IUCN Academy of Environmental Law eJournal
ISSUE 2011 (1)

Recent Developments in Environmental Policy, Statute and Case Law in Germany

Eckard Rehbinder*

A Summary of the Recent Developments

Policy Developments

For quite some time the focus of German environmental policy has been laid on climate protection and energy policy. The more recent development is marked by a certain policy shift brought about by the new conservative/liberal government that came into power after the September 2009 elections. On 28 September 2010 the government submitted a new 'Energy concept for an environmentally friendly, reliable and affordable energy supply'.[1] In accordance with the previous government, the programme continues to lay the emphasis on a gradual substitution of renewable energy for fossil and nuclear energy as the main pillar of future energy supply. However, it aims at achieving this goal in a more cost-efficient way, which entails certain reductions of the subsidies granted for the build-up of regenerative sources of energy (effectuated by feed-in obligations of public utilities and fixed feed-in prices)

* Professor of Law, Research Centre for Environmental Law, Goethe-University Frankfurt am Main, Germany. Email: Rehbinder@jur.uni-frankfurt.de.
[1] *Federal Parliamentary Document* 17/3049.

and concentration on renewable sources offering a high energy yield. To this end, offshore wind energy, repowering of existing inland wind energy facilities, a sustainable use of biomass and a renewal of the grid infrastructure are being favoured. The second pillar of energy policy is the increase of energy efficiency. Apart from making full use of saving potentials that still exist in industry, including the automobile industry, the emphasis is being laid on the private sector (energetic renewal of existing buildings and energy-efficient construction requirements for new buildings). Finally, and most controversial, the Energy programme redefines the role of nuclear energy. While it does not depart, as a matter of principle, from the policy of gradual phase-out of nuclear energy that had been adopted in 2002, it stresses the role of nuclear energy as a cost-efficient transitional solution for global climate protection ('bridging technology'). Therefore the programme proposes to prolong the maximum operation times of the 17 existing nuclear power plants.

The re-evaluation of the role of nuclear energy also had an impact on the policy on final disposal of high level radioactive waste. In 2000 the socialist/green government had imposed a moratorium of up to 10 years on the further underground exploration of the controversial salt dome in Gorleben in Lower Saxony. This area had already been selected, in a rather technocratic procedure, at the end of the 1970s as the site of the repository for high-level radioactive waste. The new government, in concert with the government of the State of Lower Saxony, now has decided to resume underground investigations without considering possible siting alternatives.

Statutory Developments

Recent statutory developments have focused on energy law, in particular nuclear energy law, although there are also other developments that are worth noting.

On 28 October 2010,[2] the German Bundestag (House of Representatives) adopted a legislative package consisting of two amendments of the *Nuclear Energy Act* (*11th Amendment* and *12th Amendment*) and two financial laws. The *11th Amendment* prolongs the maximum operation times (that had been limited in 2002) by additional

[2] *Plenary Protocol* 17/68, 7166 C.

10 years on the average, more exactly by 8 years for older facilities and 12 years for newer ones.[3] The possibility of transferring operation times from older to newer facilities (not inversely) has been fully retained although the public utilities had pleaded for more flexibility. The *12th Amendment* of the *Nuclear Energy Act* on the one hand implements the *EU Directive on the Nuclear Safety of Nuclear Installations*[4] into German law, especially with respect to safety management and the obligation to continuously improve safety. On the other hand, it integrates the improvement obligation into the existing rules on periodic safety inspections and reintroduces powers of expropriation of landowners and holders of mining rights for the construction of repositories for radioactive waste.

As part of the new policy towards nuclear energy, the government has endeavoured to scoop off part of the gains the public utilities will derive from the prolongation of the operation times of nuclear powers plants. To this end, as part of the legislative package two further laws were adopted by the Bundestag on 28 October 2010.[5] The *Act on a Tax on Nuclear Fuel* imposes, in parallel to the eco-tax that is already imposed on major fossil fuel-powered electricity generating facilities, a consumption tax on nuclear fuels the proceeds of which will go into the general federal budget. The *Act on the Establishment of a Federal Fund "Energy and Climate Fund"* (based on an agreement with the public utilities) mandates public utilities that operate nuclear powers plants to make contributions to a special public fund that is designed to finance innovative technologies in the framework of the new energy programme.

