Report on Germany

Impact Assessments – Preventive Measures against Significant Environmental Impacts in the 21st Century

Statement of

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and

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Answers:

Re Question 1

Directive 2011/92/EU served to codify the EIA Directive. In this process, the original EIA Directive (Directive 85/337/EEC) and various subsequent amendment directives were combined to form a uniform Directive.[1]

The central statute at federal level for the transposition of the EIA Directive in Germany is the Environmental Impact Assessment Act (*Gesetz über die Umweltverträglichkeitsprüfung – UVPG*). Furthermore, requirements made in the EIA Directive have also been transposed in other federal statutes and ordinances, such as

- in the Act on the Prevention of Harmful Effects on the Environment Caused by Air Pollution, Noise, Vibration and Similar Phenomena – Federal Immission Control Act (*Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigungen, Geräusche, Erschütterungen und ähnliche Vorgänge – Bundes-Immissionsschutzgesetz – BImSchG*), as well as in the Ordinance on the Approval Procedure – 9th Ordinance on the Implementation of the Federal

[1] Directive 85/337/EEC was amended by the following directives:
- Council Directive 97/11/EC,
- Art. 3 of Directive 2003/35/EC of the European Parliament and of the Council, and
- Art. 31 of Directive 2009/31/EC of the European Parliament and of the Council.

Immission Control Act (*Verordnung über das Genehmigungsverfahren - 9. Verordnung zur Durchführung des Bundes-Immissionsschutzgesetzes*) issued in connection with the former

- in the Construction Code (*Baugesetzbuch*),
- in the Ordinance on the Environmental Impact Assessment of Mining Projects (*Verordnung über die Umweltverträglichkeitsprüfung bergbaulicher Vorhaben – Verordnung Bergbau*), as well as
- in the Act Concerning Supplemental Provisions on Appeals in Environmental Matters Pursuant to EC Directive 2003/35/EC - Environmental Appeals Act (*Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG – Umwelt-Rechtsbehelfsgesetz – UmwRG*).

The Federal Republic of Germany is a federal state in which jurisdiction for legislation is divided up between the Federation and the *Länder*. Where the EIA relates to projects for which the jurisdiction for legislation lies with the *Länder*, the *Länder* have issued regulations on EIA of their own.

Re Question 2

The EIA Directive and Directive 2010/75/EU on industrial emissions (Industrial Emissions Directive) have been largely transposed in separate laws in Germany. The central law transposing the Industrial Emissions Directive is the Federal Immission Control Act; see the answer re Question 1 on the transposition of the EIA Directive. Where there are connections and overlaps between the material regulated by the Environmental Impact Assessment Act and by the Federal Immission Control Act, it was ensured when structuring the provisions that the terminology used and the content should be as consistent as possible.

In accordance with section 4 of the Environmental Impact Assessment Act, the provisions contained in the Environmental Impact Assessment Act are subsidiary, i.e. they only apply if the requirements with regard to the EIA are not regulated by a specific act in specialist law. Some of these specific provisions, which also contain requirements for the transposition of the EIA, are also contained in the Federal Immission Control Act and in the Ordinance on the Approval Procedure (9th Ordinance on the Implementation of the Federal Immission Control Act). Examples of this are the provisions on the documents to be submitted by the developer, and the public participation. These provisions satisfy both the requirements of the EIA Directive and the corresponding requirements of the Industrial Emissions Directive.

Re Question 3

When determining whether and to what degree projects must be subject to an EIA in accordance with Annex II of the EIA Directive, Germany has opted for a combination of the possibilities designated in Article 4§2 (a) and (b) of the EIA Directive. A binding obligation to perform an EIA exists in Germany for some of these projects. When it comes to most projects in accordance with Annex II of the EIA Directive, an EIA is only to be implemented by contrast if a preliminary examination reveals in the individual case that the project can have a significant adverse environmental impact. A

distinction is made here between a general and a location-related preliminary examination. The category of the location-specific preliminary examination relates to projects which have a small size or capacity value. They can only be subject to an obligation to perform an EIA if ecologically-sensitive areas can be impaired by the impact of the project.

Annex 1 of the Environmental Impact Assessment Act contains a list of all types of project subject to an imperative obligation to perform either an EIA, or a general or location-specific preliminary examination, in the individual case. Specific assessment values have also been established for these projects in some cases. These values mark a specific size or capacity value below which projects of the type mentioned cannot as a matter of principle have any significant environmental impact, and hence require neither an EIA nor a preliminary examination. In the event of a general or location-specific preliminary examination, it must be examined by specific criteria, which have been established in Annex 2 of the Environmental Impact Assessment Act, whether a significant environmental impact may occur. This list of criteria corresponds to the selection criteria in Annex III of the EIA Directive.

Re Question 4

No

Re Question 5

Yes. In accordance with section 2 subsection (1) sentence 1 of the Environmental Impact Assessment Act, the EIA is an integral part of procedures applied by authorities deciding upon the approval of projects that are subject to EIA.

In accordance with section 11 of the Act, the authority competent for the EIA prepares a summary description of the environmental impacts of the project and of the measures which will be taken to prevent, reduce or compensate for any significant adverse environmental impact, and of the substitute measures in the case of interventions in the natural surroundings and the landscape for which no compensation is possible. This summary description is to include the following

- the documents to be submitted by the developer for the EIA in accordance with section 6 of the Environmental Impact Assessment Act,
- the statements made by the authorities involved in accordance with sections 7 and 8 of the Environmental Impact Assessment Act,
- the opinions voiced by the affected public in accordance with sections 9 and 9b of the Environmental Impact Assessment Act, as well as
- own knowledge of the competent authority or the outcome of investigations carried out by the authority itself.

