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# **Noise Pollution Regulation in Germany and Hungary**



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## *Part 1*

The legal regulation of noise abatement in the Federal Republic of Germany is not concentrated in one single legal act, but is spread through different acts of legislation. This is a consequence of the distribution of legislation competencies in the Federal State on the one hand of the necessity caused by European obligations to create special arrangements for certain subject areas on the other (cf. II–IV).

### *I. Constitutional Preconditions*

Germany is a Federal State. This means that both the Federation and the Lander have the legal status of states. It is therefore one of the tasks of the constitution to distinguish between the different competences of the Federation and the Lander. For the legislative powers an allocation of special subjects is made to the Federation or the Lander in the Articles 70 sq. of the Basic Law<sup>1</sup> (hereinafter: GG). According to the rule of Art. 70 GG, the Lander have the power to legislate insofar as the Basic Law does not expressly confer legislative powers on the Federation. For the relevant field of the law of noise protection such an allocation can be found in Art. 74 para. 1 no. 24 GG. The Federation is hereby entitled to the so-called concurrent legislation for “the refuse disposal, air pollution control and noise control”. The federal legislator has the right to legislate on these matters to the extent that the maintenance of equal living standards in the Federal State or the maintenance of legal or economic unity require legislation by the federal legislator in the common interest of the Federal State (Art. 72 para. 2 GG). According to the distribution rule of Art. 72 para. 1 GG, the Lander have authority to legislate on matters mentioned in Art. 74 para. 1 no. 24 GG only as long as and insofar as the federal legislator has not used its legislative power.

The idiom “as long as” creates a temporal barrier: The Lander have the power to legislate on the areas mentioned, but lose this competence as soon as the Federation takes action. The idiom “insofar as” implies a barrier with regard to the contents of the legislation: If a law is enacted by the federal legislator which concerns a subject within the scope of Art. 74 GG but does not regulate this subject completely and exhaustively, there remains a clearance for legislation by the Lander in those areas which are not regulated by federal law.

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<sup>1</sup> Basic Law for the Federal Republic of Germany of 23 May 1949 (Federal Law Gazette I p. 1); last amended by Act of 22 December 2000 (Federal Law Gazette I p. 1755).

The latter alternative corresponds to the German legal status in the area of noise control. The Federation made exhaustive use of the possibility of issuing regulations on noise control neither concerning the fight of the noise at its source nor in the field of passive noise protection. Its legal action was limited to legislation concerning plant-related emission control (protection of the population in relation to noise caused by industrial plants and other technical plants – cf. II.) and the protection from traffic noise (cf. III.). Within the range of behaviour-related emission control (thus noise control concerning emissions resulting from the behaviour of persons) only a few federal law regulations exist. This area of noise abatement is substantially regulated by legislation of the Lander (cf. IV.).

These intermixed fields of different legislation competencies lead to a difficulty concerning the implementation of EC-Directives: namely the question in whose jurisdiction the necessary standard setting activity has to take place. The Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 Relating to the Assessment and Management of Environmental Noise (Official Journal L 189, 18/07/2002 P. 12–26) for example plans to compile by 30 June 2007 noise maps for agglomerations, major roads, major railways and major airports – this concerns essentially an area of the traffic-related noise protection that is already at this stage regulated predominantly by federal law.

However, if in addition to that also building noise – caused by persons on building sites – shall be regulated, it has to be considered whether it can be regarded as a behaviour-related source of noise. In this case an implementation by the Lander would be possible.

In the past, the implementation of EC-Directives frequently led to authority disputes between the Federation and the Lander. This kind of conflict is likely to arise if European obligations require a new structure of Land authorities or contain regulations which affect the administrative procedures of the Lander. In these cases, the Lander has the right to participate in the law-making process.

If the Lander has the authority to implement a Directive and fail to do so on time, proceedings for damages can be brought against the Federation although it had – for lack of competence – no possibility to legislate on the matter. Generally it is however recognized that under the aspect of federal loyalty and according to Article 23 GG, the Lander are committed to co-operation in the implementation of Directives.

## *II. Plant-Related emission Control*

There is no particular legal regime in Germany for the protection against noise emitted by industrial plants and other technical plants. Noise control is regulated together with the control of air pollution in the Act on the Prevention of Harmful Effects on the Environment Caused by Air Pollution, Noise, Vibrancies and

Similar Phenomena<sup>2</sup> (Federal Emission Control Act-Bundesimmissionsschutzgesetz).

### *1. General Requirements*

The Federal Emission Control Act Regulates the authorisation procedure for plants that are particularly harmful to the environment and the duty to avoid damages caused to the environment during operation. The Federal Emission Control Act represents the central regulation of emission control within the the range of federal law and has been amended several times since its entry into force in 1974, so for instance in the course of the implementation of the European Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment<sup>3</sup>, or the implementation of the European Directive 96/61/EC concerning Integrated Pollution Prevention and Control<sup>4</sup>.

#### *a) Systematic of the Federal Emission Control Act*

The second part of the Federal Emission Control Act (Art. 4–31 a) forms its core. Plants which particularly pollute the environment by air pollution or noise are herein submitted to a duty to obtain a permission that is regulated by specific procedure. The fourth Federal Emission Control Ordinance<sup>5</sup> defines the range of installations for which a license is required and specifies the respective type of licensing procedure to be applied. While the plants that are not mentioned in the ordinance (handicraft business, children's playgrounds or mobile facilities as lawnmowers etc.) are not affected by this duty to obtain permission, Art. 22–25 of the Federal Emission Control Act provides duties for the operators of such facilities to safeguard their environmental compatibility. According to Art. 6 of the Federal Emission Control Act an authorisation is to be granted if certain duties in Art. 5 and the fourth Federal Emission Control Ordinance are fulfilled. These duties include a rational use of energy, waste prevention, waste recycling, and precautions against detrimental effects on the environment which are to be taken by measures that are in compliance with the state of the art. The key requirement lay down in Art. 5 para. 1 no. 1 of the Federal Emission Control Act is that no detrimental effects on the environment or other adverse effects for the general public or the neighbourhood are caused.

