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COUNTRY REPORT: GERMANY
Local Responses to International Developments

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Introduction

Developments in German environmental policy in 2011 have been marked by the nuclear disaster at the Fukushima power plant in Japan and political responses to the challenges posed by it. Never since the early 1970s has a single event had such deep impacts on the shaping of German environmental policy. The pre-Fukushima 'Energy concept for an environmentally friendly, reliable and affordable energy supply' of the Federal Government,[1] while it did not depart as a matter of principle from the policy of gradual phase-out of nuclear energy that had been adopted in 2002, had stressed the role of nuclear energy as a cost efficient transitional solution for global climate protection ('bridging technology'). It had envisaged prolonging the maximum operation times of the 17 existing nuclear power plants. Two amendments to the *Nuclear Energy Act* and two financial laws adopted in late 2010 implemented this concept. The most important piece of legislation, the 11th Amendment of the *Nuclear Energy Act*,[2] prolonged the maximum operation times of nuclear power plants by an additional eight years for older facilities and twelve years for newer ones.

In response to the Fukushima disaster and the ensuing negative opinion of the vast majority of Germans toward nuclear energy, the Federal Government reversed its nuclear energy policy to focus almost entirely on renewable energy ('energy turn').

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[1] *Federal Parliamentary Document* 17/3049.
[2] Law of 8 December 2010, *Federal Gazette* 2010 (Part 1), 1814.

The findings of an ad hoc 'Ethics Commission on Safe and Secure Energy Supply' and a safety evaluation of all German nuclear power plants by the Reactor Safety Commission helped to prepare and legitimise the new policy. As an immediate response, the Government ordered the preliminary closure of eight nuclear power plants. As a second step, the Government did not only decide to restore the phase-out policy as adopted in 2002, but strengthened it by ordering the immediate permanent closure of these eight nuclear powers plants and setting fixed phase-out dates for the remaining nine nuclear power plants. To fill the gaps in energy supply - the share of nuclear energy in the total electricity supply before Fukushima was 23 per cent - and further reduce greenhouse gas emissions, the accelerated expansion of renewable energy was given high priority. The potential of green energy had been investigated by the German Council on Environmental Policy that found that by 2050 Germany could satisfy its whole energy demand by renewable sources of energy. Following the findings of the Council and the recommendations of the 'Ethics Commission', the Federal Government decided to set more ambitious targets for renewable energy, especially with respect to electricity.

Statutory Developments

Mirroring the policy turn from nuclear energy to renewable energy, in 2011 the Nuclear Energy Act was amended again. A statutory package of six laws or amendments was adopted (one further bill remained stalled in Parliament due to disagreement by the Bundesrat, the representation of the States).

The 13th Amendment of the *Nuclear Energy Act*[3] of July 2011 fixed exact dates for the closure of all German nuclear power plants. The Act provided that eight nuclear powers plants, among them the seven oldest, are to be closed immediately. For the rest staged closure dates were determined such that the last plant would be severed from the grid by 2022. The extended operation times awarded in 2010 were withdrawn and those set in 2002 restored. Some flexibility was added to ensure that plants ordered to close early can sell their remaining operation times and others can be fully operational until their allotted closure date by buying additional operation times. The 12th Amendment of the *Nuclear Energy Act*,[4] which had mainly transposed

[3] *Federal Gazette* 2011 (Part 1), 1704.
[4] *Federal Gazette* 2010 (Part 1), 1817.

the *EU Directive* on the nuclear safety of nuclear installations[5]and reinforced safety requirements, was not affected by the amendment.

The *Europe Adjustment Act for Renewable Energy*[6] of April 2011 and the further Amendment of the *Renewable Energy Act* (*REA*)[7] of July 2011 constitute the major impetus for an accelerated use of renewable sources of energy in Germany, especially for electricity. The *REA Amendment* of July 2011 provides ambitious staged targets for renewable electricity, a share of 35 per cent by 2020, 50 per cent by 2035, 65 per cent by 2040 and 80 per cent by 2050 - the present share being 20 per cent. The 14 per cent target for heating and cooling as established by the *Renewable Energy Heat Act* of 2008 has been left unchanged.

The two new laws also changed the remuneration for fed-in energy from renewable sources. The *REA Amendment* of July 2011 additionally introduced market-based elements into the German system for promoting renewable electricity. Since 1990 and in a reformed version since 2000, Germany has adhered to a fixed-tariff system for the promotion of renewable electricity. 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 fixed tariff is varied and decreases over time based upon the source of renewable electricity and the size of the facilities.

The new laws rearrange the fixed tariffs. They reduce the remuneration for land-based wind and photovoltaic energy, in the latter case adding a flexible total capacity cap to control excessive extension of capacity. Preference is given to offshore wind energy, the remuneration of which has been increased among other means, by postponing the beginning of the degression period from 2015 to 2018. To improve the efficiency of the subsidisation system, the *REA Amendment* of July 2011 no longer mandates public utilities to buy and distribute the fed-in electricity. Rather, the distribution grid operators shall market it on the electricity exchange or over the counter and public utilities are only required to pay the difference between the fixed

[5] Directive 2009/71/Euratom.
[6] *Federal Gazette* 2011 (Part 1), 619.
[7] *Federal Gazette* 2011 (Part 1), 1634.

tariff and the market price achieved. Moreover, the generators of renewable electricity are encouraged to directly market the electricity themselves.