On the basis of the summary description, the competent authority assesses in accordance with section 12 of the Environmental Impact Assessment Act the environmental impacts in accordance with the applicable laws as to whether the project guarantees effective prevention of environmental damage. This assessment is to be taken into account when deciding on the approval of the project

(section 12 of the Environmental Impact Assessment Act). “Taken into account” means that the environmental impacts that have been ascertained in the EIA must be considered with the weight attaching to them in each case when deciding on the approval of the project.

The results of the EIA may be significant here in a variety of ways. Firstly, the specialist environmental statutes contain protective and preventive conditions which always need to be satisfied so that a project can be approved. Approval is to be refused if the EIA shows that a project has a significant adverse environmental impact which is not permissible in accordance with such imperative legal provisions. When it comes to industrial projects, and with construction projects for which planning permission is sufficient, the developer is entitled to have the approval issued if the imperative legal provisions are adhered to (section 6 of the Federal Immission Control Act).

With regard to large numbers of types of projects, such as with infrastructural projects like the construction of roads, railway tracks, airports or power lines, the approval regulations under German law provide, by contrast, that approval is at the discretion of the authority. The authority must weigh up in each case between the environmental concerns affected by the project and other public or private interests. It may emerge from this that the approval that is applied for is to be refused because of the environmental consequences that it would have, or that it may only be issued subject to specific conditions preventing the adverse environmental impact or reducing it to an acceptable level. It is however also conceivable that certain environmental concerns must take a backseat vis-à-vis other major concerns, so that the project is nonetheless eligible for approval in spite of its adverse environmental impact. The EIA provides the necessary environmental input for this weighing-up-based decision. The approval authority is provided in a systematically-prepared form with a comprehensive overview of the environmental impacts of the project and its respective significance. The EIA thus helps ensure that environmental aspects that are relevant to the weighing up are not overlooked in the decision-making process or their significance disregarded. Moreover, it provides indications helping to determine by which measures adverse environmental effects which the project might cause can be prevented or reduced.

Reference is made to the answer to Question 8 for additional information.

Re Question 6

Partial approvals in accordance with section 13 of the Environmental Impact Assessment Act in multi-stage approval procedures may not be granted until an EIA has been implemented. In such cases, the environmental impact assessment must *provisionally* cover the environmental impacts of the overall project that are recognisable according to the respective state of planning, and *finally* the environmental impacts which are the subject of the partial approval. When it comes to subsequent partial approvals, the environmental impact assessment is to be restricted to additional or different significant environmental impacts of the project.

Reference is made to the answer to Question 8 for additional information.

Re Question 7

In the federal structure of the Federal Republic of Germany, the implementation of the law is a matter for the *Länder* as a rule. Where the *Länder* are responsible for the enforcement of the laws, they generally establish on their own responsibility which authorities are responsible for carrying out the respective task. This also applies to the responsibilities in implementing the Environmental Impact Assessment Act and the approval regulations.

In practice, it is the authority responsible for the approval of a project that is also responsible in most cases for implementing the associated EIA. Depending on the structure of the authorities within the Federal *Land* and on the type of project, responsibility for the EIA may have been attributed to a local authority, a district authority, an area authority, a superior *Land* authority or a *Land* ministry. In the (few) cases in which the approval of projects which are subject to EIA and the implementation of the EIA is incumbent on federal authorities, responsibility lies with superior federal authorities in most cases (e.g. Federal Railway Administration, Directorate-General for Waterways and Shipping, Federal Network Agency), and also with federal ministries in isolated cases.

Re Question 8

In accordance with the German legal provisions, a project which is subject to EIA may not be approved until after the environmental impact assessment has been carried out. The omission of a necessary EIA constitutes an absolute procedural error. If a project which is subject to EIA is approved without the necessary environmental impact assessment having been carried out, it may be demanded in the appeals procedure in accordance with section 4 Environmental Appeals Act (*UmwRG*) that the approval decision be rescinded (cf. on this the answers to Questions 23/24).

The statutory approval conditions are relevant with regard to the question of whether a project which is subject to EIA may be approved. The EIA provides the necessary underlying information enabling environmental concerns to be appropriately considered in the approval decision. This does not rule out a project nonetheless being approved which preferably should not be realised from the environmentally-centred point of view of the EIA. This is possible if the approval of the project is at the discretion of the authority and greater significance is to be attributed to other decision-relevant concerns (e.g. economic aspects or transport-related aspects), in the specific case, than to the environmental aspects concerned. Conditions under environmental law which take on the character of requirements which must be imperatively complied with (e.g. specific emission thresholds) must however always be observed. If the project does not meet such requirements, it may not be approved (cf. answer to Question 5).

Reference is made to the answer to Question 6 when it comes to EIAs with multi-stage procedures. In staged approval procedures, an EIA is to be implemented prior to the first partial approval, as well as before each decision on any further partial approval. Finally, the environmental consequences of the project part are to be examined here which is the subject of the partial approval. If the first partial approval is for instance restricted to specific construction measures (e.g. construction of the building shell), the environmental impacts which may ensue from these measures (e.g. removal of trees and bushes from the construction land, construction noise), must be conclusively assessed. The

environmental impacts of the overall project are to be temporarily assessed where they are already recognisable in accordance with the respective state of the planning.

With regard to the subsequent partial approvals, the assessment should then be restricted to additional or other environmental aspects. This refers to aspects which have not been observed, or not yet adequately observed, in the preceding approval stages in the EIA because they were not recognisable according to the state of planning at that time. Aspects that had been assessed earlier should be updated if the results are out of date because new factual or technical information is now available.

The environmental impact assessments which are to be carried out for the various partial approvals in each case also include participation by authorities and by the public. The results of these consultations are to be taken into account on each level on which they are relevant for the partial decision which is to be taken there.

Re Question 9:

As was already stated in the answer re Question 5, the environmental impact assessment in Germany is an integral part of the approval procedure applied by administrative authorities. The inclusion of the EIA in the approval procedure opens up considerable scope for joint or coordinated implementation of assessments under the law on the EIA and on other environmental assessments which are needed for the approval of the project.

