



Note No. 92/2015

The Permanent Mission of the Federal Republic of Germany to the United Nations presents its compliments to the Secretary-General of the United Nations and, with reference to Chapter III: B (para. 27 “Protection of the atmosphere”) of the Report of the International Law Commission on its Sixty-sixth Session (5 May to 6 June and 7 July to 8 August 2014) [United Nations document A/69/10], has the honour to submit the following information requested by the International Law Commission:

**Domestic legislation in relating to the protection of the atmosphere**

**1. General remarks**

In line with the suggested scope of the ILC’s guidelines,<sup>1</sup> we understand the notion of “protection of the atmosphere” as mainly encompassing the issue of (transboundary) air pollution (i.e. introduction of deleterious substances or energy into the atmosphere) as well as global atmospheric problems resulting from GHG emissions (e.g. climate change). Having said this, there is no overarching legal framework which deals with the protection of the atmosphere in a holistic manner in German law. Instead, there is a variety of sectoral laws which address specific problems relating to the atmosphere. It is important to note, however, that climate change and air pollution policies are often intertwined. For example, Germany has extensive energy efficiency and energy savings programmes, resulting both in a reduced use of fossil fuel and

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<sup>1</sup> UN Doc. A/CN.4/667, p. 52.

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providing co-benefits for multiple pollutants.<sup>2</sup> However, trade-offs between GHG mitigation and air pollution control may occur in some policy areas, e.g. switching the fuel mix from non-renewable fossil fuels (e.g. oil and gas) to renewable resources (such as wood) contributes to climate protection but often implies an increase of air pollutants.

## 2. Constitutional background

The German constitution (*German Basic Law, "Grundgesetz"*) lays down the goal of environmental protection as a basic principle of the German state structure and legal system. Article 20a German Basic Law stipulates that *"[m]indful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."*

The notion of "natural foundations of life" also encompasses the protection of the atmosphere. Article 20a German Basic Law thus includes the obligation for state authorities to protect the atmosphere. The constitution does not, however, prioritize the protection of the environment over other social/political goals. Emerging conflicts have to be solved on a case-by-case basis.

## 3. Legal provisions relating to climate protection

Germany has an ambitious climate protection programme which translates into a variety of legal provisions aiming at curbing GHG emissions. As indicated above, there is no all-encompassing climate change law on the federal level<sup>3</sup>. Rather, several sources of federal law are relevant to the protection of the climate. The objective of protection of the climate is furthermore achieved through a variety of policies and strategies rather than legislation (e.g. *"Aktionsplan Klimaschutz"*).

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<sup>2</sup> This information focuses on state provisions relating to the protection of the atmosphere. Due to Germany's federal structure, relevant provisions can also be found on the federal state level (Bundesländer).

<sup>3</sup> Note that some federal states (Bundesländer) have climate change laws, e.g. Baden-Württemberg (Klimaschutzgesetz Baden-Württemberg of 23 July 2013), North Rhine-Westphalia (Gesetz zur Förderung des Klimaschutzes in Nordrhein-Westfalen of 29 January 2013).

### 3.1 Energy sector

#### Promotion of renewable energy sources

Germany has introduced a number of laws to reduce emissions from the energy sector. The *Renewable Energy Sources Act* ("*Gesetz für den Ausbau erneuerbarer Energien*": EEG) explicitly aims to ensure a sustainable supply of energy, particularly in the interest of climate protection. By boosting the share of renewable energies (e.g. solar and wind power) in the overall power supply, the phasing out of power generation from carbon-intensive fuels is facilitated. To this end, the EEG stipulates the goal of increasing the share of renewable energies in gross electricity consumption to at least 80% by 2050. To achieve this goal, the EEG inter alia establishes a feed-in tariffs system for renewable energies. In addition to the EEG, the *Sustainability Ordinance for Liquid Biomass in Electricity Generation* (*Verordnung über Anforderungen an eine nachhaltige Herstellung von flüssiger Biomasse zur Stromerzeugung, BioSt-NachV*) requires that liquid biomass used for energy production purposes meets specific requirements regarding feed-stock production and has to prove a GHG reduction of at least 35 % (2017: 50%, 2018: 60 % for new installations) along the life-cycle if it is to benefit from the EEG's feed-in tariff system.

