Recent developments in Germany

Report of February 2011

(Bernhard Wegener)

1. The new government coalition of Christian Democrats and Liberals, extended the formerly limited **operation-periods for the German nuclear power plants**. On the average, the operation-periods are extended by twelve years. 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, is thereby reversed, at least for a longer period of time.

   The **constitutional legality** of the extension of the operation-periods for the German nuclear power plants is still disputed. With the extension, namely the task of supervision of nuclear power stations is extended in time. Currently, the Länder supervise the power plants on behalf of the Bund. According to many legal experts, the mandate to prolong this duty 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 election in North Rhine-Westphalia. Some Länder already announced to challenge the decision of the Bundestag before the German Bundesverfassungsgericht.

2. The new German Environment Minister Norbert Röttgen stopped the **export of nuclear waste to Russia**, claiming the insecurity of the treatment in the Russian facility.
3. The disputes over the construction of a new underground railway-station in Stuttgart (Project "**Stuttgart 21**") have led to an intense debate about public participation in the planning of major projects. The project is criticised, especially for its apparent lack of economic and technical sense. Its opponents criticise an **insufficient participation** of interested citizens and an early predetermination of the planning process. A mediation attempt brought no relief so far.
4. The German Advisory Council on the Environment (Sachverständigenrat für Umweltfragen – SRU) has intensified the debate on the **promotion of solar energy**. In a recently published statement the SRU criticized the economic promotion of solar energy as excessive. According to the SRU, the excessive promotion of solar energy could jeopardize the acceptance of the promotion of renewable energies in general. For more details see: www.umweltrat.de/SharedDocs/Downloads/DE/02_Sondergutachten/2011_Sondergutachten_100Prozent_Erneuerbare.pdf?__blob=publicationFile
5. As documented in our last reports of September 2009 and June 2010, 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, on 16. December 2010, Advocate General *Eleanor Sharpston* delivered her opinion. She suggests that, "in answer to the questions referred by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen, the Court should rule as follows: (1) Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the Eu-

ropean Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, requires that environmental NGOs wishing to bring an action before the courts of a Member State in which administrative procedural law requires an applicant to maintain the impairment of a right should be permitted to argue that there has been an infringement of any environmental provision relevant to the approval of a project, including provisions which are intended to serve the interests of the general public alone rather than those which, at least in part, protect the legal interests of individuals. (2) In the absence of full implementation into national law, an environmental NGO is entitled to rely directly on the provisions of Article 10a of Directive 85/337/EEC, as amended by Directive 2003/35/EC." Advocate General *Sharpston* thereby confirms the position of the plaintiff, the Bund Umwelt und Naturschutz Deutschland (BUND); see also *B. Wegener*, ZUR 2011, 84.

6. In an action brought on 31. August 2009 (Germany v Commission, Case T-347/09) Germany asks the ECJ to declare a **Commission Decision on State aid** null and void, to the extent that the measures notified are categorised as State aid within the meaning of Article 107 (1) TFEU. Germany challenges a Commission decision concerning aid rules which consist of, first, the **free transfer of federally-owned national nature reserves** and, second, support for large conservation projects. In that decision, the Commission takes the view that the aid rules notified are compatible with the common market under Article 106 (2) TFEU. The applicant challenges the contested decision, to the extent that the measures notified are categorised as State aid within the meaning of Article 107 (1) TFEU. As the basis of its action, Germany claims that the Commission incorrectly applied Article 107 (1) TFEU in a number of respects. In that regard, it is submitted, inter alia, that the Commission wrongly categorises **conservation organisations as undertakings** and wrongly failed to carry out the necessary overall assessment of the measures referred to. Furthermore, the conservation organisations have obtained no material advantage for State aid purposes from the measures referred to. Germany further complains of an incorrect application of the fourth criterion laid down by the Court of Justice in Case C-280/00 Altmark Trans und Regierungspräsidium Magdeburg [2003] ECR I-7747.

7. According to decisions of the Federal Administrative Court (Bundesverwaltungsgericht) of 14 April 2010, Az 9 A 5.08, ZUR 2010, 485 and 14 September 2010, Az 7 B 15.10 ZUR 2011, 85, the ECJ-Judgment of 15 October 2009 in Case C-263/08, para. 39 (Djugaarden Lilla) raises no doubts about the compatibility of the so called "**Einwendungspräklusion**" (**exclusion of objections**) of § 61 para 3 Federal Nature Conservation Act (Bundesnaturschutzgesetz) with EU law. Doubts about the compatibility of these rules concerning the administrative decision-making process had arisen because the ECJ had stated in the foregoing judgment, that "accordingly, […] the members of the public concerned, within the meaning of Article 1(2) and 10a of Directive 85/337, must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, *regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views.*" According to the Federal Administrative Court this passage of the ECJ-Judgment has to be interpreted restrictively in the light of the facts of the Lilla-case. The ECJ decided a case in which an environmental organization was completely and principally excluded from participation in the administrative approval process. Under German law, environmental protection associations are only excluded in subsequent court proceedings, if they fail to take part in the

proceedings altogether or if they fail to raise their objections against the disputed project in due time.

8. By order of 13 September 2010, Az 12 LA 18.9, ZUR 2010, 539, the Higher Administrative Court in Lüneburg, rejected the action of the island community of Borkum against the approval of an **offshore wind farm** as inadmissible. According to the reasoning of the court, the community is not affected in its right to self-government. The community of Borkum had claimed that **tourism** – the community's main source of income – would be negatively affected by the occasional but minor **visibility** of the wind farm.

9. As reported in June 2010, 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. Meanwhile however, the ECJ's Grand Chamber (!) has declared the publication obligations to be partly excessive, infringing fundamental rights and thereby invalid (Case C-92 and 93/09, Judgement of 9 November 2010).