The Environmental Impact Assessment Act however does not at present contain an implicit obligation in this regard. Having said that, EIA amending Directive 2011/92/EU, which recently came into force, which the Member States must transpose into their national law by May 2017, introduced differentiated provisions on joint and coordinated procedures with the reworded Article 2§3. For the drafting of zoning plans, section 2 subsection (4) of the German Construction Code already provides for an overarching environmental assessment which links the requirements of the EIA to those of the SEA, and at the same time serves as a procedure for other environmental assessments such as the FFH impact assessment.

Regardless of the existing law, the unwritten principle applies in implementation practice in Germany that double assessments are to be avoided wherever possible. Accordingly, it is customary for assessment criteria of the EIA, specific assessment criteria of other EU environmental directives, as well as assessment requirements of national environmental law, to be worked off jointly or coordinated in the approval procedure where such a procedure is expedient and efficient. Some of the *Länder* and federal authorities (such as the Federal Railway Administration) have published guidelines or implementation guides revealing the potential for a joint coordinated assessment. The authorities in Germany do not however proceed in a uniform fashion in detail. This is a result first and foremost of the very broad scope of the EIA Directive. It covers a variety of project types for which there are different approval conditions and assessment requirements in each case. It is therefore not possible to implement all EIA procedures according to the same pattern. Secondly, the implementation of administration in Germany largely lies with the *Länder*, where a variety of different procedures have developed.

Altogether, it is therefore not possible to submit a list of the directives with regard to which, in accordance with the procedural practice in Germany, a connection or coordination with the EIA always or regularly takes place. It is however possible to say in general that procedures are coordinated above all when it is a matter of the same or similar assessment material and the content of the assessments overlaps. This is the case above all in the relationship between the EIA and specific nature conservation procedures, such as impact assessments in accordance with Habitats Directive 92/43/EEC and Birds Directive 2009/147/EC.

In other regards, a link between the EIA and other assessments which have an environmental connection already results from the fact that the EIA helps to prepare a specific approval decision. The EIA can only achieve this purpose if environmental conditions imposed by the law on approvals, by the other environmental directives, such as Industrial Emissions Directive 2010/75/EU, Seveso II Directive 96/82/EC or the Water Framework Directive 2000/650/EC for the approval of projects subject to EIA, are reflected in the EIA assessment programme.

Re Question 10:

See the answer re Question 9. If they are likely, individually or in conjunction with other projects or plans, to have significant adverse impacts on a Natura 2000 site, projects subject to EIA are at the same time projects which are to be assessed in terms of their compatibility with the conservation objectives of a Natura 2000 site (cf. section 34 of the Federal Nature Conservation Act [*BNatSchG*]). Both the EIA and the assessment of compatibility with the conservation objectives of a Natura 2000 site form part of the approval procedure for the project in question. Moreover, the assessment has considerable overlaps in terms of its content. In order to avoid double assessments, it is hence customary in practical implementation in Germany for the EIA and impact assessment to be carried out in close coordination.

Re Question 11

Germany has reached bilateral or trilateral agreements to implement cross-border EIA procedures with various neighbouring states. In these, the statutory provisions for cross-border EIA which have a relative general and abstract outline are supplemented to include detailed arrangements on how to process the procedures in administrative practice. These agreements have proven to be extraordinarily useful in practice. Germany is therefore trying to encourage its neighbouring states in favour of this model with which such bilateral arrangements have not yet been reached.

Re Question 12

In accordance with section 6 subsection (3) No. 5 of the Environmental Impact Assessment Act (corresponds to number 2 of Annex IV of the EIA Directive), the developer must submit an overview of the principal alternative options investigated by the developer and details of the main reasons for selecting the present project with regard to the environmental impacts of the project. This provision does not give rise to any original obligation under the law on the EIA to examine alternatives, but links to whether the developer has examined alternatives when planning the project. It primarily

covers cases in which alternatives are investigated because the law on approval requires this as a condition for approval. In the German law on approval for infrastructure projects, for instance, a proper weighing up is contingent on the assessment of alternatives. When it comes to approvals for industrial plant in accordance with the Federal Immission Control Act, there is no such obligation as a matter of principle; in some cases, however, an assessment of technical variants takes place here with regard to potential environmental requirements to prevent or reduce adverse environmental impacts (e.g. installation of additional filters or other devices to hold back pollutants).

Re Question 13:

The German EIA regulations provide for scoping if the developer so requests or the competent authority considers it necessary to implement scoping (section 5 of the Environmental Impact Assessment Act).

Re Question 14:

The Environmental Impact Assessment Act does not contain any specific regulations on the quality of the documents to be submitted by the applicant. This is also not necessary since there are appropriate provisions in the law on approvals. Since the EIA is an integral part of the approval procedure in Germany, the documents which the developer has to submit for the implementation of the EIA are at the same time approval documents. In order to ensure that the approval documents are of sufficient quality, the approval regulations under German law provide that the approval authority must examine prior to initiating the public participation whether the documents are complete and suitable for being exhibited for inspection. It should in particular be examined here whether the information which the authority has provided to the developer within scoping with regard to the application documents has been taken into account. If the documents do not satisfy the requirements, the developer must supplement them on request by the authority within a suitable period (for instance section 10 subsection (1) sentence 3 of the Federal Immission Control Act).

Re Question 15:

a) Consideration of cumulation when deciding whether to implement an EIA

A distinction needs to be made between the following case groups:

<u>Case group 1:</u> Becoming being subject to EIA or obliged to perform a preliminary examination

If an existing project which was previously not subject to EIA is altered or extended, and if this results in the relevant size or capacity value (thresholds) for an imperative obligation to perform an EIA being reached or exceeded, an EIA is to be carried out for the alteration or extension (cf. section 3b subsection (3) sentence 1 of the Environmental Impact Assessment Act). When establishing the obligation to perform an EIA, the existing project and the alteration or extension are therefore

considered as to their size or capacity as if they formed one single project together. “Existing projects” are those which have already been approved.

