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elni REVIEW

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Editorial

The negotiations of the Transatlantic Trade and Investment Partnership (TTIP) began in 2013 and have been the source of heated debate since then. In addition to various concerns regarding a feared reduction of statutory health and environmental standards, the main discussion has centered around the introduction of the so-called Investor-to-State Dispute Settlements (ISDS).

Against this background the current elni issue focuses on issues relevant to TTIP with the following contributions.

Andrea Carta addresses the question of whether the Investor-to-State Dispute Settlement (ISDS) fits in the EU legal system. His article describes the framework underlying the inclusion of ISDS in EU international investment agreements (IIAs) and discusses the concerns raised, particularly by NGOs, regarding the potential impact of ISDS on EU and Member States' regulatory powers.

The regulatory coherence in the TTIP Agreement in the context of chemicals is discussed by *Vito Buonsante*. He outlines the conflict between seeking regulatory coherence and at the same time maintaining the right to choose different levels of protection in regard to health, safety, consumer, labour and the environment.

In the recent developments section *Julian Schenten* reports on activities to strengthen REACH provisions concerning (imported) articles which also touch a sensitive point in the relationship between the EU und the USA.

A second series of contributions to this issue of the elni Review covers a variety of other topical legal issues.

In an article by *Viktoria Raczyńska* the main provisions of Ukrainian legislation regulating hazardous waste management are analysed in terms of its compliance with the Basel Convention and the Directive 2008/98/EC.

Furthermore, the contribution of *Gerhard Roller* deals with the ambiguous relationship between speed and quality in decision-making in Germany by analyzing the measures taken to expedite procedures.

Finally, the issue concludes with recent developments – described by *Nicola Below* -with regard to participatory rights in the environmental decision-making process and the implementation of the Aarhus Convention.

We hope you enjoy reading the journal.

Contributions for the next issue of elni Review are very welcome. Please send contributions to the editors by mid-March 2015.

Claudia Schreider (née Fricke) / Martin Führ
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Authors of this issue

Nicola Below

Lawyer specialising in environmental information law and participation. He is a research assistant at the Society for Institutional Analysis (sofia), University of Applied Sciences in Darmstadt, Germany,
below@sofia-darmstadt.de

Vito A. Buonsante

staff attorney at ClientEarth, an organisation of activist lawyers committed to securing a healthy planet. He works on the implementation of REACH and other toxics related legislation.
info@clientearth.org

Andrea Carta

Andrea Carta, LL.M., is a legal strategist at Greenpeace - European Unit, Brussels. The views expressed in his article are personal.
Andrea.Carta@greenpeace.org

Viktoria Raczyńska

PhD student at the Institute of Legislative Foresight and Legal Expertise (Kyiv); intern at Faculty of Law and Administration, Opole University (Poland). vikarachinskaya@gmail.com

Gerhard Roller

Professor of Environmental Law at the University of Applied Sciences in Bingen, Germany, and Lecturer at Institut National des Sciences Appliquées, Centra Val de Loire, France.
roller@fh-bingen.de

Julian Schenten

Lawyer specialising in chemicals legislation and information law, research assistant at the Society for Institutional Analysis (sofia), Darmstadt University of Applied Sciences, Germany.
schenten@sofia-darmstadt.de

Quality and speed of administrative decision-making proceedings: tension or balance? The case of Germany

Gerhard Roller

1 Introduction

Measures have been taken to accelerate decision-making procedures in Germany since the beginning of the 1990s. The wellspring of these efforts was the need, on the one hand, to rapidly improve the infrastructure of the new German federal states (hereafter *Länder*) after reunification, and, on the other hand, to reduce what the government and industrial lobby groups considered the obstruction of administrative procedures to economic investment. Moreover, since 1990, a vague notion of reducing "bureaucracy" has flooded the political debate in the EU and a number of Member states, leading to ongoing activities which aim to abolish laws regarded as an unnecessary burden for economy. Meanwhile some criticism has arisen of this overloaded "anti-bureaucracy" movement.[1]

In the beginning, the field of application of some of these deregulation laws was regionally restricted (to the new *Länder*) and also subject to time limits. But step-by-step they were expanded to include all of Germany and were made unlimited law.

The peak of the deregulation movement was reached in 2011. Since then, an opposite current can be observed, which aims at improving the legal instruments for the participation of citizens, in particular in infrastructure planning procedures. These debates and legislative actions were triggered by intensive local protest movements like "Stuttgart 21" and local opposition to measures in the context of energy transition (*Energiewende*).

