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Boas Kümper

Mutual feedback principle

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Leibniz Association

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Contents

The mutual feedback principle, which is regulated in section 1(3) of the Federal Spatial Planning Act (Raumordnungsgesetz, ROG), primarily serves as a guiding principle for spatial planning and expresses a certain planning culture, but does not go beyond the express statutory requirements of participation, coordination and weighing of interests.

1 Basic principles and origins

In the discussions concerning spatial planning decisions, reference is made time and again to the mutual feedback principle, in particular to support arguments for local authorities' freedom of discretion in relation to planning issues. Nevertheless, political and legal dimensions must be differentiated. From the perspective of administrative policy, the principle essentially expresses the mutual and countervailing impacts – ahead of the adoption of any specific legal provisions – between higher and subordinate decision-making levels to arrive at a solution that addresses the interests of all decision-makers as far as possible (Schmitz 1995: 370 et seq.). This combination of top-down and bottom-up planning is, however, not unique to spatial planning law (von der Heide 2001: para. 57; cf. *StGH Nds.* [State Constitutional Court of Lower Saxony], judgment of 22 October 2010, case no. 6/09, NdsVBl. *[Niedersächsische Verwaltungsblätter]* 2011, 47 on the interaction between tertiary education development planning and federal state university planning), but is also a theme in management studies in relation to private enterprises, also commonly referred to in that context as the *mutual feedback process*. In spatial planning, the mutual feedback principle gained legal and thus special prominence, as it has been positively adopted and legally defined in section 1(3) of the Federal Spatial Planning Act. According to this provision, the development, structure and securing of the territorial subdivisions should fit the characteristics and requirements of the overall space, while the development, structure and securing of the overall space should take the characteristics and requirements of the territorial subdivisions into account. Section 8(2) sentence 2 of the Federal Spatial Planning Act includes an additional provision on the preparation of the regional plans, according to which preparatory land-use plans and the results of the other city planning undertaken by local authorities must be taken into account in accordance with section 1(3) for the purposes of the ▷ *Weighing of interests* pursuant to section 7(2).

The provision adopted in section 1(3) of the Federal Spatial Planning Act was already included in section 1(4) of the Federal Spatial Planning Act of 1965 and section 1(4) of the Federal Spatial Planning Act of 1998. It is based on a draft of the German Federation of Umbrella Associations of Local Authorities *(Bundesvereinigung der kommunalen Spitzenverbände)* for the Federal Spatial Planning Act of 12 February 1964, submitted as an alternative to the Government's draft legislation of 25 April 1963, which was considered to be too centralist. While section 2(2) of the Government's draft only sought to ensure that the plans of the federal states should not impede the realisation of the spatial planning principles in the entire federal territory (with a view to section 2(2), the justification of the Government's draft legislation spoke of a 'principle of harmonisation'), the draft proposed by the umbrella associations of local authorities explicitly wanted to engage decision-makers at the level of the local authorities. Above all, the competence for urban land-use planning, which at that stage had been transferred to the local authorities only shortly before, was to be protected against encroachments from the supra-local spatial planning level. Section 1 of the alternative draft stipulated that 'a decisive consideration of spatial planning and state spatial planning at the federal and state level should be that – with due regard to the natural and economic situation in the specific areas concerned – the structure of the smaller space fits into the structure of the larger space, and that the structure of the larger space takes the needs and characteristics

of the smaller space into account.'[1] This wording was largely adopted in section 1(4) of the Federal Spatial Planning Act of 1965 (see also Braese 1982: 12 et seq.; von der Heide 2001: para. 57).

2 Legal scope of the mutual feedback principle pursuant to section 1(3) and section 8(2) sentence 2 of the Federal Spatial Planning Act

The provisions on the mutual feedback principle adopted in the Federal Spatial Planning Act refer in section 1(3) only to the various tiers of spatial development planning *(Raumordnungsplanung)* (spatial planning by the federation, statewide and regional spatial structure planning), but do not include its interaction with municipal planning; this aspect is covered only by section 8(2) sentence 2 of the Federal Spatial Planning Act (cf. Bartlsperger 2000: 32 et seq.; Runkel 2010: para. 89).