> Example: A wind farm that is not subject to EIA and has 12 wind power systems is expanded by a further eight wind power systems. In accordance with Number 1.6.1 of Annex 1 to the Environmental Impact Assessment Act, wind farms with 20 or more wind power systems are imperatively subject to EIA. With the additional eight wind power systems, the wind farm therefore becomes obliged to perform an EIA. In accordance with the case-law, it is vital for the presumption that the wind power systems form a cohesive wind farm to determine whether the individual systems are geographically attributed to one another in such a way that their areas of action overlap or at least affect one another (Federal Administrative Court [*BVerwG*], judgment of 30 June 2004, 4 C /03, juris nos. 31 and 33).

The same applies to what is referred to as “developing into the obligation to perform a preliminary examination”. What this means is cases in which an existing project not subject to EIA is altered or extended in such a way that, if one takes an overall look at the existing and altered projects, the assessment values are exceeded for a general or location-specific preliminary examination (cf. the answer to Question 3 in this regard). The alteration project is then to be subjected to a preliminary EIA examination (section 3c sentence 5 in conjunction with section 3b subsection (3) of the Environmental Impact Assessment Act).

Case group 2: Alteration or extension of an existing project subject to EIA

The alteration or extension of an existing project subject to EIA is in turn subject to EIA if the alteration or extension by itself already reaches or exceeds the relevant size or capacity value (thresholds) for an imperative obligation to perform an EIA. When it comes to minor alterations or extensions, the need for an EIA depends on the result of a general preliminary examination (section 3e of the Environmental Impact Assessment Act).

Case group 3: Cumulation of a new project with other new projects

An obligation to implement an environmental impact assessment applies if several projects of the same type which are to be carried out at the same time and are closely related together reach or exceed the relevant size or capacity values (thresholds) for an imperative obligation to perform an EIA (section 3b subsection (2) sentence 1 of the Environmental Impact Assessment Act). For the question of the requirement to perform an EIA, the cumulative projects are therefore treated as if they formed *one* project. It is assumed that technical and other installations are “closely related” if they are situated on the same operating or construction site and are connected with common operating or constructional facilities, and if they serve a comparable purpose (section 3b subsection (2) sentence 2 No. 1 of the Environmental Impact Assessment Act). In the case of other measures which impinge on the natural surroundings and the landscape, it is sufficient for the cumulation for there to be a close spatial connection between them (section 3b subsection (2) sentence 2 No. 2 of the Environmental Impact Assessment Act). Only those projects are covered which are still in the approval procedure.

The same principles apply when, where several projects of the same type are cumulated which are to be implemented at the same time and are closely related, when seen together do not reach or exceed the thresholds for an imperative obligation to perform an EIA, but the assessment values for a general or location-specific preliminary examination are reached or exceeded. The cumulating projects are therefore also viewed as if they formed a *single* project when it comes to determining whether there is a need for a preliminary examination. If they together reach or exceed the relevant assessment value, they require a preliminary examination. The need for an EIA then depends on the outcome of the preliminary examination.

b) Taking cumulation effects into account in the implementation of the environmental impact assessment and the preliminary examination

With new and alteration projects, “cumulation with other projects in their common impact area” is generally to be taken into account for the implementation of the environmental impact assessment and of the preliminary examination when calculating the environmental impacts (cf. for instance implicitly for the preliminary examination Number 2 of Annex 2 of the Environmental Impact Assessment Act). The following consequences emerge from this for the above case groups:

- As regards the EIA or the preliminary examination of an alteration or extension project (see case groups 1 and 2 above), the question as to which environmental impact can be exercised by the alteration or extension does not only depend on the additional environmental impact caused by the alteration or extension. Rather, the environmental impact of the existing project and other pre-existing burdens at the location are also to be included. It is only taking a look at all pre-existing burdens together, and the added impact ensuing from the alteration or extension, that provides information on what overall strains may occur at the location.

- With regard to the EIA or preliminary examination of a project which is to be carried out at the same time as another project of the same type and which is closely related to it (see case group 3 above), the assessment of the environmental impacts does not only depend on the contribution made by the individual project. It is necessary, rather, to ascertain the impact of all cumulative projects, as well as of all pre-existing burdens in the entire impact area.

Re Question 16

The differentiated provisions contained in the Environmental Impact Assessment Act for determining the obligation to perform an EIA (cf. answer to Question 15) serve, not lastly, the purpose of preventing the circumvention of the EIA using “salami slicing”. Particular mention is merited here by the provisions on cumulation (section 3b subsection (2)), as well as by the principle that the preliminary examination of whether a project may have significant environmental impacts should consider not only the direct impact of the project itself, but also pre-existing strains from other projects in the entire impact area. Such “other projects in the entire impact area” can also be existing projects which are extended. If therefore a project is divided up in such a way that it is gradually

extended on a step-by-step basis, the environmental impacts of the elements which have already been approved are to be included in the preliminary examination.

It is furthermore presumed in the academic legal literature that there is also an obligation to perform an EIA if it is obvious or can be proved that a project is only split up in order to circumvent an EIA. There is however no case-law yet on this question, as far as we are aware.

When it comes to the decision, however, it may not remain unconsidered that there may be justified reasons in the individual cases to split up and successively approve a project. For this reason, a developer doing so should not be hastily presumed to be engaging in unfair conduct. Above all, linear infrastructure projects such as motorways, railway track, waterways, electricity, gas and other pipelines are frequently sub-divided into sections which are approved and constructed one after the other. In terms of the law on approvals, such a formation of sub-sections is possible in Germany according to the case-law if the sub-division appears to be expedient from a procedural point of view, taking all the circumstances into account. The project section the approval of which is applied for then also forms, as a matter of principle, the project that is to be assessed for the EIA.

