

Bans on the Use of Genetically Modified Organisms (GMO) – The Case of Upper Austria

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On 5 October 2005 the Court of First Instance¹ ruled on the admissibility of the so called 'Upper Austrian Law banning genetic engineering'. It was the first decision of an EU-Court to deal with the issue of coexistence between the cultivation of GMO and GMO-free plants, the establishment of GMO-free areas and securing biodiversity.² There is a fierce battle going on between some EU Member States reluctant to use GMOs and the European Commission,³ which is responsible for ensuring the proper implementation of the Community acquis relating to GMOs. As the trade partners of the EU are pointing to their obligations under international trade law,⁴ the judgment tackles also a controversial issue of international trade law. The Court upheld the contested decision of the Commission which had rejected the notified Austrian rules.⁵ Apart from considerations on the GMO issue the ruling is also important as it sets out clear limits concerning the derogation from EU harmonisation measures generally. Both the Commission and the Court found that the conditions for derogation under Article 95(5) EC-Treaty were not fulfilled. Even though the Commission and the Court under the current state of Community law⁶ did not have any other option than to reject the Upper Austrian draft Law, the reasoning behind this finding was in many respects, not very convincing.

I. The Upper Austrian Law Prohibiting Genetic Engineering

The subject of the proceedings was the Upper Austrian draft Act 2002 which sought to ban the use of GMO seeds and planting material in agriculture.⁷ These provisions were aimed at protecting the small-scale agriculture in Upper Austria and its

biodiversity against the hazards from the uncontrolled release of GMOs.⁸ Upper Austria argued that the extensive use of genetically modified seed and planting material in crop production would, at first, interfere with and then, in the long-term, displace organic and conventional GMO-free production, resulting in an expansion of GMO cultivation.⁹ In order to back up its approach scientific-

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1 Judgment in the Cases T-366/03 and T-235/04.

2 As to the legal framework governing this conflict see Palme/Schlee/Schumacher, 'The New Law on Plant Engineering: European framework - National Implementation - Scientific Issues', JEEPL 2005, p. 53 et seq.

3 See Brosset, 'The Prior Authorisation Procedure', European Law Journal 2004, p. 568 et seq.; Sheridan, EU Biotechnology Law and Practice, 2001, p. 82 et seq.

4 As for the proceedings against the EU before the WTO initiated by the U.S. see: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm.

5 Commission Decision 2003/653/EC of 2 September 2003, OJ 2003 L 230/36.

6 As for the plans of several Member States to introduce a special safeguard clause for regions see: www.gmo-free-regions.org.

7 Apart from that the draft Act also contains a ban on the use of transgenic animals for breeding purposes as well as the release of transgenic animals especially for the purposes of hunting and fishing. As for the national rules in detail see contested Commission Decision, supra note 5, paras. 18-23.

8 Comprehensive references to biological research work being conducted worldwide on this issue are available at Palme, 'Einführung in die EU-Freisetzungsrichtlinie', in: Eberbach/Lange/Ronellenfisch, Gentechnikrecht/Biomedizinrecht, looseleaf, 2005, volume 3, part I, D.II, paras. 20-22.

9 See in detail No 3 of the contested Commission Decision, supra note 5.

ly, Upper Austria referred to the study of 28 April 2002 'Genetically modified-free areas of farming: conception and analysis of scenarios and steps for realisation', in the following called the Müller Study.¹⁰ This study collated the existing scientific knowledge concerning the coexistence- and biodiversity issues arising from the use of GMOs and it applied this knowledge to the special situation of Upper Austria.¹¹ Its conclusion was that GMO-free areas represented the only instrument to ensure long-term safety in relation to the problems of coexistence within the small-scale Austrian agricultural sector. Given that the proportion of organic farmers is particularly high in Upper Austria (around 7 %), hardly any areas would be available for GMO cultivation if the intention was to safeguard the organic production of agricultural products by establishing protection zones with a 4 km radius from sources of foreign contamination. Apart from this Upper Austria submitted that the unique natural biodiversity of this special area can only be protected by a complete ban on GMOs. This draft Law of the Region Upper Austria was supported by the Republic of Austria.