This article will first of all deal with the ambiguous relationship between speed and quality (II). The measures taken in order to expedite procedures are analysed in the third and fourth chapter. Two types of measures can be distinguished here (with two further sub-types): Firstly, there are measures of a general scope, which are not specific to a certain sector of environmental law, but which concern administrative procedures as such (infra III.). In this category two types of rules need to be differentiated: the rules governing the administrative procedure before the administrative act is delivered by the competent authority are laid down in the Administrative Procedures act (*Verwaltungsverfahrensgesetz*) and the rules governing the judicial review of these decisions before the courts are laid down in the German Administrative Courts Procedures Act (*Verwaltungsgerichtsordnung*).

Secondly, measures have been taken to speed up infrastructure and licensing procedures in particular (chapter IV). They can generally be categorised as procedures under the German Federal Immission Control Act, which applies to industrial plants and procedures where a specific planning permit (*Planfeststellung*) is required. This is the case for all types of infrastructure projects such as airports, roads, landfills etc. Chapter V deals with a complete shift of the "deregulation" paradigm in the year 2011. Finally, chapter VI addresses the impact on the quality of the decisions in terms of environmental protection and citizens' rights.[2]

2 The length of procedures as one criterion for quality

There is no simple, unanimous answer to the question of finding the right balance between the length and quality of administrative decision-making (the same holds true for court procedures). Under German law, the competent authority is obliged to execute the procedure efficiently. This obligation is considered to be justified for two reasons: Firstly, the administration generally has to perform its activities in the most effective way (principle of public economy/budget discipline) and, secondly, in cases where fundamental rights of citizens are involved (e.g. property rights, freedom or health), the right to receive a response from the authority in due time is part of these fundamental citizen rights.[3] Thus, the duration also has to be considered a quality criterion of sound administrative procedures. Undue delays in the decision-making process may even entail government liability.[4]

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1 See the article by A. Knospe entitled *"Mehr Bürokratie wagen!"* ZRP 2/2010, p. 43. For the background to the German debate, see the country report in: Backes/Chevalier/Eliantonio/Jansen/Poortinga/Seerden, *Snellere besluitvorming over complexe projecten vergelijkend bekeken,* Den Haag, Netherlands, 2010, p. 121.

2 This article is originally based on a contribution held on the Conference "Quality and Speed of Administrative Decision-making Proceedings: Tension or Balance? organized by the Maastricht University, Faculty of Law in 2010. It has been updated in 2014 for the publication in ELNI Review.

3 See Kopp/Ramsauer, VwVfG Kommentar, 9. Aufl. 2005, § 10 Rn. 18; Schwarz, in: Fehling/Kastner/Strömer, Verwaltungsrecht, 3. ed. 2013, § 10 VwVfG, Rn. 16.

4 E.g. in cases of building permits: BGH, NVwZ 1993, 299, NVwZ 1994, 405.

With regard to court procedures the question of speed becomes even more crucial. Art. 6 I of the European Human Rights Convention provides that court procedures have to be terminated "within a reasonable time". The jurisprudence of the Court of Human Right is strict in protecting this fundamental right of citizens. Germany has repeatedly been denounced by the Court for excessively long court procedures[5] although the right to receive a court decision in reasonable time is considered part of the rule of law and some *Länder* constitutions have explicitly laid down a right to an efficient ("zügig") procedure.[6] Only recently has the German government published a proposal for the compensation of persons who have experienced unduly long (court) procedures.

Having said that, it is certainly true that an efficient and speedy procedure is not the only – and not necessarily the most important – quality criteria: The outcome of the procedure must also be lawful and just. A difficult process of weighing and balancing interests has to be conducted by the authorities, particularly when a number of different private and/or public interests are concerned. Moreover, in environmental cases the decision-making process has to take into account sound protection of the environment. Complex cases naturally need more time to be decided. It is a banal truth that too speedy decision-making may lead to bad decisions. In this respect, efficiency is not to be equated with speed. It is precisely in this field of tension between efficiency and speed that the discussion of expediting decision-making processes and general discussion of "deregulation" is to be found. Administrative rules and the related practical conditions to be applied should pave the way to find an appropriate balance between these conflicting interests.