This cannot however apply unrestrictedly to determining whether an EIA needs to be implemented. Formation of sections cannot necessarily mean that an EIA which would otherwise need to take place is not carried out. The circumstances of the individual case are decisive for the assessment in accordance with the relevant case-law of the European Court of Justice. The following aspects, amongst others, might be significant here:

- If the overall project has already been the subject of an upstream planning procedure, this speaks in favour of a more established plan justifying also taking the overall project as a basis for the obligation to perform an EIA. Mere planning intentions on the part of the developer which continue to entail uncertainty will however not be adequate for this.
- A restriction to the section of track currently due may however be appropriate when determining the obligation to perform an EIA if, because of ongoing uncertainties, the developer is planning the project from the outset such that the part of the project which has been applied for per se – that is regardless of whether further sections are also carried out at a later point – already takes on an independent purpose. This may for instance be the case with the construction of a motorway if the opening up of this section by a trunk road makes sense in terms of transport infrastructure and is sensible in terms of the infrastructural development of the region.

The question of whether to take an overall or individual view also arises if an existing linear project (e.g. an electricity or gas pipeline or a track route) is expanded or technically improved in such a way that measures are only carried out isolatedly on individual sections of line or track. Whether these individual measures are then each to be regarded as independent (alteration) projects or as integrated elements of a uniform (alteration) project is once more in line with the circumstances of the individual case. A uniform project is favoured in such cases, particularly when the developer itself plans and applies for the measures together, or if it becomes recognisable by other means that the individual measures do not assume any significance of their own.

This group of questions remains highly uncertain with regard to the details in terms of the law on the EIA. The Federal Administrative Court has not had an opportunity to address the matter as yet.

Re Question 17

Under German law, the screening decision is an "integral part of the procedure" which as such cannot be contested in its own right (section 3a sentence 3 of the Environmental Impact Assessment Act). In appeal proceedings against the approval decision, individuals or recognised environmental associations can however claim in accordance with section 4 of the Environmental Appeals Act that a necessary preliminary examination has not been carried out, or that it has not been implemented properly. In the latter case, the court examines whether the authority has complied with the statutory requirements as to the preliminary examination and whether the outcome is plausible. If the court's assessment reveals that the preliminary examination has been carried out erroneously or the result does not appear to be credible, the approval decision is to be rescinded as a matter of principle. The court can however also suspend the court proceedings and afford the authority the opportunity to subsequently carry out the preliminary examination which has been omitted, or to effect an examination which is free of errors. cf. on this also the answers to Questions 23/24.

Re Question 18

Since the environmental impact assessment is integrated into the approval procedure in Germany, it is guaranteed as a rule that the results of the EIA are still up to date at the time when the approval decision is taken. In other respects, the principle of investigations applies in the German administrative proceedings, according to which the authority must investigate the facts underlying the decision ex officio (section 24 of the Administrative Procedure Act [*Verwaltungsverfahrensgesetz – VwVfG*]). At the time of its decision, the authority must be convinced that the facts which it has taken as a basis are sufficiently up to date. If it has any doubts as to whether the facts established in the EIA regarding potential environmental impacts of the project are still correct or might be out of date (for instance because of the duration of the proceedings or of new developments), they must be analysed and where appropriate updated.

The period of validity of approval decisions is regulated in a differentiated structure in the approval regulations under German law. For instance, decisions on the admissibility of infrastructure projects lose their validity in accordance with section 75 subsection (4) of the Administrative Procedures Act if the implementation of the project is not commenced within five years. Section 18 subsection (1) No. 1 of Federal Immission Control Act provides for the approval of industrial plant that the approval authority establishes a suitable period for the start of the erection or operation of the installation. The approval ceases to apply if this period is subsequently not complied with and also not extended for an important reason. The same applies if the installation is not operated for a period of more than three years.

Re Questions 19 and 20

The information and participation of the public is carried out in several steps in Germany:

1. Announcement of the project:

After the developer has submitted to the competent authority the documents in accordance with section 6 of the Environmental Impact Assessment Act and the authority has verified that they are complete and suitable to be exhibited for inspection (cf. answer re Question 14 above), the project is initially announced (cf. section 9 subsection (1) sentence 3 of the Environmental Impact Assessment Act in conjunction with 73 subsection (5) of the Administrative Procedure Act and section 10 subsection (3) of the Federal Immission Control Act). The announcement constitutes the start of the participation procedure, in which the competent authority must inform the public about the following (section 9 subsection (1) a) of the Environmental Impact Assessment Act):

a. the application for a decision on the approval of the project, or any other act by the developer to initiate a procedure for assessing the environmental impact,

b. the determination that the project is subject to EIA,

c. the competent authorities for implementing the procedure and decision on the approval of the project, from whom further relevant information can be obtained and to whom comments or questions may be submitted, and the deadlines laid down for their submission,

d. the nature of any possible decision on the approval of the project,

e. details of the documents to be submitted by the developer,

f. the details of where and for what period these documents are exhibited for inspection, and

g. further details of the public participation procedure.

The announcement is made in approval proceedings for industrial installations in the official gazette of the approval authority, as well as either on the Internet or in local daily newspapers (section 10 subsection (3) sentence 1 of the Federal Immission Control Act). When it comes to infrastructure projects, the project must be announced in the municipalities in the area of which it is likely to have its impact. There are plans for an announcement according to local custom (in most cases in the local official gazette in practice), as well as the recent additional requirement of announcing it on the Internet (section 27a of the Administrative Procedures Act).

