Recent Developments of Environmental Law in Germany in 2012/13

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Legislation

1. As a consequence of the ECJ judgment in the Trianel case (C-115/09) the German Act on Environmental Law Remedies (Umweltrechtsbehelfsgesetz – UmwRG) has been amended (publication of 8. April 2013, BGBl. I S. 753). The revised law allows an association action irrespective of whether an individual person had legal standing in the case. The amendment also makes clear that the association may allege breaches not only of EU but also national environmental law in the pertinent areas, i.e. EIA, IPPC and Natura 2000. In addition the law extends the grounds for challenging EIA based decisions: presently it is only the complete absence of an EIA or preliminary test of the necessity of an EIA, in the draft it is also an incomplete EIA (provided the omission is likely to have been relevant for the final decision.
   Following proposals developed by a representation of bigger German enterprises (Bundesverband der Deutschen Industrie – BDI) the new law also creates certain new obstacles for legal actions in the field of environmental law. § 4a UmwRG introduces a stricter time-limit (six weeks, with the possibility of a longer time-span set by the court) for the reasoning of the plaintiff. If the administrative authority is granted a certain margin of assessment of facts in the application of environmental legislation, the court shall only check to see if the facts have been recorded correctly and completely, the procedural rules and legal policies have been complied with, that law has not been misunderstood, and that no extraneous considerations exist. One might characterize this to reduce the traditional German high density of court review to something like the English Wednesbury standard. In addition, concerning suspensive effect of complaints, the law specifies that the court shall order or restore the suspensive effect of the legal action brought by an association only if an overall assessment gives rise to "grave doubts" as to the legality of the administrative act. The literature already expressed doubts, whether this "special" (and especially restrictive) rules of court review are in conformity with EU-law. Especially the ECJs jurisdiction on the effective and non-discriminatory application of national procedural rules in cases concerning EU-law may not allow such special legislation.
2. The German change of energy policy from fossil to renewable sources is considered to necessitate the construction of a much closer network of electricity lines which for instance allows to transport electricity from the wind parks in the North to the less wind rich South, and vice versa if there is no wind in the North but water power in the South. The construction of transmission lines incites resistance from house owners who are afraid of non-ionizing radiation – a typical case of inner-ecological conflicts. A law was enacted that provides for a stepwise identification of new lines including also notice and comment procedures for the concerned and general public. This has caused various practical problems including the question of determination of transmission need, the effectiveness (or illusiveness) of public participation, and the possibility of laying cables instead of constructing high voltage pylons.
3. The German feed in system for renewables (ie priority feed in of renewable electricity into the grid for a guaranteed price the additional costs of which is paid from a renewable energy charge on end-consumers) has produced the so-called merit order effect: high input from renewables (especially wind) increases energy supply, this reduces the market price for electricity, which in turn increases the difference between guaranteed price and market price and thus the money that must be collected from the

renewables energy charge. A first reaction was to lower the guaranteed price, especially that for electricity from sun energy collectors which are not efficient in a rainy country like Germany.