Another important legal instrument to promote the use of renewable energy sources is the *Renewable Energies Heat Act* ("*Erneuerbare-Energien-Wärmegesetz*": EEWärmeG). In short, the EEWärmeG makes the use of renewable energies for heating and cooling mandatory in new buildings. The aim is to increase the share of renewable energies in this sector to 14 % by 2020 (para 1 (2) EEWärmeG). Moreover, Germany has established a programme which introduces market incentives for heat from renewable energy sources ("*Marktanreizprogramm für erneuerbare Energien im Wärmemarkt*", cp. EEWärmeG) which is mainly directed towards the existing building stock.

The *Energy Tax Act* ("*Energiesteuergesetz*": EnergieStG) is also designed to promote the shift towards renewables by taxing electricity from fossil fuels.

#### Promotion of energy efficiency

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Another important strategy is to improve the energy performance across a wide range of sectors. Measures to increase energy efficiency in buildings are promoted in the *Heat-Power Cogeneration Act* ("*Gesetz für die Erhaltung, die Modernisierung und den Ausbau der Kraft-Wärme-Kopplung*": KWKG), the *Act on Energy Saving in Buildings* ("*Energieeinsparungsgesetz*": EnEG) and the *Energy Saving Ordinance* ("*Energieeinsparverordnung*": EnEV). The *Heat-Power Cogeneration Act* protects existing combined heat and power (CHP) plants, promotes their modernisation and supports the development of small CHP and fuel cell systems, thereby contributing to reducing emissions from the use of fossil energy sources. Its main instruments are feed-in tariffs for energy from CHP plants. The EnEG and EnEV lay down binding energy-efficiency requirements (mainly for new buildings) to reduce emissions caused by energy generation.

In addition to that, there is a variety of laws - frequently prescribed by EU law - dealing with energy efficiency in other sectors.<sup>4</sup> In the field of product legislation, for example, there are mandatory ecological requirements for energy-using and energy-related products pursuant to the EU Ecodesign Directive<sup>5</sup> and the *Energy-related Products Act* ("*Energieverbrauchsrelevante-Produkte-Gesetz*": EVPG).

### 3.2 Cross-cutting policies

The *EU Emissions Trading Scheme* (EU ETS) is an integral part of Germany's climate change law. As a market-based instrument, it internalizes the external costs of GHG emissions and provides a financial incentive to avoid carbon-intensive production processes and improve energy efficiency. The relevant German legal provisions can be found in the *Greenhouse Gas Emissions Trading Act* ("*Treibhausgas-Emissionshandelsgesetz*": TEHG) and the *Allocation Ordinance 2020* ("*Zuteilungsverordnung 2020*": ZuV 2020). In 2005, the Federal Administrative Court

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<sup>4</sup>For a comprehensive overview see Rodi et al., *Das Klimaschutzrecht des Bundes* [Federal Climate Change Law], German Federal Environment Agency, Climate Change 17/2011.

<sup>5</sup>Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products.

(“*Bundesverwaltungsgericht*”) ruled that the Emissions Trading Scheme is compatible both with European and constitutional law (see BVerwGE [Decisions of the Federal Administrative Court] Vol. 124, p. 47.)

Moreover, as far as production processes are concerned, the *Federal Immission Control Act* (“*Bundes-Immissionsschutzgesetz*”: BImSchG) provides that installations subject to licensing shall be established and operated in such a way that energy is used in an efficient manner (para 5 (1) No. 4 BImSchG). In addition to that, the *Chemicals Climate Protection Ordinance* (“*Chemikalienklimaschutzverordnung*”: ChemKlimaschutzV) is designed to reduce the emission of highly climate-damaging fluorinated greenhouse gases.

In the transport sector, there exists legislation establishing efficiency standards for new cars (based on EU law: cp. Regulation No. 443/2009/EG and No. 510/2011/EU) and biofuel quotas (*Biofuel Quota Act*, “*Biokraftstoffquotengesetz*”). Moreover, the introduction of CO<sub>2</sub>-based car taxation (*Vehicle Tax Act*, “*Kraftfahrzeugsteuergesetz*”) as well as the introduction of a highway toll for heavy duty vehicles is designed to have positive effects on Germany’s overall GHG emissions.

Finally, the aim of climate protection has been integrated into a number of other sectoral laws. Construction and planning law is a case in point: The *Federal Building Code* (“*Baugesetzbuch*”: BauGB) provides that the impact on the climate has to be taken into consideration when drafting land-use plans (see para 1 (6) BauGB). A similar provision can be found in regional planning law (“*Raumordnungsgesetz*”: ROG).

