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AGRICULTURE AND ENVIRONMENTAL LAW IN THE FEDERAL REPUBLIC OF GERMANY

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I. INTRODUCTION

At the outset, I would like to emphasize that a conflict exists between agriculture and environmental protection that can in principle not be solved. A "natural" agriculture, as a matter of principle, is not possible. Any agriculture aims at growing a single crop (at best two crops) on a given piece of land, at reducing wild plants, wild animals, insects and microorganisms that threaten the yield and generally at increasing the yield. The realization of these objectives necessarily leads to encroachments - the free countryside with its diversity of species and opportunities for leisure, is itself a product of agriculture cultivation - it is a cultivated rather than a natural nature.

However, it is the methods applied in agricultural production that count. Traditional agricultural methods as applied until the end of the fifties mostly preserved the precarious balance between agricultural economy and ecology. The modern, almost industrial forms of agriculture emerging in West Germany in the sixties are characterized by intensive cultivation, high specialization of farmers, mechanization and chemicalization of production. The European Community common agricultural policy has contributed greatly to promote this development, but other factors such as intensive competition among producer countries, high labor costs, the rise of industrial incomes push agriculture in West Germany in the direction of becoming a kind of sister of industry. These modern forms of agricultural production are almost by necessity associated with substantial adverse impacts on the environment. In a country such as West Germany where over 50 percent of the nation's land is agricultural land, this problem is of high concern.

Examples of adverse effects on the environment are:

- (1) The enlargement of lots, especially in the framework of reassembling of agricultural land, is accompanied by destruction of protective vegetation such as trees, brush, hedges etc; this leads to increased soil erosion by wind and water in some parts of the country;
- (2) Cultivation of wetlands, measures of flood control, conver-

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sion of meadows into arable land, application of fertilizers to poor soils and of chalk to sour soils destroys habitats of wild species of plants and animals (the red list of endangered species is increasing in West Germany);

(3) Application of huge quantities of fluid manure from cattle farms threatens, at least in some areas of the country, the quality of groundwater;

(4) The massive use of pesticides, especially herbicides, 60 percent increase in the last 10 years, also leads to a diminution or even extirpation of species;

(5) Finally, the use of heavy equipment (tractors, etc.) in agricultural production causes a solidification of arable soil and as a consequence soil erosion and pollution from run-offs.

However, agriculture is not only a polluter but also a recipient of pollution and a victim of competing land uses. Agricultural land is exposed to air pollution, such as acid rain and heavy metals, which may adversely affect crops and cattle. Animal feeds may contain toxic substances that must be controlled. Industrial and residential development and stripmining of brown coal and sand and gravel are increasingly consuming agricultural land.

I. LEGAL REGIME OF AGRICULTURAL LAND USE

A. *Reassembling of Agricultural Land*

Due to local inheritance law, agricultural land in many areas of West Germany used to be split into small lots. The industrialization of agriculture required an enlargement of lots and new distribution of ownership. The Act on Reassembling of Agriculture Land, enacted already in the fifties, provides a procedure to achieve reorganization of agricultural land tenancy. Under section 1 of the Act, the Act's objectives are: 1) agricultural production and working conditions, 2) general "land culture" and 3) land development.

These latter two objectives also encompass environmental considerations. And section 37 of the Act which establishes criteria for the selection of measures of reassembling does by no means grant priority to agricultural interests; rather, all interests concerned, including environmental interests, must be adequately balanced with and against one another. Finally, a short-cut procedure is available for converting agricultural land into nature reserves, landscape associated with the reassembling of agricultural land must in principle be physically compensated or mitigated; the act requires determining a special plan in which the relevant measures for compensating or miti-

gating encroachments must be provided.

In practice, however, rural reassembling has not been emancipated from its original priority and its genuine objective, namely improvement of agricultural production and working conditions by enlarging agricultural lots. Environmental concerns have played a minor role because both farmers and administrators were mainly interested in the improvement of economic conditions and an environmental lobby was missing in rural areas. Consequently, rural reassembling measures have caused considerable harm to the environment and only recently have a certain reconsideration of rural reassembling policy taken place. Environmentalists demand that as much as 8-10 percent of rural land must be set aside as nature reserves to save endangered species and preserve diversity of species in general. A second wave of reassembling of rural land with environmental objectives may become necessary. Moreover, the introduction of formal environmental impact assessment procedures for all new rural reassembling measures is demanded.

B. Protection of Nature Act

The agriculture's privileged position is also expressed in major provisions of the Federal Protection of Nature Act of 1976. These provisions concern the planning of landscape and nature protection at the state, regional and local levels, the control of encroachments on nature by agricultural operations and the establishment of protected areas. The "harmony clause" of section 1(3) of the Act states that "proper agriculture and forestry plays a central role in maintaining the cultivated and recreational landscape; as a rule it serves to achieve the objectives of the Act." The harmony clause must be considered in the planning of protection of nature and landscape. Moreover, section 8(7) of the Act contains a special agriculture clause with respect to encroachments. As encroachment is any alteration of the form or use of land that is liable to substantially or permanently impair the sustained yield of natural resources or the landscape. Avoidable encroachments must be omitted, unavoidable encroachments must be physically compensated by protective measures; if this is not possible, the encroachment can be prohibited. Many measures taken in agricultural operations theoretically come under this provision, especially alterations of use (for example, conversion of meadows into arable land). However, section 8(7) specifically exempts agriculture from the application of section 8 by declaring that "the agricultural utilization of land that is proper in the meaning of the Act is not an encroachment." Finally, even in the establishment

of some categories of protected areas, the harmony clause must at least be considered.

