France

ENVIRONMENTAL PROTECTION

Measures to reduce vehicle emissions

A report by the Environment and Energy Control Agency (ADEME) emphasises that the real impact of motor vehicle pollution on health is still difficult to assess. Nonetheless, it establishes for certain that fuels and vehicles are still causing too much pollution. The solutions proposed include the development of 'alternative' fuels such as LPG, compressed natural gas ('CNG'), biofuels or electricity. Other possibilities are the development of public transport, and traffic restrictions. France intends to promote the achievement of a moderate level of fuel consumption in new vehicles in the European Union: to 5 litres/100 kilometres (48.5 mpg) by 2005. It is also proposing the development, especially through tax measures, of an 'urban electric vehicle' and 'other alternative vehicles'.

The Minister for the Environment has admitted that CO^2 emissions in France will probably increase by 7 per cent between now and the year 2000. The factors responsible for the increase in pollution are the large increase in traffic, especially heavy goods vehicles, changes in the regulating of vehicles over four years old, and the increasing proportion of diesel-engine vehicles. Diesel is indeed the fuel that produces the most particles of nitrogen oxide and sulphur compounds and attracts the lowest level of tax (72 per cent compared with 80 per cent for petrol).

TL

MARKET TRENDS

Increases in oil and chemical sectors

Oil

Deliveries of gas oil (+8.9 per cent) and jet fuel (+7.8 per cent) increased greatly on the French market in January 1995, compared with the same month in 1994. For the year ending January 1995, supplies increased by 5.1 per cent for gas oil and 6.8 per cent for jet fuel.

Chemicals

According to figures published by the French Union of Chemical Industries (UIC), after a gloomy 1993, the French chemicals industry experienced a real turn-round in 1994, with a 5.6 per cent increase in production by volume and 7 per cent in turnover. The great increase in volume was accompanied by modest price rises (+1.4 per cent on average over the year) in spite of the soaring prices of some products such as raw materials for plastics, which led to problems for industries downstream. On the other hand, the prices of basic organic chemicals are still somewhat below their 1990 level. For 1995, the UIC forecasts a 3.5 per cent growth in French chemicals production. *TL*

PRODUCTION

New oil field in production

A new oil field has just gone into production in Ile-de-France, located some 50 kilometres south of Paris. This is the Itteville field which was discovered thanks to leading-edge technologies, in particular 3D seismic surveys.

The Itteville field should produce between 1 and 2 million tonnes of oil in a production life of between ten and fifteen years.

The annual production of the Ile-de-France sector is exceeding 400,000 tonnes and represents around 20 per cent of all production in the Paris basin.

TL

Germany

ENVIRONMENTAL LAW Oil tanks

Duty of care of operators

3 Ss 149/94
Provincial Court of Celle
24 November 1994
ZUR 1994/101

Legal Provision: § 324 of the German Penal Code states:

> Pollution of Waters
> (1) Who pollutes without authorisation the water of who changes its qualities in a disadvantageous manner will be punished with imprisonment up to five years or with a pecuniary fine.
> (3) If the perpetrator acts negligently the punishment is imprisonment up to three years or a pecuniary fine.

Held: Heating oil installations have to be constructed and operated in such a manner that there is no danger of polluting the water. They have to be run

within at least the generally recognised rules. The operator of the installations has to take the necessary provisions against a disadvantageous change of the quality of the water. The installation must be constantly monitored with regard to its imperviousness and the functionality of the safety devices. Taking into account the seriousness of the pollution of water for human beings and nature, high demands have to be placed on the operator.

Oil tanks which are made of steel do rust from the inside because of the aggressiveness of the heating oil, so they have to be carefully cleaned and examined from the inside every five to seven years. This is because after a certain number of years fissures can appear in oil sumps from sinking.

Operators of heating oil installations are obligated to act not only at times when they are able to detect without expert advice the imperviousness of the tank or the collecting oil sump; they also have to make sure by appropriate measures that no heating oil can leak and contaminate the water. Proprietors of leased houses remain jointly liable for the houses' heating oil installations, at least as long as they do not transfer their duty of care by an express stipulation with legal effect to the tenant.

