

## § 3 Legal and political framework conditions for the economic law on natural resources and the environment

### I. The restriction of state intervention in the economy by the principle of an open market economy with free competition in the European internal market (art. 119 FEU Treaty)

- 1) **Not a fundamental value but a legally binding guiding principle for the entire economic policy of the European Union and its member states**
  - unlike democracy and rule of law, the principle is not included in the fundamental values (cf. art. 2 EU Treaty) but only a specific principle for the field of economic policy
  - nevertheless, a principle of EU primary law, binding all economic legislation and policies of the Union and its member states
  - a decision in favour of an open (not social) market economy and of unhindered competition
- 2) **A principle requiring a strictly market-orientated economic policy, limiting state interventions to few exceptions** (art. 120 FEU Treaty)
  - solutions must be found within the framework of a market-orientated policy
    - planned-economy policies are a priori ruled out - even for climate protection!
  - however, the market-orientated policy shall "favour an efficient allocation of resources", including natural resources
- 3) **A principle implemented and complemented by far-reaching approximation of laws, strict competition law and a prohibition of state aids that would distort competition** (art. 114 et seq., 101 et seq., 107 et seq. FEU Treaty)
  - the approximation of laws must aim at a high level of environment protection (art. 114(3)) and therefore is often used to establish higher environmental standards
  - state aids (subsidies) that would distort competition and affect the trade between member states are generally prohibited in the EU (with exceptions, see art. 107(2, 3), 108(2) sub-sect. 3))
    - even at the local level
    - compliance is closely monitored by the European Commission
    - this largely rules out classical state interventions to favour the national economy

### II. The protection of the environment and the climate as legally binding policy objectives

- 1) **Policy objectives as legally binding principles of EU primary law and national constitutional law**
  - *state policy objectives* [Staatsziele] under the constitution are constitutional principles that enjoy the primacy of the constitution and substantially guide or limit all policies and activities of all public institutions in the state
  - *union policy objectives* [Unionsziele] under the EU treaties (EU Treaty, FEU Treaty) are legally binding principles that enjoy the primacy of EU primary law and substantially guide or limit or even direct all policies and activities of all EU institutions
    - they are also binding to the member states when they execute EU law
  - policy objectives should only set a legal framework, within which politics can freely develop, but many union policy objectives set the political direction more concretely

## 2) Environmental protection, including climate protection, as a European Union policy objective (art. 3(3) EU Treaty, 191 FEU Treaty)

- the European Union shall work in all its policies for a high level of protection and improvement of the quality of the environment (art. 3(3) EU Treaty)
- its environmental policy shall pursue the objectives to
  - *preserve, protect & improve the quality of the environment,*
  - protect human health,
  - *utilise natural resources prudently & rationally and*
  - promote international measures, in particular to *combat climate change,*
- ▶ always aiming at a *high level of protection* (art. 191(1, 2) FEU Treaty)

## 3) The protection of the natural foundations of life as a German state policy objective (art. 20a Basic Law [= BL], inserted 1994)

**Art. 20a BL:** Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life ... by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.

- a *constitutional value* (not a *fundamental value*) with a rather weak concrete design
  - protection only "in accordance with..." / "within the framework of..."
- aims at *protection of the posterity*
- requires *active intervention* by the state, in particular by legislation and regulation, but leaves a wide margin of appreciation and discretion
- guides the interpretation and application of all German law

## 4) In particular: the state's duty of adequate climate protection in good time, to preserve the freedom of future generations (art. 20a BL and fundamental rights)

- The spectacular but controversial *climate protection decision of the Federal Constitutional Court* of 2021 (BVerfGE 157,30)
  - Declares some provisions of the Federal Climate Action Act [Bundes-Klimaschutzgesetz] of 2019 unconstitutional because they set too low targets for greenhouse gas reduction until 2030 and no targets for the following years and thus *shift the burden* of the inevitable restrictions on freedom for climate protection *lopsidedly onto future generations*.
  - The state's duty to protect the life and physical integrity of the citizen (art. 2(2) BL) encompasses the *state's duty to protect against* environmental pollution and *climate change*
    - this can even include the *duty to protect future generations*.
  - Under art. 20a BL, the state *must* take climate action and aim to achieve climate neutrality.
  - **Fundamental rights are intertemporal guarantees of freedom:** they also protect against the offloading of the burden to reduce greenhouse gas onto the future.
    - Consequence: citizens can in principle file constitutional complaints alleging that their fundamental rights are violated because the present measures against climate change are not tough enough!
- The climate protection decision has triggered a wave of so far unsuccessful constitutional complaints for insufficient environmental and climate protection.
- The innovative but unorthodox approach to instrumentalise the fundamental rights today to secure freedom vaguely in the future
  - is an outstanding example of judicial further development of law
  - but leaves the platform of established constitutionalist traditions, approaches and methods
  - and therefore meets with broad scepticism (but also approval) among constitutionalists.
- DISCUSSION: Is this a convincing approach?