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<sup>2</sup> Federal Emission Control Act of 14 May 1990 (Federal Law Gazette I p. 880): last amended by Act of 26. September 2002 (Federal Law Gazette I p. 3830).

<sup>3</sup> Council Directive 85/337/EEC of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment (OJ L 175 p. 40–48).

<sup>4</sup> Council Directive 96/61/EC of 24 September 1996 (OJ L 257, p. 26).

<sup>5</sup> Fourth Ordinance for the Implementation of the Federal Emission Control Act (Ordinance Concerning Installations Subject to Licensing Requirements – 4<sup>th</sup> BimSchV) of 14 March 1997 (Federal Law Gazette I p. 504), last amended by Ordinance of 14 August 2003 (Federal Law Gazette I p. 1614).

*b) The Technical Instruction on Noise Abatement*

Important reference points for the specification of the duty to provide protection and control in the area of noise control are supplied by the Technical instruction on Noise Abatement (TA Lärm).<sup>6</sup> The revised version of the Technical Instruction on Noise Abatement of 1998 replaces an old version which was enacted in 1968 on the basis of the Trade, Commerce and Industry Regulation Act long before the entry into force of the Federal Emission Control Act. The revised Act eliminated many shortcomings of the old regulation.

While the old Technical Instruction on Noise Abatement did not make clear whether the emission limit values referred to the plant or to the acceptor, the revised Act basically decided in favour of the acceptor-related approach, so that at the relevant place affected not only noise caused by the plant itself, but also noise caused by other surrounding plants has to be taken into account (initial level of pollution). The acceptor-related approach corresponds to the ratio legis of the Federal Emission Control Act, which defines emission with detrimental effects on the environment in Art. 3 para. 2 as air pollution, noise, vibration [...] and similar effects on the environment *which affect human beings*. Therefore, the determining factor is the character of the contamination which human beings, animals and plants are exposed to, irrespective of its point of origin.

The Technical Instruction on Noise Abatement is a highly complex specification of the requirements of the Federal Emission Control Act, characterised to a large extent by the employment of specialised scientific-technical expert knowledge. According to the principles of General Administrative Law, the Technical Instruction on Noise Abatement as an administrative regulation has no direct external legal effect. It is an internal legal norm, which has legally binding effect only for the administration itself or for the public servants of the authorizing agency. The need for legal certainty and equality in the application of the law, however, led to the fact that judiciary and literature – though on different grounds – awarded a legally binding effect to the technical instructions also for the courts concerned with the judicial review of the administrative decision. The Federal Administrative Court (Bundesverwaltungsgericht – BVerwG) initially based the binding effect of the technical instructions on its character as "anticipated expert opinion"<sup>7</sup>. Since then it has however turned down this qualification again and justifies the binding effect now – in accordance with the prevailing view of the literature – with the consideration that an independent margin of appreciation is to be granted to the administration. Details of the conditions and the range of this administrative scope of concretion and the resulting binding effect are still

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<sup>6</sup> 6<sup>th</sup> General Administrative Instruction concerning the Federal Emission Control Act (Technical Instruction on Noise Abatement – TA Lärm) of 26 August 1998 (GMBI. P. 503).

<sup>7</sup> BVerwGE 55, 250 (256); OVG Berlin, NVwZ 1985, 759; OVG NW, NVwZ-RR 1989, 640; see further Breuer, AöR 101 (1976), p. 46 (83 ff.).

controversial.<sup>8</sup> The courts, however, are allowed to deviate from the values of the Technical Instruction on Noise Abatement in atypical cases<sup>9</sup> or if the specifications of the Technical Instruction are outdated because of new developments or scientific insights.

The Technical Instruction regulates the adherence to the duty of protection and defence (no. 3,2) and to the duty of precaution (no. 3,3). Relevant for the evaluation is the total emission load for the concerned person (acceptor). The total emission load is made up of the noise caused by the plant in question (additional pollution) in addition to the noise of other sources (initial level of pollution). The Technical Instruction on Noise Abatement contains detailed guidelines for the determination of noise according to which certain noise levels are to be determined at different evaluation times (e.g. inter alia the loudest night hour). On the basis of clearly specified methods of calculation, an evaluation level is to be determined, whose concluding evaluation depends on the legal category of the area in which the object is situated. The result is a system of emission standard values which is committed to the urban development legislation principle of the separation of functions, i.e. the spatial separation of disturbing uses from each other.

The emerging network of emission standard values is based upon the categorisation of areas in the Federal Land Utilisation Ordinance (BauNVO)<sup>10</sup>. The ordinance lays down differentiated emission standard values for industrial areas (70 dB (A)), industrial areas (65dB (A) in the daytime, 50 dB (A) at night), residential-only areas (50 dB (A) in the daytime, 35 dB (A) at night), hospitals (45 dB (A) in the daytime, 35 dB (A) at night) etc. These guideline values finally determine the "substantial nuisance" set up in the prerequisites for licensing laid down in Art. 6 para. 1 in conjunction with Art. 5 para. 1 no. 1 Federal Emission Control Act. For interrelated fields – structural situations in which for instance an industrial area borders on a residential area – no. 6.7 of the Technical Instruction on Noise Abatement prescribes that intermediate values are to be set up<sup>11</sup>.

The Technical Instruction on Noise Abatement does not apply to certain specific structures such as e.g. to sports sites (cf. 2b below), building sites (cf. 2c below) or mining areas.

### *c) Subsequent Orders*

In case permission has been granted to a plant subject to licensing but the protection afforded to the neighbourhood turns out to be inadequate because it is exposed to substantial noise disturbances or air pollutions, the responsible authority

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<sup>8</sup> For a summary of the subject see JARASS, *BimSchG*, 5<sup>th</sup>ed. 2002, § 48 Rn. 26 sq.