3 General expediting measures concerning administrative and judicial procedures

3.1 Provisions in the administrative procedures act (Verfahrensregelungen zur Beschleunigung)

The German administrative procedures act states in Art. 10 (2) a basic condition which applies to all procedures: The administrative procedure has to be performed simply, appropriately and efficiently. In the 1990s, this rule was expanded by introducing a whole chapter into the Act which aimed at expediting the procedures; it was entitled "expedition of licensing procedures" (*Beschleunigung von Genehmigungsverfahren).* This chapter only applied in cases where a licensing procedure was under discussion. According to the explanatory statement of the lawmaker the amendment aimed at having an "announcement (or signaling) effect" for the competent authorities in terms of "beeing aware" to speeding up the procedure [7.] In Art. 71b-e some more or less self-evident advice to the competent authority was given, such as to terminate the procedure in "appropriate time", to provide advice to the applicant or to send the relevant application documents delivered by the applicant simultaneously to the other administrative bodies involved in the decision. The legislator created the innovative notion of "*Sternverfahren*" (a parallel procedure) for this latter practice. Despite the fact that these rules may be regarded as "symbolic legislation", this legislation underlined the notion that the real potential of speeding up administrative decision making processes lies much more in sound administrative management than in sophisticated legal provisions. In 2008 the legislator, coming to the same conclusion, abolished most of the provisions enacted in 1996.[8]

3.2 Elimination of preliminary administrative objection proceedings

Traditionally, the claimant has to undergo a preliminary administrative objection proceeding before he or she can present his or her case to the court (Art. 68 of the Administrative Courts Procedure Act). This proceeding may be considered a type of administrative "self-control". The advantage for the claimant is that these proceedings are much less costly than a court procedure and that the administration may also consider the appropriateness of a decision and not only its legality. In some sectors this preliminary procedure is quite effective; in others, particularly when intensive investigations had already been undertaken prior to the decision being taken, the chance that the administration would modify its own decision is rather limited. For these reasons, the preliminary procedure has been repealed little by little in recent years. Thus, on the federal level a number of sectoral laws eliminated the preliminary procedure, e.g. under Art. 14 (7) of the genetic engineering law in cases of dissemination permits for genetically modified organisms (GMOs).

On the *Länder* level it can be observed that in most *Länder* by-laws on the basis of Art. 68 par. 1 s. 2 of the German Administrative Courts Procedure Act produce a large number of exceptions to the rule of

5 ECHR, 29.5.1986, Deumeland ./. Federal Republic of Germany, NJW 1989, 652.

6 Brandenburg and Sachsen, see on this: Lau, *Überlange Dauer eines verwaltungsgerichtlichen Verfahrens*, NVwZ 2010, 358.

7 Huck, in: Bader/Ronellenfitsch (ed.), Beck Online Kommentar, VwVfG § 71a par. 17 Status: 01.10.2014.

8 See Huck, in: Bader/Ronellenfitsch (ed.), Beck Online Kommentar, VwVfG § 71a par. 18 (Status: 01.10.2014). The old articles have been now replaced by a chapter transposing Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

preliminary objection proceedings. In fact, only 6 Länder *did not* act on the basis of this option.[9]

3.3 Elimination of suspensive effect

In contrast to some other countries like the Netherlands, a remedy against an administrative act (be it the administrative objection or the action before the court) has a suspensive effect under Art. 80 (5) of the German Administrative Courts Procedure Act. As a result, the plaintiff who brings a claim against a license of an industrial plant in his or her neighbourhood could stop the plant by just lodging the complaint. In spite of the fact that usually in such cases the administration may overrule this effect by an administrative act, determining that the operation or building of the plant is in the private or common interest, most sectoral laws dealing with infrastructure projects today have abolished this suspensive effect. This is the case, for example, under Art. 18e par. 2 of the German General Railway Law concerning planning permits (Planfeststellungsbeschluss) for the construction or modification of railway lines, Art. 17e of the law on long distance roads or Art. 10 par. 6-8 of the Air Traffic Law (airport licences).

3.4 Restriction of the right of appeal

According to the 6th amendment of the German Administrative Courts Procedure Act[10] in 1996, the right to appeal (on questions of fact and law, *Berufung*) against decisions of the first instance administrative courts was restricted. Art. 124a[11] provides that the administrative court must decide that an appeal is admitted. Otherwise the plaintiff hast to apply for the admission of appeal to the Higher Administrative Court.

3.5 Federal Administrative Court as first instance tribunal

The classical German juridical control system is based on three instances: Administrative Courts (Verwaltungsgericht), Higher Administrative Court (Oberverwaltungsgericht or Verwaltungsgerichtshof), and Federal Aministrative Court (Bundesverwaltungsgericht). Speeding up court procedures was already an issue in a proposal made by the German Federal Council (Bundesrat) in 1983. A first amendment of the German Administrative Courts Procedure Act in 1985[12] eliminated the first instance for certain infrastructure projects and large industrial plants (like electrical power plants with a thermal output of more than 300 Megawatt or large waste incineration plants). The legislator considered that the length of court procedures was too long where such large investment projects were concerned and that such lengths would hinder planning security and have a negative effect on the protection of legal rights. At that time the law was subject to time limits, but with the 4th amendment of the German Administrative Courts Procedure Act, which came into force on 1 January 1991, these rules were made unlimited and incorporated in Art. 48 of the Administrative Courts Procedure Act.

