COUNTRY REPORT: GERMANY
New Renewable Energy and Waste Management Legislation

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Introduction

After the turbulences in the wake of the Fukushima nuclear disaster that led to the German "energy turn", that is, the rapid switch from nuclear energy to renewable sources of energy, German environmental and energy policy has managed to sail again into calmer and more predictable waters. The primary task for the near future is the smooth implementation of the energy turn. This is not an easy task and the insight that there are various implementation problems has already given rise to some legislative amendments of the statutory framework. Apart from energy policy, waste management has come into focus. Both fields of environmental policy are characterised by the central feature that governmental intervention has created "artificial" markets in which factors such as market power, access to the market, investment incentives, investment security and equitable distribution of costs and risks play a major role.

Statutory Developments

In the field of climate protection and renewable energy, two new laws respond to implementation problems of the energy turn. The German *Renewable Energy Act*[1] is based on a fixed-tariff system for the promotion of renewable energy. Grid operators, transmission grid operators and public utilities have to connect all sources of renewable electricity to the grid, feed in all renewable electricity offered with priority and remunerate the producer at a fixed rate. The costs are equally redistributed country-wide in the whole electricity transmission and distribution system and ultimately passed on to the end users of electricity. Practically, the consumer must subsidise the expansion of renewable electricity. The remuneration for fed-in photovoltaic electricity is particularly high. This has led to an unexpected increase of the photovoltaic energy capacity and the associated cost burden of end electricity consumers that has caused a considerable imbalance in the whole system.

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[1] Law of 25 October 2008, *Federal Gazette* 2008 (Part 1), p.2074, as amended.

Therefore, an amendment of the Renewable Energy Act, the *Act for Amending the Legal Framework for Electricity from Solar Sources* of 17 August 2012,[2] reduces the remuneration of fed-in photovoltaic energy (new Sections 20a and 20b of the *Renewable Energy Act*). The Act provides for a degressive percentage of reduction (1 percent per month in relation to the remuneration for the respective previous month) and in addition a further fixed percentage of reduction insofar as the permissible corridor of overall capacity increase (2,500 to 3,500 MW per year) is exceeded (0.4 to 1.8 percent). These changes are also applicable to existing facilities although the *Renewable Energy Act* sets a fixed 20 years time frame for financial promotion.

The *Third Act for Amending Energy-Related Provisions* adopted by the Bundestag (House of Representatives) on 29 November 2012[3] addresses the distribution of financial responsibility for economic losses associated with the inability of transmission grid operators to accept electricity from offshore wind energy parks. The legislative process was complex because in the field of renewable energy, the Government is fully dependent on investment by private business. The operators of offshore wind energy parks were not willing to bear the economic risk caused by an overburdening or delayed construction of the grid and threatened to stall all new investments. Against this backdrop, the new Act provides that the transmission grid operators shall bear the primary responsibility in the amount of 90 percent of the remuneration foregone by the offshore generators of wind electricity but can in principle shift the losses onto the end consumers. However, such passing of financial risk is limited where the transmission grid operator failed to use due diligence in the operation and construction of the grid insofar as the loss does not exceed relatively high, differentiated retention sums; moreover, there is a presumption of negligence and even gross negligence.

Germany has a new waste management law, the *Circular Economy Act* of 24 February 2012.[4] The Act mainly transposes the *EU Directive on Waste 2008/98* into German law but also contains elements of autonomous German waste management policy. However, the changes of existing law that in an international comparison has already been quite progressive, are not of a fundamental nature. The *Circular Economy Act* introduces – instead of the previous three-tier system – a five-tier waste management hierarchy (prevention, preparation for re-use, recycling, recovery and disposal), which is not absolute but qualified by the prerequisites of technical feasibility, economic reasonableness and

[2] *Federal Gazette* 2012 (Part 1), p. 1754.
[3] Deutscher Bundestag, Die Beschlüsse des Bundestags am 29. November (available at www.bundestag.de; see also *Federal Parliamentary Documents* 17/11705 (Recommendations and Report of the Commission of Economic Affairs and Technology) and 17/10754 (Draft Act).
[4] *Federal Gazette* 2012 (Part 1), p. 212 (as corrected p. 1474).

compatibility with the protection of the environment. The Act retains the German “dual system” of waste management. Apart from waste originating from production processes for which producers are responsible, the dual system entails direct responsibilities of producers and distributors for a major part of product-related waste and responsibilities of the municipalities for the remaining household waste. The Act extends the responsibility of producers for product-related waste. Furthermore, it stiffens the existing recycling quotas although not significantly beyond the high recycling rates that have already been achieved in practice, and it provides for an extension of the separate collection of particular categories of waste. Disposal of waste on land is only permitted after thermal or biological treatment. This means that waste that cannot be recycled must in most cases be incinerated, either in the form of recovery for the generation of energy or in that of thermal treatment for reducing its volume and making it inert.