Comment: § 324(1) of the German Penal Code threatens with punishment the unauthorised pollution of the water. Also a negligent act may lead to imprisonment. Any conduct is unlawful which leads to a disadvantageous change of the quality of the water. Thus, pollution in the sense of § 324 of the Act will be caused by the flowing over of an oil tank or the spillage of oil or petrol from a tank lorry,[1] or even the negligent causing of an accident which leads to damage caused by oil.[2] The negligent act presupposes that the pollution is based on a violation of the duty of care; it is not required that there is conduct directed towards feeding the oil into the water. The Provincial Court of Dusseldorf[3] held that in the case of the acquittal of charge of the negligent pollution of water by reason of the individual lack of foreseeability, the necessary comprehensive assessment of evidence presupposes verification concerning the objective foreseeability if the standard of care was established by the law. This means that in the case in which the standard of care is established, for example, by bylaws relating to the construction law, a court has to examine carefully the factual circumstances concerning the foreseeability which relieve the person accused from liability.

It has been controversial as to whether and to what extent negligent acts should be punishable. However, at its conference in 1988, the German Jurists' Conference[4] did not adopt a recommendation according to which the basic provisions of the penal provisions of the environmental law were to be limited to irresponsible, wilful or intentional acts. Because of the grave effects which pollution of the water cause, it seems that even punishment of the negligent commission of the offence is accepted by society.

The term 'pollution' in § 324 of the Criminal Code designates the result with regard to the actual facts – the way in which the result is achieved is irrelevant. In particular, the law incriminates pollution caused by a non-feasance relating to the safety of substances dangerous for the water.[5] The Provincial Court of Saarbrücken[6] held that the charge of the commission of the facts by a non-feasance presupposes the non-execution of an imperative duty for the person concerned to act in a manner which meant that it was possible and even likely that the negative result would be avoided.

§ 19g of the German Water Resources Act concerns installations dealing with substances which can be dangerous for water. According to subsection 1, installations for the keeping of such substances have to be of such a quality, have to be constructed, set up, maintained and operated in such a manner, that pollution of the water of any other disadvantageous change of the water quality does not have to be feared. Subsection 3 establishes that this duty has to correspond at least to the recognised rules. A violation of these provisions will lead to the imposition of an administrative fine. The reference to the recognised rules permits the adaptation of the legal standard of care to the development of such rules.[7] Accordingly, the standard of care depends on the circumstances of the individual case. Such rules may be established by bylaws of the German provinces relating to technical construction or protection against corrosion, or by recognised standard specifications of the industry. The imperviousness of installations may be examined by regular inspections of the place of setting up, of the tanks and pipes and of the safety devices.[8]

§ 19i of the German Water Resources Act concerns the duties of the operator of the installation. Subsection 2 imposes on the operator the obligation to constantly watch for imperviousness and the functionality of the safety devices. According to sentence 2, the competent public authority may, in individual cases, order that operators conclude contracts for such supervision with special undertakings if they themselves do not have the necessary expertise

1 Leizpiger Kommentar, *Strafgesetzbuch*, 10th edn, Vol. 7, Walter de Gruyter, 1988, No. 38 to § 324.
2 Federal Parliament, Document 8/2382, page 14.
3 Provincial Court of Düsseldorf of 1 December 1992, NJW 1993/1408.
4 Report of the German Jurists' Conference of 1988 in Mainz, NJW 1988/2993 at 3002.
5 Lackner, *Strafgesetzbuch*, 21st edn, C.H. Beck, 1995, No. 4 to § 324.
6 Provincial Court of Saarbrücken of 27 June 1991, NJW 1991/3045.
7 Gieseke/Wiedemann/Czychowski, *Wasserhaushaltsgesetz*, 6th edn, C.H. Beck, 1992, No. 10 to § 19g.
8 Sieder/Zeitler/Dahme, *Wasserhaushaltsgesetz*, Vol.1, C.H. Beck, supplement August 1994, Nos 5 and 6 to § 19l.

or if they do not have the experienced personnel. Sentence 3 states that in certain circumstances the operator has to ask experts to examine the installation.

