AVOSETTA RIGA MEETING

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Permit procedures for industrial installations and infrastructure projects: Assessing integration and speeding up"

Report Germany (Gerd Winter)

I. Development of Environmental Control Regimes

The history of control regimes in Germany is erratic but helpful to be looked at if the present system shall be understood. The following strands of development must be distinguished:

1. Land-use planning: it started with minimalist approaches ensuring the coordination of building in cities, but extended to land outside settlements, involved more and more categories of land-uses (housing, industry, administration, roads etc => agriculture, nature etc) and was (differing in scale) organise at different hierarchical levels (local, regional, Land, Bund based land-use planning)

2. Construction of buildings: traditionally any building („Vorhaben") was subjected to a permit requirement. The criteria that were to be met were continually enlarged. While originally safety requirements were preponderant (statics, fireproof) environmental concerns were later added (noise, isolation, construction material). The construction permit includes proof of compatibility with land-use plans. No separate development permit is required.

3. Industrial installations: industrial installations polluting the environment were originally subject only to construction law plus neighbourhood nuisance law. A special permit regime for such installations was introduced in order to provide legal certainty to investors who otherwise were at risk to be condemned to stop operations under nuisance law. This permit regime has gradually embraced many more concerns than just neighborhood protection, including long-range air pollution, energy saving, waste avoidance, etc. The permit is called Immissionsgenehmigung – emission[1] permit. The emission permit includes testing requirements of construction and planning law, thus covering also the construction permit and a statement of compatibility with land-use planning. This also implies that no separate development or planning permit is required.

[1] The term immission seems to be unfamiliar in the English language and legal culture. In German law emissions and immissions are distinguished, emissions being measured at the exit point of the chimney (waste water pipe etc), and immissions as concentrations in a "medium" such as the atmosphere or a river. Of course, any emission with wider distribution becomes an immission. The English term for immission would possibly be environmental contamination or concentration. In normative terms German law speaks of immission thresholds (Immissionsgrenzwerte), which would be environmental quality standards in the English legal language (cf Art. 18 Dir. 2010/75). I will call the Immissionsgenehmigung emission permit in what follows.

4. Infrastructure projects: Infrastructure projects, starting with railroads, were subjected to a special regime which originally aimed at proper technical planning and the coordination of authorities whose competence realms were affected. It was called Planfeststellung (plan determination or approval), a name which has since prevailed. It was considered to be an „internal" (inneradministrative) mechanism but developed towards a genuine authorization regime with the final decision having „external" effects on rights of citizens. In substantive terms the criteria to be observed developed from internal technical optimisation to considering property and health rights of citizens and finally the environment at large. While the construction and emission permit is construed as being determined by precise legal criteria the operator having a subjective right to get the permit if all criteria are fulfilled, the plan approval is a matter of weighing up positive and adverse effects of the project. Other than buildings and installations which are directed not to cause any harm (considering also that zoning plans induce distances between industry and housing areas) infrastructure projects unavoidably cause adverse effects (such as sealing of soils, removal of flora and fauna, emissions from airports and roads, expropriation of private land, etc.). For that reason a public interest must be given that justifies the project and its adverse effects. The competent authority has a discretionary margin that leads to reduced court review. However, the weighing up of conflicting interests does not dispense from observing environmental quality standards that may have been set. The discretionary margin is also limited by certain rules of good weighing practice. This means that the plan approval regime is gradually moving closer to the emission permit regime.

5. Extraction, drainage, pollution of water: the management of surface waters and groundwater has a history of its own entailing specific standards, permit requirements and types, procedures and specialised water authorities. Up until today an industrial installation using or polluting water needs to obtain a special permit that is not integrated into the emission permit. In contrast, the plan approval for infrastructure projects does include the water use permit. Such plan approval is thus a fully integrated authorization.

6. Minerals exploitation: the law of property and exploitation of surface and subsoil minerals has also a history of its own and has since remained a separate regime. In general, it has moved towards integrating environmental concerns but is insofar still in need of improvement.