#### 4. Legal provisions relating to air pollution control

German air pollution control is based on the following four strategies: environmental quality standards, emission reduction requirements according to the best available technology, product regulations and emission ceilings.

Limit values are increasingly stipulated in European air pollution control directives and then transposed into German law. Important European directives include, for example, *Directive 2008/50/EC on ambient air quality and cleaner air for Europe* (EU Air Quality

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Directive), *Directive 2010/75/EC on industrial emissions* and *Directive 2001/81/EC on national emission ceilings for certain atmospheric pollutants* (NEC Directive).

Air quality control in Germany is mainly governed by the *Federal Immission Control Act* ("*Bundes-Immissionsschutzgesetz*": BImSchG) and its implementing ordinances and administrative regulations (e.g. *13. Ordinance Implementing the Federal Immission Control Act for large combustion plants* (13. BImSchV) and *Technical Instructions on Air Quality Control* ("*TA Luft*") including air quality and emission limit values). It is the purpose of these regulations to protect human beings, animals and plants, soil, water, the atmosphere as well as cultural objects and other material goods against any harmful effects on the environment ("*Gefahrenabwehr*") on the one hand, and to prevent the emergence of any such effects ("*Vorsorge*") on the other hand. German air pollution control law thus pursues a two-fold approach: First, it states the duty to avoid any harmful effects on the environment. Second, it applies the precautionary principle which means in practical terms that all sources (new and existing) must prevent and control emissions according to the current state of the art ("*Stand der Technik*"). Existing installations have to fulfil these dynamic requirements within certain transitional periods according to the principle of proportionality.

For energy efficiency and energy savings provisions, resulting both in a reduced use of fossil fuel and providing co-benefits for multiple pollutants, see 3.1 and 3.2.

#### 4.1 Stationary sources

The establishment and operation of installations which are particularly likely to cause harmful effects on the environment are subject to prior approval by the regulating authorities (para 4 BImSchG). The relevant plants are listed in the *4<sup>th</sup> Ordinance Implementing the Federal Immission Control Act on Installations requiring a permission* (4. BImSchV). They will not be approved if their emissions exceed the air quality standards laid down in the *Federal Immission Control Act* and its implementing ordinances and administrative regulations or the limit values according to the best available techniques (paras 5, 6 BImSchG). Also, installations not subject to prior

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approval shall not harm the environment (para 22 BImSchG). In addition, several ordinances implementing the *Federal Immission Control Act* establish requirements regarding the precautionary principle (para 23 BImSchG).

One of the most important sources for quality standards, emission limit values and control requirements for stationary sources is the administrative regulation *Technical Instructions on Air Quality Control ("TA Luft")*. In addition, there are specific regulations for certain types of installations which lay down emission limit values and emission control requirements for certain pollutants according to the best available techniques (*Ordinances Implementing the Federal Immission Control Act*). These regulations are mandatory and have to be applied by the competent management authority. In case there are no such requirements, the competent permitting authority decides on the limit values itself by determining the best available techniques.

The federal immission control law is based on an integrative approach. This principle is already stipulated in European law relating to the approval of plants, mainly Directive 2010/75/EU. The permit according to para 6 BImSchG therefore in principle encompasses other permits such as the building permit, so called concentration effect. This accelerates and simplifies the approval procedure.

#### 4.2 Agriculture

Some agricultural activities are regulated by the *Federal Immission Control Act* and its secondary legislation as far as air pollution control is concerned. For instance, large stables are subject to a prior approval procedure according to the *Federal Immission Control Act*. Storage and handling of animal manure (liquid and solid) are regulated by *Technical Instructions on Air Quality Control ("TA Luft")*.

Land spreading of fertilizers including animal manure is regulated by the *Ordinance on Principles of Good Professional Practice in the Use of Fertilizer* (Fertilizer Ordinance, "*Düngeverordnung*": DüV). It regulates both the quantity and way of application of fertilizers including spreading of liquid and solid animal manure.

#### 4.3 Mobile sources (transport)

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The emissions from motorized vehicles such as cars, trucks, motorcycles and mobile machinery (i.e. construction equipment, tractors, trains and inland water vessels) are governed by European regulations and directives implemented into German law. For airplanes and ocean-going vessels, emissions standards are covered by international regulations.

The *Ordinance Authorising the Use of Motor Vehicles for Road Traffic*

(*"Straßenverkehrs-zulassungsordnung"*: StVZO) defines technical requirements for motor vehicles, e.g. emission levels for various types of vehicles (passenger cars, heavy duty vehicles, off-road engines) to transpose the *EC Directives on emission reduction from motor-vehicles* into German law.

