Recent Developments of Environmental Law in Germany in 2013/14

Bernhard Wegener

Legislation

1. On 9th April 2014 the European Commission adopted **new rules on public support for projects in the field of environmental protection and energy** (http://ec.europa.eu/competition/sectors/energy/eeag_en.pdf.). The guidelines shall support Member States in reaching their 2020 climate targets, while addressing the market distortions that may result from subsidies granted to renewable energy sources. To this end, the guidelines promote a gradual move to market-based support for renewable energy. They also provide criteria on how Member States can relieve energy intensive companies that are particularly exposed to international competition from charges levied for the support of renewables. With these new rules the Commission opted for a compromise with Germany which had been under close scrutiny for its large number of exemptions from those charges. Furthermore, the guidelines include new provisions on aid to energy infrastructure and generation capacity to strengthen the internal energy market and ensure security of supply

Case law

1. As reported in 2013, there is still some 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 been 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 been decided by the BVerwG 7 C 21.12, of 5.9.2013 (Quick revision to VG Wiesbaden). The BVerwG has not refered the case to the ECJ for further clarifications but has decided on its own, following the generous approach of the ECJ.
   The court granted the plaintiff environmental organization a right of action to enforce an immission control air pollution action plan. According to the BVerwG EU-law commands a broad interpretation of the national concept of "subjective public rights". The German Code of Administrative Court Procedure (§ 42 II 2 Verwaltungsgerichtsordnung – VwGO) must therefore be interpreted in a broad sense. Environmental NGOs recognized under § 3 UmwRG therefore derive a right of action directly out of § 47 para 1 BImSchG.
   The Brown Bear decision is currently primarily read as a decision on the need for action rights for environmental organizations. But Art. 9 para 3 Aarhus Convention speaks about the legal protection for "members of the public". The term is broadly

defined in Article 2 para 4 Aarhus Convention. The right of action shall therefor also be a right of individual plaintiffs.

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.
   As reported last year, PAN-Europe and Greenpeace have tried to get more detailed information concerning test-data on Glyphosat, the herbicide mostly used world-wide. In Germany PAN-Europe and Greenpeace had 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.
   In a parallel attempt to get the information, Greenpeace and PAN-Europe have been more successful before the EU-Court, T-545/11, 8.10.2013 (Greenpeace u. Pan-Europe/Com). The Court held that that Greenpeace and PAN-Europe had the right of access to (nearly) all the requested information. The Court held that the requested information was information about "emissions" and could therefore not be kept secret under the exemptions for business secrets. The Commission challenged the decision before the ECJ (pending case C-673/13 P).
3. Meanwhile the ECJ gave its verdict on the request for preliminary decision by the Bundesverwaltungsgericht asking questions about the **legal effect of administrative procedural failure** (C-72/12 – **Altrip**). Concerning flawed EIA the BVerwG 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. Only the first alternative corresponds to the practice of the BVerwG.
   The ECJ answered that: "Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as precluding the Member States from limiting the applicability of the provisions transposing that article to cases in which the legality of a decision is challenged on the ground that no environmental impact assessment was carried out, while not extending that applicability to cases in which such an assessment was carried out but was irregular. Subparagraph (b) of Article 10a must be interpreted as not precluding national courts from refusing to recognise impairment of a right within the meaning of that article if it is established that it is conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant. None the less, that will be the case only if the court of law or body hearing the action does not in any way make the burden of proof fall on the applicant and makes its ruling, where

appropriate, on the basis of the evidence provided by the developer or the competent authorities and, more generally, on the basis of all the documents submitted to it, taking into account, inter alia, the seriousness of the defect invoked and ascertaining, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making, in accordance with the objectives of Directive 85/337."

4. On 21 March 2014, the Commission brought an action (Case C-137/14) against Germany before the ECJ, asking that the Court should declare that, by

regarding the provisions of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment as not, in principle, conferring any **subjective rights**, and thereby largely excluding any recourse to legal action by individuals (Paragraph 113(1) of the Verwaltungsgerichtsordnung (Administrative Court Rules));

limiting the annulment of decisions on the basis of procedural errors to the complete absence of a requisite environmental impact assessment or the absence of a requisite pre-assessment (Paragraph 4(1) of the Umwelt-Rechtsbehelfsgesetz (Law on environmental appeals), 'UmwRG') and to cases in which the applicant proves that the procedural error was causative as regards the result of the decision (Paragraph 46 of the Verwaltungsverfahrensgesetz (Law on administrative procedure), 'VwVfG') and the applicant's legal position is affected;

limiting the right to bring proceedings and the scope of the courts' review to objections previously raised within the period allowed for raising objections in the administrative procedures that led to the adoption of the decision (Paragraph 2(3), UmwRG and Paragraph73(6), VwVfG) ("**Präklusion**")

the Federal Republic of Germany has failed to fulfil its obligations under Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control).

In essence, the following pleas in law are raised:

In substantive terms, the rules adopted by the defendant are inadequate and contradict both the aforementioned case-law and the judgment of the Court of Justice in Altrip.

In relation to the judicial protection afforded to individuals the Federal Republic continues to restrict any review by the courts to compliance with rules conferring subjective rights within the meaning of the 'Schutznormtheorie' (protective provision theory). Further restrictions apply to the judicial protection afforded to individuals as well as that afforded to organisations. Thus the UmwRG permits annulment of decisions granting authorisation only if there is no environmental impact assessment, but not if the assessment was carried out incorrectly.

In addition, Germany provides for annulment of a procedurally unlawful environmental impact assessment decision that has been challenged by individuals only if the applicant specifically makes out a case for the proposition that that decision would have been different if there had been no procedural error, and the procedural error affects a substantive legal position to which the applicant is entitled.

Further, objections by organisations in judicial proceedings are precluded in so far as they have not already been raised during the administrative procedure. Lastly the new version of the UmwRG and the relevant German case-law fail, in key respects, to meet the requirements of Directive 2011/92, as determined in more detail by the Court of Justice in **BUND/Trianel and Altrip**.

These significant restrictions are contrary overall to the objective of Directive 2011/92: to provide broad judicial protection in accordance with Article 9(2) and (3) of the Aarhus Convention.

5. A green member of the German Bundestag filed a complaint concerning the planned new Nuclear Power Plant **Hinkley Point C** in the UK to the **ESPOO**-committee. The UK has failed to inform the public and other Member States about the project (with the notable exemption of Austria, which had asked for its participation). In a formal letter to the UK-Government, the ESPOO-Committee stated that in failing to consult its neighbours, Hinkley Point raises "a profound suspicion of non-compliance" with international law (the Espoo Convention on Environmental Impact Assessment in a Transboundary Context).
   In a parallel development, An Taisce - the National Trust for Ireland – on 27th March 2014 successfully obtained leave to take its Hinkley Point legal challenge to the Court of Appeal in London. The case is likely to be heard before the end of the summer. An Taisce argues that the UK government's decision to approve Hinkley Point C nuclear plant (on England's west coast) without first consulting the public in Ireland is contrary to international, EU and English law. The High Court in London found against An Taisce's arguments in December 2013, ruling that there was no need to consult the public in Ireland in the circumstances. However, in the light of the findings of the ESPOO-Committee Sullivan LJ concluded that leave to take the case to the Court of Appeal should be granted, overturning an earlier decision on the papers.