The most controversial issue has been the relationship between the municipalities and private business in the field of managing domestic waste for recycling or recovery. The backdrop of this controversy is the fact that recycling and recovery of waste for generating or processing secondary raw materials have become an important business as to which the municipalities and private enterprises compete. Under previous law there was a kind of monopoly of municipalities in the shape of an obligation of waste possessors to leave the wastes to the municipality although exceptions were permissible and in practice widely used. The Government and the conservative/liberal majority of the Bundestag (House of Representatives) wanted to introduce a liberalisation of existing law to the extent that private collection and recycling or recovery shall be permissible unless there are paramount interests that militate for the contrary; this requirement was then to be specified by reference to the functioning of municipal waste management and mandatory take-back systems on the one hand, the higher performance of private collection and recycling or recovery on the other. By contrast, the Bundesrat (representation of the States) and the municipalities insisted on retaining and even expanding the monopoly of the municipalities for domestic waste management, arguing that ‘cherry picking’ by private business should not be allowed. The Conciliation Commission of Parliament then reached a compromise solution whereby the relevant requirements are further specified by lengthy provisions that favour the municipalities. In particular, section 17(2) no 4, and (3) of the Act provides that an endangerment of planning security and organisational responsibility of municipalities for waste management that would justify the municipal monopoly is deemed to exist when the municipalities themselves or through private enterprises charged by them to carry out a separate collection and recycling or recovery of waste that is close to households and has a high quality, the stability of municipal waste management fees is endangered or the non-

discriminatory and transparent procurement of waste management services in competition is significantly impaired or frustrated. Moreover, the prerequisite of higher performance of private collection and recycling or recovery is qualified by elements that make it extremely difficult for private business to remain in or enter into the market. The ultimate effect of the compromise solution will be that private collection and recycling of household waste will in the future only be an exception.

Moreover, the Federal Government, in late summer 2012, has proposed an amendment to the *Environmental Remedies Act* (*ERA*).[5] This is a response to the landmark holding of the European Court of Justice of 12 May 2011 in the "Trianel" case,[6] as analysed in the German Country Report for 2011. This judgement had declared the German limitation of association standing to the vindication of individual rights of any affected person to be inconsistent with EU law. The proposal would now introduce a full-fledged association suit in environmental matters. It even goes beyond the Trianel holding in that it also includes decisions relating to the environment taken under non-harmonized national law. To this extent the proposal would directly transpose Article 9(3) of the *Aarhus Convention* into German law. In the "Slovak Brown Bear" case,[7] the European Court of Justice had derived from Article 9(3) of the Convention that this provision required an interpretation of national standing rules in conformity with the Convention also with respect to official action or inaction not subject to mandatory participation under the *Aarhus Convention.* Due to the limited competence of the Court, this was qualified by the proviso that the subject matter needed to be at least partly covered by EU law. The draft amendment of the *ERA* draws the consequences from the core message of this holding as far as German law is concerned. However, the draft would retain the controversial German concept of limited relevance of procedural errors for the legality of official action, introduce new substantiation requirements for instituting environmental suits, specify the depth of judicial review of the merits of administrative decisions challenged by such suits and reduce the traditional balancing concept of interim judicial protection. The Bundesrat, the representation of the States (which is dominated by the opposition), has immediately submitted critical comments on the draft.[8] It remains to be seen how the draft will fare in the legislative process.

[5] *Federal Parliamentary Document* 17/10957.
[6] Case 115/08, Bund für Umwelt- und Naturschutz/Bezirksregierung Arnsberg (available at www.curia.europa.eu).
[7] Judgement of 8 March 2011, Case C-240/09, Lesoochranárske zoskupenie VLK/Ministerstvo životného prostredia Slovenskej republiky (available at www.curia.europa.eu).
[8] *Federal Parliamentary Document* 469/12 (Resolution of the Bundesrat).