The expansion of the share of renewable electricity in the total electricity supply envisaged by the new legislation, raises problems of security of supply. Due to the climatic conditions in Germany, renewable electricity is dependent on weather and freshwater levels and is not available in equal quantities throughout the year. Moreover, offshore wind energy is generated far away from consumption centres and is transmitted over large distances. The German grid is designed for decentralised supply and cannot easily be adjusted to local or temporary peaks and deficits of renewable power generation. Therefore, as part of the energy law package, the Amendment of the *Energy Act*[8] of 26 July 2011 and the new *Act on Measures for Speeding-Up Grid Extension*[9] of 27 August 2011 envisage various measures for extending the transmission grid and improving its performance in respect of the new technological challenges. Under the former Act, industry is required to develop programmes for the extension of the electricity grid and its technological improvement. The latter Act introduces a federal planning procedure for the extension of the grid. It consists of a comprehensive federal plan that determines the corridors of long-distance transmission lines and a new planning permission procedure for individual transmission lines or segments of such lines. The planning permission procedure is a well-established part of German administrative procedures and widely used for the planning of infrastructure projects. The innovation brought about by the new Act is that to improve public acceptance, it introduced elements of better coordination of affected authorities, more effective NGO participation, mediation and optional compensation of municipalities that suffer from overland transmission lines without having any advantages from them.

Finally, as part of the energy law package, the Amendment of the *Federal Building Code*[10] of 22 July 2011 obliges municipalities to consider climate protection in local planning. In particular, they are empowered to prescribe active measures for the use of renewable energy and energy efficiency in the local building plans. This is a new element of local planning since in the past the municipalities could only require house owners to construct new buildings in such a way that renewable energy could be

[8] *Federal Gazette* 2011 (Part 1), 1554.
[9] *Federal Gazette* 2011 (Part 1), 1690.
[10] *Law for Strengthening the Climate-Friendly Development in the Cities and Municipalities - Federal Gazette* 2011 (Part 1), 1509.

used, without being able to prescribe such a use. In essence, the municipalities can now develop an autonomous local policy of climate protection through the use of renewable energy.

Apart from energy law, the Government draft[11] on transposing *EU Directive* 2008/98 on Waste has not yet climbed over all parliamentary hurdles. While there is agreement between the two chambers of Parliament on most issues, the limitation of the monopoly of municipalities in the field of domestic wastes for recovery has remained controversial. The Government and the majority of the Bundestag (House of Representatives) want to introduce a liberalisation whereby private collection and recovery are permissible unless there are paramount interests that militate for the contrary; this requirement would then be specified by reference to the functioning and organisational security of municipal waste management. By contrast, the Bundesrat and the municipalities insist on retaining the present monopoly of the municipalities for domestic waste management, arguing that 'cherry picking' by private business should not be allowed.

Recent Case Law

Judicial developments in 2011 have been dominated by a landmark judgment of the European Court of Justice on the conformity of the standing requirements of the German *Environmental Remedies Act*[12] (*ERA*) with the *EU Public Participation Directive*.[13] This Directive was adopted for transposing Article 9(2) of the *Aarhus Convention on Access to Information, Public Participation and Access to Justice* with respect to national decisions subject to the *EU EIA Directive*[14] and the *EU Directive on Integrated Pollution Prevention and Control*.[15] In conformity with the *Aarhus Convention*, Article 10a of the *EIA Directive* (as amended by Directive 2003/35) in principle respects the dichotomy between objective and subjective systems of judicial review of administrative action in Europe. It provides that standing of individuals is conditional on a sufficient interest or, where national law so requires, on the violation of a subjective right. The parties may specify the details, considering the need to grant the public concerned broad access to justice. As regards associations, Article

[11] *Federal Parliamentary Document* 17/6052.
[12] *Federal Gazette* 2006 (Part 1), 2816.
[13] Directive 2003/35/EC.
[14] Directive 85/337/EC, as amended.
[15] Directive 2010/75/EU.

10a declares that associations for the protection of the environment are deemed to have a sufficient interest or, alternatively, to be holders of a right that can be violated.

The German law on standing in administrative matters follows the narrow 'protective norm theory'. Under the *Administrative Court Procedure Act*[16] standing of individuals depends on the violation of a right, which means that plaintiff must assert the violation of a legal norm that is designed to protect individual interests. Environmental laws are considered to be protective of individual interests insofar as they protect human health against significant risk. However, precautionary provisions contained in such laws as well as laws that protect the environment as such do not normally confer standing on affected citizens.