<sup>9</sup> *BverwG*, DVBl. 1988, 539; *BverwG*, RdL 1990, 34 (35); *BverwG*, DVBl. 1995, 516 (517); *BverwGE* 55, 250 (258); VGH BW, DVBl. 2000, 1867; *Jarass*, JuS 1999, 105 (110f.).

<sup>10</sup> Federal Land Utilisation Ordinance (Baunutzungsverordnung – BauNVO) of 23 January 1990 (Federal Law Gazette I p. 132); last amended by Act of 22 April 1993 (Federal Law Gazette I p. 466).

<sup>11</sup> See further HANSMANN, *TA-Larm*, München, 2000; MÜLLER, *Die TA-Larm als Rechtsproblem*, Berlin, 2001.

may – in accordance with Art. 17 Federal Emission Control Act – give subsequent orders to force the plant operator to install technical precautions for the reduction of noise or air pollution. The Technical Instruction on Noise Abatement sets up guidelines for these cases, but these requirements (named in no. 5.1 Technical Instruction on Noise Abatement) remain clearly behind the requirements of the licensing procedure, in particular the consideration of the initial level of pollution is limited (no. 5.1 para. 3 Technical Instruction on Noise Abatement).

#### *d) The Law of Building Design*

It should by now have been made clear that the afore-mentioned separation principle in the law of building design (the objective of a spatial separation of disturbing uses from each other, e.g. trade and residential areas) is a suitable instrument for avoiding noise disturbances of the resident population by commercial or industrial plants. The different types of use specified in the Federal Land Utilisation Ordinance (cf. Art. 1 para. 1 and 2 BauNVO) turn out to be a helpful instrument for the municipalities responsible for the planning to avoid conflicting uses. The catalogue of Art. 9 of the Federal Building Code (BauGB)<sup>12</sup> offers various possibilities for the protection from noise, in particular the possibility (according to Art. 9 para. 1 no. 24 Federal Building Code) to include special areas for the purpose of noise protection in the land-use plan.

#### *2. Regulations for Special Plants*

In addition to the general requirements for the protection against noise caused by plants set-up by the Federal Emission Control Act and the Technical Instruction on Noise Abatement, there are further statutory orders – legislative acts of the executive – which are based on the Federal Emission Control Act and set up specific requirements for special plants. This regulation technique is a consequence of the EC-legislation, which requires an implementation of Directives into the German legal system. Legal basis to the issuing of these regulations is usually Art. 23 Federal Emission Control Act, which authorises the Federal Government to stipulate, by means of statutory ordinance, that the establishment, nature and operation of plants not subject to licensing satisfies certain requirements regarding the protection of the general public and the neighbourhood from harmful effects on the environment which are caused by these plants.

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<sup>12</sup> Federal Building Code of 27 August 1997 (Federal Law Gazette I p. 214); last amended by Act of 23 July 2002 (Federal Law Gazette I p. 2850).



*a) Ordinance concerning Noise Protection against Sports Sites (18<sup>th</sup>BImSchV)*

In 1991, the Ordinance concerning Noise Protection against Sports Sites (18<sup>th</sup>BImSchV)<sup>13</sup> was issued based on Art. 23 para. 1 Federal Emission Control Act. It concerns the establishment, nature and operation of plants that are intended for sports practice and are operated for this purpose. This ordinance is a reaction to the fact that sports sites are frequently established in the proximity of or even within residential areas, so they can be reached easily in particular by children and young people. Thus the sports facilities come into conflict with the need for quiescence of the adjacent residents. The sports noise is particularly disturbing because it develops predominantly outside the general work time, i.e. at times, in which the next-door residents want to spend their spare time in peace. The Legislator therefore had to create a balance between the right to free development of the personality by sport practice of those using the sports facilities and the right of the next-door residents to free development by peace and recovery and the right to use their property free of disturbances<sup>14</sup>.

After sports emissions had become more and more the subject of judicial neighbour disputes and the courts could not resort to a clear concretion of the noise protection requirements, this ordinance was designed to give obligatory noise values. Its content it is oriented towards the procedure for the evaluation of sports noise suggested by the Federation of German Engineers<sup>15</sup>.

The range of application of the ordinance covers nearly all sports sites, for instance football stadiums, tennis places, swimming pools or gymnasia. Recreational sports activities in open spaces or children's playgrounds are not covered by the regulation<sup>16</sup>. The ordinance uses the term sports noise for direct and indirect sports noise, thus not only noise caused by technical facilities of the sports site or by those who take exercise, but also noise caused by the spectators or the noises which proceed from the parking lots on the sports area. The 18. BImSchV regulates emission standard values which are to be observed at certain times in the course of the establishment and operation of sports sites

Taking into account the fact that to a large part the disturbance by sport noise is caused by single brief noise peaks (e.g. goal cries), Art. 2 para. 4 of the ordinance regulates that brief peaks may not exceed the guideline values for more than 30 dB during the day and/or 20 dB at night. Art. 3 names examples of measures that are to be taken by the operator in order to abide by the guideline values: external loudspeaker systems for instance are to be provided with technical precautions for noise delimitation; noise-reducing ball catch fences, floor mats or sound isolation

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<sup>13</sup> 18<sup>th</sup> Ordinance for the Implémentation of the Federal Emission Control Act (Sportanlagen-Lärmschutzverordnung) of 18 July 1991 (Federal Law Gazette I p. 1588).

<sup>14</sup> See further ROSSNAGEL, in Koch/Scheuing/Pache (eds.), GK zum BImSchG, § 23 Rn. 146 sq.

<sup>15</sup> VDI-Richtlinie 3724, see Official Bundesrat-Dokument 17/91, p. 37 sq.