Of course, it may be asked what is proper - or proper in the meaning of the Act? There is much controversy about the interpretation of this statutory term. Does it mean economically proper? Or must the ecological objectives of the Act be considered? The impact of the Federal Protection of Nature Act on agricultural operations outside protected areas is slight and requests have been made to abolish the harmony clause entirely.

C. Protection of Agricultural Land Against Conversion

The problem area of protection of agricultural land against conversion is primarily regulated by general land use planning legislation. The major planning acts all provide that prime agricultural land shall be preserved, i.e. not converted to other uses. Since this is only one among many balancing factors to be considered in the planning decision, the protection of agricultural land has no priority. In practice, at least in the surroundings of urban agglomerations, but also in some rural areas, a continuous "consumption" of agricultural land has taken place.

Apart from land use planning law, legal rules protect agricultural land against acquisition by nonfarmers. An important protection of agricultural land is afforded by the principle of German Building Law that buildings in the free landscape are in principle not allowed. Only industry that, due to its nature, must be located in the free landscape, such as quarries, sanatoriums, perhaps also nuclear power plants and residences for farmers are permissible in the free landscape. Exemptions are granted only under very narrowly defined conditions. It has been said that this provision of the Federal Building Act, section 35, is the hidden core of effective protection of nature in Germany.

II. CONTROL OF DAY TO DAY AGRICULTURAL OPERATIONS

Control of agricultural operations is difficult. Agricultural pollution normally is nonpoint pollution; it is much harder to control than industrial pollution. For example, it is of course possible to set forth the requirement of using state-of-the-art techniques in applying pesticides or fertilizers; however, it is almost impossible to enforce such requirements. Moreover, the usual objections against overregulation in the field of environmental protection are even more pertinent in the field of agriculture than they are with respect to industrial pollu-

tion. Apart from the rather ineffective Federal Protection of Nature Act, few environmental controls are exercised over agriculture operations.

Larger cattle growing farms and chicken farms need a permit under the Federal Emission Control Act if they cause air pollution (i.e. bad odors). In this case, waste disposal can also be regulated.

Certain agricultural operations that are liable to directly deteriorate the water quality are subject to a permit requirement under the Federal Water Resources Management Act (e.g. use of chemicals for maintenance of water courses and ponds, abstraction of surface and groundwater for irrigation). Theoretically, excessive use of solid or fluid manure or fertilizers that causes water pollution through run-offs is subject to a permit requirement under the Federal Water Resources Management Act and some states have promulgated regulations that attempt to limit the excessive application of fluid manure. However, in practice, the implementation and enforcement problems of controlling normal agricultural activities as well as the spirit of the harmony clause have led to practicable nonapplication of the Federal Water Resources Management Act or to nonenforcement of the regulations. The application of sewage to agricultural land is controlled under the Water Disposal Act (Regulations made under the Act set maximum concentration levels for hazardous substances). Furthermore, the use of pesticides is regulated. This subject will be dealt with in connection with product controls.

Finally, practically no regulations exist for the protection of agricultural soil against erosion caused by agricultural practices. Generally speaking, the problem of soil pollution and soil protection is a rather neglected area in German environmental law.

III. PRODUCT CONTROLS

With respect to certain products used in agricultural operations, especially pesticides, fertilizers, animal feeding stuffs and agricultural drugs, there are controls concerning marketing (i.e. premarket controls) and in some cases also controls over their use.

A type-approval procedure is provided for fertilizers. This regulation implements the EEC directive on fertilizers. However, contrary to the directive, together with the type-approval concentration levels for hazardous substances can also be set. With respect to animal feeding stuffs, concentration levels for hazardous substances, especially lead, cadmium and thallium, are set; also, soil pollution with heavy metals is partially regulated under the Federal Emissions Control Act. Agricultural drugs are subject to an approval requirement

and their use is strictly regulated.

The most extensive regulation exists concerning pesticides. Pesticides are regulated under the Plant Protection Act and regulations implementing the Act. The Act has a dual purpose: to protect plants and plant products from pests and pathogens, and to prevent damage to human or animal health or the environment which may be caused by the application of pesticides.

The Act's core is the registration (approval) procedure for pesticides. Pesticides may only be placed on the market if the competent agency approves them. The approval of a pesticide is only granted upon the following three conditions.

- the substance is sufficiently effective according to the state of the art;
- the protection of the health of men and animals in the distribution for commerce of hazardous substances is ensured; and
- the substance, when performing its intended function and applied with reasonable care, has no adverse effects on the health of men and animals and no other adverse effects which are unreasonable according to the state of scientific knowledge.