2. Exhibition of the documents

In accordance with section 9 subsection (1) (b) of the Environmental Impact Assessment Act, the documents of the developer and the decision-relevant reports and recommendations relating to the project which were in the hands of the competent authority at the commencement of the participation procedure must be exhibited for inspection by the public. Additionally, the documents in question must be published on the Internet (section 27a subsection (1) sentence 2 of the Administrative Procedures Act). The exhibition period is one month in most cases in Germany, and even longer in some procedures. More information which may be significant to the decision on the admissibility of the project and which the authority only has at its disposal once the participation procedure has commenced must be made available to the public in accordance with the provisions on access to environmental information, i.e. only on application as a rule.

3. Submission of objections

In accordance with section 9 subsection (1) sentence 2 of the Environmental Impact Assessment Act, the affected public must be given an opportunity to comment. The affected public which is entitled to comment includes any individual whose concerns are affected by the project, as well as all associations whose field of activities, in accordance with their statues, is affected by the approval decision. In derogation from this fundamental provision contained in the Environmental Impact Assessment Act, specialist environmental law provides broader participation rights for specific approval procedures. For instance, in the approval procedure for industrial installations or specific nuclear installations, any individual may lodge objections to the project, regardless of whether they are concerned or not.

The objections may be lodged from the first day of the exhibition onwards. The objection period ends as a rule two weeks after the expiry of the exhibition period (section 73 subsection (4) sentence 1 of the Administrative Procedures Act); there are longer objection periods with some procedures.

4. Implementation of a discussion

As a rule (exceptions are possible subject to specific conditions), the authority must discuss the objections which have been lodged in time and the statements of the authorities with the developer, those affected and the parties (section 9 subsection (1) sentence 3 of the Environmental Impact Assessment Act in conjunction with section 73 subsection (6) of the Administrative Procedure Act). The time and date for the discussion must be announced in the affected municipalities at least one week in advance (including on the Internet). The authorities involved, the developer and the parties which have lodged objections or made statements are to be informed of the date of the meeting.

5. Announcement of the approval decision

Once the approval procedure has been concluded, the competent authority must publicly announce the decision on the approval or rejection of the project. The approval notice, together with its explanatory memorandum and information on legal remedies, is to be exhibited for inspection (section 9 subsection (2) of the Environmental Impact Assessment Act) and additionally published on the Internet (section 27a subsection (1) sentence 2 of the Administrative Procedures Act).

Re Question 21

See the answer re Questions 19 and 20 with regard to the preconditions subject to which individuals and associations can participate in the EIA within the public participation.

In addition to the public participation, the environmental impact assessment also includes participation by the authorities. In accordance with section 7 of the Environmental Impact Assessment Act, the authority competent for the EIA informs all authorities whose environment-related sphere of responsibility is affected by the project about the project, forwards the EIA documents to them and obtains their statements.

The Environmental Impact Assessment Act does not contain any specific provisions on what facts, technical aspects and concerns members of the affected public (including affected associations) and the authorities concerned in the proceedings can assert. In accordance with the meaning of the provisions on participation, firstly, members of the public and the authorities involved are to be afforded the opportunity to input information to the proceedings which may be significant for the approval decision. The participation procedure helps make sure that the results of the EIA and the subsequent approval decision are based on a sound footing in terms of information. Moreover, the affected public is to be enabled in terms of early legal protection to assert their own concerns and interests which may be adversely affected by the project. The same applies to participation by the authorities. It is to ensure that public concerns for the assertion of which the authorities in question are competent are appropriately involved in the environmental assessment and decision-making.

Reference is made to the answers re Question 17 and Questions 22 to 26 on the appeals that are available in Germany against procedural errors in the EIA.

Re Question 22

German administrative procedure law does not provide for independent appeals against official procedural acts on the EIA (e.g. the summary description and assessment of the environmental impacts by the competent authority in accordance with sections 11 and 12 of the Environmental Impact Assessment Act). In accordance with section 44a of the Code of Administrative Court Procedure, appeals against errors in the EIA may only be asserted at the same time as the appeals which are admissible against the approval decision. Breaches of provisions of the law on the EIA asserted by the plaintiff are also examined within the appeal procedure against the approval decision. Please refer to the answers to Questions 23/24 with regard to the details.

The appeals which are available against approval decisions are objection and action before the administrative courts. The objection procedure is an official review procedure which as a rule proceeds review by the administrative court. Section 68 of the Code of Administrative Court Procedure provides (with certain exceptions) that the lawfulness and expedience of the approval decision is to be first of all reviewed in objection proceedings prior to lodging a rescissory action before the administrative courts. The objection is to be lodged with the authority which took the approval decision. If the authority considers the objection to be justified, it remedies it, so that the approval decision is rescinded or altered. If the objection authority considers the approval to be ill-founded, an objection notice is handed down. This is as a rule issued by the next highest authority, but under certain preconditions also by the approval authority itself.

Re Questions 23 and 24

It is possible to lodge an action before the administrative courts against decisions of the administrative authorities on the admissibility of projects for which there may be an obligation to implement an environmental impact assessment (as a rule not until objection proceedings have been implemented; cf. answer to Question 22). The Code of Administrative Court Procedure provides for various types of action in this regard the applicability of which depends on whether the approval decision is handed down as an administrative act or in another form (e.g. within a zoning plan).

When it comes to the preconditions for the admissibility of the action, German administrative procedure law distinguishes between appeals by individuals and by recognised environmental associations. The recognition of an environmental association is contingent on specific prerequisites. This includes in particular that the association, in accordance with its statutes, promotes goals of environmental protection, has been in existence for at least three years and has been active during this period within the meaning of the environmental objectives which it pursues and has a democratic internal structure (section 3 of the Environmental Appeals Act).