The law on the acceleration of traffic infrastructure went one step further: It concentrates the competence of judicial review in certain cases only on the Bundesverwaltungsgericht in the first and last instance. Actually the law applied only for certain highway projects connecting the new Länder with Western Germany[13]; later on it was extended to further projects. In addition, the German Infrastructural Planning Procedures Act (Infrastrukturplanungsbeschleunigungsgesetz)[14] now covers overall 22 railway-, 57 road- and 6 waterways where the Federal Administrative Court is the only competent tribunal.[15]

4 Measures taken to speed up licensing procedures under the Federal Immission Control Act and infrastructure planning procedures

4.1 The relationship between licensing requirements and length of procedures

In Germany, there are two different types of licensing procedures for industrial plants under the Federal Immission Control Act, a simplified procedure without public participation and a procedure with public participation. The installations requiring a permit are listed in the 4th Ordinance on the Implementation of the Federal Immission Control

9 See Erbguth, *Abbau des Verwaltungsrechtsschutzes*, Die Öffentliche Verwaltung, 22/2009, p. 925.

10 1-11-1996, BGBl I p. 1626.

11 Art. 124a VwGO reads as follows: „(1) The administrative court shall admit the appeal on points of fact and law in the judgment if the grounds of section 124, subsection 2, No. 3 or No. 4 apply. The Higher Administrative Court shall be bound by the admission. The administrative court shall not be empowered to not admit the appeal on points of fact and law." The relevant subsection in Art. 124 read as follows: "(2) The appeal on points of fact and law shall only be admitted (...) 3. if the case is of fundamental significance, 4. if the judgment derogates from a ruling of the Higher Administrative Court, of the Federal Administrative Court, of the Joint Panel of the supreme courts of the Federation or of the Federal Constitutional Court, and is based on this derogation, (...)". (Translation taken from the website of the German Federal Ministry of Justice, http://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html#p0582.

12 On its history, see: Bier, in: Schoch/Schmidt-Assmann/Pietzner, *Verwaltungsgerichtsordnung*, Kommentar, Loseblatt, § 48 Rn. 1 (as of May 1997).

13 Verkehrswegeplanungsbeschleunigungsgesetz, see: Steinberg/Berg/Wickel, *Fachplanung*, 3. Aufl. p. 88; Backes et al., p. 138.

14 Of 9-12-2006, BGBl. I p. 2833.

15 Erbguth, *Abbau des Verwaltungsrechtsschutzes*, Die Öffentliche Verwaltung, 22/2009, p. 926.

Act.[16] It is important to note that in practice the overwhelming majority of procedures are simplified procedures without public participation. This is due to the fact that the regulator listed more and more plants in this category but also because the majority of licensing procedures concern modifications of existing plants that usually are privileged to undergo a simplified procedure. Thus, between 1997 and 2004 in Nordrhein-Westfalen – the federal state with by far the most industrial plants in Germany – the average number of procedures with public participation between 1997 and 2004 is under 10 % of the overall procedures, as the following table shows[17]:

Category	Licensing procedures in NRW 1997-2004		
	Number	Public procedures	
		Number	%
1	1115	79	7.1
2	999	40	4.0
3	1016	64	6.3
4	1493	41	2.7
5	328	22	6.7
6	125	12	9.6
7	776	75	9.7
8	1778	60	3.4
9	443	30	6.8
10	481	2	0.4
Total	8554	425	5.0

Empirical evidence shows that in cases where public participation is required, the impact on the speed of the procedure is rather limited; it tends to be more influenced by the participation of other administrations and by the fact that the dossier of the applicant is not satisfactory and needs to be supplemented.[18] Thus, public participation has no significant impact on the length of the procedure in most cases.

Moreover, the general question of whether permitting procedures have any impact on the investment decisions of companies seem to be largely overestimated in the public debate. Empirical research carried out in 1990 arrived at the conclusion that the duration of procedures is not decisive; companies rated this criterion the 16th most important one from 19 possible answers. Rather, a healthy environment was considered to be an important factor.[19] Other empirical evidence supports the thesis that there is no relevant relationship between investment decisions and the duration of procedures.[20] This fact is all the more interesting as all legislative and regulatory measures taken to "deregulate" administrative procedures were based on the assumption – unsupported by empirical evidence – that there is a causal relationship between these two factors.