<sup>16</sup> See BverwG, NVwZ 2003, 751.

walls have to be used etc. The requirements of the 18. BImSchV are examined during the licensing procedure according to the Federal Building Code and are enforced – in case of plants already existing – by means of subsequent orders (see above II. 1.c).<sup>17</sup>

*b) Ordinance on Lawn Mower Noise (8th BImSchV)*

Based not only on Art. 23 but also on Art. 32 and 37 Federal Emission Control Act, the Ordinance on Lawn Mower Noise (8th BImSchV)<sup>18</sup> was issued. Art. 32, 37 Federal Emission Control Act empower the Federal Government and others in order to implement intergovernmental agreements or binding decision taken by the EC to provide by regulation that machines and other stationary technical installations are to satisfy certain requirements in order to prevent harmful noise effects. The 8th BImSchV for example is the result of the implementation of the EC-Directive 84/538/EEC<sup>19</sup>. This Directive was however to a large extent in accordance with the regulations that already existed in the Federal Republic of Germany. The range of application of the ordinance covers the bringing into circulation and the operation of lawn mowers. The ordinance tries to reach noise delimitation by two measures: On the one hand lawn mowers may only be brought into circulation if they stay in accordance with the limit values specified in Art. 3 of the ordinance. On the other hand, the ordinance stipulates in Art. 6 a general operating prohibition for lawn mowers on Sundays or holidays and in the evening and at night-time (7 p.m. to 7 a.m.). This operating prohibition was the subject of one of the above-mentioned (cf. I.) authority disputes: The controversial point was whether the federal legislator was authorised to issue regulations concerning the protection of the peace on Sundays or holidays even though this matter falls into the range of the legislative competences of the Lander.<sup>20</sup>

The 8. BImSchV was amended several times, particularly to take into account the amending EC-Directives<sup>21</sup> - last time on 3 May 2000<sup>22</sup>.

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<sup>17</sup> See further HERR, *Sportanlagen in Wohnnachbarschaft*, 1998; KETTELER, *Sportanlagen-Lärmschutzverordnung*, 1998; SPINDLER/SPINDLER, *NVwZ* 1993, 225sq.

<sup>18</sup> 8<sup>th</sup> Ordinance for the Implementation of the Federal Emission Control Act (*Rasenäherlärm-Verordnung*) of 13 July 1992 (*Federal Law Gazette* I p. 1248).

<sup>19</sup> Council Directive 84/538/EEC of 17 September 1984 on the Approximation of the Laws of the Member States Relating to the Permissible Sound Power Level of Lawnmowers, *OJ L* 300, 19.11.1984, p. 171; Directive as last amended by Directive 88/181/EEC of 26 March 1998 (*OJ L* 81, 26.3.1998, p. 71).

<sup>20</sup> See on the one hand OVG Lüneburg, *UPR* 1984, 276 sq. And on the other SEILER, *Die Rechtslage der nichtgenehmigungsbedürftigen Anlagen i.S.v. §§ 22 sq. BImSchG*, 1985, p. 77 sq.

<sup>21</sup> So in particular the Directives 88/180/EEC and 88/181/EEC of 22 March 1988 amending the Directive 84/538/EEC (*OJ L* p. 81, 69 and 71).

<sup>22</sup> *Federal Law Gazette* I p. 632. See further on the 8<sup>th</sup> BImSchV: HANSMANN, *NVwZ* 1988, 1000; ROSSNAGEL, in Koch/Scheuing/Pache (eds.), *GK zum BImSchG*, § 23 Rn. 140 sq.; amtliche Begründung, *Official Bundesratdocument* 176/87.

*c) Ordinance on Construction Machine Noise (15th BImSchV)*

The 15. BImSchV on Construction Machine Noise<sup>23</sup> was based on Art. 37 Federal Emission Control Act alone and was also issued in the course of the implementation of several EC-Directives.<sup>24</sup> Art. 3 para. 1 of the 15. BImSchV declares the noise levels laid down in the respective Directives by means of direct reference to be obligatory in domestic law. To that extent the clause contains a legally unproblematic static reference. Art. 3 para. 2 of the 15. BImSchV however regulates that future changes of the appendices of the Directives mentioned also become part of national law – for the purpose of adjustment to the technical progress these parts are to be applied after three months without a further act of implementation. Thus a so-called dynamic reference to Community law is created which raises difficulties concerning the rule of law. A dynamic reference requires the authorities applying the law to take into consideration whether there had been an amendment of the Directives referred to in the ordinance.<sup>25</sup>

The implementation of the Council Directive 86/662/EEC on the limitation of noise emitted by earth-moving machines shows a German characteristic. This Directive required a double marking obligation: Each earth-moving machine was required to bear a clear and permanent mark indicating the sound-power level and the sound-pressure level at the operator's position (Art. 3 para. 6 of the Directive). However, in the course of the implementation of the Directive in the year 1988 only the first marking obligation was inserted in the 15. Federal Emission Control Act, because the authorisation in Art. 37 Federal Emission Control Act did not cover the second marking obligation. This second obligation did not become part of the German law until December 1992, implemented by statutory order based on the authorisation in Art. 4 para. 1 of the Federal Equipment Safety Act.<sup>26</sup>

*d) Ordinance on the Protection against Noise caused by Equipment and Machines (32nd BImSchV)*

The remarks under b) and c) on the 8. and 15. BImSchV are no longer applicable to new lawn mowers and construction machines. On the 6<sup>th</sup> of September 2002 the

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<sup>23</sup> 15<sup>th</sup> Ordinance for the Implementation of the Federal Emission Control Act (Baumaschinenlärmverordnung) of 10 November 1986 (Federal Law Gazette I p. 1729).

<sup>24</sup> Council Directives 84/532/EEC to 84/537/EEC of 17 September 1984 (OJ L 300, p. 111sq.) and Council Directive 86/662/EEC of 22 December, 1986 on the limitation of noise emitted by hydraulic excavators, rope-operated excavators, dozers, loaders and excavator-loaders (OJ L 384, p. 1).

