



Demand assessments in German infrastructure law as an instrument for strengthening environmental protection

- German experiences and a scope for improving -

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Overview

- I. Public demand assessments – an introduction
- II. Public demand assessment: legal framework in Germany
- III. Strengthening environmental protection in public demand assessments: specifications for environmentally sound public demand planning – results of a research report on behalf of the Federal Environment Agency -
- IV. Conclusion

I. Public demand assessments – an introduction



Federal Traffic
Infrastructure Plan
2030, draft

I. Public demand assessments – an introduction

- In Germany public infrastructure projects are generally subject to an administrative assessment of need (public demand; “Bedarfsprüfung”).
- In the case of major infrastructure projects, like highways or transmission lines for electricity, that assessment is often the first step within a multi-stage planning process (1. public demand planning – 2. preliminary sectoral planning with determination of spatial options – 3. project authorization)
→ tiered planning system for public infrastructures
- **scope:** The public demand assessment identifies and evaluates the existing needs, the alternative options to meet those needs, and the consequences (impacts) of different options. It leads to an official decision: declaration of publ. demand!
- Such assessments have a decidedly political character; the determination of public needs and demand is thus often not performed at the administrative level, but at the policy-making level (statutory declaration of public demand by the legislator, f.e. “Bundesverkehrswegeplan” (Federal Traffic infrastructure plan; “public demand plan”))

Figure 1: The role of public demand planning



I. Public demand assessments – an introduction

- in contrast, in accordance with our free market economy, privately sponsored projects (with spatial relevance) are only subject to similar assessments under certain circumstances:

in the EU (for public and private projects with spatial relevance):

→ if the project leads to significant effects on protected habitats (Habitats Directive) imperative reasons of overriding public interests are needed, including assessing of reasonable alternatives (Art. 6.4 HD)

(element of public demand assessment)

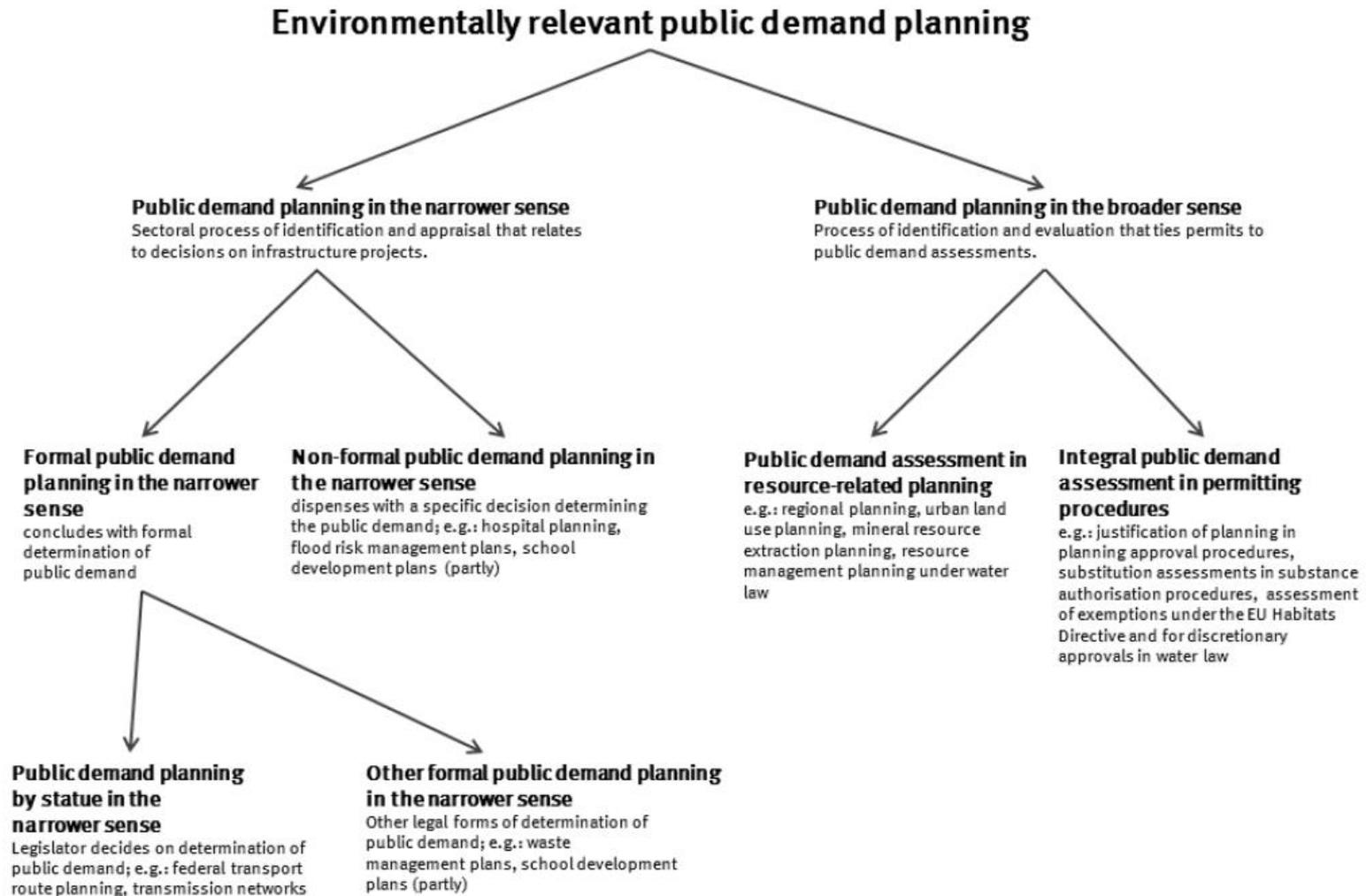
→ if the project leads to an deterioration of the status of a water body (WFD) resp. will lead to a non-compliance with the quality goals of WFD exemption requirements of Art. 4.5 and Art. 4.7 WFD, including assessing reasonable alternatives