On 26 November 2010 the Bundesrat, the representation of the States, decided by majority vote not to object to the nuclear package[6] so that it became law in December 2010[7]. However, the opposition parties assert that a positive agreement of the Bundesrat is required by the *Federal Constitution*. Ultimately the Federal Constitutional Court will have to decide on this issue.

[3] New Section 7(1a), 1st and 2nd sentences, Annex 3, *Nuclear Energy Act*.
[4] *Directive* 2009/71/Euratom.
[5] *Plenary Protocol* 17/68, 7166 D.
[6] *Document* 683/10 [Resolution].
[7] *Federal Gazette 2010 I, at 1814, 1817 (Atomic Energy Act), 1804 (Tax on Nuclear Fuel) and 1807 (Energy and Climate Fund)*.

The legislative development in the field of the environment is to an ever increasing extent influenced by European law. Thus, the legislative changes that have recently occurred in the field of air quality policy are essentially due to the new *EU Air Quality Directive*.[8] This directive consolidated the previous framework directive and several daughter directives into one piece of regulation and adjusted the regulatory regime to experience gained in implementation practice and to more recent knowledge about the harmful effects of particular air pollutants, especially the 2,5PM fraction of particulates. The *8th Amendment* to the *Federal Emission Control Act* that entered into force on 6 August 2010[9] adjusts the Act to the new *EU Air Quality Directive*. Among other things, it mandates the establishment of air quality plans, beyond non-attainment of mandatory limit values, already when the target values for the 2,5PM fraction of particulates are exceeded.[10] The *39th Federal Emission Control Regulation*[11] consolidates the existing two regulations that had implemented the various preceding EU air quality directives into one piece of regulation and adjusts them to the new requirements. Moreover, the Government announced a new regulation on the quality of gasoline that would require gasoline stations to offer gasoline with a 10 per cent content of ethanol made of biomass. The regulation implements the *EU Directive on the Specification of Petrol, Diesel and Gas-Oil*.[12]

Finally, it is to be noted that on 6 August 2010 the Ministry for the Environment submitted a first draft on implementing the new *EU Waste Directive*[13] into German law. The draft introduces new definitions, a five-tier hierarchy of waste management options (prevention, preparation for re-utilisation, material reprocessing, recycling for generation of energy and final disposal), waste prevention programmes, more demanding recycling quotas (beyond the minimum quotas prescribed by the Directive) and rules aiming at a more cost-efficient supervision.

[8] *Directive* 2008/50/EC.
[9] *Federal Gazette* 2010 I, at 1059.
[10] New section 47(1), 2nd sentence.
[11] *Federal Gazette* 2010 I, at 1065.
[12] *Directive* 2009/30/EC.
[13] *Directive* 2008/98/EC.

Recent Case Law

In Germany every year the administrative courts hand down numerous decisions on environmental and planning law, most of which are published in official reports and/or legal periodicals. Moreover, the Federal Constitutional Court is an active player in this area. The following four more recent decisions are representative of the kind of issues dealt with by German courts in the field of the environment.

