Recent developments in Germany

Report of June 2010

(Bernhard Wegener)

1. The new government coalition of Christian Democrats and Liberals, is planning to extend the formerly limited operation-periods for the German nuclear power plants. Officially, the new government calls **atomic energy** a "bridge technology" only. However, it seems likely, that the decision to end the peaceful use of nuclear energy in the future, which was one of the main projects of the former “red-green”-coalition, will be reversed.

   The extension of the operation-periods for the German nuclear power plants may be constitutionally difficult. With the extension, namely the task of supervision of nuclear power stations will be extended in time. Currently, the Länder supervise the power plants on behalf of the Bund. The legal mandate to do so requires under Article 87c of the Grundgesetz, the consent of the Bundesrat. In the Bundesrat however, the conservative-liberal coalition-government lost its majority after the recent election in North Rhine-Westphalia.

   The new German Environment Minister Norbert Röttgen also announced exploration works on the salt dome in Gorleben will resume. The salt dome in Gorleben has always been renowned as the most likely location for a future German nuclear waste repository. The further exploration of the site was stopped by the previous government for the time being. The resumption of the exploration is likely to spark substantial protests.

2. As documented in our last report of September 2009, the High Administrative Court of North Rhine-Westphalia / Oberverwaltungsgericht (OVG) Münster (Decision of 8.3.2009, 8 D 58/08.AK, ZUR 2009, 380) referred a case concerning the **standing of NGOs** to the ECJ: Case C-115/09 (Trianel Kohlekraftwerk Lünen) referred to at 27.3.2009, OJ. C 141, 26. The OVG questions the transformation of Directive 2003/35/EC (Aarhus-Directive) into German law. It asks the ECJ whether NGOs must have standing to fully address the conformity of public planning decision and EC-law. Meanwhile, the hearing before the ECJ on 10 June 2010 took place. Bernhard Wegener has represented there the plaintiff, the Bund Umwelt und Naturschutz Deutschland (BUND).
3. Currently there is some discussion about the decision of the ECJ on the possible need for a **FFH-assessment for ongoing and already approved maintenance measures** (ECJ, Case C-226/08, Judgement of 14/01/2010 – Papenburg v. Germany). The case concerns the ongoing dredging of the river Ems. The river-bed will be kept deep to allow newly-built cruise ships of the Meyer shipyard in Papenburg an exit to the North Sea. According to a widespread estimate, that decision, at least potentially, modifies the national administrative law relating to the revocation of lawful administrative acts (§ 49 of the Administrative Procedure Act – Verwaltungsverfahrensgesetz, VwVfG).
4. In a number of decisions (in particular, see Federal Administrative Court, Judgement of 12.3.2008, Case 9 A 3.06 - Hessisch-Lichtenau II; OVG Koblenz, Judgement of 8.11.2007, Case 8 C 11523/06.OVG, DVBL 2008, 72; BVerwG, Dec. v. 17.7.2008, Case 9 B 15.08 - Hochmoselbrücke II, see also Gellermann, Europäischer Gebiets- und Artenschutz in der Rechtsprechung, Natur und Recht – NuR 2009, 8), the Federal Administrative Court and the higher administrative courts have eased the **requirements for the**

FFH-assessment. The Federal Administrative Court, in its decision about the so-called "Westumfahrung Halle" (Federal Administrative Court, Judgement of 17.01.2007 – Case 9 A 20.5, NVwZ 2007, 1054) initially set demanding standards to determine the effects of projects on protected species and habitats. According to this earlier judgement, scientific knowledge gaps and uncertainties about possible threats to species and habitats, and about the suitability of the proposed measures to prevent and compensate for impairments, had to be dealt with by the planning authorities and the applicant. Uncertainty had to be taken into account in worst-case-scenarios. To justify these strict requirements, the Federal Administrative Court referred in particular to the decision of the ECJ in Case C-127/02, Judgement of 7. September 2004 (Herzmuschelfischerei). The Westumfahrung Halle-decision, however, was met with harsh criticism. Overall, in Germany the discussion about the rationality of the limitations of infrastructure projects by the European FFH-directive is still very much alive.

5. With Judgement of 12/09/2009, the Administrative Court of Berlin (Case VG 11 A 299.08, Zeitschrift für Umweltrecht – ZUR 2010, 155) decided that the so-called **Environmental Zone** (Umweltzone) in Berlin is lawful. The Environmental Zone was introduced to meet the EU air quality limit values for particulate matter (PM 10) and for sulphur dioxide (NO2). The establishment of driving restrictions for diesel vehicles without particulate filters are said to be proportionate as they are suitable and necessary to reduce air pollution and to meet the EU air quality limit values. The complaint had been filed by a resident of the city, whose vehicle did not fulfil the conditions for a "green badge", required to enter into the city since 01/01/2010.

6. By order of 16/02/2010, the Administrative Court of Hannover (Case 4 B 533/10, ZUR 2010, 208), in a preliminary decision, decided that individuals, living in areas where the concentration of sulphur dioxide (NO2) in the air is higher than allowed according to the EU air quality standards, are entitled to **judicial review** of administrative actions, which intend to reverse or modify already established "**environmental zones**". The court therefore lifted an administrative order of the Lower Saxony Ministry of the Environment, in which the ministry had instructed the City of Hannover to reverse its ban of diesel vehicles without a particulate filter in the environmental zone.

7. By decision of 3 December 2009, the Federal Administrative Court (Bundesverwaltungsgericht) ask the ECJ for an interpretation of Article 12 paragraph 1 of the **Seveso II** Directive 96/82/EC of 9 December 1996 (Case 4 C 5.09, ZUR 2010, 139). The Federal Administrative Court is asking in particular whether the **distance requirement** of the directive is applicable for planning (and planning authorities) in the strict sense only, or whether it has to be taken into account by building authorities also. Under German law, the building authorities are bound to grant building permits when all other legal requirements are fulfilled. The particular case relates to the approval of the establishment of a gardening store near a hazardous facility in the vicinity of which already a number of other retailers comparable with the gardening store have been established.

8. With its ruling of 18. June 2009 (Case 7C 16:08, ZUR 2009, 487) the Federal Administrative Court has decided the so-called "**battle for the paper**" in favour of the public authorities, specifically the municipalities. The dispute concerns the question whether private households are free to decide, who takes away their waste paper on a regular basis. Because of the value of the paper, private companies had offered to collect the paper free of charge. According to the Federal Administrative Court, German waste law (more precisely, the Recycling and Waste Act – Kreislaufwirtschafts- und Abfallgesetz), obliges the private households to hand over their domestic waste, including its recyclable compo-

nents, to the local authorities for disposal (and to pay a price for this service). Private companies are generally not allowed to offer concurring services.

9. The requirement to publish the names of the beneficiaries of **agricultural subsidies** on the Internet by the EU's **Transparency** Regulation 259/2008 provoked some resistance in Germany. The state of Bavaria first refused to publish the data, but then gave in small. Some lower courts regarded the publication as an undue restriction of fundamental rights. The corresponding decisions were revoked in the higher courts, thereby ensuring the implementation of the transparency regulation.