Case law

1. There is still much doubt about the correct application of the ECJs decision in the Slovak brown-bear case, C-240/09, of 8.3.2011 (Lesoochranárske zoskupenie). A number of German courts have interpreted the ECJs call for a generous „interpretation" of national law on standing in a creative and generous way, granting standing even in situations where standing would not have been granted according to the traditional understanding of German procedural law (see for example: VG Wiesbaden, Az. 4 K 757/11.WI(1) of 10.10.2011, ZUR 2012, 113; confirmed by Judgement of 16.08.2012 – 4 K 165/12.WI, Immissionsschutz 2012, 190 (Luftreinhalteplanung); VGH Kassel, 14.05.2012 – 9 B 1918/11, ZUR 2012, 438, 440; VG München, 09.10.2012 – M 1 K 12.1046, ZUR 2012, 699 Annotation Klinger, ZUR 2012, 702; VG Augsburg, 13.02.2013 – Au 2 S 13.143, juris Rn. 21.
   The higher administrative court of OVG Koblenz has even internally divided on the matter: see on one hand 6.2.2013 – 1 B 11266/12 and on the other 27.2.2013 – 8 B 10254/13. In the meantime, the question has reached the BVerwG 7 C 21.12 – still pending (Quick revision to VG Wiesbaden). The BVerwG might refer the case to the ECJ for further clarifications.
2. Dangerous substances are licensed in the EU in various regimes. Under all regimes, the producer/importer must supply information about the toxicity and about other potentially dangerous aspects of the substance. This information is often generated by the producer/importer himself. It is made available to public authorities of the Member States, to the EU-Commission and to EU-agencies such as ECHA. A critical examination of the information supplied is often hindered. The public is generally restricted to access to summary information of a more general character. The details of the substance-licensing-applications are often kept secret. They are considered to be business-secrets under freedom of information-law. The systematic problem is that independent (and critical) studies on substances are often dismissed by the industry as non-valid. They are supposed not to meet the high standards of industrial testing routines.
   Currently, PAN-Europe and Greenpeace are trying to get more detailed information concerning test-data on Glyphosat, the herbicide mostly used world-wide. A respective case is currently pending before the EU-Court; see T-545/11 (Greenpeace u. Pan-Europe/Kom). Of potential relevance is the opinion of Advocate General Kokott, of 23.9.2010, Rs. C-266/09, Propamocarb, para 92.
   In Germany PAN-Europe and Greenpeace have unsuccessfully tried to get the very same information from the Bundesamt für Verbraucherschutz und Lebensmittelsicherheit (BVL), which is the authority in charge of coordinating the transnational licencing process. The VG Braunschweig rejected the application, stating, that 1. The information shall be considered as business secrets, 2. The secrecy-exemption of "emissions" is not applicable, because the requested information about the testing and the product is not covered by this exemption, 3. There is no overriding public interest in releasing the information because the danger created by Glyphosate has not been sufficiently established.
   The case highlights general problems of access to information in licensing procedures.
3. The BVerwG submitted to the ECJ a request for preliminary decision asking questions about the legal effect of administrative procedural failure (C-72/12). Concerning

flawed EIA it asked the question if a mistake in the EIA is only relevant (ie leading to a quashing of the final decision) if there was a concrete possibility (konkrete Möglichkeit) that another decision would have been taken without the mistake, or if the mistake is to be given more effect. The first alternative corresponds to the practice of the court, the second would necessitate that the ECJ invents a new formula. Maybe the avosetta group should discuss this question in the light of court practice in other member states.

4. There is a general trend in court case law to preclude third party allegations from legal protection if they were not submitted at the stage of administrative proceedings with sufficient specification. See Federal Adminisrative Court judgment of 29 Sept. 2011, 7 C 21.09, BVerwGE . [1]For a concrete case see Administrative Court Halle judgment of 28 August 2012, 4 A 51/10, ZUR 2013, 109.The BVerwG opined that preclusion does not breach the principle of effectiveness. It however refused to submit the problem to the ECJ as a prelimimary question.

[1] The court of first instance had determined: „ Mit den Einwänden gegen die Richtigkeit der Immissionsprognose sei der Kläger bereits präkludiert. Auch mit dem Vorbringen, die Zusatzbelastung mit Stickstoffdioxid im Einwirkungsbereich der Anlage sei unzulässig hoch, sei der Kläger präkludiert, da er sich hierzu in seinem Schreiben vom 18. Januar 2007 nur pauschal geäußert habe. Insbesondere die nunmehr im Klageverfahren erhobene Rüge, dass die mit dem Ausstoß von Stickstoffdioxid durch die Anlage verbundene dauerhafte Überschreitung des in § 3 Abs. 4 der 22. BImSchV enthaltenen Immissionsgrenzwertes von 40 µg/m3 unzulässig sei, lasse sich den Ausführungen im Einwendungsschreiben nicht ansatzweise entnehmen; das Gleiche gelte für die Überschreitung des NO2-Immissionswertes nach Nr. 4.2.1 der TA Luft.