<sup>25</sup> For detailed discussion see MANN in Löwer/Tettinger, Kommentar zur Verfassung des Landes Nordrhein-Westfalen, 2002, Art. 71 Rn. 13.

<sup>26</sup> Federal Equipment Safety Act, see the renewed version of 11 May 2001 (Federal Law Gazette I p. 866); See further: KLINDT, die Bekämpfung des Baustellenlärms, 1997.

new 32nd BImSchV<sup>27</sup> came into force and replaced the 8. and 15. BImSchV as well as ten administrative regulations on mission control. The Federal Government thereby fulfilled its obligations to implement the Directive 2000/14/EC of 8 May 2000.<sup>28</sup> The ordinance is based on the Federal Emission Control Act and the Federal Equipment Safety Act and regulates the bringing into circulation and the operation of 57 different kinds of equipment and machines, among them construction machines, building and cleaning vehicles as well as landscape and garden devices (e.g. chain saws, lawn mowers). In the future, new devices of this kind must be provided with the CE mark and must indicate a sound-power level which is guaranteed not to be exceeded.

Particularly loud types of machines and devices are subject to additional limit values, which are presumably lowered further by 2006. Beyond the compulsory obligations of the Directive, the Ordinance places restrictions on the devices and machines in certain areas to protect the peace of Sundays and holidays as well as night rest.

### *III. Traffic-related Noise Protection*

The protection against noise caused by traffic is regulated in different ways in Germany, depending on whether the noise is caused by traffic, rail traffic or air traffic. Towards the end of the seventies there had been plans to regulate the different traffic sectors together in a single traffic noise protection code, but this Federal legislation project failed in 1980.<sup>29</sup>

#### *1. Protection against Noise Caused by Aircrafts*

As a consequence of the increasing use of civilian aircrafts since the end of the fifties and the changing to jets at the same time, particularly in the proximity of airports the noise disturbance increased rapidly both with regard to the intensity and to the frequency of the noises caused by the flying operation. As a reaction to these rapid and constant increases the Aircraft Noise Act (FluLärmG)<sup>30</sup> was issued by the Federal legislator in 1971. The legislative competence of the Federation for the Aircraft Noise Act is based upon Art. 74 para. 1 no. 18 GG. The aim of the Aircraft Noise Act is the protection of the public from dangers, substantial disadvantages and disturbances by aircraft noise in the surroundings of airports (Art. 1 FluLärmG). It is supplemented for the range of the airfields by the

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<sup>27</sup> Verordnung zur Einführung der Geräte- und Maschinenlärmschutzverordnung of 29 August 2002 (Federal Law Gazette I p. 3478).

<sup>28</sup> Directive 2000/14/EC of the European Parliament and Council of 8 May 2000 on the approximation of the laws of the Member States relating to the noise emission in the environment by equipment for use outdoors (OJ L 162, p. 1).

<sup>29</sup> See Official Bundestag-Documents 8/1671, 3730 and 4360.

<sup>30</sup> Aircraft Noise Act (Fluglärmschutzgesetz – FluLärmG) of 30 March 1971 (Federal Law Gazette I p. 282); last amended by Act of 29 October 2001 (Federal Law Gazette I p. 2785).

Ordinance on Airfield Noise Protection.<sup>31</sup> The Aircraft Noise Act is split into two sections: In the first one so-called passive noise abatement measures in the surroundings of airports and airfields are prescribed (specification of noise protection areas), While the second section regulates improvements of the Air Traffic Act concerning active noise abatement. These measures combat aircraft noise directly at its source, for example by duties of conduct for the operation of air traffic.

Both areas have reciprocal effect: The more effective emission reductions at the sources of noise are, the less planning-related interferences in the neighbourhood of airfields are necessary. Since according to the rule of law the person who causes the noise is to be consulted primarily before sanctions are imposed upon the concerned to their protection, the active noise protection takes priority.

There were plans to amend the Aircraft Noise Act in the last legislative period of the Bundestag, but the legislative procedure could not be carried out before the expiration of this period. The reasons for the failure of the legislative procedure were differences between the Federal Ministry for the Environment and the Federal Ministry of Transport. According to the Principle of Discontinuity, the legislation project had to be brought before the newly elected Bundestag again in the year 2002. In view of the growth rates forecast in the field of international air traffic (growth of 3,5% cf. Reed Business information, September 1999, S. 11), a revision and modernisation of the 31-year old Aircraft Noise Act is essential.<sup>32</sup>

#### *a) Active Aircraft Noise Protection*

Based on Art. 15 FluLärmG, legal bases for active aircraft noise protection measures were inserted in the Air Traffic Act (LuftVG),<sup>33</sup> besides there are further legal bases for measures of active aircraft noise protection in the Air Traffic Code (LuftVO),<sup>34</sup> the Aviation Admission Code (LuftVZO)<sup>35</sup> and in some statutory orders supplementing the Air Traffic Act.<sup>36</sup>

According to Art. 2 para. 1 sentence 2 no. 4 of the Air Traffic Act (LuftVG), German airplanes are authorised only if they are technically equipped in such a

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<sup>31</sup> Of 19 January 1999 (Federal Law Gazette I p. 35).

<sup>32</sup> See the draft version of an act amending the Aircraft Noise Act, [www.bmu.de/sachthemen/lärm/flug.php](http://www.bmu.de/sachthemen/lärm/flug.php); Jörg Berkemann, ZUR 2002, 202. See also the detailed annotation of SOELL, in Landmann/Rohmer, Umweltrecht, 2nd ed., Kz. III 5.1.

<sup>33</sup> Air Traffic Act (Luftverkehrsgesetz – LuftVG) of 27 March 1999 (Federal Law Gazette I p. 550); last amended by Act of 29 December 2003 (Federal Law Gazette I p. 3093).

<sup>34</sup> Air Traffic Code (Luftverkehrsverordnung – LuftVO) of 27 March 1999 (Federal Law Gazette I p. 580); last amended by Ordinance of 14. December 2001 (Federal Law Gazette 2002 I p. 396).