Moreover, in Germany an electronic heavy-duty vehicle tolling system is in place, covering the country's entire motorway network. The charge per kilometre varies according to the number of axles and the vehicle's emission category. The toll gives an incentive for an ecologically desirable shift towards rail and waterway-based freight transport, more efficient use of heavy-duty vehicles and the use of cleaner heavy-duty vehicles.

#### 4.4 Diffuse sources

As prescribed by EU law, for some pollutants product-related ceilings were established in German law. Concerning air pollution, the *Ordinance on Solvent-Containing Paints and Varnishes* (*"Lösemittelhaltige Farben- und Lack-Verordnung"*: ChemVOCFarbV) sets different limit values for the content of volatile organic compounds depending on the type of coating material.

#### 4.5 Cross-cutting measures

National emission ceilings for SO<sub>2</sub>, NO<sub>x</sub>, NMVOC and NH<sub>3</sub> as well as the National Programme with concrete measures to achieve the national emission ceilings are regulated in the 39<sup>th</sup> *Ordinance Implementing the Federal Immission Control Act on air quality standards and emission ceilings* (39. BImSchV) which transposes the Directive

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2001/81/EC on national emission ceilings for certain atmospheric pollutants into German law.

Moreover, the 39. BImSchV which implements the EU Air Quality Directive (Directive 2008/50/EC) into national law sets air quality limit values for different pollutants. Local authorities have to monitor the air quality frequently. If the air quality limit values are exceeded, local authorities have to establish air quality plans (according to paras 44 et seq. BImSchG, para 27 39. BImSchV) which include measures suitable to reduce air pollution in regions affected by high pollution levels.

#### 5. Information – Participation – Access to justice

Substantive environmental law is in Germany complemented by legislation which ensures that citizens have access to information, are entitled to participate in decision-making and have access to justice in environmental matters. Germany thereby implements the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) as well as corresponding EU law.

The *Environmental Information Act* (“*Umweltinformationsgesetz*”: UIG) grants public access to information on the environment held by authorities of public administration. A legal interest does not have to be stated, but in some legally defined cases other interests such as national defence or commercial and industrial secrets are weighed against the individual right to be granted access on a case-by-case basis (excluding information about emissions, cp. Federal Administrative Court , 02.08.2012, access to information – confidentiality). Furthermore, authorities of public administration obliged to provide information must adopt practical measures to facilitate access to the environmental information they hold. For instance, the German Federal Environment Agency (UBA) provides open access to data about emissions from about 5,000 registered industrial facilities in Germany ([www.Thru.de](http://www.Thru.de); cp. PRTR Act [SchadRegProtAG]), implementing the PRTR-Protocol of the Aarhus-Convention.

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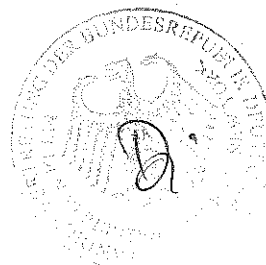
Furthermore, there are various statutory provisions that safeguard the obligation to provide information to citizens and broad public participation in environmental decision-making (e.g. para 5 UIG, para 10 BImSchG and the 9<sup>th</sup> Ordinance Implementing the *Federal Immission Control Act on the approval procedure* (9. BImSchV), para 73 of the *Federal Administrative Procedure Act* ("*Bundesverwaltungsverfahrensgesetz*": VwVfG), paras 3 and 4a of the Code on Urban Development ("*Baugesetzbuch*": BauGB) as well as the *Federal Environmental Impact Assessment Act* ("*Gesetz über die Umweltverträglichkeitsprüfung* ": UVPG), setting minimal standards).

For the adoption of secondary legislation, e.g. the ordinances implementing the *Federal Immission Control Act*, German environmental law provides for broad stakeholder participation (cp. para 7 BImSchG read on conjunction with para 51 BImSchG).

Review of decisions of public authorities concerning air pollution control can be undertaken by citizens whose rights may have been violated and by domestic and foreign associations recognised pursuant to the *Environmental Appeals Act* ("*Umwelt-Rechtsbehelfsgesetz*": UmwRG, cp. BVerwGE [Decisions of the Federal Administrative Court] Vol. 147, 312 – air quality plan).

The Permanent Mission of Germany to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.

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