(element of public demand assessment)

in Germany:

→ all projects with a requirement for a “plan approval procedure” (Planfeststellungsverfahren, a special kind of authorization procedure)

Systematization of public demand planning/assessment



I. Public demand assessments – an introduction

Public demand assessment and the environment

- If the official declaration of a public demand is the precondition for further planning steps and for the realization of infrastructure projects (like highways, railroads, waterways, transmission lines for electricity, airports, waste disposal sites), public demand assessments are a significant factor for environmental protection (what do we need?)
- German Federal Environment Agency (Umweltbundesamt) mandates the Helmholtz Centre for Environmental Research (UFZ) to analyze the legal framework for different public demand assessments in Germany and to develop a requirement profile how to strengthen the element of environmental protection in such assessments / planning steps
background: decline of public acceptance for a lot of large scale projects
hope of decision makers: a better public demand assessment will lead to more convincing decisions.
- This presentation highlights some of the findings

II. Public demand assessment: legal framework in Germany - some remarks



II. Public demand assessment: legal framework in Germany – some remarks

- A long legal tradition that urban development planning and the authorization of large scale projects by plan approval order (Planfeststellungsbeschluss) require a public demand assessment
→ necessity of „plan justification“ (Planrechtfertigung)
- **Federal Administrative Court** (constant jurisdiction since 1969):
the exercise of state or public planning authority is not lawful in and of itself; it requires a justification. The necessity of planning must first be proven by means of assessing the public demand, applying the measure of the purposes of sectoral or spatial planning law.
Legal reasons: large scale projects and urban development planning very often affect basic individual rights: **property**
in the meantime the Fed. Admin. Court base it's jurisdiction more on the **principle of proportionality**
in my opinion: also the **constitutional principle of environmental protection (Art. 20 GG)** leads to the requirement of public demand assessment.

II. Public demand assessment: legal framework in Germany – some remarks

- The Court's rulings do not define how a public demand assessment is to be determined on the basis of the objectives of sectoral law in the given case, nor which procedures and methods are to be applied.
- Court's accentuates that the scope for forecasting and process design is wide, and accordingly limit the test to a check of whether decisions are evidently appropriate or not (in the case of determination of public demand by statute: review on the criterion of 'evidently inappropriateness').
- This judicial restraint is a consequence of the largely political character of determination of public needs and demands.
- **result:** Legal requirements ruled out by the court's are not very strong, but they are nevertheless an important first building block to come to more rationality of public decision making according to public infrastructures ("what do we need?")

II. Public demand assessment: legal framework in Germany – some remarks

- The necessity of Public demand assessments are originally based on rulemaking by court's (Federal Administrative Court)
- In the meantime the German legislator established legal acts for a lot of public demand assessments as a first planning step within a tiered planning system for public infrastructures
f.e.
- Federal Highway Planning (Bundesfernstraßengesetz)
- Planning of transmission lines for electricity (Energiewirtschaftsgesetz)
in many ways the most progressive public demand assessment:
 - forecasting of public demand has to build on different scenarios
 - public demand assessment has to ensure the renewable energy goals of the government
 - different kinds of public participation

III. Public demand assessments and the environment: specifications for environmentally sound public demand planning

– results of a research report on behalf of the Federal Environment Agency --



III. Public demand assessments and the environment: specifications for environmentally sound public demand planning

The mandate (given by Federal Environment Agency):

- analyze the legal framework for the different public demand assessments in Germany,
- develop a requirement profile how to strengthen the element of environmental protection in such assessments / planning steps
- Give recommendations for policy makers for further legislation to implement the findings
- **Overall goal:** evaluate the procedures, the methods and the controlling, generate suggestions to provide a good base for further public demand decisions

III. Public demand assessments and the environment: specifications for environmentally sound public demand planning

The analysis leads us to 4 types of elementary requirements, which should be acknowledged for the further development of public demand assessments

- 1) general specifications
- 2) special specifications regarding to environmental quality
- 3) specifications concerning forecasting
- 4) specifications concerning up-to-dateness and control (checks) by independent bodies resp. the society

Specifications upon environmentally sound demand planning for public projects

General specifications

- ▶ Explicit statutory stipulation of requirements planning as a precondition for permit decisions
- ▶ Separate requirements determination by a state institution with legitimate authority, as conclusive formal act of the first planning stage
- ▶ Involvement of the public in needs assessment

Specifications concerning environmental quality and other objects of legal protection

- ▶ Identification, evaluation and consideration of conceptual alternatives
- ▶ Identification, evaluation and consideration of impacts upon human health and the environment (mandatory SEA)
- ▶ Requirements determination oriented substantively to environmental and sustainability goals, especially environmental quality goals enshrined in statute

Specifications concerning forecasting

- ▶ Disclosure of underlying assumptions, and transparent characterisation and consideration of forecasting uncertainties
- ▶ Statutory provisions governing the production of forecasts

Specifications concerning up-to-dateness and checks

- ▶ Check on requirements planning by way of direct recourse to judicial review
- ▶ Check on requirements planning through non-judicial review mechanisms (courts of auditors, environment commissioners)
- ▶ Periodic updates

IV. Conclusion

- The acknowledgement of these specifications will lead to better public demand assessments and hopefully to more convincing decisions about large scale infrastructure projects
- leads to a reduction of the political margins for the declaration of public demands
- Helps linking environmental quality standards and the authorization of large scale projects (beyond the current EU-law)
- next steps: from research to practice – chances for implementation?

Thank you very much for your attention!



Literature:

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