4.2 Measures taken to speed up licensing procedures

4.2.1 Reduced need for licences under the Federal Immission Control Act

The easiest way to "accelerate" a procedure is to eliminate the obligation of permitting. When no permitting procedure is required the question of duration is obsolete. In fact, in recent years the regulator released in a number of cases industrial plants from the permitting obligation under the Federal Immission Control Act by eliminating them from the list in the respective ordinance. Thus, by virtue of Art. 3 of the law on reducing and accelerating permitting procedures[21] 30 types of installations were exempted from the permitting requirement. These installations still have to apply for a building permit but there is no licencing procedure under the Federal Immission Control Act and thus the environmental impact is less taken into acount. There is indeed evidence that the overall number of permitting procedures under the Federal Immission Control Act is decreasing.[22]

Another element of deregulation in this context is the increasing importance of the notification compared to the permit. In cases of simple modification of the installation without negative impact on the environment, the operator of the plan is not obliged to run through a permitting procedure; rather, he simply has to notify the modification to the authority (Art. 15 of the Federal Immission Control Act). The difference is that the operator is allowed to set into force the modification after one month even if the authority has not replied to his notification.

16 Vierte Verordnung zur Durchführung des Bundes-Immissionsschutzgesetzes (Verordnung über genehmigungsbedürftige Anlagen) in der Fassung der Bekanntmachung vom 14. März 1997 (BGBl. I S. 504), zuletzt geändert durch Artikel 7 des Gesetzes vom 17. August 2012 (BGBl. I S. 1726).

17 A. Baum, Immissionsschutzrechtliche Genehmigungsverfahren – Entwicklung der Verfahrensdauer und der Beteiligungsrechte im Zeitraum von 1996 bis 2004, Dipl.-Arbeit, FH-Bingen 2005.

18 Sachverständigenrat für Umweltfragen (SRU), *Umweltverwaltungen unter Reformdruck*, Sondergutachten, Erich Schmidt Verlag (Berlin, February 2007), para 295 ss.; Gebers, B.; Jülich, R.; Küppers, P.; Roller, G., *Bürgerrechte im Umweltschutz*, Öko-Institut e.V., Freiburg 1996.

19 Steinberg/Allert/Grams/Scharioth, Zur Beschleunigung des Genehmigungsverfahrens für Industrieanlagen – Eine empirische und rechtspolitische Untersuchung, Baden-Baden 1991, p. 34.

20 SRU, *Umweltverwaltungen unter Reformdruck*, Sondergutachten, Erich Schmidt Verlag (Berlin, February 2007), para. 245.

21 Gesetz zur Reduzierung und Beschleunigung von immissionsschutzrechtlichen Genehmigungsverfahren of 23.10.2007, BGBl. See on this: P. Küppers/F. Schulze, KGV-Rundbrief 3/2007, p. 2.

22 SRU, *Umweltverwaltungen unter Reformdruck*, Sondergutachten, Erich Schmidt Verlag (Belin, Februar 2007), para 267, e.g. in the State Hessen between 1995 and 2005 the number of procedures decreased by 47% and in Northrhein-Westfalia by 15 %.

4.2.2 Change of the type of procedure: from public procedure to "simplified" procedure

Another method of expediting procedures is to modify the type of procedure and move installations which require public participation to the list of simplified procedures. The aforementioned law of 2007 transferred 15 types of installation to the second column (= without public participation). The latest modification in this respect took place in 2009.[23]

4.2.3 Reducing the number of public hearings

The public hearing ("*Erörterungstermin*") used to be a crucial element of the public participation procedure. The public hearing was compulsory whenever objections against the project were lodged to the competent authority during the procedure. The revision of Art. 10 par. 6 of the Federals Immission Control Act in 2007 transformed the compulsory character of the public hearing into a discretionary decision of the competent authority.[24] In some sectoral law, the public hearing had already been abolished by this time.[25]

4.2.4 Loss of standing in case of non-participation

A far-reaching and for several reasons doubtable rule in German administrative law is the so called *materielle Präklusion*. The rule provides that a plaintiff loses the standing to sue in cases when a participation right was not used by the plaintiff. If a public procedure takes place and the person does not lodge an objection during the administrative procedure, he will lose the right to sue against the permit (in the case it is issued). This rule is not only enshrined in Art. 10 (3) s. 5 of the Federal Immission Control Act but also applies to all infrastructure planning procedures. It seems to be questionable if this rule is in compliance with EU law, at least as far as the Environmental Impact Assessment Directive applies. Recently the European Court of Justice held in a decision concerning a Swedish case that "participation in an environmental decision-making procedure under the conditions laid down in Articles 2(2) and 6(4) of Directive 85/337 is separate and has a different purpose from a legal review" and that therefore "participation in the decision-making procedure has no effect on the conditions for access to the review procedure".[26] However, the German Federal Administrative Court decided recently that the ECJ ruling could not be interpreted against the Präklusion and that the rule is in compliance with EU law.[27]