The envisaged provisions aimed to prohibit GMO products legally placed on the market under Directive 2001/18/EC¹² and thus represented a derogation from that harmonisation measure.¹³ However, this is only possible within the strict limits of Article 95(5) and (6) EC-Treaty¹⁴ whose main criteria are the emergence of 'new scientific evidence' and 'a problem specific to a Member State'. As it is the Commission's task to verify the EU compliance of diverging national provisions, in March 2003, Austria notified the draft Law to the Commission for approval. As the matter was highly complex, the Commission, for its part, sent the notification to the European Food Safety Authority (EFSA) and requested it to provide a scientific opinion as to whether any new scientific evidence had been provided and if there was a problem specific to (Upper) Austria.¹⁵ As the EFSA answered both questions in the negative,¹⁶ the Commission, in its decision of 2 September 2003, consequently rejected the notified provisions. In November 2003, both the Republic of Austria and the Region of Upper Austria challenged this decision in the European Court of Justice, which referred¹⁷ the case to the Court of First Instance.

10 Carried out 2002 on behalf of the Department for Environment of the region of Upper Austria and of the Austrian Federal Ministry for Social security and Generations. See also the references provided in para 63 of the contested Commission Decision, *supra* note 5.

11 As to the scientific aspects of this question see Palme/Schlee/Schumacher, 'Biological aspects of environmental law questions', JEEPL 2005, p. 59 et seq.

12 OJ 2001 L 106/1 et seq. An introduction to this directive is available at Palme, *supra* note 9; see also Christoforou, *supra* note 6.

13 As to the contents of this directive in terms of biodiversity and the protection of GMO-free farming see Palme/Schlee/Schumacher, JEEPL 2005, p. 53 et seq.

14 On this see Palme, EU-Freisetzungsrichtlinie, 2005, paras. 113-116.

15 Question No EFSA-Q-2003-001.

16 Opinion of the Scientific Panel on Genetically Modified Organisms on a question from the Commission related to the Austrian notification of national legislation governing GMOs under Article 95(5) of the Treaty, The EFSA Journal (2003) 1, 1-5.

17 Pursuant to Article 2 of Council Decision 2004/407/EC, Euratom of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice, OJ 2004 L 132/1.

18 Paras. 25-30 of the Judgment.

19 On this generally see Case 25/62 - Plaumann v Commission [1963] ECR 95 at 107, Case 169/84 - COFAZ and Others v Commission [1986] ECR 391, para. 22.

20 As to the locus standi of non-privileged applicants see Weatherill/Beaumont, EU Law, 1999, p. 253 et seq.

21 Case 222/83 - Municipality of Differdange and Others v Commission [1984] ECR 2889, para. 9.

II. Admissibility of the action brought by the Region Upper Austria

Apart from its considerations on Article 95 EC-Treaty the Court delivered some interesting reasonings on the admissibility of an action brought by a region or other subdivisions of EU Member States such as provinces, Bundesländer (Upper Austria) and States.¹⁸ In derogation procedures under Article 95 of the EC Treaty only the Member States themselves are the addressees of the Commission's Decisions. Hence the question arises whether in a case where a Member State notifies provisions which do not fall within its own competences but within those of one of its subdivisions, those subdivisions (also) have standing to challenge a Commission Decision.¹⁹ According to Article 230(4) of the EC Treaty this is the case when the contested decision is of direct and individual concern for the applicant²⁰ and thus, when the applicant is, in fact, affected by it as if it were the addressee.²¹ As Upper Austria was not only the author of the draft law but also had the exclusive power to legislate on these issues, the Court considered the Land, Upper Austria, as indi-

vidually concerned.²² And as Austria, as the addressee of the decision, did not have any discretion in communicating the decision to the Land of Upper Austria the requirement of direct concern was also met.²³ With these inferences the Court strengthened the standing of the above mentioned subdivisions of the EU Member States before the European Courts. In the case at issue, this was of no practical relevance as the Republic of Austria itself had also challenged the decision. But in a case where the 'parent' Member States refrains from doing so, this grants the affected subdivisions or regions in derogation procedures genuine legal standing before the European Courts²⁴ and thus enhances their influence at EU level.