In the following I will focus on industrial installations and infrastructure projects (Nos. 3 and 4). The related procedures have stepwise developed and undergone many changes. The overall trends were oscillating between strengthening regulation for environmental purposes and deregulation for facilitating investment. The original model which was based on public participation, precaution and full court review (although confined to a narrow concept of standing). It stems from the early seventies when German law pioneered environmental protection. In the following three decades (1980ies, 1990ies, 2000s) EC/EU influence became stronger, in particular through the EIA-Directive 85/337 (now 2011/92),

the IPPC Directive 96/61 (now 2010/75), SEA-Directive 2001/42, Directive 2003/4 on access to information and Directive 2003/35 on participation and access to justice). While this influence pushed German legislation to further raise the level of environmental protection a parallel and conflicting trend emerged in Germany in the late 1980ies and 1990ies that aimed at deregulation. This led to three major legislatory packages, one law of 1991 (BGBL 1991 I 2174) enabling the improvement of transportation infrastructure in the new federal states after unification (Verkehrswegeplanungsbeschleunigungsgesetz), one law of 1993 (BGBl. I 1993, 466) called law on the simplification of planning (Planungsvereinfachungsgesetz) and a set of four laws 1996 all aiming at the acceleration of permit procedures (Beschleunigung der Genehmigungsverfahren). These deregulatory moves used the margins of MS procedural sovereignty not seized by EC/EU law. In some respects they transgressed EC/EU frameworks and had to be corrected by the ECJ.[2] Nowadays, in the 2010s, it seems that the EU with its neo-liberal Commission has taken over the initiative towards deregulation. The policy is still more rhetoric than producing 'deconstructive' legislation, but recent expert reports and policy papers need to be monitored carefully (which in fact is the aim of this Avosetta meeting).

II. Standard model procedure for industrial installations and infrastructure projects

A standard model procedure has in Germany been developed over years aiming at the careful checking of environmental effects of projects. The procedure is similar both for industrial installations and infrastructure projects. The difference is rather one of substantial yardsticks (precise standards for industry, weighing up of pros and cons for infrastructure, see above sub No. 4). Here are the major procedural steps. (I have no empirical data on their length).

1. Informal discussions between operator/developer concerning the feasibility of a project.
2. Screening and scoping of whether and how to prepare an Environmental Impact Assessment
3. Compilation of documents, including Environmental Impact Report
4. Submission of application including required documents
5. Public notice that an application was submitted, where and how the documents are made accessible, that comments may be filed, and whether and when a hearing will be held.
6. Sending of application to other competent authorities
7. If neighouring countries are affected: Sending of application to foreign authorities
8. Display of documents (project description, EIA etc.)

[2] See within relevance for industrial installations and infrastructure projects C-131/88 on air pollution; C–531/03, C-301/95, C-431/97 on EIA, C-98/03 on species protection, C-72/12 on administrative procedure, C-137/14 on preclusion of evidence, C-361/88, C-237/07 on standing of individuals, C-115/09, C-137/14 on association action, C-117/03, C-239/04, C-362/06P on the Natura 2000 regime.

9. Receival of comments from the public and from other competent authorities
10. Hearing before deciding authority (plan approval: before hearing authority) of persons who filed comments, and competent public authorities
11. Summary report of hearing by hearing chair
12. Decision on construction (and, possibly, operation) by competent authority; the reasons include the final EIA. The decision is accompanied by numerous conditions of construction and operation.
13. Publication of decision
14. Supervision of construction

The authorisation of specified projects is predetermined by various planning procedures that order conflicting land uses at different governmental levels. Integrated spatial planning (Raumordnung und Bauplanung) and sectoral (ie project related) planning (Fachplanung) must be distinguished.

For industrial installations integrated spatial planning (Raumordnungsplanung und Bauplanung) is an important instrument that helps to identify and determine suitable zones for industrial development. Such planning is done at Land, regional, and local levels.

For infrastructure integrated spatial planning is also important but due to the large dimension of many projects such projects enjoy certain privileges of exemption from regular plans; for instance, a plan approval for a federal highway supersedes a local zoning plan.

For certain categories of infrastructure higher level sectoral planning precedes the authorisation of specified projects. This is most sophisticated in relation to transportation infrastructure. Every about 5 years a Federal Transportation Plan (Bundesverkehrswegeplan) is compiled that identifies prioritary construction projects for federal roads, railways and waterways. This plan is subject to a Strategic Environmental Impact Assessment (SEA). The corridor within which the project shall be realized is gradually narrowed down on two more steps, the Line Determination (Linienbestimmung) by the responsible Bund-Minister and Spatial Location Procedure (Raumordnungsverfahren) by the responsible Land-Minister. Also these decisions are subject to SEA, but only in a stacked way, ie complementing the SEA of the Bundesverkehrswegeplan. One critique of the procedure is that the Bundesverkehrswegeplan treats the three transportation modes, roads, water and railway, separately instead of coordinating them so that synergy is created and public transportation given better priority. The Planfeststellung (plan approval) of the detailed project comes only as the final step after Bundesverkehrswegeplan, Raumordnungsverfahren and Linienbestimmung.