The operator of an installation will generally be the owner, lessee, tenant or any other person who is authorised to use it. An operator is not the person who is charged with the servicing or maintenance of the tanks and who does not draw a profit from the installation. Tenants of apartments generally do not have the right to control the installation so they cannot be considered as operators. According to legal writers, contractual stipulations do not release the operator from liability.[9] The court, however, considers that the owner of a house may effectively transfer the duty of care imposed by the penal law to the tenant. It seems appropriate to take into consideration the purpose of the law and to accept the transfer of the liability of the owner as operator of the installation in those cases in which the transfer facilitates the supervision of the installation.

9 Gieseke/Wiedemann/Czychowski, Note 7 above, No. 4 to § 19i.

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COMPETITION LAW
Federal Cartel Office

Court action against demarcation contracts

The German Federal Cartel Office ('Bundeskartellamt' – FCO) has recently issued two further prohibition-decrees concerning demarcation contracts between gas distribution companies in East Germany.

In the first case, Wintershall Erdgas Handelshaus GmbH, Berlin, (WIEH) and Wintershall Gas GmbH, Kassel, (WIG) had undertaken *vis-à-vis* Verbundnetz Gas AG, Leipzig, (VNG) to refrain from the supply of natural gas to third party customers in a defined part of East Germany, except for certain long-standing WIEH/WIG customers. This agreement was concluded as part of a settlement between the parties who had previously argued about WIEH's attempt to win customers from VNG by way of third party access (TPA) to VNG's distribution pipelines (the so-called 'VNG case'.[1] In this dispute, the FCO had assisted WIEH by ordering VNG to grant access to its pipeline if WIEH was prepared to pay an appropriate transit fee. While this order was appealed by VNG and finally annulled by the Federal Court, VNG, WIEH and WIG in the meantime settled on their own terms.

The FCO considers demarcation agreements to have an anti-competitive effect. Under their terms WIEH and WIG are prevented from supplying customers in VNG's exclusive territory directly from their own pipeline, as well as by transmission through VNG's network. In the FCO's view the dispensation, granted in section 103 paragraph 1 No. 1 of the German Law against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen- 'GWB') for demarcation contracts in this case does not apply because a second, parallel pipeline already exists (namely WIEH's). Thus, the aim of the dispensation, which was to prevent uneconomical duplication of expensive infrastructure investments can no longer be achieved by the demarcation agreement between VNG and WIEH/WIG. Thus is does not merit dispensation and the general GWB-rules which forbid such restrictive agreements apply. On these grounds the FCO has declared the agreement null and void (decision of 3 March 1995, file no. 8-822000-N-01 and -62/94).

A second decree of similar content was issued on 7 March 1995 against Erdgas Versorgungsgesellschaft mbH Erfurt (EVG) by the FCO (file no. B 8-833000-N-164/94). EVG is a Joint Venture of VNG and Ruhrgas AG operating the natural gas supply in Thuringia and parts of Saxonia and Saxonia-Anhalt. WIG and EGV have also concluded a demarcation agreement with each other.

In both cases the concerned parties have appealed against the FCO decrees at the Berlin High Court ('Kammergericht' - KG).

At the same time (decision of 22 March 1995, file no. B 8-822000-N-139/93) the Federal Cartel Office has revoked its decree of last year in the *Ruhrgas/Thyssen* case which also concerned a demarcation agreement (decision of 22 March 1995, file no. B 8-822000-N-139/93). According to the FCO this step was taken as a consequence of the Federal Court judgment in the VNG case which had ruled, *inter alia*, that the Cartel Office had to consult special energy administration agencies before the FCO could take action in this field. Apparently the FCO doubted whether it had met those requirements in preparing the *Ruhrgas/Thyssen* decision and – as the decision had already been appealed before the courts – preferred to retreat in time.

1 OGLTR 2 [1995] D–38.

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