III. Infringement of the right to be heard

Regarding the procedural aspects the applicants complained that the Commission had not given them the opportunity to state their views before adopting the contested decision. This led the Court to state more precisely the law of procedure governing derogations from harmonisation measures.²⁵

1. Procedural aspects of Article 95 of the EC Treaty

Up to now, the Court of Justice had only ruled that the right to be heard does not apply as far as requests for derogation under Article 95(4) of the EC Treaty are concerned,²⁶ but as, in this case, the derogation was based on Article 95(5) EC the applicants asserted that the circumstances called for a different answer. The difference between paras. 4 and 5 is that the first one relates to national provisions already in force before the adoption of the harmonisation measure whilst the latter applies to draft laws envisaged after the adoption of such measures.²⁷ But as both procedures are initiated by the Member State it is in both cases free to comment on the decision it asks to have adopted. So in this respect the considerations which led the ECJ not to grant another opportunity to be heard in the case of Article 95(4) of the EC Treaty would indeed also be true for Article 95(5).²⁸

But there are other aspects which demand a different view. As the 'para. 4-procedure' applies to provisions already in force, there is a need for a quick resolution as the functioning of the internal market is at stake. The fact that a Member State in case of

Article 95(4) is not authorised to apply the notified provisions until after it has obtained Commission approval²⁹ does not call for different answer. Provisions already in force which only may not be applied pose a more serious threat to the internal market than draft laws that have no legal effect yet, as in the case of the 'para. 5-procedure'. Therefore, if the period in Article 95(6) is extended to enable another hearing or at least a submission in writing, the only effect is that the envisaged law cannot be adopted. This may be detrimental to the Member State that has submitted the request, but not to the internal market. As the Member State is at liberty to accept this limbo situation or not, the consideration of the Court, that a short period in which the request should be resolved would also be in the interest of the requesting Member State³⁰ is not comprehensible.

2. Modifications due to the involvement of the EFSA

Even less convincing is the argument the Court employed to refuse the applicant the opportunity to rebut the EFSA opinion.³¹ The Commission Decision was almost entirely prejudiced by this agency. As the Commission sought the EFSA expert report due to the 'complexity of the matter', the logical step to take would have been to extend the decision period as provided for in subparagraph Article 95(6) of the EC Treaty thus giving both the

22 Case T-214/95 - Vlaamse Gewest v Commission [1998] ECR II-717, para. 29 et seq., and Joined Cases T-346/99, T-347/99 and T-348/99 - Diputación Foral de Álava and Others v Commission [2002] ECR II-4259, para. 37.

23 Joined Cases 41/70 to 44/70 - International Fruit Company and Others v Commission [1971] ECR 411, paras. 25 to 28.

24 Notwithstanding the requirement that, in the first place, the request for derogation under Article 95(4), (5) EC Treaty only can be submitted by the Member State itself. But where the legislative powers of its subdivisions are concerned, there is a good chance that those subdivisions have a constitutional right to demand this from their national Member State governments.

25 Paras. 32-47 of the Judgment.

26 Case C-3/00 - Denmark v Commission [2003] ECR I-2643.

27 See also Christoforou, 'The regulation of genetically modified organisms in Europe, the interplay of science, law and politics', *Common Market Law Review* 2004, p. 637, 670 et seq.

28 Judgement paras. 37-39.

29 See, by analogy with the procedure under Article 100a(4) of the old EC Treaty, Case C-41/93 - France v Commission [1994] ECR I-1829, paras. 29 and 30, and Case C-319/97 - Kortas [1999] ECR I-3143, para. 28.

30 Judgment, paras. 40 and 43.

31 Judgment, para. 45.

EFSA and the applicant a chance to state their views. But by requesting the EFSA report without extending the decision period, the applicants were deprived of their opportunity to comment on it³² and it is questionable whether such a procedure, in general, is compatible with the right to a fair trial.³³ But in this particular case there was another point which ultimately rendered the procedure unlawful, namely by producing an opinion on the issue as to whether there were unusual or unique ecosystems in Upper Austria³⁴ the EFSA acted outside its legal powers and gave scientific advice without having the capacity to do so. The Commission cited Article 29(1) and Article 22(5)(c) of Regulation No. 178/2002/EC³⁵ to legitimate the involvement of the EFSA, however, assessing the uniqueness of ecosystems and their biodiversity is not 'within its mission' in terms of Article 29(1) of Regulation 178/2002/EC. As Article 22(5)(c) clearly shows, the mission of the EFSA is to give scientific opinions on (GMO) 'products' and not on the ecological value of landscapes and regions.³⁶ So had the EFSA acted as an agency afforded with executive powers and not merely as a consulting body, the decision would