YOUR OPINION: \_\_\_\_\_

YOUR ARGUMENTS: \_\_\_\_\_

### III. The protection of the environment and the climate as a separate policy and a cross-cutting task

- The objectives of environmental and climate protection are implemented in the legal system in three different ways that complement each other:

#### 1) Specific protection through specialised legislation

- laws specifically designed for this purpose - the classical field of environmental and climate protection law
- includes laws on special economic matters (e.g. emissions trade) that serve this purpose

#### 2) Cross-cutting protection through anchoring of environmental and climate standards in other laws

- laws designed for other purposes and promoting other public interests or a multitude of public interests but showing considerateness for environmental and climate protection
- in particular laws that *emphasize* environmental and climate protection *as important public interests* that must be taken into account *in balancing processes*
  - example: urban land-use planning law (e.g. sect. 1(6), 1a Federal Building Code [Baugesetzbuch])
  - example: public procurement law (see the planned new sect. 120a of the German Competition Act)
- the practical effect of such provisions is enhanced by statutory participation rights that enable civil society environmental associations to exert influence in political processes

#### 3) Incidental protection through general consideration in the making of other laws (mandatory in the European Union under art. 11 FEU Treaty)

- leading to *higher legal and regulatory requirements* for products and services and stricter regulation of activities
  - in particular *higher standards in EU product regulations* and other harmonisation measures for the European internal market (approximation of laws), which must "take as a base a high level of protection" (cf. art. 114(3) FEU Treaty)
  - example: the regularly tightened European emission standards for motor vehicles
    - ambitious: EU Regulation 2019/631, which aims to gradually reduce the registration of new passenger cars with combustion engines to zero until 2035
- All these laws and individual norms must be seen in context: Only together do they form one coherent system of instruments to protect the environment and the climate.

### IV. The dual purpose of the economic law on natural resources and the environment to serve both the economy and the environment

- it may be predominantly economic law or environmental & climate protection law, but it always serves *both* purposes
- this *precludes any lopsided understanding*, interpretation or application, as it has been traditionally the case for the experts in both fields of law
- to develop a holistic understanding beyond the traditional ideological lines of partisan economist or ecologist thinking is an ongoing challenge

## **V. The law on natural resources and the environment at the center of the political struggle**

### **1) The constant profit-driven push by Big Business and their influential lobbies for low standards**

- topical: the lobbying of the European car industry against the ban on combustion engines
- influential: climate disinformation campaigns

### **2) The hypocritical neoliberal concept of "self-responsibility" and "voluntary self-commitment"**

- a strong ideological approach against legally binding standards that restrict business, proposing to rely instead on voluntary self-restraint
- three decades of German and European experience have proved again and again that in the face of profit interests, appeals for voluntary self-restraint are little successful

### **3) The ideological fight of many environmentalists for higher standards regardless of the costs in freedom and the burdens caused by over-bureaucratic regulation**

- a strange willingness to work with poorly designed and formulated laws with overly technocratic and complicated, small-scaled detailed regulations that provide little progress but cause excessive bureaucratic burden for public administration and businesses
- the unwillingness of some environmentalists to accept that in the balancing with other public interests these may prevail
- a demonisation of the car and excessive restrictions of car traffic in the cities
  - making access by car more difficult but not compensating that by better public transport
- excessive illegal road and airport blockades and other criminal actions by radical climate activists with a totalitarian approach
  - have not increased but rather reduced the interest of the public in climate protection

### **4) The result: a highly dynamic but also volatile part of the law**

- due to political struggle and polarisation of society there is little general consensus on the right approach to climate protection
- a high risk that newly enacted laws will be tightened, relaxed or replaced by a new law with a new approach in the next legislative period