The subjective standing concept also has important consequences for association standing. Under general law, associations are not allowed to vindicate the public interest according to their charter. In nature conservation, associations that fulfil certain conditions have statutory standing, limited to certain infrastructure facilities and exceptions in protected areas. Since this type of association suit was not sufficient to comply with Directive 2003/35, the *ERA* introduced a new statutory association suit that covered a broader range of decisions and laws. In an attempt to marry the German protective norm theory and the *Aarhus Convention*'s concept of association standing, the *ERA* created an odd hybrid limiting the grant of standing to the assertion, by the association, of the violation of norms that establish individual rights. This limitation was challenged in an association suit that concerned the application of the EIA requirements and EU nature conservation law to the authorisation of a coal-fired power plant (Trianel case). The competent Administrative Court of Appeal of Münster (like the majority of legal commentators) had doubts about the conformity of the *ERA* with Article 10a of the *EIA Directive* as amended by Directive 2003/35, and referred the question to the European Court of Justice for a preliminary ruling.

On 12 May 2011, the European Court of Justice[17] held that the *ERA* standing requirements for associations were not consistent with the Directive. The Court underlined that national transposition must be based on the objective of giving the public concerned wide access to justice and enabling it to challenge the legality of a

[16] *Federal Gazette* 1991 (Part 1), 686.
[17] Case 115/08, Bund fürUmwelt- und Naturschutz/Bezirksregierung Arnsberg, available at www.curia.europa.eu.

decision without limiting the pleas that can be brought forward. Relying on the principles of wide access to justice and effectiveness of EU environmental law, the Court held that environmental associations are accorded a particular role in verifying compliance with EU law. Therefore, association standing cannot depend on conditions which only natural persons can fulfil. Rather, the associations must be entitled to comprehensively invoke the violation of all EU environmental law, more exactly: of national law based on EU law.

As a consequence of this decision, Germany will have to amend the *ERA* and create an association suit in its own right. In the meantime, as stated by the EU Court, Article 10a of the Directive has a direct effect.

Critical Consideration of Recent Developments

The response of German environmental policy and law to the Fukushima disaster certainly is motivated more by the perceptions of German politicians as to the public opinion and less by sound science and technology-based judgement. The specific contingencies that arose at Fukushima - a combination of an earthquake and a tsunami - is not one that can realistically be expected in Germany. The accidents at Three Mile Island in 1979 and Chernobyl in 1986 represent much more what might happen in Germany and these did not lead to an abrupt flight from nuclear energy. What one can learn from Fukushima is that the unthinkable may indeed occur and that redundancy of crucial safety and security measures must be pursued. In the German case it may be added that given the backdrop of the safety assessment carried out by the Reactor Safety Commission, the selection of eight powers plants for immediate closure was not based on rational grounds. Although under Article 14 of the *Federal Constitution* the legislature is in principle entitled to determine the contents and limits of private property and can restructure legal regulation of a field of business activities, the requirements of equal treatment and proportionality must be observed and an adequate balancing of all interests affected performed. The Government takes the view that the right of operators of nuclear facilities that are to be closed to sell remaining operation times constitutes an adequate compensation. However, a specific assessment whether there is a realistic possibility to do so has not been undertaken. Merely speculative economic considerations are not sufficient

to justify an intervention into property.[18] Ultimately, these questions will have to be decided by the courts or - in the case of one foreign operator - an investment arbitration tribunal; three of the four operators of German nuclear power plants have announced that they will seek judicial redress.

The German policy for the promotion of renewable energy based on the fixed-tariff system has been very successful if one only considers effectiveness. The present share of renewables in total electricity supply is 20 per cent and that in total end energy consumption is 10.9 per cent. Compared with 3.1 and 1.9 per cent, respectively in 1990, this is a tremendous increase which nourishes the hope that the ambitious new targets can be met in the future. However, Germany is paying a high price for the accelerated phase-out of nuclear energy - both in terms of higher energy costs and lesser security of supply and possibly also in terms of higher carbon dioxide emissions. The approach of heavily relying on renewable energy has already been addressed in the Country Report for 2010 and does not need to be further specified here. What may be added, though, is that it remains to be seen whether the envisaged speeding-up and technological innovation programme for extending and restructuring the grid will be as successful and occur as rapidly as expected. If this is not the case, it might be necessary to rely more than is desirable on fossil fuels. Moreover, the high degree of permanent subsidisation of renewable energy does not particularly contribute to maintaining the competitiveness of the industry on the world market. On the other hand, there is no denying that there are also opportunities for restructuring the entire electricity generating and distribution system through decentralisation and technological innovation.

The reported judicial developments indicate that Germany sometimes relies too much on its perceived role as a pioneer of substantive environmental policy and law in Europe and is not always well prepared to adjust to more modern common European concepts, especially in the field of procedure. The present writer in the early 1970s had pleaded for the introduction of a full-fledged association suit in environmental matters. Against the backdrop of the traditional aversion to 'self-appointed guardians of the public interest', it has been a long path to introducing association suits in the field of nature conservation - at federal level only in 2002 -

[18] Federal Constitutional Court, decision of 14 July 1981, 1 BvL 24/78, Decisions vol. 58, 137, at 148.

and the final step towards having a comprehensive association suit in environmental matters had to be enforced by the European Court of Justice.