AVOSETTA MEETING Vienna 2018 – QUESTIONNAIRE – German report (Bernhard Wegener)

FLEXIBILITIES WITH REGARD TO MEETING EU REGULATORY OBJECTIVES AND REQUIREMENTS

I. Policies of prioritising economy and ecology

1. Are you aware of similar initiatives, current or planned, in policy- and/or decision-making in your country which result in prioritising economic activities over environmental interests? If so, please provide examples.

Comparing the situation in Austria with the situation in Germany there is a similar legal status in Germany. Thus, this status is not a product of recent law making, but a result of the development of the last decades.

Since 2011 the impact assessment of new laws is realised by the "National Regulatory Control Council" (*Nationaler Normenkontrollrat*) in a way that by law it considers also "the financial costs for the economy, i.a. for medium-sized businesses".

Since 1967 there is a constitutional provision referring to an "overall economic equilibrium" that is to be achieved within the European framework.

A kind of "Business Hub Ombudsman" does not exist in Germany.

Furthermore, in the sector of environmental law there is almost no "gold plating" in Germany. The German legislator rather focuses on a "one to one"-implementation (p. 137, coalition agreement 2017/2021). In some sectors of EU-environmental law, esp. in the area of rules on standing before administrative courts, which has been a highly controversial topic in Germany for decades, this approach has led to a minimalistic and sometimes deliberately restrictive and obviously insufficient transformation of the requirements of EU and international law. The resulting "Umwelt-Rechtsbehelfsgesetz" had to be modified four times and is still not in conformity with EU-law.

All in all it is also true for Germany that prioritising goes more in the direction of supporting the prospering economy than environmental interests. Referring to this, the new coalition agreement of CDU, CSU and SPD says in the chapter "Environment and Climate": "Maintaining the competitiveness of our business location is the basic condition of a successful *Energiewende* and to make the *Energiewende* an international success model."

Techniques aiming at introducing more flexibility to or even diluting regulation

1. Offsetting regulatory directions

a) EU-ETS

1. (How) was the possibility of using international credits transposed into national legislation?

The current EU-Directives regarding the EU-ETS were implemented into German Law through several acts and laws. Among them are the TEHG,[1] the ProMechG[2] and the ZUG.[3] Centerpiece of the implementary acts is the TEHG, which mainly provides rules on eligibilities and their

[1] Treibhausgas-Emissionshandelsgesetz.

[2] Gesetz zur Einführung der projektbezogenen Mechanismen nach dem Protokoll von Kyoto zum Rahmenübereinkommen der Vereinten Nationen über Klimaveränderungen und zur Umsetzung der Richtlinie 2004/101/EG.

[3] Z.B. Gesetz über den nationalen Zuteilunsplan für Treibhausgas- und Emissionsberechtigungen in der Zuteilungsperiode 2005 bis 2007 (ZuG 2007) bzw. ZuG 2012.

allocation and was substantially amended in 2011 due to several changes in European Law.[4] However, the possibility to use CDM and JI mechanisms provided for in Article 6 and 12 of the Kyoto-Protocol and the "Linking-Directive"[5] was mainly implemented through the so-called ProMechG.[6] These rules took effect on September 30th 2005 and were therefore, from the beginning, a key component of the legislator's efforts to comply with international and European requirements. The ProMechG mainly contains rules, on how the different projects are to be executed.[7] E.g. § 3 ProMechG lays down the specific requirements, which have to be fulfilled, in order to get approval for CDM and JI Projects, which take place outside of the German state.

In Order to link the "baseline and credit" approach of the CDM and JI to the "cap and trade" approach of the general EU-ETS, the German Legislator also laid down specific rules on how CER's and ERU's may be used in Germany in § 18 TEHG (former § 6 TEHG). These rules state that international credits have to be transformed into accepted eligibilities, in order to be used in the ETS. Basically, these rules therefore repeat, what was set out in the reformed European Directives. E.g. the new restrictive provisions of Art. 11b of the Directive are implemented in § 18 TEHG.

However, due to the continuing development of European Law, the German implementary acts find themselves in constant change. The number of eligibility credits and its facilitation is regulated in the different ZUG's, which provide rules on distribution for different time periods. E.g. for the time period between 2008 and 2012 the ZUG (2012) additionally contained rules on the cap of international credit allowances in its § 18. According to that provision, emitters were allowed to convert up to 22 % of their entire emittary eligibilities from CERs and ERUs into additional eligibilities. These rules were abrogated and transferred into § 18 TEHG, which now also sets the general cap at 22 % in its § 18 Subs. 2 Nr. 1 TEHG. The now new § 18 Subs. 2 Nr. 2 and 3 TEHG also contain special provisions for special facilities, which are not already included in Nr. 1 (cap at 4,5 %) or the now additionally regulated airplane emissions (cap at 1,5 %). Because the European trading period runs out in 2020 the provision makes clear, that the therein laid out possibilities may only be used between 2013 and 2020.