<sup>35</sup> Aviation Admission Code (Luftverkehrszulassungsordnung – LuftVZO) of 27 March 1999 (Federal Law Gazette I p. 610); last amended by Ordinance of 10 February 2003 (Federal Law Gazette I p. 182).

<sup>36</sup> See KLOEPFER, Umweltrecht, § 14 Rn. 181.

way that the operating noise does not exceed a certain degree that is in accordance with the respective state of the art. Relevant in this context are the limit values specified in the proclamations of the Federal Office of Aviation, which are they based on a convention of the International Civil Aviation Organization (ICAO-agreement annex 16).<sup>37</sup> The compliance with these requirements is to be proven by the manufacturer. This licensing requirement as part of the aviation admission procedure makes it possible to combat aircraft noise directly at the source. Beyond that, the German law sets up requirements for the operation of airplanes. Art. 29 b para. 1 Air Traffic Act imposes an obligation to prevent avoidable noise during the operation of airplanes airborne and on ground and to limit the propagation of unavoidable noise to a minimum if this is necessary to protect the population against substantial annoyances by noise, especially at night-time. However, this provision is to be criticized. Since it does not provide for a fine and due to its wording cannot be taken as a legal basis for measures of the aviation authorities (particularly restrictions of night flights), it is difficult to be implemented. Beyond that, Art. 11 a and 11 b of the Air Traffic Code prohibit with close exceptions flights of civilian airplanes with supersonic speed. According to Art. 11 C LuftVO, noise certifications are required for the operation of civilian airplanes with jet engines in the territory of EU-member states. A further incentive for the use of low-noise airplanes in traffic with German airports is created by a reduction of the landing fees for such airplanes which comply with the noise limit values laid down by the ICAO, annex 16.<sup>38</sup>

Parts of the active noise protection are beyond those regulations concerning the establishment or extension of airfields. Air Traffic Code differentiates, under the generic term of the airfield (Art. 6 para. 1 LuftVG), between airports on the one hand landing places on the other.

Art. Para. 1 of the Aviation Admission Code (LuftVZO) defines airports as airfields that require certain building restrictions for flight safety reasons (in particular restrictions concerning the height of the surrounding buildings) depending on the kind and extent of the planned flying operation. This safe area for the purpose of flight safety is not to be confused with noise protection areas for the purpose of noise control, which is regulated in the FluLärmG (cf. b). Landing places on the other hand are airfields without such building restrictions. The establishment and the operation of airports are subject to licensing according to Art. 6 para. 1 LuftVG. In addition to that, a special plan approval procedure in accordance with Art. 8 LuftVG is necessary. This double requirement of a permission and plan approval procedure is a singular phenomenon in the German law – usually the plan approval procedure replaces the licensing procedure. It is systematically unsatisfactorily, since there are no differences between the two administrative proceedings regarding the subject matter, but only regarding the course of the proceedings. According to Art. 40 para. 1 no. 10 LuftVZO, expert

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<sup>37</sup> See further SOEL, in Salzwedel (ed.), *Grundzüge des Umweltrechts*, 1982, S. 329 ff.

<sup>38</sup> See the scale of charges and fees of traffic airports in *Verkehrsblatt* 1978, p. 383.

opinions on the extent of the noise expected and its effects on the population are to be submitted already during the licensing procedure. If it turns out in the later plan approval procedure that the noise protection was not considered sufficiently in the licensing procedure, the licence can be changed.

In the context of the plan approval procedure, noise protection is of special importance for the consideration of the different interests. In favour of noise protection interests, a plan approval decision may also contain restrictions on night flights, landing restrictions for certain types of aircrafts or other plant-related regulations.<sup>39</sup>

Since airports may, according to Art. 8 para. 1 LuftVG, only be put into operation and/or changed if a plan approval is given, the former permission becomes void. It can only be regarded as a partial decision, which itself does not allow for any measures of the applicant, but only permits the opening of the plan approval procedure. The Federal Administrative Court therefore spoke of an "empty tube".<sup>40</sup> Parts of the literature interpret the graduation of licence and plan approval procedure as kind of a rough and fine examination. Legal protection for third parties is granted only in relation to the plan approval decision. Altogether, the regulation of the Air Traffic Code on the establishment and extension of airports therefore appears to be in urgent need of reform.<sup>41</sup> Once airports have been granted a licence, according to Art. 19a LuftVG the operator of the airport is required to install measuring instruments on the airport and in its environment which continuously measure the noise caused by the aircrafts flying in and off. The results are to be communicated to the licensing authority and to an aircraft noise commission (Art. 32 b LuftVG).

Excluded from the regulations on active noise protection in the Air Traffic Code and its implementing ordinances are military facilities, thus airfields of the German Federal Armed Forces, the Federal Border Police and the NATO-troops stationed in the Federal Republic of Germany (cf. Art. 30 LuftVG).

### *b) Passive Aircraft Noise Protection*

Relevant for the passive aircraft noise protection are Art. 1 to 14 FluLärmG. According to these articles, noise protection areas are to be established in the surroundings of airports connected to line operation or military airfields (Art. 1 FluLärmG). The noise protection area covers the area outside the airfield area in which the volume caused by aircraft noise exceeds 67 db (A) (Art. 2 FluLärmG). It is divided into two zones of protection to which different noise protection measures apply. Within the entire noise protection area it is not allowed to build hospitals, homes for the elderly or similarly noise-sensitive installations. In the protected zone 1, which starts at a volume level of 75 db (A), also the building of dwellings

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<sup>39</sup> KOCH, NVwZ 2000, 490 (499).

<sup>40</sup> BverwG, NJW 1969, 340sq.