Individuals are only entitled to lodge appeals if they can claim that their own rights have been violated by the impugned approval decision. This is the case for instance if the plaintiff claims that the project has impacts which adversely affect their health or property and such an adverse effect appears to be possible. In contrast, individuals may not claim via an action that the project will be injurious to protected animals or plants because this does not constitute a potential violation of the plaintiff's personal rights.

In accordance with section 2 subsection (1) of the Environmental Appeals Act, environmental associations have greater powers to file actions in comparison with individual plaintiffs. They may lodge appeals against approval decisions without needing to assert a violation of their own rights. They may hence also complain of a violation of provisions which serve to protect not the individual, but environmental concerns voiced by the public, for instance provisions on the conservation of nature and the landscape. In accordance with the regulation currently in operation, an action filed by a recognised environmental association is admissible if the environmental association asserts that the approval of the project contradicts decision-relevant provisions serving environmental protection, and affects the tasks of the association in accordance with their statutes. It is furthermore necessary for the association to have already participated in the approval procedure. However, with regard to the first prerequisite (claiming a violation of environmental regulations), the Fifth session of the Meeting of the Parties to the Aarhus Convention decided on 1 July 2014 at the recommendation of the Aarhus Compliance Committee that this provision inadmissibly restricted the entitlement of environmental associations to file actions (violation of Article 9§2 of the Aarhus Convention). In future, it will hence suffice for the admissibility of appeals by recognised environmental associations that a violation of decision-relevant provisions is complained of, regardless of whether these are environmental provisions or other provisions (for instance those under construction law).

A comparable picture emerges when it comes to whether the appeal is well-founded. It is also necessary to distinguish here between appeals by individuals and those by recognised environmental associations. In accordance with section 113 subsection (1) sentence 1 of the Code of Administrative Court Procedure, actions by individuals against decisions on the approval of a project subject to EIA are well-founded if the decision is unlawful and violates the plaintiff's own rights. Appeals on the part of recognised environmental associations, by contrast, are already well-founded if the decision breaches relevant legal provisions serving environmental protection and the violation of the law affects environmental interests for the promotion of which the association campaigns in accordance with its statutes (section 2 subsection (5) of the Environmental Appeals Act). In accordance with the abovementioned decision of the Meeting of the Parties to the Aarhus Convention, it will no longer be a matter in future of whether the provisions that have been violated are environmental protection provisions, but only of whether there is a breach of decision-relevant legal provisions.

The plaintiff may also assert a violation of administrative proceeding provisions within the appeal procedure. According to the German legal understanding, these include the provisions on the necessity of an EIA and the provisions relating to the implementation of an EIA. The following detailed distinction is to be made in this regard:

In accordance with section 4 of the Environmental Appeals Act, both environmental associations and individuals can demand the rescission of the approval decision if a necessary environmental impact assessment, or a necessary preliminary examination of the individual case, was not carried out, and has also not been subsequently carried out (cf. on this the answer re Question 17 above). In the same vein, when it comes to violations of provisions on the implementation of an EIA, the plaintiff may demand that the decision be rescinded unless it is obvious that the violation of the EIA provision in question has not materially influenced the approval decision (section 46 of the Administrative Procedure Act).

With regard to the approval of specific infrastructure projects (such as the construction of trunk roads), the Federal Administrative Court has modified this legal consequence with regard to specific particularities under specialist law. According to this case-law, the approval decision is not rescinded, but declared unlawful. This ultimately has the same consequence as the rescission of the decision: the approval may not be used. [2] The authority is however enabled to subsequently carry out the EIA which has been omitted. If the EIA is then carried out, the authority must examine whether the earlier approval decision (which the court has declared unlawful) can remain unchanged as to its content, or must be rescinded or modified on the basis of the result of the EIA.

Re Question 25

In accordance with section 80 subsection (1) of the Code of Administrative Court Procedure, appeals against approval decisions have a suspensive effect as a matter of principle. There are however a large number of exceptions to this principle. Firstly, various specialist statutes, in particular for the approval of infrastructure projects, explicitly provide that an objection and an action have no suspensive effect. Moreover, the suspensive effect does not apply in cases in which immediate execution of the approval is separately ordered by the approval authority or the objection authority in the public interest or in the overriding interest of a party concerned (section 80 subsection (2) No. 4 and section 80a subsection (1) No. 1 of the Code of Administrative Court Procedure). This possibility is quite frequently taken up in practice.

If the appeal does not have a suspensive effect for the above reasons, the court may completely or partly order, or where appropriate restore, the suspensive effect at the request of the plaintiff (section 80 subsection (5) of the Code of Administrative Court Procedure). The court's decision is contingent on an overall weighing up in which the interest in the immediate execution of the approval against the plaintiff's interest in suspension is weighed up.

[2] Federal Administrative Court, judgment of 20 December 2011, ref. 9 A 31/10.

Re Question 26

No. The court has neither jurisdiction to change the results of the EIA, nor can it itself make any alterations to the content of an approval decision for a project that is subject to EIA. Rather, the consequence of the well-foundedness of the appeal is as a matter of principle that the erroneous approval decision is rescinded by the court (section 113 subsection (1) of the Code of Administrative Court Procedure). If the decision on the approval of the project is at the discretion of the authority, and the authority has exercised its discretion erroneously, the court obliges the authority to hand down a new ruling on the application for approval of the project, observing the legal opinion of the court.

Re Question 27

Monitoring of the environmental impacts of projects which may potentially have an adverse impact on the environment is regulated in Germany not in the law on the EIA, but at specialist law level. The provisions are varied and differentiated. On this basis, additional stipulations are regularly included in the approval notice when approving the project, obliging the developer to carry out specific monitoring measures such as emission or immission measurements or taking and analysing soil or water samples, to transmit the results of such measures to the competent supervisory authority or to make them available for assessment by the authority. As well as self-monitoring by the developer, a broad spectrum of official monitoring measures are carried out. These serve, firstly, to verify whether the environmental conditions set out in the approval notice are being complied with by the developer, as well as whether these are sufficiently effective. Then there is a system of state environmental observation, which – independently of monitoring individual projects – serves to identify environmental changes triggering protection or prevention measures on the part of the authorities. These also include supra-regional, regional or sectoral monitoring systems.