have had to be annulled for 'lack of competence' within the meaning of Article 230(2) and (4) of the EC Treaty.³⁷ As the Commission relied almost entirely on the expert report of the EFSA when determining whether there was a 'problem specific to a Member State' in terms of Article 95(5) of the EC Treaty the result certainly came very close that annulment reason. In summing up, the involvement of the EFSA without the applicants being given a chance of rebuttal and thus the Commission being enabled to take a different stance³⁸ can, at least in these special circumstances, be regarded as a denial of their right of 'audi alteram partem'³⁹ coming very close to an 'infringement of an essential procedural requirement' within the meaning of Article 230 of the EC Treaty.⁴⁰

IV. Assessment of merits

The conditions set out in Article 95(5) and (6) of the EC Treaty for the introduction of national measures that are incompatible with an EU harmonisation measure such as Directive 2001/18/EC are the emergence of 'new scientific evidence' after the Directive's adoption, which was 2001, 'a problem specific' to the Member State requesting the derogation and the absence of a 'disguised trade restriction on trade'. These conditions are cumulative, ie. all three of them must be satisfied⁴¹ and the burden of proof lies with the diverging Member State.⁴²

1. New scientific evidence

Even though the Müller Study was released about a year after the adoption of Directive 2001/18, the EFSA/Commission did not consider it as new scientific evidence.⁴³ As the vast majority of the sources referred to in the bibliography had been published prior to the Directive's adoption, the core of the study, in their view, appeared to be more a validation of previous work than new material. This view is quite peculiar, as scientific work is a continuing process which virtually defines itself by building on the available knowledge and further developing or falsifying it, and any single new detail can lead to a completely different picture. Apart from this, the Müller Study also contained research work carried out after the adoption of the Directive and, moreover, in a original piece of research work, the Müller

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- 32 See also Christoforou, 'The regulation of genetically modified organisms in Europe, the interplay of science, law and politics', *Common Market Law Review* 2004, p. 637, 670 et seq.
- 33 As for the problem of who decides what current scientific knowledge is see also Fischer, 'Current Scientific and Technical Knowledge in the Authorisation Process for Plant Protection Products', *JEEPL* 2005, p. 135 et seq.
- 34 Thus constituting a 'problem specific to a Member State' in terms of Article 95(5) EC Treaty, see below V.2.
- 35 Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, *OJ* 2002 L 31/1.
- 36 As to the mission of the EFSA see: http://www.efsa.eu.int/about_efsa/catindex_en.html. See also Kraphol, 'Credible Commitment in Non-Independent Regulatory Agencies: A Comparative Analysis of the European Agencies for Pharmaceuticals and Foodstuffs', *European Law Journal* 2004, p. 518 et seq.
- 37 On this ground for annulment see Hartley, *The Foundations of European Community Law*, 2003, p. 415.
- 38 As to the procedural principles to be observed when determining scientific issues see Fischer, *supra* note 33, p. 138.
- 39 ECJ, Case 17/74 - [1974] ECR 1063.
- 40 To this more in detail see Hartley, *supra* note 37, pp. 416-418.
- 41 Case C-512/99 - *Germany v Commission* [2003] ECR I-845, paras. 80 and 81.
- 42 Opinion of Advocate General Tizzano in *Germany v Commission*, point 71; see also, by analogy with Article 95(4) EC, *Denmark v Commission*, para. 84.
- 43 Para. 65 of the contested Commission Decision, *supra* note 5.

Study transposed this knowledge to the special situation of Upper Austria.⁴⁴ As the elements of biodiversity in each region are different already this is a (new) scientific project of its own and, besides, since 2001 studies have been conducted worldwide showing that, especially in small-scale farming systems, the coexistence of GMO and GMO-free agriculture is not feasible at all or only by incurring very high costs.⁴⁵ One of this studies was conducted in 2003 by the EU itself,⁴⁶ which is two years after the adoption of Directive 2001/18 and even more new research has been conducted on the detrimental effects of GMOs on biodiversity.⁴⁷ In 2003, farm scale evaluations were carried out by the British Royal Society, in trials commissioned by the British government, showing significant damage to biodiversity on areas cultivated with GMOs.⁴⁸ Given all this, the findings of the EFSA/Commission which declared the claims of Austria as mere conjecture⁴⁹ seem to be poorly founded on sound science.⁵⁰

