COUNTRY REPORT: GERMANY

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Introduction

The year 2013 was characterised by two peculiarities: a confrontation between the two chambers of Parliament brought about by the gains of the opposition in provincial elections which resulted in different majorities in the two chambers, on the one hand; and the approaching federal elections that took place in September on the other. These peculiarities resulted in fewer legislative activities than usual - although some important laws were adopted - and some business was left unfinished. In particular, this is true for the problem of ever increasing electricity prices for end-users caused by the German fixed-tariff system for the promotion of renewable energy. The judiciary was, however, quite active, especially regarding the impact of international and EU environmental law on national law.

Statutory Developments

In April 2013, the German Parliament adopted major changes to *the Environmental Remedies Act (ERA)*.[1] This is a response to the landmark judgment of the European Court of Justice of 12 May 2011 in the "Trianel" case.[2] This judgment had declared the German limitation of association standing with regard to the vindication of individual rights to be inconsistent with EU law. The new law now introduces a fully-fledged association suit in environmental matters whereby environmental associations can invoke the violation of any legal provision for the protection of the environment which may be relevant for the decision. However, association standing is limited to decisions that are subject to an EIA, integrated pollution control or environmental liability under EU law.

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[1] Law of 8 April 2013, *Federal Gazette* 2013 (Part 1), p. 734; consolidated version: *Federal Gazette* 2013 (Part 1), p. 753.
[2] Case 115/08, Bund für Umwelt- und Naturschutz/Bezirksregierung Arnsberg, available at www.curia.europa.eu . This case was analysed in the German Country Report for 2011.

Moreover, the law retains the controversial German concept of limited relevance of procedural errors for the legality of official action. In particular, procedural errors regarding EIAs are only relevant where an EIA or screening as to the need for an EIA was not carried out or – in the latter case – was not carried out pursuant to the requirements of the EIA Act. This means that only an incomplete or insufficient screening, but not an incomplete or insufficient EIA can be challenged by associations. In contrast, the European Court of Justice[3] has held that all procedural errors related to an EIA are relevant unless it can be demonstrated that they could not have had an effect on the outcome of the administrative decision.[4] Finally, the law also specifies the depth of judicial review of the merits of administrative decisions challenged by association suits and reduces the traditional balancing concept of interim judicial protection.

Another field of legislative activity was public participation regarding major infrastructure projects. It is safe to say that developments in this field since the early 1990s have been characterized by amendments which aim to speed up proceedings at the expense of effective participation. The criticism has focused on long-lasting tiered procedures for infrastructure projects. It has been asserted that the tiered procedures are too complex, lack sufficient transparency, do not provide an opportunity to discuss the project in its entirety (including the need for it), and do not allow the public to influence the relevant decisions at an early stage when alternatives are still open.

A rebellion by local communities against a major railway station and track extension project in Stuttgart in the State of Baden-Württemberg ("Stuttgart 21") has directed public attention to these deficiencies. As a means for promoting public acceptance of such projects, the new Act for the Improvement of Public Participation and Harmonisation of Planning Permission Procedures (Planning Harmonisation Act)[5] was promulgated.[6] The Planning Harmonisation Act now includes provisions which call on the project proponent to inform the public voluntarily about the project before submitting an application and hence before the beginning of the formal administrative proceedings. Project proponents should consult the public regarding the objectives and the expected impacts of the project ("whether at all, where and how"). The project proponent should also provide the public with an opportunity to comment

[3] Judgment of 7 November 2013, Case C-72/12, Gemeinde Altrip, available at http://www.curia.europa.eu.
[4] This was decided on a reference by the Federal Administrative Court as to whether this limitation is consistent with EU law.
[5] Act of 31 May 2013, *Federal Gazette* 2013 (part 1), p. 1381.
[6] This Act amends Section 25 of the Administrative Procedure Act, Consolidated version of 23 January 2003, *Federal Gazette* 2003 (Part 1), p. 102, as amended.

on and discuss the project and its impacts through an informal, self-organized procedure. The result of this voluntary public participation must be communicated to the public and the competent authority when applying for planning permission. Moreover, the Act tries to improve public participation by obliging the competent authority to publish applications, accompanying documentation and relevant administrative decisions on the internet.

