Recent Developments of Environmental Law in Germany in 2012

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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) had to be amended. This was initiated by a draft of the government submitted to the Bundestag in october 2012 (BT Drs 17/10957). The draft 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 draft 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.
2. In the aftermath of the German nuclear exit there is now much upcoming legislation and law implementation fostering renewable energy sources.
    a. One crucial point is the need to transport renewable electricity from where it is abundant to where it is lacking. This entails massive investment into the network. The construction of new electricity tranportation lines however causes potest by affected houseowners and tenants. A comprehensive scheme was introduced in order to avoid unnecessary projects and involve the public. Three steps are envisaged: (1) the elaboration and adoption of a need plan which determines the volume of electricity expected to be transported from where to where. (2)The determination of corridors for new lines. (3) The authorisation of individual projects. All three steps are subject to public participation. A problem of this in principle commendable scheme is that houseowners and tenants will only know at the third step if they are affected. However, they will still be able to challenge the previous steps at court when appealing against the final decision.
    b. Another topic is the rising price of electricity. The average price of 24 cents per kw will after January 2012 be increased by 3-4 cents, ie about 15. This is mainly due to the fact that the renewable energy charge (which reflects the cost difference between conventional and renewable energy) must be elevated with the decreasing input of (fallaciously) cheaper nuclear power. This has caused concern about additional burdens for low income families and has been used by the political wings to put the nuclear exit into question. From the other side it was criticised that the many industries are freed from the renewable energy charde thus causing cross-subsidisation from households to that industry.

Case law

1. On the release of GMOs: Sometimes (and maybe in future increasingly often) seeds that are sold as GM free are found to contain traces of GM seeds. If they are sown is that a deliberate release which is not allowed without prior authorisation? In one case concerning rape cultivation, at the occasion of quality checking of seeds the competent authority found GMO traces in a sample of seeds and ordered a farmer who was using the seeds not to bring the harvest on the market, not to use the seeds for further cultivation, destroy the harvest by ploughing it into the soil, apply herbicides to any

offspring and desist from cultivation on the field of rape for one year. The farmer argued that the sowing of the seeds was no “deliberate” (“gezielt”) release of GMOs, because he did not know about the GMO traces. The case went up to the Federal Administrative Court (BVerwG of 29.02.2012) which ruled that the word “deliberate” is meant to delineate genetic engineering in contained and open systems excluding accidental introductions of GMOs into the environment from the authorisation regime for releases. It was not meant to exclude the accidental presence of GMOs in non-GMO crop from the release regime. This was also necessitated by the aim of this regime which is to effectively check environmental effects of the introduction of GMOs into the environment. The decision appears as very harsh but another decision would have opened up a loophole for de facto introduction of GM seeds.

2. An interesting decision on questions of standing was taken by the administrative court of Frankfurt (02.09.2011, ZUR 2012, 440). A local commune had filed a complint against the authorisation of a plant burning brown coal dust for electricity generation. The commune alleged air pollution of the vicinity. The court interpreted the clause members of the public” in Article 9(3) Aarhus convention to not only include NGOs but also local communes representing the public interest of their inhabitants.
3. The BVerwG submitted to the ECJ a request for preliminary decision asking questions about the legal effect of administrative procedural failure. 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.