On 24 November 2010 the Federal Constitutional Court[14] confirmed the constitutionality of the provisions of the *German Act on Biotechnology* concerning the public site register on GMO releases (section 16a), the precautionary obligations for handling GM products, especially cultivation of GM plants (section 16b) and the liability of GM farmers and other GMO users towards conventional and organic farmers for impairment of their use of land (section 36a). The plaintiff, the State of Saxony-Anhalt, had asserted a violation of various fundamental rights, especially the freedom of scientific research, the right to privacy (protection of personal data), the guarantee of property and the right to free exercise of a profession. The Court held that the requirements of proportionality (suitability, least burdensome alternative and adequacy) were met by the challenged statutory provisions, granting the legislature a broad margin of prognostic appreciation and political discretion. In the view of the Court, this was justified by the existing uncertainties as to the long-term effects of the release of GMOs into the environment. The legislature had not only to accommodate for the interests of those who are adversely affected by the use or the regulation of gene technology but also respect the duty, established in article 20a of the *Federal Constitution*, to protect the natural bases of life, also in responsibility for the future generations. As regards the issue of liability, the Court was of the opinion that the attachment of liability to adverse effects on the marketability of conventional or organic crops (need to label them as GM or prohibition to label them as GMO-free) only constituted a development of Civil Code liability for private nuisance and was an adequate means to safeguard coexistence of different forms of cultivation.

[14] 1 BvF 2/05.

A Chamber of the Federal Constitutional Court in its decision of 20 January 2010[15] refused to accept a constitutional complaint instituted by operators of nuclear power plants who asserted that the user fee the State of Lower Saxony charges for the commercial abstraction and diversion of surface and ground water violated federal constitutional principles. In keeping with existing precedents, the Federal Constitutional Court upheld the state regulation on the ground that it was legitimate to scoop off the special benefits derived from the use of a scarce, administratively managed natural resource. Moreover, it held that the user fee could also aim at providing incentives for an economical water use. In both respects, the Court recognised a broad margin of appreciation for the State legislature, acknowledging that the objective of protecting the resource was adequately reflected in differentiating the amount of the fee as to surface and ground water and refusing to assume lack of proportionality of the fee for the sole reason that particular operators, due to the short remaining operation time of their facilities, may be economically unable to switch to a circular cooling system.

For quite some time, the Federal Administrative Court, acting as a court of first instance with respect to infrastructure projects that are in the national interest, has had do deal with complex questions arising from the application of the *EU Habitats Directive*[16] and the *German Nature Conservation Act* that implements the directive to public infrastructure projects, mostly raised by association suits brought under the *Federal Nature Conservation Act*. The major features of applying the rather stringent area protection regime for European habitats (*Natura 2000*) as well as the special rules on species protection to new or significantly modified federal highways and airports have already been carved out in the previous case law of the Court. However, quite a number of open questions remain. In its lengthy judgement of 14 April 2010,[17] the Federal Administrative Court had to deal with a number of issues of area and species protection out of which only two can be presented here. Section 34 of the *Federal Nature Conservation Act* requires a habitat impact assessment whenever a project is likely to have a significant effect on a protected habitat. If the assessment cannot rule it out that the project will not adversely affect the integrity of the site in view of its conservation objectives or its protective purpose, the project is -

[15] 1 BvR 1801/07, 29 Neue Zeitschrift für Verwaltungsrecht 2010, at 831.
[16] *Directive* 92/43/EC.
[17] 9 A 51/08, 29 Neue Zeitschrift für Verwaltungsrecht 2010, at 1226.

subject to narrow exceptions – not permissible. In the case before the court the question was whether, in evaluating a possible impairment of protected beech habitats through nitrogen oxide car exhausts from the planned highway, a *de minimis* threshold could be recognised. In principle, the idea of such a threshold is inherent in the notion of 'significant' effect and habitat 'integrity'. The Court rejected accepting a general *de minimis* threshold of 10 per cent of the critical loads value (that aims at protecting natural resources against acidification and eutrophication). However, based on scientific consensus, it recognised a threshold of 3 per cent, at least in a case where the nitrogen oxide concentration in the ambient air was already double as high as the critical load value. As regards the potential impairment of protected species that already are in an unfavourable conservation condition, the Federal Administrative Court held that under the exception laid down in article 16 of the *Habitat Directive* a project is admissible when it neither deteriorates the existing unfavourable condition nor hampers the restitution towards a more favourable conditions, holding that the reference to 'exceptional circumstances' by a previous European Court of Justice Decision[18] did not constitute an additional requirement but rather described these two prerequisites.