A major achievement of the legislative process in the year 2013 has been the new *Act on the Search and Selection of a Site for High Level Radioactive Waste (Site Selection Act)*.[7] This Act was adopted by Parliament on 23 June 2013 after lengthy negotiations with the opposition parties and State governments.[8] The new Act introduces a tiered and highly complex site selection procedure which ranges from the decision on waste management options to the final site selection. The procedure includes the establishment of a pluralistic commission which is to develop criteria and make proposals in the initial phase. The procedure also envisages the establishment of a societal body which shall accompany the whole tiered process. The Act provides for early, transparent, pluralistic and structured participation of the public, including municipalities, at all stages. The administrative competences for site selection and the operation of the depository are to be separated. The First Chamber of Parliament, the Bundestag, decides by law at the end of each step of the procedure. For example, the highly controversial salt dome at Gorleben in Lower Saxony which, subject to interruptions, has already undergone quite extensive underground investigations, shall remain in the basket of potential sites but must meet the relevant selection criteria in order to "survive".

Recent Case Law

The German judiciary continues to draw on the jurisprudence of the European Court of Justice on the implementation of the *Aarhus Convention*.[9] Article 9(2) of the *Aarhus Convention* and the EU *Aarhus Directive*[10] are limited to listed facilities (subject to mandatory participation, i.e. subject to an EIA or integrated pollution control) and, following the Trianel decision of the European Justice,[11] were implemented by the amendment of the German Environmental Remedies Act. Now, the more comprehensive Article 9(3) of the *Aarhus Convention* has come into focus. The latter provision encompasses all other

[7] *Federal Gazette* 2013 (Part 1), p. 2553.
[8] *Federal Gazette* 2013 (Part 1), p. 2553.
[9] 2161 U.N.T.S. 447.
[10] Directive 2003/35/EC, as amended.
[11] Supra note 2; see Country report for 2011.

decisions and omissions and even includes private action. It requires the Parties to ensure that, where they meet the criteria laid down in its national law, members of the public have access to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment.

In the "Slovak Brown Bear" case,[12] the European Court of Justice had denied a direct legal effect of Article 9(3) of the Convention, but held that it required an interpretation of national standing rules in conformity with the Convention with respect to official action or inaction not subject to mandatory participation under the *Aarhus Convention.* Moreover, the Court held that under the Convention environmental associations had a particular status that required granting them standing. 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.

In a landmark decision of 5 September 2013,[13] the Federal Administrative Court applied the holding of the Brown Bear case to decisions not covered by Article 9(2) of the Aarhus Convention but at least partly subject to EU environmental law. At first glance it would seem that the distinction between a direct legal effect and mere interpretation of law was blurred by the decision. Section 42 paragraph 2 of *the German Administrative Court Procedure Act*[14] requires the plaintiff to assert that the decision or omission violates his or her subjective rights (notwithstanding special laws which have introduced broader statutory standing). However, the Federal Administrative Court recognised that the *Aarhus Convention* conferred on environmental associations a subjective right that could be violated, at least to the extent that individuals were protected under EU law. In the case at issue, the question was whether an environmental association could require the competent authority to establish an air quality plan in order to secure compliance with ambient air quality standards set by the *EU Air Quality Framework Directive.*[15]

Another decision by the Federal Administrative Court[16] reflects the more recent judicial trend towards being more responsive to obligations established by EU environmental law. At issue was the interpretation of the prohibition of deterioration of water quality as established by

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[12] Judgment of 8 March 2011, Case C-240/09, Lesoochranárske zoskupenie VLK/Ministerstvo životného prostredia Slovenskej republiky, available at www.curia.europa.eu .
[13] 7 C 21.12, available at www.bverwg.de/entscheidungen/entscheidungen.php .
[14] Consolidated version of 19 March 1991, *Federal Gazette* 1991 (Part 1), p. 686, as amended.
[15] Directive 2008/50/EC.
[16] Decision of 11 July 2013, 7 A 20.11, available at www.bverwg.de/entscheidungen/entscheidungen.php.