Finally, a rebellion of the local population against a major railway station and track extension project in Stuttgart in the State of Baden-Württemberg ("Stuttgart 21"), has directed public attention to deficiencies of the highly complex German system of public participation in the planning of major infrastructure projects. As a means for promoting better public acceptance of such projects, the Federal Government has proposed a new law[9] that would oblige the competent authority to see to it that the author of the project voluntarily informs the affected public before submitting an application about the expected impacts of the project Law and discuss these impacts with the public. This proposal is generally considered as rather weak. An alternative that has found much support is to enrich the EIA scoping process by comprehensive participation and make better use of the internet.

Recent Case Law

The most interesting developments in case law relate to the repercussions of the Trianel decision of the European Court of Justice.[10] It is evident that this decision has set in motion a process of reassessing fundamental bases of German administrative court procedure law in environmental matters. Pending the adoption of the *ERA* Amendments, the German administrative courts now accept the direct effect of Article 10a of the *EIA Directive* (Article 11 of the new consolidated *EIA Directive*)[11] and Article 15a of the *Directive on Integrated Pollution Prevention and Control*[12] (identical: Article 25 of the new *Industrial Emissions Directive*)[13] that were introduced by the *Aarhus Directive* of the EU.[14] Thus, the Federal Administrative Court[15] held that by virtue of the direct effect of the *EIA Directive*, the limitation of association standing to the vindication of subjective rights under the *ERA* has to be ignored. Moreover, the Federal Administrative Court, in a decision rendered in early 2012,[16] referred the question as to whether the limited relevance of procedural errors under the *ERA* and general law is in conformity with the *EIA Directive*, to the European Court of Justice for a preliminary ruling under Article 267 of the *Treaty on the Functioning of the European Union*. The *ERA* only provides that the lack of an environmental impact assessment and that of a preliminary environmental assessment (which determines case by case whether an environmental impact assessment is required for projects not listed in the

[9] Law for the Improvement of Public Participation and Harmonisation of Planning Procedures, *Federal Parliamentary Document* 17/9666.
[10] Supra note 6.
[11] Directive 85/337/EEC, consolidated as Directive 2011/92/EU.
[12] Directive 96/61/EEC, consolidated as Directive 2008/1/EC.
[13] Directive 2010/75/EU.
[14] Directive 2003/35/EC.
[15] Judgement of 20 December 2011, 9 A 31/10, Neue Zeitschrift für Verwaltungsrecht 2012, p. 575.
[16] Decision of 10 January 2012, 7 C 20/11, Neue Zeitschrift für Verwaltungsrecht 2012, p. 448.

German EIA Act) constitute grounds for quashing the relevant administrative decision. All other procedural errors, including incomplete or insufficient impact assessments, are subject to general law. They are only relevant if they may have had an impact on the substantive legality of the administrative decision and they can be remedied during the administrative and even court proceedings. The European Court of Justice will have to decide whether Article 10a(1) (new Article 11(1) of the *EIA Directive*) which accords the plaintiff also a right to the review of the procedural legality of administrative decisions but grants member states some margin of shaping the relevant remedies, requires a broader scrutiny of procedural errors.

By contrast, the German administrative judicature has not been prepared to deviate from its traditional stance that the institution of "preclusion" is a legitimate element of administrative and administrative court procedure. Under the relevant environmental and planning laws belated and unsubstantiated comments and objections do not need to be considered. Moreover, the *ERA* (Section 2(1) no. 3)) explicitly states that environmental NGOs which have not participated in the preceding administrative proceedings or have not raised objections on particular issues although they were given an opportunity to do so, do not have standing at all or are precluded with all arguments and assertions they could have already brought forward in the administrative proceeding. Although, in the light of the holding of the European Court of Justice in the case "Djurgården-Lilla Värtans Miljöskyddsvorening",[17] preclusion appears problematic. The German administrative courts consider it to be covered by the empowerment of member states to shape the details of environmental remedies.[18]

Outside the field of procedural law, the growing body of case law dealing with wind power facilities under the perspectives of spatial planning, nature conservation (especially bird and bat protection) and protection of neighbours against noise should be noted. Whilst administrative courts emphasize the interest in extending wind power under planning law by barring municipalities from declaring their territory as "wind energy-free", there is a judicial tendency to establish legal barriers to the operation of wind energy facilities based on species protection and protection against noise nuisances.[19]

