25] – in the basin of the River Elbe within the area covered by Natura 2000. The area was classified as being of international importance under the Ramsar Convention[26].

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[23] *Managing Natura 2000 sites. The provisions of Article 6 of the Habitats Directive 92/43/EWG*, document of the Environment Directorate-General services of the European Commission, http://ec.europa.eu/environment/natura/natura2000/management/docs/art6/provision_of_art6_pl.pdf, p. 46.

[24] Ibidem, p. 46.

[25] The site was to cover 171 ha of the Mühlenberger Loch area or approx. 20% of its total area.

[26] Convention on Wetlands of International Importance of 2 February 1971.

The German authorities submitted that it was not possible to resort to alternative solutions since production of the aircraft required machines and devices located in the existing plant along with the highly qualified staff. It was also impossible to move the project elsewhere in the vicinity of Hamburg due to the size of the aircraft, and consequently, the size of a hangar and machinery. The European Commission shared that position. It indicated that the expansion was justified by the imperative reasons of overriding public interest, since:

1. The project will be of high social and economic significance to the region by creating demand for highly qualified employees directly and indirectly related to the project. It will have a positive economic and social impact on Hamburg and on neighboring lands: Schleswig-Holstein and Lower Saxony.

2. As Airbus is an international European consortium, the implementation of the project it to significantly influence the development of the European air-space industry, contribute to the technological progress in the aviation sector and foster cooperation. Consequently, it will increase competitiveness of the European aeronautic industry.

The Commission's opinion indicates that the list of reasons inherent in the overriding public interest was significantly expanded. Commission's opinion concerning a port in Granadilla leads to the same conclusion. A new container terminal of 26 ha in Granadilla, Canary Islands was to expand into a site of Natura 2000. The Spanish authorities proposed measures that would not eliminate a significant impact on the priority areas and species. In addition, alternative locations while not affecting the integrity of the protected area, would negatively affect the island's inhabitants, causing further disruption in the islands already imbalanced transport system. That in turn would render unfeasible the construction of a natural gas terminal necessary to diversify the energy sources. Therefore, the Commission agreed with the Spanish government expressing the view that a new terminal "would add needed capacity to accommodate future growth in container, dry bulk and general freight traffic while at the same time de-congesting the existing port of Santa Cruz"[27] and that "the port is expected to generate a sound economic rate of return and it

[27] *Opinion of the Commission pursuant to Art. 6 (4) § 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, concerning the Request by the Kingdom of Spain in relation to the construction project of the new port of Granadilla (Tenerife)*, http://ec.europa.eu/environment/natura/natura2000/management/guidance_en.htm, p. 6.

will also provide the island with the possibility of attracting international container traffic"[28].

Similarly, the Rotterdam port development project was to interfere with the Wadden Sea tidal area, another Natura 2000 site. Alternative solutions considered by the Dutch authorities could increase social and environmental damages and pose a risk to public safety. In its positive opinion the Commission noted that ports and port-related industries are the pillars of the Dutch economy. Secondly, if Holland is to maintain its current position on the market, at a time of expected growth in the global container handling, it must maintain competitive position in the Hamburg – La Havre range. Thirdly, the Rotterdam port is an important element of the Trans-European Network. However, the Commission's made a reservation that the imperative reasons in the Rotterdam case were different and referred not to human health, public safety or environmental protection. Hence, the shift in freight transport from land to sea will produce significant benefits such as the reduction of greenhouse gases, atmosphere pollution and ease the road freight transportation overload. These benefits should be considered in the assessment of the public interest[29].

The above cases show that understanding of the overriding public reasons may go significantly beyond the literal reading of Art. 6(4) of the Habitats Directive. In this context the opinion of the Commission concerning a French project to build a high-speed line TGV East is worth-analyzing. A railway was to run across a Natura 2000 site, including natural habitats covered by Annex I to the directive. Alternative solutions submitted by France would not allow to bypass the area of the European Ecological Network. In its opinion the Commission justified the project by the overriding public interest other than relating to human health, public safety or environmental protection. The Commission emphasized that the European TGV East project was viewed favorably by the Council of Ministers of the European Community and was granted priority by the European Council in 1994 in reference to previous EU decisions on the importance of infrastructure projects[30].

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[28] Ibidem, p. 6.

[29] Managing Natura 2000 sites. The provisions of Article 6 of the Habitats Directive 92/43/EWG, document prepared by Environment Directorate-General services of the European Commission, http://ec.europa.eu/environment/natura/natura2000/management/docs/art6/provision_of_art6_pl.pdf, p. 47.

[30] Opinion of the Commission pursuant to Art. 6 (4) § 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, concerning the request by France in relation to a project to build a high-speed line (TGV East), http://ec.europa.eu/environment/natura/natura2000/management/guidance_en.htm, p. 3.