III. Streamlining elements as part of the standard model procedure

The standard model procedure included, from the outset, certain elements that aim at facilitating procedures, such as the following:

- Preliminary decision (Vorbescheid): The operator can apply for a decision on certain requirements of law, such as if the location of the project is compatible with zoning plans, or if the overall concept of the complex entire project is acceptable. The decision is in principle binding but can be modified if the factual or legal situation changes pending the ongoing subsequent procedure. The preliminary decision may by third parties be challenged at court, and it must be because otherwise it will become final with the expiry of the complaint deadline.
- Partial permits (Teilgenehmigung): Complex projects may be realized stepwise. For instance, a first permit may be granted for the construction pit, a second for the buildings, a third for the machinery, a fourth for parking lots, a fifth for operation tests, and the last for routine operation. Such partial permit can only be granted if the project so requires and if a prelimary check of the entire projects shows that the part is compatible with it. The permit is binding but can be modified if the factual or legal situation changes. The partial permit may by thrid parties be challenged at court, and it must be because otherwise it will become final with the expiry of the complaint deadline.
- Mistakes in administrative procedure are only relevant if there is a „concrete possibility" that without the mistake another decision would have been taken.

IV. Streamlining in a deregulatory culture

As said above, in the late eighties and early nineties discussions were spreading that looked at environmental protection as a barrier to investment. This led to proposals of deregulation aiming at facilitating investment (Investitionserleichterung). Some promoters of deregulation likely had in mind to lower the level of protection of the environment, others insisted that facilitation of procedures should not come at the cost of environmental protection. There were also voices who claimed that the level of environmental protection is by far not sufficient but they were less and less heard.

What effect deregulation causes in fact certainly depends on the individual device and its design. The simplification of procedures is of course reasonable if it does not hinder the authority to take a hard environmental look at the project. Vice versa, such hard look of course needs time and effort.

A specific dialectic of facilitating or delaying procedures should however be kept in mind. Often extraordinarily big and very costly projects have been procedurally much delayed to the discontent of developers but sometimes this very delay moved the project into a time of new circumstances that allowed to better assess the long-term economic vialibility of the project so that the operators were finally happy with having been hindered against their original wishes. This is for instance true for the large German reprocessing plant for nuclear waste planned in the eighties which would have been a financial desaster not only from the

outset but even more so after the nuclear step out. Such economic desaster occurred with the fast breeder reactor in Kalkar which was in fact built but never went into operation.

As a sociological observation one should also be aware of the fact that the speed of procedures does not seem to be of very high priority for investors. Much more important appear to be factors like availability of qualified workers, wage levels, transportation infrastructure, tax law, etc.[3]

I will list the relevant elements of facilitating procedures adding a summary comment on whether I find this useful (+), detrimental (-) or difficult to judge (~).

Facilitation embraces the following elements:

- Obligation of the competent authority to advise the operator (+)
- No permit requirement if installation is standardised and type was authorised (~)
- Notification without permit requirement of construction or modification of installations that are not suceptible to cause adverse effects; developer seeking legal certainty has the right to opt for permit procedure (+)
- Scoping for the EIA (+). Only optional participation of NGOs in the scoping (-)
- Digitalisation of procedures
- Permit of early start of works before emission permit if forecast positive and operator agrees to set back if emission permit finally refused (-)
- Coordination of procedures of different licensing agencies (eg one EIA for all procedures, one lead agency coordinating the procedures) (+)
- Simultaneous (rather than sequential) information of all affected authorities (Sternverfahren) (+); 1 month term for comments (-); presumption of consent after expiry (~)
- 6 weeks term for comments (-); preclusion of delayed comments (-)
- Public hearing at the discretion of authority (-)
- For projects with limited environmental effects no public participation („vereinfachtes Verfahren" for industrial installations, „Plangenehmigung" for infrastructure projects)
- 7 months term for decision on industrial installations (-); prolongation possible if matter complex or delay caused by applicant (+)
- Concentration effect of permits (industrial permit and plan approval include planning and construction permit but not water use permit) (+)
- Mistakes in the weighing up of interests concerning infrastructure projects are only relevant if obvious and of influence on the result (~)
- Mistakes can be corrected by complementary procedure if this does not distort the weighing up (-)

[3] Empirical study based on interviews with investors by R. Steinberg, H.-J Allert, C. Grams, J. Scharioth, Zur Beschleunigung des Genehmigungsverfahrensfür Industrieanlagen, Nomos Verlag 1991.

