

Recent developments in Germany

(Gerd Winter and Bernhard Wegener)

1. The plan of the last coalition of the Christian and Social Democratic Parties to adopt a comprehensive **environmental code** was given up. The newly elected coalition of the Christian and the Free Democrats is not likely to put it on the agenda again. This means that three major moves towards a code undertaken since the early nineties and resulting in a draft of a Commission of professors, a draft of a Commission of professors and practitioners, and a draft produced by the environmental ministry have finally failed. In fact, the last draft was so unambitious that its failure is not much to be regretted. Perhaps things are nowadays too fragmented for comprehensive codifications. Moreover, the EC law is possibly too dominant to allow for national codes. What seems to be achievable is a General Law on Environmental Protection which puts together the horizontal legislation cross-cutting sectoral laws.
2. **New federal laws on nature protection and on water** were adopted. The competences for these areas were in 2006 redefined from framework to concurrent competences of the Bund and Laender. This necessitated integrating into the federal laws much of what the Laender had legislated in the 2 areas. Some modifications were at the same time introduced. For instance, the cascade of checks in cases of encroachments on nature (outside Natura 2000 sites) which go from tests of alternatives, compensability, replaceability to necessity, was amended by the possibility of a compensatory payment. This was much demanded and welcomed by developers who prefer to pay a sum rather than to provide for compensation in kind.
3. Some decisions of high courts have clarified issues of **legal protection in cases of omission or insufficient EIAs**. The Federal Administrative Court had to decide on the following case (judgement of 20.8.2008): Farmer A received a construction and operation permit for a turkey stable for 12000 animals. Neighbour B, a farmer living in his house 190 m apart, filed complaint for quashing of the permit arguing that neither an EIA nor a preliminary checking for need of EIA had been made. The Court: (1) There was no obligation under German law to make a preliminary check nor an EIA. (2) Art. 4 II 1 EIA Dir has direct effect. Therefore the agency committed a procedural mistake. (3) However, the mistake can be healed (analogy to § 45 Administrative Procedure Act which provides for the healing of certain procedural mistakes before the termination of the last court instance reviewing the merits of the case). (4) If the made up for preliminary checking concludes that an EIA is due the permit must be quashed or its execution must be stopped until it was produced. (5) The healing of the mistake does not breach the principle of early EIA of the EIA Directive because if an EIA is due the permit must be stopped, and is also not against the ECJ ruling in C-215/06 Commission vs Ireland which rejected the possibility of legalisation of non-authorized projects because subsequent checking of EIA-obligation is different from such legalisation.
4. 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.
5. The High Administrative Court of North Rhine-Westphalia / Oberverwaltungsgericht (OVG) Münster Decision of 3.9.2009, 10 D 121/07.NE) stopped the ongoing construction of Europe's largest monoblock **coal-power-plant**. One of the many planning-deficits the OVG identified was the alleged incompatibility of the new plant with the Regional, European and International Law obligations to reduce **greenhouse-gas emissions**.