2. Problem specific to Austria

Following the EFSA's assessment both the Commission and the Court held that Upper Austria had no unusual or unique ecosystems that required separate risk assessments or other precautionary measures. This finding is surprising since Upper Austria is part of the Alpine Region, an area whose unique value in terms of biodiversity is undisputed by biologists. As this unique ecosystem is very susceptible to external impacts, in 1991 the States of the Alpine Regions agreed on the 'Convention for the Protection of the Alps'. In its preface, the contracting parties declare that they are aware of this region's 'outstanding unique and diverse natural habitat'. The general obligations in Article 2(2)(f)-(h) of the Convention explicitly address the conservation of ecosystems, environmentally compatible mountain farming and forestry and the European Community ratified this Convention in 1996.⁵¹ It seems contradictory to acknowledge, on the one hand, the unique value of this region in terms of its biodiversity by signing the Convention and, on the other hand, to deny it a specific status within the meaning of Article 95(5) of the EC Treaty. Therefore, the failure to recognise Upper Austria's unique ecosystem and the above mentioned⁵² lack of competence of the EFSA in assessing those questions led to a substantively flawed decision by the Commission.

3. Disguised restriction on trade

So contrary to the findings of the Court it appears that the conditions of Article 95(5) of the EC Treaty were indeed met. But as any exceptions to the principles of the uniform application of Community law and the internal market must be strictly interpreted, this did not necessarily mean that the notified provisions had to be approved. To ensure that such derogations do not extend beyond their permissible scope, Article 95(6) of the EC Treaty stipulates that they must not constitute 'arbitrary discrimination or a disguised restriction on trade between the Member States'. And this is where the design of the notified provisions comes into play. Upper Austria deliberately diverged from the case by case principle governing European legislation on plant engineering⁵³ by introducing a comprehensive ban on all kinds of GMO irrespective of their bearing on organic/conventional farming and biodiversity. In choosing this approach Upper Austria ignored scientific evidence showing that the effects of GMO are different depending on the genetically modified plant and the biosphere where it is cultivated. For instance, the cross-pollination and introgression of genetically modified potatoes can easily be controlled, but in the case of wheat or maize the situation is different and where GM-rapeseed is cultivated, its dissemination even over long distances

44 See also Forman, 'Community Regulation on Genetically Modified Organisms: a Difficult Relationship between Law and Science', *European Law Journal* 2004, p. 580 et seq.

45 As for Germany see for instance Hermanowski/Tappeser, *Grüne Gentechnik und ökologische Landwirtschaft, Studie im Auftrag des Umweltbundesamts* 2002.

46 Joint Research Center, *Scenarios for coexistence of genetically modified, conventional and organic crops in European agriculture*, http://www.jrc.cec.eu.int/download/GMCrops_coexistence.pdf.

47 See Palme, *Einführung in die EU-Freisetzungsrichtlinie*, para. 20 et seq., supra note 9. All studies referred to were published after the adoption of Directive 2001/18.

48 Champion et al., *Crop management and agronomic context of the Farm Scale Evaluations of genetically modified herbicide-tolerant crops*, *Philosophical Transactions of The Royal Society London Series B* (358) 2003, 1801 ff.

49 Contested Commission Decision, supra note 5, para. 72.

50 Palme/Schlee/Schumacher, 'Biological aspects of environmental law questions', *JEEPL* 2005, p. 59 containing ample references.

51 OJ 1996 L 61/31-36.

52 Para. IV.

53 Para. 56 of the contested Commission Decision, supra note 5.

cannot be prevented.⁵⁴ The introduction of a complete ban, instead of looking at each single GMO and each single biosphere, meant that Upper Austria created a disguised restriction on trade with GMO products.⁵⁵ This is true, irrespective of the limitation of this ban to three years, as Article 95(6) EC does not contain any *de minimis* clause in terms of the duration of such restrictions.