In the light of its origins, the mutual feedback principle should be understood as primarily an expression and key notion of a certain understanding of planning or ▷ *Planning culture* (see also Appold 2000: 33; Bartlsperger 2000: 34). It essentially rejects the perception of spatial planning as a totalitarian 'top-down' imposition of plans in the sense of 'command and obedience' (Runkel 2010: para. 93) and thus expresses scepticism towards the notion of spatial planning *(Raumordnung)*, which had been prevalent before the adoption of the Federal Spatial Planning Act of 1965 (see also Appold 2000: 23 et seq.). According to this principle, specifications for the purpose of spatial planning can only become binding if they have addressed the concerns of the other respective level of decision-making (Durner 2005: 83, 103 et seq.).

In current spatial planning law, however, the mutual feedback principle has become overlaid with various specific provisions on procedural matters and participation, as well as by material specifications, such as requirements to develop, duties of consideration and observation (Runkel 2010: para. 88, who believes it may have even become an 'old hat'). Accordingly, it does not establish any further, independent obligations for the spatial planning authorities. In the first place, express statutory provisions on the participation of the planning agencies whose interests are affected and on cooperation in spatial planning (cf. sections 10, 13, 18 of the Federal Spatial Planning Act) obviate the need for an independent procedural mechanism, e.g. under the designation of the *'mutual feedback process'* in line with the mutual feedback principle (see also Braese 1982: 8 et seq., 14 et seq., 49 et seq., who wants to distinguish this procedural manifestation from the mutual feedback principle in material law). And in material law, too, there is no measurable regulatory scope for the mutual feedback principle that goes beyond the prerequisites for the required weighing of interests in spatial planning (section 7(2) of the Federal Spatial Planning Act), as the interests of other planning agencies must already be taken into account as public interests in the ▷ *Weighing of interests* for spatial planning purposes. To the extent that section 1(3) of the Federal Spatial Planning Act emphasises the interaction between

1 „Für Raumordnung und Landesplanung in Bund und Ländern soll unter Berücksichtigung der natürlichen und wirtschaftlichen Gegebenheiten der einzelnen Gebiete maßgeblich sein, daß die Ordnung des kleinen Raums sich in die Ordnung des größeren Raums einfügt, die Ordnung des größeren Raums die Erfordernisse und Gegebenheiten des kleineren Raums berücksichtigt."

territorial subdivisions and overall space, this merely has a declaratory effect for the weighing process, which may illustrate the relevance of those concerns but cannot serve as the basis for any independent obligations (see also Bartlsperger 2000: 33 et seq.; Durner 2005: 83, 346 et seq.; Runkel 2010: para. 94). And finally, the systematic position of section 1(3) of the Federal Spatial Planning Act in conjunction with the tasks and guidelines of spatial planning *(Raumordnung)* indicates that the provision was not intended to create any specific formal or material obligations (see also Bartlsperger 2000: 34). In regard to the required weighing of interests, too, section 8(2) sentence 2 of the Federal Spatial Planning Act merely has declaratory effect.