4.3 Measures in infrastructure planning procedures

A number of measures which have already been discussed in chapter III also have an impact on planning procedures because the German Administrative Procedures Act is also applicable to this type of procedure. Beyond this, legislative measures have been taken in recent years to strengthen the legal effect of planning permits (*Planfeststellungsbeschluss*). This type of permit is used for large infrastructure projects, such as roads, waterways, airports, landfills, etc. According to Art. 76 ss of the Administrative Procedures Act the legal effect of an approved plan goes far beyond the effect of a license issued under the Immission Control Act. Thus, the law largely provides for rules which allow the subsequent remedying of formal infringements of the law by the competent authority after the decision has been taken. The law determines the principle of "maintenance of the plan" in order to avoid as far as possible that the plan has to be nullified ex post if there is any violation of the law. Even in cases where the plan is not in compliance with substantive law, the court is to determine (or to oblige the authority to do so) a supplementary measure so as to "repair" the plan instead of annulling it. In fact, the possibility of challenging this type of administrative decisions is nearly impossible. A plaintiff might achieve a modification of the plan (*Planergänzung*), but the legal doctrine (and the law in force) provides for a very high protection of the plan.

Furthermore, these procedures are highly complex; reducing delays therefore has an impact on the opportunity of the plaintiff to prepare his case.

4.4 Recent developments after "Stuttgart 21"

Up to the beginning of 2011, the political and legal measures taken to frame the administrative procedures aimed at restricting participating rights and clearly laid more emphasis on *speed* than *quality*. In 2011, a local planning conflict basically changed the attitude of political representatives. "Stuttgart 21" is a railway and urban development project in the city of Stuttgart, Germany. The highly controversial project led to a political crisis for the regional government of Baden-Wurttemberg and after the election in March 2011 a *Ministerpräsident* of the Green Party was governing for the first time this German federal state, which was traditionally known to be rather conservative than open for political experiments.

At the same time, in early 2011, the nuclear accident in Fukushima turned the German debate on nuclear energy upside-down. The Christian Democratic Union

[23] Gesetz zur Bereinigung des Bundesrechts im Geschäftsbereich des Bundesministeriums für Umwelt, Naturschutz und Reaktorsicherheit (Rechtsbereinigungsgesetz Umwelt – RGU) of 11.8.2009, BGBl. I 17.8.2009, p. 2723, in force since 1.3.2010.

[24] See Jarass, Bundes-Immissionsschutzgesetz, 8th edition, 2010, § 10 para 78.

[25] Art. 18 (3) of the Law on genetic engineering.

[26] ECJ, C-263/08 of 15-10-2009 (Lilla Värtans association for environmental protection).

[27] BVerwG, Urt. v. 14.7.2011, Neue Zeitschrift für Verwaltungsrecht, 3/2012, p. 183.

(CDU) under the tutelage of Angela Merkel decided in a 180-degree turnaround to quit the nuclear path and to more or less re-enact the "*Ausstiegsgesetz"* of 2002. This was only a few months after having considerably prolonged the phase-out dates of the nuclear power plants foreseen in the Act of the red-green coalition voted in 2002 (the *Ausstiegsgesetz).* A number of new laws accompanied the "*Energiewende*" aiming at building the energy future of Germany on renewable energy. The main problem with this accelerated approach is the insufficiency in the grid. Therefore, a law in order to *speed up* the expansion and modernisation of the electricity transport system was put into force (*Netzausbaubeschleunigungsgesetz* - NABEG). As there are a number of local NGOs protesting against new transport lines, the public resistance risks becoming a major obstacle to the *Energiewende.* It is interesting to see that the "new" approach to this is not to *de*crease, but to *in*crease public participation. In this respect, the law provides in Sec. 9 (3) public participation in the general planning of the energy network on the federal level (*Bundesnetzplan*).[28] This is indeed a new approach but, on the other hand, the law does not provide for access to the courts as far as this plan is concerned.[29] Access to the courts is only given to challenge the final *planning permit,* in this procedure the previous general plan can be examined implicitly by the Judge.

In this context, two further amendments of the German administrative procedures act should be noted: Sec. 25 para. 3 provides for "early participation" and sec. 27a, in force since 7 June 2013, obliges the authority to publish the documents of procedures on the internet (and not only in the office of the authority).

It seems that also on the regional and local level new forms of public participation in decision-making procedures are experiencing a "renaissance" today, such as the participation in legally not binding, preparatory procedures[30] or planning workshops for urban planning projects on the local level.