- Suspensive effect of complaint against emission permit or plan approval abrogated (-)
- Compensation payment for delaying decision under civil liability (-)

V. Integration

Integration is a catchword that can mean different things and should only be used if properly defined. In a substantial sense it can be considered as a means against the shifting around of pollution from emissions into the air to emissions into waters and emissions through solid waste disposal or incineration. Integration in that context means to find the best environmental option. Sceptics object that it is even better to keep the different emissions separate and reduce each of them individually to a minimum. Integration in an organizational sense means that competent authorities and procedures should be coordinated in order to exclude contradicting decisions, such as that for an installation the permit for air pollution is granted but the permit for water pollution denied.

On the EC-level integration was rather used in the second, organizational sense. It led to the adoption of the IPPC-Directive 96/91 which introduced a modest version of coordination of permitting procedures. In Germany more elaborate concepts of integration were proposed by several expert commissions, such as the concept of an integrated (many doors, one key) licence. But this did finally not materialize. German law was only adapted to what Dir. 96/91 required. Concerning infrastructure projects, however, the related authorization, called plan approval, does include the full integration of criteria, procedures and competent authority.

VI. Locus standi for local government concerning permits for industrial installations and infrastructure projects

Local government in Germany is not construed as being a “bottom up” collectivity. It is rather regarded as lower level of the state executive. However, as such it has a double administrative function: as lowest level of the administrative hierarchy, and as elected self-government body. In the first quality it is concerned with routine administrative issues (such as to issue construction permits), in the second it is in charge of making local politics and policies. The first function is not construed as a right of the local authority; this means that it cannot challenge at court orders of hierarchically superior levels of government. The second function however is indeed constituted as a right – the constitutionally guaranteed right to local self-government (örtliche Selbstverwaltung – Art. 28 II Grundgesetz). Local authorities have standing to sue in those realms which affect this right to self-government. They do not have standing if they claim to act in the collective interest of the local population e.g. to be protected from noise or air pollution caused by an industrial installation or infrastructure project. The major components of the right to self-government are local land-use planning

and local public services. Thus, in our case, the permit can only be challenged at court if the industrial installation or the infrastructure project encroach on that right. This is so if the local community had already established a zoning plan that provided land uses (such as housing, a park, agriculture etc) that exclude industry or the particular infrastructure. The same is true if the infrastructure project would consume a major part of the area of the local community so that the latter would be stripped of chances for further local development (BVerwGE 81, 95 (106); BVerwGE 84, 209 (215)). The right to self-government is also affected if a neighbouring local community in its zoning plan provides for industrial development at the border without consulting the affected community and taking its land-use policy into consideration (BVerwGE 84, 209 (215-220).[4]

[4] See for a parallel problem ECE Aarhus Compliance Committee, Report on 49th meeting para 35: Concerning communication ACCC/C/2014/101 (European Union), the Committee had requested the communicants to respond to the contention of the Party concerned, in its response to the communication, that one of the communicants, London Borough of Hillingdon, was a public authority within the definition of article 2, paragraph 2, of the Convention, and thus was not a member of the public within the scope of article 2, paragraph 4, of the Convention.2 On 4 June 2015, the communicants had provided their views. After taking into account the communicants' views, the Committee considered that, since the London Borough of Hillingdon exercised administrative decision-making powers, it was a "public authority" within the definition of article 2, paragraph 2 (a), of the Convention. While under the domestic law of Parties municipalities might exercise their right to self-government and other subjective rights, even before courts, in the context of the Convention and international law in general, a "public authority" under article 2, paragraph 2 (a), of the Convention was an emanation of the Party concerned. Hence, an allegation brought to the Committee by the communicant would give rise to an internal dispute between authorities of a Party concerned, which was not within the remit of the Committee. The Committee therefore found that the London Borough of Hillingdon was not a member of the public for the purposes of article 15 of the Convention and was thus unable to submit a communication to the Committee under paragraph 18 of the annex to decision I/7. It reconfirmed its earlier determination of preliminary admissibility with respect to the other two communicants.