Planning law jurisprudence generally also does not recognise the mutual feedback principle to have any independent regulatory content. Nevertheless, parties frequently rely on the principle in legal proceedings to demonstrate insufficient consideration of municipal planning interests by supra-local planning agencies (cf. on the designation of concentration areas for wind power by regional planning: *OVG Niedersachsen* [Higher Administrative Court of Lower Saxony], judgment of 28 August 2013, case no. 12 KN 22/10, *NuR (Natur und Recht)* 2013, 808; similarly: *OVG Mecklenburg-Vorpommern* [Higher Administrative Court of Mecklenburg-Western Pomerania], judgment of 19 June 2013, case no. 4 K 27/10, juris, para. 109). However, case law usually denies the occurrence of a breach of the mutual feedback principle (cf. also *VGH Bayern* [Higher Administrative Court of Bavaria], judgment of 25 April 2006, case no. 8 N 05.542, *NuR* 2007, 57; *OVG Thüringen* [Higher Administrative Court of Thuringia], judgment of 15 March 2008, case no. 1 KO 304/06, *ZfBR [Zeitschrift für deutsches und internationales Bau- und Vergaberecht]* 2009, 50; *VGH Hessen*[Higher Administrative Court of Hesse], judgment of 10 May 2012, case no. 4 C 841/11.N, *DVBl. [Deutsches Verwaltungsblatt]* 2012, 981). While a correlation with the required weighing of interests is frequently presumed (cf. *OVG Niedersachsen*, judgment of 31 March 2011, case no. 12 KN 187/08, *BauR [Zeitschrift für das Baurecht]* 2011, 955; *VGH Hessen* [Higher Administrative Court of Hessen], order of 5 February 2010, case no. 11 C 2691/07.N et al., juris, para. 192 et seq.; *VGH Baden-Württemberg* [Higher Administrative Court of Baden-Württemberg], judgment of 17 December 2009, case no. 3 S 2110/08, *VBlBW [Verwaltungsblätter für Baden-Württemberg]* 2010, 357; *VGH Baden-Württemberg*, judgment of 7 December 2009, case no. 3 S 1528/07, juris, para. 45), there is, in the absence of any weighing errors, no room for an independent finding of a breach of the mutual feedback principle (stated expressly in: *OVG Brandenburg* [Higher Administrative Court of Brandenburg], judgment of 27 August 2003, case no. 3 D 5/99.NE, *DVBl.* 2004, 256; *OVG Brandenburg*, judgment of 12 November 2003, case no. 3 D 22/00.NE, juris, para. 122; correctly ruling against an overly broad application of the mutual feedback principle as a 'general' duty to consult independent of any legal duties to adapt and observe, also: *OVG Berlin-Brandenburg* [Higher Administrative Court of Berlin-Brandenburg], judgment of 25 April 2006, case no. 10 A 14.05, juris, para. 32 et seq.).

3 General applicability of the mutual feedback principle in spatial planning law as a whole?

The mutual feedback principle has been expressly embedded in statutory law only in the Federal Spatial Planning Act and in some federal state spatial planning acts. Yet some legal commentators believe that the mutual feedback principle also applies outside the scope of spatial planning *(Raumordnung)* as a general principle of planning law, irrespective of any express statutory provision; this is deemed to be true in particular for sectoral planning (see also Gaentzsch 1985: 241; Ronellenfitsch 1986: 14; Braese 1982: 35 et seq., 177 et seq.; cf. also Durner 2005: 346 et seq.; in favour of application beyond spatial planning *(Raumplanung)*: von der Heide 2001: para. 57; for its application within the various levels of landscape planning: Biermann 2014: 423 et seq.; for a different viewpoint: Runkel 2010: para. 89). In this sense, the mutual feedback principle is also understood to be a special manifestation of the constitutional principle that all competences must be exercised with due consideration of any conflicting competences of other stakeholders (Brohm 2002: section 36, para. 4 and section 9, para. 6 et seq.; Appold 2000: 33). This generalising, constitutionally established foundation of the mutual feedback principle offers a parallel to the required weighing of interests, which is generally understood to be a requirement for any constitutional planning irrespective of the existence of a provision to that effect in sub-constitutional legislation, as it already applies by virtue of constitutional law (cf. judgment of the Federal Administrative Court *[Bundesverwaltungsgericht, BVerwG]* of 20 October 1972, case no. IV C 14.71, *BVerwGE* [Official Reports of the Federal Administrative Court] 41, 67/69; Durner 2005: 270 et seq.). However, there is no need for such a general, constitutionally established mutual feedback principle, as the legal positions of subordinate planning agencies are already sufficiently protected by the statutory requirements of participation, coordination and weighing of interests. As the binding effects of the mutual feedback principle do not go beyond the scope of these provisions, there is no room for an independent mutual feedback principle of constitutional weight (Bartlsperger 2000: 34). The same must be true in regard to local planning autonomy (for a different viewpoint: Bartlsperger 2000: 35 et seq.).

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