To sum up, it may be said that the use of international credits is extensively possible in Germany. However, due to several restrictions in the European regulatory system, the legislator also included several restrictions in the use of CER and ERU.

2. Has your country used the possibility of using international credits to comply with EU-ETS requirements? If so, to what extent? Are you aware of the reasons for relying on this possibility?

German law envisages the use of international credits only for private facilities and emitters. The Law does not provide the possibility for the state to use international credits in order to comply with international and European regulation.[8] To my knowledge, the BRD therefore has not participated directly in the EU-ETS.

3. How is the change to a domestic emissions reduction target received in your country? Is this change expected to affect your country's abilities to comply with EU-ETS requirements? Are you aware that other possibilities are discussed to compensate the loss of the flexibility through international credits?

[4] *Greb*, Der Emissionshandel ab 2013, S. 23 f.
[5] Richtlinie 2004/101/EG des Europäischen Parlaments und Rates vom 27.10.2004 zur Änderung der Richtlinie 96/61/EG über ein System über den Handel mit Treibhausgas-Emissionszertifikaten in der Gemeinschaft im Sinne der projektbezogenen Mechanismen des Kyoto-Protokoll.
[6] Gesetz zur Einführung der projektbezogenen Mechanismen nach dem Protokoll von Kyoto zum Rahmenübereinkommen der Vereinten Nationen über Klimaveränderungen und zur Umsetzung der Richtlinie 2004/101/EG.
[7] *Marr*, NVwZ 2006, S. 1102 (1105).
[8] *Ehrmann*, ZUR 2006, S. 410 (413).

Since the state does not have the possibility to use international credits in order to comply with EU and international regulation, the abolishment of the international trading system will not have a direct effect on Germany in the sense that an adoption of the current plans would become necessary. However, especially in the private sector, CDM-projects were rather popular, because they provided a certain leeway for facilities and emitters wherein they could purchase additional credits.[9] It is therefore expected that the new regulatory system will mainly effect the private sector and the ability to purchase additional leeway.

Since carbon reduction is not a local, but an international goal, the international credit-system was, in general, received with positive reception. However, the main problem of the current system was and still is its error-proneness.[10] The Commission recognized the ineffectiveness of this instrument since the very beginning of its implementation and therefore included a bundle of regulatory restrictions in the ETS-reform for 2013-2020, in order to enhance the effectiveness and at the same time reduce potential malpractice.[11] However, since the success of these restrictions is still doubtful, a complete abolishment of the program may be deemed necessary.

b) Effort Sharing (Non-ETS)

1. (How) were the flexibility mechanisms of the ESD transposed into national law?

The reduction of green-house gas emissions is targeted with several decentralized plans of the German Government, known as the "Klimaaktionsplan 2020 and 2050". Therein the Government lays down a wide range of policy measures, which are also supposed to ensure the accomplishment of European requirements. For example, these measures include the shutdown of the most harmful coal-power-plants, the focus on renewable energies and a wide range of local community projects.[12] But as far as one can see, flexibility mechanisms have not been specifically implemented into German Law up until this point. The German Government uses the flexibility mechanisms in Art. 3.3 ESD, but parliament has not enacted a specific law, in which the procedural aspects are being laid down. Because the ESD is binding and directly applicable to the state, an extra implementation into German Law apparently was not deemed to be necessary.

2. Has your country used any of the flexibility mechanisms yet in order to comply with ESD requirements? If so, to what extent?

Up until this point, the German Government mainly used the possibility to bank its credits in accordance with Art. 3 Sub. 3 S. 2 of the ESD. These banked credits were used in the years 2016, 2017 and will be used for parts of 2018 to ensure the adherence with EU regulation. However, it is expected that these flexibility mechanisms will no longer be available to the Government, because the banked credit will be exhausted. In the second part of 2018 the Government is therefore expected to use the borrowing mechanism laid down in Art. 3.3 ESD.[13] Because this mechanism will not be sufficient for 2019, it is then planned to use the flexibility mechanisms in Art. 3.4 ESD and therefore purchase additional credit.[14] Up until this point such a purchase has not taken place. It is therefore not known, to what conditions and in what manner this expected purchase will be transacted.