<sup>41</sup> See SCHMIDT-ABMANN, DVBl. 1981, 334 (337); KLOEPFER, Umweltrecht, § 14 Rn. 188.

is interdicted in principle; in the protected zone 2, in which a volume from 67 db (A) to 75 db(A) prevails, dwellings may only be built with certain noise control mechanisms. Thus the growing of settlements around airports is prevented. The installations and dwellings permitted within the noise protection area have to meet certain noise control requirements, which are specified in the Noise Control Regulation<sup>42</sup> (Art. 6 FluLärmG). Because of the restrictions of the building use within the individual protected zones following from the definition of noise protection areas, Art. 8 FluLärmG provides for compensation. In accordance with Art. 9 FluLärmG (cf. Art. 12 FluLärmG), expenditures for sound-proofing measures are to be repaid by the airfield operator to the owners of properties concerned.<sup>43</sup>

## *2. Noise caused by Road Traffic*

According to an investigation of the Federal Environmental Office, the main reason for complaint for the population (approximately 70%) is road traffic noise.<sup>44</sup> German law offers a large variety of instruments for the fight against noise caused by road traffic, both aiming at noise protection at the source, noise protection in traffic route planning and noise protection by traffic regulations and restrictions.

### *a) Noise Protection at the Source*

According to Art. 38 Federal Emission Control Act, the nature of motor vehicles must be such that in case of normal use, the emissions resulting from their participation in traffic do not exceed the limits which must be observed to ensure protection from harmful effects on the environment. They must be operated in such a manner that avoidable emissions are prevented and unavoidable emissions are kept to a minimum. The practical importance of the provision is small because an offence against the basic obligation remains without sanction and monitoring is practically impossible.

In view of the increasing influence of EU-law on the traffic-related requirements of motor vehicles, an increase of its practical meaning is, however, foreseeable. The relevant Directives of the EC<sup>45</sup> are implemented through Art. 49

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<sup>42</sup> Ordinance on architectural requirements for sound screening against noise caused by aircrafts (Schallschutzverordnung) of April 1974 (Federal Law Gazette I p. 903).

<sup>43</sup> See BGHZ 129, 124sq. And the comment by MANN, JR 1996, 332 sq.

<sup>44</sup> Federal Environmental Office, Daten zur Umwelt 1990/91, p. 505.

<sup>45</sup> For example Council Directive 70/157/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the permissible sound level and the exhaust system of motor vehicles (OJ L 42, p. 16.) or Council Directive 92/97/EEC of 10 November 1992 amending Directive 70/157/EEC on the approximation of the laws of the Member States relating to the permissible sound level and the exhaust system of motor vehicles (OJ L 371, p. 1).



of the Motor Vehicles Regulations (StVZO) into the German law.<sup>46</sup> This regulation demands noise limitation according to the state of the art and refers in detail to the relevant Directives of the European Community. In addition to that, the StVZO contains regulations which serve noise protection by the fact that they limit the acoustic characteristics of signal-horns (Art. 55 para. 2 StVZO) and theft alarm systems (Art. 38 b StVZO).

*b) Noise Protection in Traffic Route Planning*

The regulations concerning the planning of traffic routes play an important role for the limitation of the noise caused by road traffic. The Federal Emission Control Act contains in Art. 41 to 43 and in Art. 50 special regulations which supplement the regulations of the Federal Highway Act (Bundesfernstraßengesetz) and the national road laws. The Federal Emission Control Act sets up a three-step regulation in these provisions: According to the optimisation requirement of Art. 50 Federal Emission Control Act as far as regional planning projects are concerned, the land earmarked for specific types of use – in this case route planning – shall be zoned in such a manner that harmful environmental effects are kept to a minimum (requirement of a careful routing and configuration of streets).

If this is not possible, as a second step Art. 41 Federal Emission Control Act states that provision shall be made in case of any road construction that it does not involve any harmful effects on the environment according to the best available technology. This goal is achieved by active prevention measures, for example the building of noise protection walls. The ordinance on the implementation of the Federal Emission Control Act (Ordinance on Traffic Noise Protection – Verekehrslärmschutzverordnung)<sup>47</sup> specifies obligatory limit values in this regard. This statutory order of the Federal Government was issued on the basis of an authorization in Art. 43 para. 1 no. 1 Federal Emission Control Act and applies to the building or the substantial change of public roads and railways. The ordinance on traffic noise protection (hereinafter 16. BImSchV) determines limit values of emissions for areas with different quiescent needs at day and night time which may not be exceeded during the evaluation. These limit values are to be regarded as minimum requirements, the observance of which is an indication that the requirements of Art. 41 Federal Emission Control Act are satisfied.

If the costs of this active noise protection are disproportionate to the protection purpose desired, – as a third step – the owners concerned are entitled to claim adequate compensation for the costs of passive noise protection arrangements at the buildings (Art. 42 Federal Emission Control Act). The obligation for the

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<sup>46</sup> Motor Vehicles Regulations (Straßenverkehrszulassungsordnung – StVZO) of 28 September 1988 (Federal Law Gazette I p. 1793); last amended by Ordinance of 7 February 2004 (Federal Law Gazette I p. 248).

<sup>47</sup> Ordinance on Traffic Noise Protection (Verekehrslärmschutzverordnung – 16<sup>th</sup> BImSchV) of 12 June 1990 (Federal Law Gazette I p. 1036).

implementation of active noise protection measures can to that extent become void (Art. 41 para. 2 Federal Emission Control Act).

The limit values of the 16. BImSchV lie between 57 db (A) db at daytime and 47 db (A) at night-time in areas with particularly noise-sensitive use (hospitals, schools, homes for the elderly). In general residential areas, they amount to 59 db (A) during the day and 49 db (A) at night time. In village areas, they lie between 54 db (A) and 64 db (A), in trade areas the sound limit value lies between 69 db (A) at daytime and 59 db (A) at night time.

Kind and extend of the sound-proofing measures which become necessary if the limit emission values determined in the 16. BImSchV are exceeded are specified in the 24. BImSchV,<sup>48</sup> which contains detailed mathematical formulas for the computation of passive sound proofing measures.