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[17] Case C-263/08, Djurgården-Lilla Värtans Miljöskyddsvorening/Stockholms kommun genoom dess marknämd, [2009] European Court Reports I-9967.
[18] Federal Administrative Court, Judgement of 20 December 2011, 9 A 31/10, Neue Zeitschrift für Verwaltungsrecht 2012, p. 575; Judgement of 3 March 2011, 9 A 8/10, Entscheidungen des Bundesverwaltungsgerichts vol. 134, p. 150.
[19] See, for example, Federal Administrative Court, Judgement of 20 May 2010, 4 C 7/09, Entscheidungen des Bundesverwaltungsgerichts vol. 137, p. 74; Judgement of 1 July 2011, 4 C 6/09, Entscheidungen des Bundesverwaltungsgerichts vol. 137, p. 259 (spatial planning law); Administrative Court of Appeal Magdeburg, Judgement of 26 October 2011, 2 L 6/09, Natur und

Critical Consideration of Recent Developments

In autumn 2012, the share of electricity from renewable sources in the whole electricity supply mounted to 26 percent. While this can be seen as an immediate success of the German policy on renewable energy, it remains equally true that the most urgent implementation problems of the energy turn such as the extension of the grid, the connection of off-shore wind energy parks to the grid and the technical improvement of the grid so as to cope with fluctuations and geographical imbalances on the supply and demand side have not yet been solved. Moreover, there is an inflation of electricity prices which is due to the generous remuneration of fed-in renewable electricity, the exemption of electricity-intensive industrial end users from redistribution and perverse impacts of the market premium that is paid to cover the difference between the price of directly marketed renewable electricity and the price noted on the German Energy Exchange. The associated financial burdens imposed on all other consumers have to an ever increasing extent become grounds for concern of the public. The reduction of the fixed tariff for photovoltaic electricity is just a first step to make the whole system of renewable electricity promotion a little more efficient. In any case, the intervention of the Legislature into the fixed periods of guaranteed remuneration of renewable energy is not without problems. Although technically speaking, the reduction is not retroactive since only the future remuneration is affected, investors had legitimate expectations that the remuneration would remain stable throughout the fixed period and had oriented their investment decision on these expectations. Therefore, the reduction of the remuneration is subject to constitutional concerns.[20] However, this does not relate to the adjustment of the remuneration to the development of installed total capacity, which was already laid down in previous versions of the *Renewable Energy Act*. Money is also at issue in the conflict between operators of offshore wind energy parks, transmission grid operators and end users of electricity on bearing the risk of overburdening and belated extension of the grid. Caught between several fronts, it was not easy for the Legislature to devise a solution that considers the interest in expanding offshore wind energy, promoting the extension of the grid and ensuring an equitable distribution of financial burdens.

As regards the new *Circular Economy Act*, the maintenance and even strengthening of the municipal monopoly for household wastes for recycling or recovery has become the source

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Recht 2012, p. 196; Administrative Court of Appeal Koblenz, Judgement of 28 October 2009, 1 A 10200/09, Natur und Recht 2010, p. 348 (bird and other species protection); Administrative Court of Appeal Kassel, Judgement of 27 July 2011, 9 A 103/11, Natur und Recht 2012, p. 485 (noise).

[20] See Federal Constitutional Court, Decision of 15 March 2000, 1 BvL 16/96, Entscheidungen des Bundesverfassungsgerichts vol. 102, p. 68, 97-98.

of legal and economic controversy. It is an open question whether the new Act is inconsistent with the market freedoms or justified by the exception for public enterprises charged with services of general economic interest laid down in the *Treaty on the Functioning of the European Union* (Articles 34 and 106). A number of German business associations have made complaints to the European Commission and asked for its intervention. Apart from legal arguments, the value of competition on the recycling market for price formation and for the assurance of the quality of secondary raw materials has convincingly been emphasized by the complainants. On the other hand, it does not appear illegitimate to put limits to 'cherry picking' by private business and leaving the bad fruit of household waste management to public corporations.

The draft amendment of the *ERA* is satisfactory if one only considers association standing. However, the draft must be criticized for its attempt to deteriorate substantive judicial review in environmental matters – the more so since the relevant proposals do not only concern association suits but also suits brought by individuals. The extension to individual suits is explained by the Government with the seemingly innocent argument that the amendments are necessary for off-setting the undesirable results of the extension of association standing but, by virtue of the prohibition of discrimination of association suits, unfortunately had also to be imposed on individuals. Arguably, these curtailments of judicial review constitute a violation of the requirement of effective judicial protection set out in the *Aarhus Directive* and the *Aarhus Convention.* Thus, Germany may face another judicial defeat before the European Court of Justice.