Finally, a judgement of the Federal Administrative Court rendered on 16 March 2010[19] dealt with a municipal construction plan that aimed at enabling the construction of a large coal-fired power plant in the vicinity of residential areas. Among others, the question was whether, in the framework of the exercise of planning discretion under section 2(7) of the *Federal Building Code* and section 50 of the *Federal Emission Control Act* (the latter implementing the *EU Seveso Directive*), the construction plan had sufficiently considered the possibility of a major accident occurring at the facility premises. The Court held that where there are sensitive uses in the vicinity, the risk potential of the envisaged power plant must be specifically assessed and, applying the planning principle of conflict avoidance, the solution of potential conflicts with the neighbourhood can only be transferred to the subsequent permit procedure where it is to be expected that they can be solved there in an appropriate manner. Otherwise the plan itself must embody the necessary precautions, such as safety distances, or renounce to the siting of such a project.

[18] 2007 *European Court Reports* I, 4713 – Commission/Finland.
[19] 4 BN 1246/09, 29 Neue Zeitschrift für Verwaltungsrecht 2010, at 1246.

A Critical Consideration of Recent Domestic Developments

The emphasis on climate and energy policy and law reflected in the reported policy and statutory developments is representative for the priority the problem of global climate change has been accorded in the more recent German environmental policy. However, one should also note that this policy has a strong industrial policy facet: contributing to 'saving' the world climate but also fostering the competitiveness of the German economy by promoting environmental innovations that can be sold on the world market. Whilst there is national consensus that climate-friendly sources of energy must be pushed up so that by the year 2050 energy production based on fossil fuels will occupy an insignificant role only, there is no agreement on the future role nuclear energy is to play in this field. In contrast to almost all other EU member states, the opposition parties as well as a majority of the population in Germany, including a quite large hard core of militant opponents, are strictly opposed to nuclear energy and insist on a closure of the existing 17 nuclear power plants at least by 2022 by the latest as agreed upon in 2002. The efficiency-based arguments of the government in favour of prolonging the operation times of the existing nuclear power plants ('bridging technology') are countered by innovation-based arguments. It is asserted that the expected cost savings derived from nuclear power will be consumed by negative effects that the continued presence of the four big public utilities with their centralised systems of energy generation and distribution on the electricity market will have on the development of innovative, decentralised systems of energy generation and distribution. This latter view is also shared by part of, although not all, economic experts. On the other hand, the enormous costs that will be incurred for the necessary renewal and extension of the existing energy distribution grid (especially needed for the transmission of wind electricity generated off-shore) and its technological adjustment to varying volumes of regenerative energy fed in over time, militate for cost-efficient solutions. Already now the fixed prices, which the public utilities have to pay to regenerative electricity generators that feed their electricity into the grid, are causing continuous increases of electricity prices. Therefore, subsidisation of research and development of regenerative sources of energy may be superior to massive subsidisation of their market entry, at least of their market presence, as long as nuclear energy is available. Unfortunately, the negotiations between the government and the public utilities on scooping off part of the gains derived from the nuclear package have left the negative impression that what the nuclear package was all about was money for the state and for industry.

As far as the other noted policy developments as well as the case law are concerned, they reflect the deep impact EU environmental law is exerting on domestic developments. Nevertheless, there remains space for autonomous national policy and law, as represented in particular by the two constitutional cases. These decisions reflect a marked judicial stance in favour of the environment, at least where the constitutionality of existing regulation is at stake, less where citizens request more effective regulation. Moreover, it goes without saying that the existing national differences in judicial styles have not been eroded by Europeanization of environmental law. The lengthy decision of the Federal Administrative Court on the application of the *Habitats Directive* to a federal highway project shows that the German administrative courts, although they defer to a certain extent to the expertise of the administration, deeply scrutinize complex determinations of fact and application of scientific judgement, in a way behaving as if they were themselves scientific experts. A further judicial self-restraint might be advisable and bring Germany more in line with other European jurisdictions.