5 The impact of accelerating measures on the quality of decisions and on the protection of legal rights of third parties

The extent to which the number of measures taken in the last years has had an impact on the quality of decisions in terms of environmental protection is difficult to evaluate. There is no empirical data available to assess this – a fact that has been regretted also by the General Advisory Council of the German Minister for the Environment.[31] Generally speaking, there seems to be a relationship between the quality of decisions and the judicial control system. Administrative acts that can be challenged by the courts are better prepared and motivated by the authorities; in this way environmental law is better enforced by the administration.[32] On the other hand, measures that create obstacles to effective judicial control[33] are suited to lowering the level of enforcement of environmental legislation.

Indeed some authors estimate that the accelerating measures in Germany have had a considerable (negative) impact on the protection of legal rights in environmental cases.[34] Whereas some industrial lobbyists still argue in favour of further "deregulation" measures, the contrasting argument of some legal scholars comes to the conclusion that there is no longer a balance between safeguarding the function of administrative procedures on the one hand and speeding them up on the other hand.[35]

Another indirect negative effect is linked to time limits prescribed by law within which the decision has to be taken as well as time limits set by the competent authority for opinions to be provided by other administrative bodies who are also involved. Although these instruments have undoubtedly had a positive accelerating effect, it also has had the negative effect that the authorities changed priorities: They deal more efficiently with permitting cases and push other issues like surveillance and compliance control after the licence has been issued further down the list of priorities.[36] This is particularly the case if the resources of the administration are not improved but rather, as it has been the case in the last years, reduced.[37]

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28 The law transferred this competence from the Länder level to the Regulatory Agency (*Bundesnetzagentur*) on the federal level.

29 For a critical appraisal of this concept, see Durner, *Die aktuellen Vorschläge für ein Netzausbaubeschleunigungsgesetz*, Deutsches Verwaltungsblatt 14/2011, p. 853.

30 Sarcinelli/König, *Bürgerbeteiligung in der Kommunal- und Verwaltungsreform*, in: Das Parlament, http://www.das-parlament.de/2011/07-08/Beilage/006.html, concerning the reform of the local administration system.

31 SRU, *Umweltverwaltungen unter Reformdruck*, Sondergutachten, Erich Schmidt Verlag (Berlin, February 2007), Rz. 282.

32 De Sadeleer/Roller/Dross, *Acces to Justice in Environmental Matters and the Role of NGO's, Empirical Findings and Legal Appraisal,* Europa Law Publishing, (Groningen 2005), p. 175/176. The original study is also published on the website: http://europa.eu.int/comm/environment/aarhus/pdf/accesstojustice_final.pdf

33 Like the "*Präklusion*" or reduced delays for lodging complaints.

34 Explicitly Erbguth, *Abbau des Verwaltungsrechtsschutzes*, Die Öffentliche Verwaltung, 22/2009, p. 921 ff, who highlights the cumulative effect of the amount of measures undertaken in the last two decades.

35 See Erbguth (supra note Fehler! Textmarke nicht definiert.). Also the Advisory Council on the Environment issued some critical remarks on this.

36 Lübbe-Wolff, *Beschleunigung von Genehmigungsverfahren auf Kosten des Umweltschutzes*, Zeitschrift für Umweltrecht, 2/1995, p. 57 ff.; SRU, *Umweltverwaltungen unter Reformdruck*, Sondergutachten, Erich Schmidt Verlag (Berlin, February 2007), para. 281.

37 SRU, *Umweltverwaltungen unter Reformdruck*, Sondergutachten, Erich Schmidt Verlag (Belin, Februar 2007), chapter 2.3.

As far as the quality of environmental licenses is concerned, a closer look reveals an ambiguous picture. Firstly, it can be generally noted that the quality of administrative decisions in environmental licensing procedures has increased since environmental legislation commenced in Germany in the 1970s. It could happen that a licence for a chemical plant issued in the 1960s consisted of two pages only without any substantial or detailed measures prescribed to protect the environment; also objections in procedures lodged by third parties were rare. As empirical research on Environmental Impact Assessment in Germany shows, there is some evidence, that participation rights have a positive impact on the quality of the decisions, this is also the opinion of civil servants involved in the proceedings.[38]

In the 1980s, the powerful environmental movement actively used the procedural rights provided by the laws. The authorities were in most cases generally not prepared to effectively deal with this new situation and sometimes tried to hinder the effective use of these rights.[39] This may be one reason why procedures took longer in this period but, as a positive effect, the quality of decisions improved and more environmental protective conditions were included in the permits. The relatively success of these participation rights in the 1980s and 1990s might be considered one motivation for the regulator's reaction aiming at reducing theses rights.