[9] Vgl.: Bilanz der DEHSt CDM & JI: Ein Jahr Projekt-Mechanismen-Gesetz.
[10] *Wegener*, ZUR 2009, S. 283.
[11] http://www.wwf.de/themen-projekte/klima-energie/klimapolitik/klimakonferenz-der-un/1997-kyoto-japan/flexible-mechanismen/
[12] *Stäsche*, EnWZ 2017, S. 446.
[13] https://www.tagesspiegel.de/wirtschaft/co2-bilanz-deutschland-verpasst-auch-klimaziel-der-eu/20877780.html
[14] http://www.ikem.de/deutschland-verpasst-die-eu-klimaziele-2020/#_ftn3

3. How is this proposal on further flexibility mechanisms received in your country? If the proposal becomes law, would you expect your country to rely on those flexibility mechanisms in the future?

The newly released coalition agreement between the SPD and CDU/CSU is silent on this matter. It is therefore difficult to predict, if and how the government will make use of additional flexibility mechanisms. However, since the Government currently fails to achieve the set out goals for carbon reduction, it can be expected that additional flexibility mechanisms will be used, in order to avoid sanctions.

2. Exemptions from regulatory directives

a) Water Framework Directive: Establishing less stringent environmental objectives

1. (How) was the possibility of establishing less stringent environmental objectives transposed into national law? Is the transposing legislation stricter than Art 4.5 by, e.g., adding further requirements for deviating from the environmental objectives?
§ 30 WHG implements Art 4 (5) WFD almost congruently.

2. Have national authorities relied on the option of establishing less stringent environmental objectives in their river management plans? If so, to what extent and for what reasons? If not, why?
Yes, national authorities rely on the exception.
In the **first management cycle (2009 – 2015)** it was planned not to achieve the "good status" of 36% of groundwater and even 82% of surface waters, but only a **minority of cases** considered the exception of Art. 4 (5) WFD. With regard to groundwater, this applied to the mining regions of the Rhine, Maas, Elbe and Oder river basins; concerning the surface waters, this applied to the Weser river basin, where heavy metals from waste dumps, mines and old sites are introduced into smaller waters. In the majority of cases, only deadline extensions according to Art 4 (4) WFD or § 29 (2) WHG were sought in order to achieve the management objective of "good status" at a later date. (BMU/UBA, Die Wasserrahmenrichtlinie – Auf dem Weg zu guten Gewässern, www.umweltbundesamt.de/sites/default/files/medien/publikation/long/4012.pdf, p. 13 f.)
In the **current (second) management cycle (2015 – 2021)** the German authorities continued to maintain the "less stringent environmental objectives" from the first management cycle and also set other "less stringent environmental objectives" (with regard to the Weser or Elbe, for example) using the exemptions in Art. 4 (4) WFD. In the **future (third) management cycle (2021 – 2027)** they will have to rely on the exception in Art. 4 (5) WFD in a **large number of cases** (Reese, ZUR 2016, 203 ff., who refers to a paper of the federal / state water working group: LAWA, Handlungsempfehlung für die Ableitung und Begründung weniger strenger Bewirtschaftungsziele, die den Zustand der Wasserkörper betreffen, LAWA-Arbeits-programm Flussgebietsbewirtschaftung, Produktdatenblatt 2.4.4). The reason is, of course, the inadequate quality of the water, but also that the mentioned deadline extensions are only possible two times for six further years in each case. Therefore, in the third management cycle it must finally be decided on whether the "good status" or the "less stringent environmental objectives" should be achieved.

Due to the forecast of the increasing use of the exception, it is feared that the rule-exception-ratio will be reversed due to the non-achievement of the objectives under § 27 WHG (surface waters) or § 44 WHG (coastal waters) or § 47 WHG (groundwater).
(In favour of a general rule-exception-ratio: ECJ and Reese, ZUR 2016, 203 ff.; for a different view: Franzius, ZUR 2015, 643, 649.)
So far the reasons for the establishment of “less stringent environmental objectives” have been mainly “practical impossibility” (due to human activities or natural conditions) and much less often “disproportionately high costs”.

3. If national authorities have established less stringent environmental objectives in their river management plans, are these objectives regularly reviewed? Have such less stringent environmental objectives been adapted or even lifted?