4. The role of the precautionary principle

As opposed to the claims of (Upper) Austria this result is compatible with the precautionary principle as laid down in Article 174(2) EC-Treaty.⁵⁶ But the reason was not – as the Commission put it⁵⁷ –

that the recourse to the precautionary principle was too general and lacked substance,⁵⁸ rather, as shown above,⁵⁹ that Upper Austria did submit specific evidence⁶⁰ but could not support a complete ban of all GMO products in each kind of biosphere. Hence a more convincing reason given by the Court was that as the conditions of Article 95(5) were in its view⁶¹ not fulfilled, the precautionary principle could not be invoked any more. The Court construed Directive 2001/18/EC as a special embodiment of the precautionary principle designed by the European legislators. And as this Directive in ample ways refers to this principle this view is convincing. So as long as EU secondary legislation complies with the exigencies of the precautionary principle, recourse to primary EU law ie. Article 174(2) of the EC Treaty is preempted. This structural argument is corroborated by substantive considerations. As Article 95(5) of the EC Treaty explicitly refers to scientific evidence which, according to Article 174(3)(i) EC of the Treaty, is the cornerstone of European environmental law there is indeed no need for additional recourse to Article 174(2) of the EC-Treaty.⁶²

V. Conclusion

Even though the reasonings on both procedural and substantive aspects seem to be flawed, the result of the judgment of the Court cannot be disputed. The Upper Austrian draft law banning GMOs went far beyond the scope necessary to protect organic/conventional farming and biodiversity. A blanket ban without any consideration of the individual GMO product involved thwarts the legal position of those companies that have obtained the right to market their goods under Directive 2001/18.⁶³ On the other hand, even comprehensive bans on different GMO products may be legal, if for each single one the need for a ban under the special circumstances of the region concerned can be established. So ‘through the backdoor’ at the least, something coming close to a GMO-free region still seems possible.⁶⁴ Apart from that, in future, the significance of derogations under Article 95 EC Treaty will vanish anyway as far as the coexistence issue is concerned,⁶⁵ because, since 2003, this aspect is governed by the special safeguard clause of the newly inserted Article 26a of Directive 2001/18.⁶⁶

54 Hermanowski/Tappeser, *Grüne Gentechnik und ökologische Landwirtschaft*, Studie im Auftrag des Umweltbundesamts 2002, p. 115 et seq.

55 See also the Recommendation the Commission adopted on 23 July 2003 on guidelines for the development of national strategies and best practices to ensure the coexistence of genetically modified crops with conventional and organic farming (OJ 2003 L 189/36). No 2.1.5. of this Recommendation states that: ‘Measures of a regional dimension could be considered. Such measures should apply only to specific crops whose cultivation would be incompatible with ensuring coexistence, and their geographical scale should be as limited as possible. Region-wide measures should only be considered if sufficient levels of purity cannot be achieved by other means. They will need to be justified for each crop and product type (e.g. seed versus crop production) separately.’

56 To this see in general Commission Communication on recourse to the precautionary principle, COM(2000)1 final, of 2.2.2000.

57 Commission Decision, *supra* note 5, paras. 72, 73.

58 As to the degree of scientific data necessary for backing preventive action see Cases T-13/99 and T-70/99 of the Court of First Instance, [2002] ECR-II, p. 3305.

59 See para. V.1.

60 To the exigencies of the precautionary principle on plant engineering see Palme, *EU-Freisetzungsrichtlinie*, 2005, *supra* note 9, paras. 23-27.

61 Following the view of this article (only) the conditions of Article 96(6) EC Treaty were not met but in terms of the applicability of Article 174(2) EC Treaty this amounts to the same.

62 See also Cazala, ‘Food Safety and the Precautionary Principle: the Legitimate Moderations of Community Courts’, *European Law Journal* 2004, p. 539 et seq.

63 Palme, *EU-Freisetzungsrichtlinie*, 2005, *supra* note 9, para. 89.

64 As to the discretionary powers of the EU Member States in this respect under the current law see an overview at Palme/Schlee/Schumacher, *JEEPL* 2005, p. 53 et seq. and in detail Palme, *EU-Freisetzungsrichtlinie*, 2005, *supra* note 9, paras. 102-118.

65 On the delimitation of environmental and coexistence issues see paras. 67-68.

66 To this new article and its relation to other derogation possibilities see Palme, *EU-Freisetzungsrichtlinie*, 2005, *supra* note 9, para. 118 and Palme/Schlee/Schumacher, *JEEPL* 2005, p. 57.