Thus, the concept of overriding public interest known from Art. 6(4) provides only a general framework and has a broad scope. Its full interpretation is trusted with the European Commission and with the Court of Justice. As transpires from the case law the concept in question must be considered by reference to individual circumstances.

The above examples allow to adopt an incomplete catalogue of imperatives:

1. reasons relating to human health;
2. reasons relating to public safety;
3. reasons relating to environmental protection;
4. other imperative reasons such as:
   - ☒ the increase (or maintaining) of competitiveness of a given state or region;
   - ☒ the increase of competitiveness of the European Union;
   - ☒ the enhancement of international cooperation within the Community;
   - ☒ combating unemployment;
   - ☒ the implementation of priorities adopted by the European Union,
   - ☒ the implementation of projects strategic for the Community's interests.

The above reasons can be qualified as serving social or economic interests known from the first section of Art. 6(4).

The above document[31] aimed at providing guidelines to the member states on the interpretation of certain key concepts used in Article 6 of the Habitats Directive[32]. The document reminds that the Community law has resorted to the concept of *service of general economic interest* invoked in Art. 86 sec. 2 of the Treaty Establishing the European Community. It is a *sui generis* community law construct having no direct equivalent in domestic legal orders. Like overriding public interest it is a notion with a wide scope of discretion manifest in the fact that the "European Court of Justice has never given in its judgments a specific and precise definition of services of general economic interest (...). The Court prefers a casuistic approach and in each individual case assesses whether a given service has the features of a service of general economic interest[33].

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[31] Managing Natura 2000 sites. The provisions of Article 6 of the Habitats Directive 92/43/EWG, document prepared by Environment Directorate-General services of the European Commission, http://ec.europa.eu/environment/natura/natura2000/management/docs/art6/provision_of_art6_pl.pdf

[32] Ibidem, p. 5.

[33] A. Wróbel, *Traktat ustanawiający Wspólnotę Europejską.*, Vol. II. (K. Kowalik-Bańczyk, M. Szwajc-Kuczer eds.), Wolters Kluwer Polska, Warsaw 2009, pp. 518–519.

In 2006 the European Parliament and the Council adopted a services directive[34], the fundamental purpose of which was to establish general provisions facilitating the exercise of the right of establishment by service providers and the free movement of services. In an extensive preamble the concept of overriding public interest is invoked three times.

Item 65 of the preamble declares that although according to the principle of equal treatment and non-discrimination access to a service activity or the exercise thereof in a Member State, either as a principle or secondary activity, should not be made subject to criteria such as place of establishment, residence, domicile or principal provision of the service activity, these criteria should not include requirements that a provider or one of his employees or a representative must be present during the exercise of the activity when this is justified by an overriding reason relating to the public interest.

Item 69 of the preamble indicates that in order to coordinate the modernization of national regulations, it is necessary to evaluate certain non-discriminatory national requirements which, by their nature, could severely restrict or even prevent access to an activity or the exercise thereof under the freedom of establishment. This process should be reduced to the assessment of the aforementioned requirements taking into account the ECJ case law (except in competition law). The requirements should be abolished if they are discriminatory, disproportionate, or are not objectively justified by overriding public interest. In fact, the recitals of the preamble play the role of guidelines for the member states.

As for the scope of overriding public interest it is best to refer to recital 40 of the preamble. It declares that, firstly, the concept of overriding public interest has been developed in the case law relating to Articles 43 and 49 of the TEC, and, secondly, that it may continue to evolve. In this recital the concept of overriding public interest should cover at least such elements as: public policy, public security and public health, within the meaning of Articles 46 and 55 of the Treaty; the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare; the preservation of the financial balance of the social

[34] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ UE No. L 376 of 27.12.2006.

security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment, including town and country planning; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; cultural policy objectives, including safeguarding the freedom of expression of various elements, in particular social, cultural, religious and philosophical values of society; the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language; the preservation of national historical and artistic heritage; and veterinary policy.

Art. 4 section 8 in the normative part of the directive defines overriding public interest as reasons recognized as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objective.

The above text demonstrates that, first, the concept of overriding public interest contained in the preamble is in fact repeated in the normative part of Directive 2006/123/EC, however more concisely. Secondly, the extensive list is open and exemplary, which is emphasized by the legislator. And finally, a fundamental criterion by which to determine the notional scope of overriding public interest is the case law of the ECJ. Therefore, if the Court is trusted with giving final interpretation of the directive, including the notion and use of overriding public interest, it is possible that future judgments will substantially affect its current form. It is so broad a concept that that in all probability the issue of overriding public interest will never be brought to a close.