   The exceptions ("less stringent environmental objectives") must be regularly reviewed (BeckOKUmweltrecht-Giesberts/Reinhardt/*Ginzky*, § 30 WHG, Vorbemerkungen). The LAWA recommends the review as part of the update of the river management plans (LAWA, Textbausteine für die Festlegung weniger strenger Bewirtschaftungsziele, die den Zustand der Wasserkörper betreffen, Produktdatenblatt 2.7.11, p. 7). This has been done, for example, in relation to the "less stringent environmental objectives" for groundwater of the Elbe (here: Saale as inflow) in the first management cycle (see question 2) as part of the update of the management plan for the second management cycle in December 2014. This example also shows that due to the ongoing measurements an adjustment of the objectives is regularly considered as needed as part of the update, but in the concrete case the objectives of the first management period were confirmed on the basis of appropriate data (FGG Elbe, Überprüfung der Festlegung weniger strenger Bewirtschaftungsziele Grundwasserkörper SAL GW 14a (Merseburger Buntsandsteinplatte)).

4. Are there possibilities for the public to challenge the establishment of less stringent environmental objectives in river management plans? If so, please describe those possibilities briefly.

   Pursuant to § 83 (4) WHG (implementing Art 14 WFD) each person may submit written comments to the responsible authority within six months after the publication of the management plan (including the exceptions). However, due to the legal nature of the management plan as a "publicized administration internal" (Czychowski/Reinhardt, WHG Kommentar, § 83, Rn. 8) a judicial review (*Normenkontrollantrag*) under § 47 (1) no. 2 VwGO relating to a river management plan is not permitted (for a different view: Götze, ZUR 2008, 397 f.).

   Additionally, pursuant to § 85 WHG (also implementing Art 14 WFD) the responsible authorities shall encourage the active participation of all interested persons in the establishment, review and update of action programs and river management plans. Therefore, the public is also involved in establishing the "less stringent environmental objectives" for the respective water bodies.

b) Industrial Emissions Directive: Setting less strict emission limit values

1. (How) was the option of setting less strict emission limit values as permit conditions transposed into national law? Is the transposing legislation stricter than Art 15.4 by, e.g., adding further requirements for deviating from the emission limit values?

   The possibility of setting less strict emission limit values provided by the IED is implemented in national German law only on the basis of technical characteristics of the installation, not due to the geographical location or local environmental conditions, § 7 (1) b) no. 1 a) and § 48 (1) b) no. 1 a) BImSchG. This is a slight deviation from the basic principle of “one to one”-implementation in Germany, because the transformation is a little more restrictive, compared to the requirements of the IED, but would have been without hardly any practical relevance anyway.

   (Betensted/Grandjot/Waskow, ZUR 2013, 395 ff.; Koch/Welss, NVwZ 2015, 633 ff.)

2. Have national authorities relied on the option of setting less strict emission limit values in permitting industrial installations? If so, to what extent, for what reasons and for which types of industrial installations? If not, why?

Up to now, exceptions have not been established by the regulator. The authorities also did not grant any exceptions in individual cases on the basis of § 17 (2) b) no. 1 BImSchG in the first reporting period.
(First reporting period: 01.01.2013 - 31.12.2013; the figures for the second reporting period 01.01.2013 - 31.12.2016 should have been presented to the European Commission on 30.04.2018 (date was postponed from 30.09.2017).

3. If national authorities have set less strict emission limit values in permitting industrial installations, is there a requirement to review these permit conditions regularly?
No less strict emission limit values were set in the first reporting period, see above.

4. Are there possibilities for the public to challenge the setting of less strict emission limit values as part of permit conditions, the lack of review of such less strict emission limit values respectively? If so, please describe those possibilities briefly.
If the less strict emission limit values were set by ordinance or within the scope of the authorizing administrative act itself, an action for annulment (*Anfechtungsklage*) of the permitting administrative act (when indicated accompanied by an incidental standard review of the ordinance) may be admissible. Furthermore, when it comes to an action of an environmental association, the provisions of the UmwRG are to be considered.

3. Exemptions and offsetting combined: the case of NATURA 2000

1. How was the obligation to take compensatory measures in view of the coherence of the network as part of the appropriate assessment transposed into national law? Do the national rules go beyond the requirements of the Directive by, e.g. adding further requirements for compensatory measures?

Art. 6 (4) of the Directive 92/43/EEC (Habitats Directive) states that the Member States shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. Member States have to inform the Commission about the compensatory measures adopted. Hence, no further requirements for compensatory measures are foreseen by the Habitats Directive. The Directive was transposed into the §§ 31-36 of the German Federal Nature Conservation Act (BNatschG). § 34 (5) states that before a project of overriding public interest is approved or implemented the necessary measures have to be arranged. However, the rule does not state what these necessary measures could be in particular.[15] According to the German Federal Administrative Court, these measures can be the measures listed by Art. 3 (3) read in conjunction with Art. 10 of the Habitats Directive.[16] § 34 (5) 2 of the national Act states that the competent authority has to inform the European Commission via the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety.