Although the Act does not clearly spell this out, the latter requirement also covers environmental effects. An amendment of the Act put before Parliament in 1983 will lay more emphasis on environmental protection in the goals provision of the Act as well as in the registration procedure.

To enable the agency to assess the pesticide, the producer must submit certain data as prescribed by the Act and implementing regulations. Among others, the producer must inform the agency about the composition of the pesticide, its fields of application including the possible hazards presented by its application, instructions to applicators, labelling and packaging. Furthermore, he must submit data which are necessary for the assessment of the plant treatment substance on the health of men and animals, data concerning the behavior of the pesticide on or in plants or plant products, in particular conversion and residues of the substances contained in the product, and data concerning the behavior of the pesticide in the soil and water, in particular conversion and residues of its components.

The competent agency has issued various, rather detailed directives designed to ensure that tests undertaken by the producer will be undertaken under defined or standardized conditions according to the state of the art. Testing is required respecting the effectiveness of

the pesticide, its effects on human health and on the environment. Thus, the determination of acute fish toxicity is always necessary. Furthermore, the data to be submitted on the behavior and residues of the components of the product or their metabolites in soil and water allow to draw conclusions concerning ecological effects. However, because of the lack of developed testing methodology and of testing institutions, there are no exhaustive testing requirements with respect to ecological effects. For example, testing with respect to adverse effects on beneficial arthropods, is not yet mandatory. It remains to be seen whether the strengthening of environmental concerns in the new Act will lead to a stiffening of environmental test requirements.

In assessing a new pesticide, the competent agency must evaluate whether the preparation is sufficiently effective according to the state of the art, presents a risk of injury to health of men or animals or has other adverse effects which are unreasonable according to the state of scientific knowledge. As already stated, this latter requirement in particular covers ecological effects. As far as ecological effects are concerned, the standard is less strict as with respect to health effects. While a simple risk of injury to health is sufficient to deny an application, in the case of ecological effects these effects must be unreasonable according to the state of scientific knowledge. But this is only a matter of degree. All the approval prerequisites leave the agency a certain margin of discretion.

In practice, about 8 percent of all applications are denied. This figure is low and may indicate the efficiency and reliability of the previous testing undertaken by industry. Virtually all new pesticides are approved subject to certain conditions which may exceed the proposals of the producer. Primarily, these conditions concern the labelling of containers and packages sold to the applicator. They concern the purpose, manner and time of application, quantity to be applied, waiting time, further precautions to be taken by, and dangers likely to arise to, the applicator and instructions and directions for the application of pesticides. Especially the latter conditions provide for the protection of the consumers of food products directly or indirectly treated with the pesticides as well as for the protection of water, wildlife, fish, bees, forests and nature reserves. There exists a list of standard conditions regularly attached by the agency to the approval of a new pesticide. Approved pesticides are classified and listed in a catalogue. After ten years, reregistration must be secured.

The Plant Protection Act also contains authority for the Minister to make regulations to ensure that particular hazards to health or the environment presented by certain uses of pesticides are definitely

avoided. Under this authority, the Regulation Concerning prohibitions and Restrictions for the Use of Plant Protection Products of 1971, as amended in 1974 and 1977, prohibits certain uses of 197 substances and restricts the application of 61 substances to certain uses. About 50 percent of all registered pesticides are covered. These limited prohibitions or restrictions of application are partially designed to protect the consumer, and to protect water and forests. Special regulations apply to protect bees against risks presented by the application of pesticides. Finally, the production and use of DDT and DDT preparations is prohibited under a particular Act.

Control of the application of pesticides is also, to a certain extent, ensured by personal requirements. The new Plant Protection Act will add general obligations of applicators to use state-of-the-art techniques in applying pesticides. However, even if this general requirement will be specified by regulations, it cannot be expected that a comprehensive control over field application of pesticides will be ensured.

IV. IMPACT OF EUROPEAN COMMUNITY LAW ON AGRICULTURE

The common agricultural policy of the European Community with its preference for industrialized agriculture has an enormous indirect effect on environmental problems associated with agriculture. In the long term, no solution of these problems is possible without major changes in the Community agricultural policy.

The contribution of Community legislation to tackling environmental problems of agriculture is slight. The Drinking Water Directive limits, among others, the nitrate concentration in drinking water and thereby indirectly affects agricultural operations. With pesticides, Community regulation has a marginal impact. It primarily concerns the classification, labelling and packaging of pesticides; moreover, certain substances are prohibited for use as or in pesticides. The Commission has proposed an EEC approval system for pesticides but has not yet been adopted by the Council because of fundamental divergencies of opinion among the member states. The question is whether the approval of pesticides should be granted by the Council or a special committee by unanimous or majority vote or whether there should be a harmonized national approval procedure whereby a national approval would be recognized in all other member states. Finally, the Directive on Farming in Mountainous and Less Advantaged Areas grants subsidies for maintaining the traditional location and forms of agriculture in certain areas of the Community. One can see in this system a European parallel to purchased develop-

ment rights. Although specifically aimed at improving economic conditions of farmers in these areas, the directive also has the side effect that the cultivated environment in these areas is preserved.