Article 4 of the *EU Water Framework Directive*.[17] This Directive is transposed by Section 27 of *the Water Resources Management Act.*[18] In particular, the questions were: whether the prohibition is merely a planning principle or also a permit requirement; whether a deterioration constitutes only a change to a lower quality category as established by the Directive or any deterioration of actual water quality; and, in the latter case, whether there was any threshold of significance.

Departing from the view that the German legislature intended to merely transpose the Directive and not create more stringent law, the Federal Administrative Court referred these questions to the European Court of Justice for a preliminary ruling.[19] In doing so, the Federal Administrative Court developed a very broad interpretation of Article 4 of *the Water Framework Directive* which disregarded the wording and systematic structure of this provision. The Court's interpretation was more aligned with the idea that in spite of the general "paste and copy" transposition concept, the German legislature intended to adopt a more stringent law regarding the prohibition of deterioration (which would have been permissible under Article 193 TFEU). Indicators for this intention of the national legislature can indeed be found in the wording, systematic structure and legal history of Section 27 of the Act. However, without reliance on Article 4 of *the Water Framework Directive* the Federal Administrative Court might have risked a rejection of the case for irrelevance of European law.

Critical Consideration of Recent Developments

As regards the amendment of the ERA it is safe to state that it is satisfactory if one only considers association standing. However, the law must be criticized for its attempt to deteriorate substantive judicial review in environmental matters – the more so since the relevant rules do not only concern association suits but also suits brought by 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.

The new Planning Harmonisation Law has been hailed by some commentators as a "turning point" in the field of administrative decision-making and an important step towards a "new

[17] Directive 2000/60/EC, as amended.
[18] Act of 31 July 2009, Federal Gazette 2013 (Part 1), p. 2585, as amended.
[19] The referral took place under under Article 267 of the Treaty on the Functioning of the European Union.

administrative culture". However, the voluntary nature of the process is criticised. Earlier drafts proposed to introduce mandatory early participation, patterned on the mandatory early participation on projects for new construction plans (zoning ordinances) under *the Federal Building Code*.[20] The EIA scoping process was considered to be appropriate for institutionalizing early and comprehensive mandatory participation on the whole project. However, the legislature accepted the view of the Government that voluntarism and informality are preconditions for engaging in a real dialogue about the envisaged project without formal constraints. This is tantamount to asserting that the mandatory early participation under *the Federal Building Code* does not work. There is no empirical evidence which could support this proposition.

Finally, the new Site Selection Law certainly improves the chances of selecting and constructing a site for a repository for high level radioactive waste in Germany. However it remains to be seen whether the trust in organised participation as a means to create legitimacy and public acceptance which underlies the whole Act will prove justified. Moreover, the involvement of Parliament at the end of all procedural steps raises constitutional problems regarding the separation of powers.

As regards the recent case law, there is a clear contrast between the reluctance of the legislature to fully transpose European law in the field of judicial review, and the more open attitude of the German administrative courts displayed in recent cases. Whilst the legislature seems unwilling to surrender traditional positions unless compelled to do so by the European Court of Justice, the administrative courts are much more responsive. It would be in line with the logic of the decision by the Federal Administrative Court on Article 9 (3) of the *Aarhus Convention* not to limit the recognition of association standing to subject matters at least partly governed by EU environmental law, but to also include decisions that are exclusively based on national law. The principle recognised by the European Court of Justice that rules of an international convention which do not have a direct effect can nonetheless influence the interpretation of broad statutory terms is of a universal character.

[20] Consolidated version of 23 September 2004, *Federal Gazette* 2004 (Part 1), p. 2414, as amended.