Therefore, the national law conforms to the standards set by the European Directive. In particular, it does not foresee any further requirements for the compensatory measures.

2. Does your national law allow for 'mitigating measures' or 'protective measures' to be considered under the rules transposing the appropriate assessment of the Habitats Directive? If so, to what effect? Can such 'mitigating measures' or 'protective measures' allow a developer not to undergo the test set out in Art 6(4) Habitats Directive?

In practice, developers occasionally try to avoid compatibility testing for their projects by planning protective and mitigating measures which are supposed to prevent negative effects.[17]

[15] BeckOK UmweltR/Lüttgau/Kockler, BNatSchG, § 34, Rn. 24-26, beck-online.
[16] BVerwGE 128, 1.
[17] Landmann/Rohmer UmweltR/Gellermann, BNatSchG, § 34, Rn. 11, beck-online.

However, administrative courts did not accept measures of that kind as a reason to abstain from performing a compatibility test.[18]

Nevertheless, a project which causes significant impairment to the preservation goals and protective purposes of the Directive can be considered as a permissible project if the impairment is eliminated by a comprehensive accompanying protective concept. A necessary condition thereby is that the effect of the concept to eliminate the impairment is beyond question.[19] In this case a developer does not have to undergo the test set out in Art. 6 (4) of the Habitats Directive.

Mitigating and protective measures can be part of such concepts.[20] According to the 9th senate of the German Federal Administrative Court, compensation measures can be a part of protective concepts as well.[21] On this notion, the court considered the re-founding and preparation of replacement habitats as eligible measures in a protective concept.[22] This opinion was criticized with the statement that compensation measures could not enable developer to abstain from performing a compatibility test. In its latest decision, the 4th senate of the German Federal Administrative Court ruled that only mitigating and protective measures but no compensating measures where capable of excluding an impairment created by a project[23] and therefore would allow developers not to undergo the test of Art. 6 (4) Directive.

3. Are you aware of any other options, in law or in court practice, that allow for the offsetting of negative environmental impacts within the context of the Natura 2000 framework? If so, please describe these options. If not, are you aware of discussions on this subject pushing for a change of the law?

The German court practice does not consider measures of agricultural land use as projects covered by the Habitats Directive. Therefore, farmers are generally not obliged to undergo the compatibility test set out by Art. 6 (4) Directive[24]. This practice has partly been criticized. The notion of 'project' could only exclude measures of agriculture if the latter would comply with the requirements of 'best practices' set out by § 5 (2) of the Federal Nature Conservation Act. Otherwise there would be no reason why those measures should be less harmful than projects from other areas of the economy.[25]

Developers tried to avoid compatibility testing for their projects by emphasizing that the negative effects of their project would be only of minor extent. However, administrative courts did not approve to this. According to the judges, impairment of any extent would impose the duty on the developer to undergo compatibility testing. Otherwise the summation effect would lead to a slinking damage for the protected areas. Furthermore § 34 (1) of the German Federal Nature Conservation Act (BNatschG) would not foresee such an exception for projects with minor impairment.[26]

Furthermore, compatibility testing after permitting the project has not been allowed under German law. The test has to be performed prior to the permission for the project.[27]

4. Does ecological economics provide an answer? Is there any debate in your country suggesting that we should better factor in the socio-economic services of natural resources?

[18] OVG Greifwald, NuR 2011, 136 (141).
[19] BVerwG, ZUR 2003, 416 (419).
[20] BVerwG, ZUR 2003, 416 (419).
[21] BVerwG, NuR 2007, 336, Rn. 54 f.; NVwZ 2010, 1225, Rn. 57.
[22] BVerwG, NuR 2014, 344, Rn. 59 f.
[23] BVerwG, NVwZ 2010, 123.
[24] BVerwG, Urt. v. 6.11.2012 – 9 A 17.11.
[25] Landmann/Rohmer UmweltR/Gellermann, BNatSchG, § 34, Rn. 7, beck-online.
[26] OVG Münster, NuR 2012, 342 (355).
[27] Landmann/Rohmer UmweltR/Gellermann, BNatSchG, § 34, Rn. 2, beck-online.

There has been no recent and major debate on this issue.