Recent Developments in German Environmental Law

Gerd Winter (January 8, 2006)

1. New government coalition

The new government which is based on a center coalition of christian and social democrats has repeatedly declared that environmental protection shall be, more than before, become a motor of economical innovation carrying opportunities for international competitiveness and employment. Of particular importance in this respect will be renewable energy resources and energy conservation on the one hand, and biotechnology on the other. This means, that, even more than before, environmental protection rhetoric will be outdated. Those used to it will have to learn the language of win-win. This is a challenge also for environmental law. It will more and more be „enriched" by risk-cost-balancing. I believe the strategy should therefore be to point to economic damage resulting from environmental damage, and to scrutinise the economic expectations often overoptimistically alleged as a justification of projects. Interdisciplinary work for environmental lawyers will mean cooperation not only with natural sciences but also with economics.

2. Water framework directive

This directive has been transformed into Bund and Laender legislation. The responsible Land administrations are working hard to develop the plans and programmes required by the Directive. It seems, however, that the work on strengthening standards and implementing them in order to trigger the actual improvement of water use conditions have come to a halt. The work out there at the spot appears to have made way for the production of documents.

3. Air pollution

On January 1, 2005, the first of the air pollution standards prescribed by Directive 1999/30, i.e. the limit values on particulate matter, became binding, as provided both by the Directive and the Regulation transposing it. Although Art. 8 Directive 1996/62 requested the MS „to ensure that a plan or programme is prepared or implemented for attaining the limit value within the specific time limit" almost nowhere such plans had in fact been prepared. In many agglomerations the limit values were reported to exceed the thresholds. A public and professional debate arose on what the binding character meant in this situation, and if the courts could be invoked to trigger action.

Two kinds of complaints were reaching the courts. One was that persons living close to non-attainment roads asked the courts to order the responsible agencies to draft an attainment and action plans, and to take specific measures such as the restiction of traffic. Some courts denied the plaintiff to have legal standing arguing that the limit values protected the public as a whole rather than the

individual neighbour.[1] Other courts did accept standing to enforce the limit values because obviously neighbours do benefit from them. But they denied that the claim was grounded. Where a plan was missing it was said that the administrative agencies were already hard working on their elaboration. Where specific measures such as traffic restriction was ask for they said that there were different possibilities to reduce the actual emissions, and that the agencies had discretion to select the best measure.

The other kind of complaint is related to the construction of roads. For instance, in Dresden the responsible Land Minister authorised the construction of two more lines for an important and often congested road in the inner city. Students working in a close-by university library filed a complaint asking the court to quash the authorisation on the ground that already now the limit values for particulate matter (PM 10) were exceeded, and that more traffic and thus more emissions were to be expected from the enlarged road. Due to special legislation for East Germany the case was decided by the Federal Administrative Court as a first instance.[2] The court decided that the students had standing to sue because not only persons living but also persons working in polluted surroundings were to be protected by the limit values. But the court found the case not to be grounded arguing that the pollution caused by the road traffic could be reduced by other means than the denial of further space for transportation.

In more general terms, the plan based approach to environmental problems intelligent as it may seem for its deployment of a whole bundle of different instruments proves to be of no use for court protection of citizen rights. The right is there – to be protected from pollution above certain standards – but it does not extend to a specific measure. I should like to invite colleagues to discuss strategies of how to better use the courts in this situation.

4. Nature protection law

Germany has still not notified all of the Natura 2000 sites required and faces a fine of some 700.000 € per day by judgement of the ECJ to be rendered in mid february. The reason for the delay is general resistance from the side of the agricultural and industrial lobby, but also the structure of a federal state in which the competence for nature protection lies with the 16 Laender. Nevertheless German courts have pioneered in the carving out of a preliminary protective regime already in the run-up of the formal designation and determinaton of a protected area. The ECJ has in the Dragaggi case followed this line, although somewhat more cautiously, by acknowledging protection of those areas which have been notified but not yet put on the EC list. German

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1 Note that under German law a legal norm must aim at the protection of individuals in order to qualify as a „Schutznorm" (protective norm) from which legal standing to enforce the protective standard can be derived.

2 BVerwG 9 A 6.03 f 26 May 2004, Official Reports vol. 121 p. 57 et seq.

courts go even further than the Dragaggi jurisprudence by extending the preliminary protection regime to areas which qualify for designation but have not been notified to the Commission. The Federal Administrative Court has refined its case law especially in relation to Art. 6 para 3 and 4 Directive 92/43, such as on what an encroachment on a site is, what interest qualifies as an overriding public interest, and what is meant by alternative solutions. A complaint presently pending at the Federal Administrative Court concerns the question whether a dam cross-cutting a protectable area and it by 5 percent is an encroachment per se, or if it must still be shown that the birds living and nesting in the area are affected. Another question to be answered is the scope and financial feasibility of alternative options: Do „alternative solutions" only mean better geographical placement of the project, or does the term also involve other concepts, as, in this case, the improvement of dikes in lieu of the construction of a dam.

5. Biotechnology

The German Law on Gene Technology (Gentechnikgesetz, GenTG) was thoroughly revised in 2004 to transpose Directive 2001/18 on the deliberate release of GMOs and to adjust to Regulation No. 1829/2003 on the placing on the market of genetically modified food and feed. The core of amendments was to strengthen the environmental impact assessment, to establish duties of monitoring environmental impacts of deliberate release and marketing, to introduce labelling requirements, and to ensure the coexistence of GMO based agriculture with conventional and organic agriculture. With regard to ensuring coexistence a duty to register the sowing of GM-seeds and rules on good agricultural practice were laid down, as well as a liability of GMO-farmers in case genes contaminate other farmers' crop which can then no more be sold as GM-free. Criticism by the seed indutry that this liability would prevent farmers from using GM-seeds has tempted the new government to weaken the liability, most probably requiring negligence as a precondition for liability. It widely went unnoticed in the public debate that Regulation No. 1829/2003 has shifted to the EC level the risk assessment and decision-making on GM food and feed, and argueably also on GM seed, thus alienating decision-making from the attention of the normal citizen. This was done in response to the complaint the US and other states have filed at the WTO against the so-called EC moratorium on GMOs.