6 Conclusion

In recent decades and in contrast to the situation in Germany, information, participation and access to justice has largely evolved in EU law. In so far, one might say that EU law has become a "safety net" for participation rights in Germany in recent years. This is even truer for access to the Courts, as traditionally the legal doctrine in Germany has been very restrictive as far as the legal standing of individual persons is concerned.[40] It is interesting to see that this restrictive approach has been partly adopted by the Netherlands' "crisis" legislation.[41] Moreover, the association lawsuit was restricted in Germany for a long time although there were clear obligations to open the law for an association lawsuit under the Aarhus Convention and the implementing EU directives.

The near future will also show whether the paradigm shift towards improved public participation in German law in the last 3 years is a flash in the pan or if they will lead to a fundamental change in the perception of the value of public participation. Although some doubts may be justified insofar as the discussion does not really reflect the limits to "speed up" the procedure that have already been reached by the measures taken in recent years; and the fact that there is indeed a natural tension between improvement of the quality of the decision and the objective of speeding up the procedure is more or less ignored.[42] At the same time it should be noted that the spread of the debate is rather broad and the issue has been taken up by the 69th conference of the honorable "*Deutscher Juristentag*" in 2013[43] recently, which made a number of reform proposals.[44] The fact that participation in the procedure has intrinsic value and a democratically legitimate function has also been stressed by recent studies.[45] In so far it seems that the foundations have been laid down for a "new" perspective on "speed and quality".

38 See on this the comprehensive study of Führ/Bizer et.al., *Evaluation des UVP Gesetzes des Bundes*, 2008, p. 84 ss.

39 Very instructive case studies can be found in Führ, *Sanierung von Industrieanlagen*, 1989, p. 34 ss.

40 See on this: G. Roller, Locus standi *for environmental NGOs in Germany: the (non)implementation of the Aarhus Convention by the* 'Umweltrechtsbehelfsgesetz', ELNI-Review 1/2010, p. 30.

41 Backes/Jansen, Quality and Speed of Administrative Decision-Making Proceedings: Tensions or Balance? ELNI-Review 1/2010, p. 23.

42 See also Durner, op.cit, pa. 859.

43 This association of German lawyers exists since 1860 and organizes the German Jurists Forums (Deutsche Juristentage), which are held every two years in a different city in Germany with 2500 to 3000 participants. See on the partipation issue: http://www.djt.de/fileadmin/downloads/69/djt_69_Oeffentliches-Recht_120312.pdf

44 See on this: Stender-Vorwachs, Neue Zeitschrift für Verwaltungsrecht, 2012, 1061, Dolde, Neue Zeitschrift für Verwaltungsrecht, 2013, 769.

45 Renn/Köck/Schweizer et.al, *Öffentlichkeitsbeteiligung bei Vorhaben der Energiewende*, Zeitschrift für Umweltrecht 2014, 281.

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Contact

Freiburg Head Office:
P.O. Box 17 71
D-79017 Freiburg
Phone +49 (0)761-4 52 95-0
Fax +49 (0)761-4 52 95 88

Darmstadt Office:
Rheinstrasse 95
D-64295 Darmstadt
Phone +49 (0)6151-81 91-0
Fax +49 (0)6151-81 91 33

Berlin Office:
Schicklerstraße 5-7
D-10179 Berlin
Phone +49(0)30-40 50 85-0
Fax +49(0)30-40 50 85-388

www.oeko.de

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Contact

Prof. Dr. jur. Gerhard Roller
University of Applied Sciences
Berlinstrasse 109
D-55411 Bingen/Germany
Phone +49(0)6721-409-363
Fax +49(0)6721-409-110
roller@fh-bingen.de

www.fh-bingen.de

sofia

The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.
The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.
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Contact

Darmstadt Office:
Prof. Dr. Martin Führ - sofia
University of Applied Sciences
Haardtring 100
D-64295 Darmstadt/Germany
Phone +49(0)6151-16-8734/35/31
Fax +49(0)6151-16-8925
fuehr@sofia-darmstadt.de

www.h-da.de

Göttingen Office:
Prof. Dr. Kilian Bizer - sofia
University of Göttingen
Platz der Göttinger Sieben 3
D-37073 Göttingen/Germany
Phone +49(0)551-39-4602
Fax +49(0)551-39-19558
bizer@sofia-darmstadt.de

www.sofia-research.com

elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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elni, c/o Institute for Environmental Studies and Applied Research
FH Bingen, Berliner Straße 109, 55411 Bingen/Germany

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