In accordance with section 10 subsection (2) No. 4 of the German Environmental Information Act (*Umweltinformationsgesetz – UIG*), the authorities are obliged to actively disseminate and make available to the public data or summaries of data from monitoring activities of the above nature. In addition, interested members of the public are to be given access to the results of the monitoring in individual cases on application unless there are justified reasons for refusing to do so.

Re Question 28

The monitoring of compliance with environmental requirements which have been set in approval decisions for projects that are subject to EIA is very largely a task for the *Länder* in Germany. It is the supervisory authorities there which are competent. Some of these are independent authorities, whilst in other cases the approval authority is also responsible for the subsequent monitoring of the projects which it has approved.

The supervisory authorities have qualified staff, the necessary technical equipment (e.g. measuring equipment, laboratories, etc.), and the necessary legal tools (such as the power to enter and inspect third-party premises) in order to be able to carry out their monitoring activities effectively. Where special expertise or special methodical or technical skills are needed in individual cases, they can consult external experts or have reports drawn up by experts.

The organisation and implementation of the monitoring task is generally determined by the nature of the project, the risk potential which it represents and the interests affected. If monitoring reveals violations of environmental provisions or determinations contained in the approval notice, the authorities have a range of reactions at their disposal. They range from simple warnings, through formal hearings, to fines and criminal charges.

Where it is recognisable, the authorities in Germany endeavour to use the set of tools which they have at their disposal flexibly according to the circumstances of the individual case. Where shortcomings are recognised, it is primarily attempted to find appropriate solutions in cooperation with the developer, and to find administrative means. It is significant in this context in particular that German environmental law makes it possible to also hand down subsequent orders once the approval has been issued with which the requirements set out in the approval notice can be supplemented or tightened up. For instance, the authorities make use of the tool of making subsequent orders, inter alia when it emerges in the monitoring process that the public or the neighbourhood cannot be adequately protected with the measures that had been initially provided for to counter adverse environmental consequences of the project.

More serious sanctions (such as fines) are not handed down in practice until less incisive measures fail to provoke any reaction or appear to have no prospects for success. Having said that, most *Länder* have obliged the staff of the environmental authorities via administrative regulations ("cooperation decrees") to inform the public prosecution office of any environmental crimes which come to their notice in the course of their monitoring activities.

Reference is made to the answer re Question 27 when it comes to the question of informing the public of the outcome of the monitoring.

Re Question 29

Sanctions imposed on the violation of provisions of the law on the EIA are provided for neither in German law nor in the valid EIA Directive 2011/92/EU. In accordance with Article 10a of new EIA amendment directive 2014/52/EU, the Member States can however set sanctions in future which can be imposed in case of violations of national provisions on the transposition of the EIA Directive.

Unlike the provisions contained in the law on the EIA, the provisions of specialist environmental law already contain a great number of differentiated sanctions that are available in case of violations by the developer of procedural, approval or monitoring requirements. Firstly, cases are covered in which a project is implemented without the necessary approval or in violation of environmental requirements or subsequent orders. It is also possible to sanction the failure to comply with obligations to report on the part of the developer.

When it comes to the sanctions that are available, there is a need to distinguish between administrative and criminal offences. Administrative offences constitute a kind of administrative wrong-doing. Unlike criminal offences, they constitute less grievous violations. They are prosecuted and sanctioned by the competent administrative authority as a matter of principle. Fines of up to 50,000 € can be imposed. If the breach of the law was committed by an individual who did so while acting in a senior capacity for a legal person or association of persons, the fine can be imposed not

only on the offenders themselves, but also on the legal person or association of persons (section 30 of the Act on Administrative Offences [*Gesetz über Ordnungswidrigkeiten – OwiG*]).

German law provides for criminal sanctions for particularly serious breaches of environmental law. The Criminal Code (*Strafgesetzbuch – StGB*) and specialist environmental law contain offences covering such cases. If, for instance, nuclear installations, pipelines for transporting materials which constitute a hazard to water or specific waste disposal plant are operated without the necessary approval, this constitutes a criminal offence in accordance with section 327 of the Criminal Code which can be punished with imprisonment or a criminal fine. Prosecution is a matter for the public prosecution office, whilst sentencing is incumbent on the criminal courts. The *Länder* have established special departments or specialist public prosecution offices dealing with environmental crime at the public prosecution offices in some cases. This is to ensure that the environmental authorities have contacts in the public prosecution offices which have subject-related expertise.

Re Question 30

If a project that is subject to EIA is implemented without the necessary approval, the competent authority can ban the further use of the plant or order the operation to be closed. If it is established that a plant is not only formally illegal because of the lack of approval, but in fact cannot be approved in accordance with the relevant legal provisions, the authority can also order its removal where appropriate.

Re Question 31

So far, there are no specific provisions on sanctions for violations of provisions to transpose the EIA Directive in Germany (cf. answer to Question 29). However, failure to comply with requirements under the law on the EIA can entail consequences under administrative law which have a serious effect on the developer, and which might be able to have a similar preventive effect as “real” sanctions.

First of all, it is necessary to point out once again that the failure to carry out a necessary environmental impact assessment, or a violation of other provisions relevant to the EIA, can lead to a complaint being filed in the appeal procedure and entail the approval decision being rescinded. Over and above this, the approval authority can withdraw the approval decision in accordance with section 48 of the Administrative Procedures Act if it was brought about by information provided by the developer which was incorrect or incomplete in terms of a major aspect. This offence can also be deemed to have been committed if the developer has provided erroneous or incomplete information on decision-relevant environmental aspects in its EIA documents.