A compensation for noise pollution caused by roads already existing (so-called old routes) is granted in accordance with the judicially developed claim for damages according to expropriation principles.

### *c) Noise Protection by Traffic Regulations and Restrictions*

Arts. 33, 45 StVO<sup>49</sup> contain regulations for noise limitation. According to Art. 30 para. 1 StVO, for example unnecessary noise during the operation of Vehicles – e.g. the running of engines, loud door striking – is forbidden. According to Art. 30 para. 2 StVO, events with motor vehicles are subject to permission if they take place at night. The aim of the driving ban for heavy transport on Sundays lay down in Art. 30 para. 3 StVO is not only noise protection but beyond that also employee protection and the safeguarding of the recovery. According to this provision, trucks with a total weight over 7,5 t may not operate on Sundays and holidays in the time from midnight to 10 p.m., with exceptions expressly made for special transports, e.g. of fresh meat.

Further traffic restrictions for the protection against traffic noise are possible on the basis of the authorization of Art. 45 StVO. According to Art. 45 para. 1 sentence 2 no. 3 StVO, the traffic authorities can limit or forbid the use of certain roads or road distances for the protection of the resident population against noise and exhaust gases. For the evaluation of the question which noise pollution is acceptable, the courts every now and then use the guidelines of the 16. BImSchV<sup>50</sup>. Possible measures in this regard are for instance night driving bans for truck traffic on certain residential streets or speed limits in residential areas. According to Art. 45 para. 1 b no. 5 StVO, the traffic authorities can declare whole inner-city areas as traffic-calmed down areas for the protection of the population against noise.

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<sup>48</sup> 24<sup>th</sup> Ordinance for the Implementation of the Federal Emission Control Act (Verkehrsweg-Schallschutzmaßnahmen VO) of 4 February 1997 (Federal Law Gazette I p. 172).

<sup>49</sup> Federal Highway Code (Straßenverkehrsordnung – StVO) of 16 November 1970 (Federal Law Gazette I p. 1565); Last amended by Act of 22 January 2004 (Federal Law Gazette I p. 117).

<sup>50</sup> See e.g. VGH München, NZV 1999, 269.

### *3. Noise caused by Rail Traffic*

Even if rail traffic is a rather pollution-free means of transport, noise disturbances are still possible. Remarkable is however that to this day, there are almost no regulations for noise protection at the source, thus no emission limit values for driving components, brakes or the track bed. Also for the area of rail traffic, Art. 38, 41 to 43 of the Federal Emission Control Act apply if noise protection in traffic route planning is concerned. Therefore, a closer analysis of this area is not necessary since the legal situation does not differ fundamentally from the regulations for motor traffic.<sup>51</sup>

The German unification however led, especially in the area of rail traffic, to particularly serious questions. Since substantial parts of the railway system particularly in the east-west direction had been diminished or shut down totally or partly during the German division and were desired to be re-activated rapidly and economically after the reunification, the question arose whether a "reactivation" represented a substantial change or a new building of a railway which – as a consequence, led to the application of Art. 41 sq. of the Federal Emission Control Act and the 16. BimSchV. In a decision of 1995, the Federal Administrative Court came to a solution rather disadvantageous for noise protection: The judges rejected a substantial change and thus the applicability of Art. 41 sq. Federal Emission Control Act unless a clear act of state was recognizable by which the old railway had been given up (Entwidmung).<sup>52</sup> Based on dogmatic considerations which need not to be reformulated here, the Federal Administrative Court however demanded that the expected noise effects of a reactivation of the railroad line are to be considered in the administrative proceedings in the interest of the neighbours of the track way.

Noise protection by way of traffic regulations as in the case of noise caused by road traffic cannot be implemented, since there is no authorization for interference in order to set up provisions for the time-table organization of a large-scale enterprise like the Deutsche Bahn AG.

### *IV. Behaviour-Related Emission Control*

The area of behaviour-related emission control remaining for independent regulation by the Lander extends both to air pollution and to noise disturbances which emanate from actions of persons. The legal situation in the 16 German Lander of the Federal Republic is non-uniform: Some Lander Federal Republic, for example Bavaria, North Rhine-Westphalia or Rhineland-Palatinate, issued their own legislation to the general emission control, other Lander such as Berlin, Hamburg, Saxony or Turing, issued special laws to the protection against noise. A

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<sup>51</sup> See BverwGE 59, 253.

<sup>52</sup> BverwG, UPR 1999, 388.

third group finally has no own emission control laws yet at all, partially because earlier regulations were waived in the meantime (for example in Lower Saxony and Schleswig-Holstein). In the latter cases, the behaviour-related emission control is dealt with using the general rules of police law. In that Lander of the Federal Republic which has special Land emission control laws, general police law applies subsidiary if no special arrangements are made.<sup>53</sup>

Despite the inconsistency of the Lander regulations certain examples can be identified which are characteristic for the behaviour-related emission control in Germany: Regarding the relevant noise control, these are above all regulations on the protection of night rest, on noise annoyances caused by the use of sound reproduction devices or by the burning down of fireworks. Furthermore, there are regulations on noise annoyances caused by the use and operation of motor vehicles or by the use of lawn mowers and garden machines, which however to a large extent became obsolete because of Federal law regulations (cf. above III 2 a, II 2 b; see also I on the range of the Federal legislative authority according to Art. 72 para. 1 GG - "insofar as").

The regulations for the protection of the night rest usually state that activities which might disturb night rest forbidden from 10 p.m. to 6 a.m.. The laws however provide for exceptions of this prohibition for agricultural harvest work between 5 a.m. and 6 a.m. and between 10 p.m. and 11 p.m. or measures for the prevention or the removal of a state of emergency. Beyond that, it is regularly determined that the municipalities are authorized to permit exceptions to the general prohibition as fairs or celebrations in the night from 31 December to January are concerned. Municipalities can also set up general rules for exceptions for the purpose of the external catering trade if a public need exists or special local conditions are given (for example if there are no residential zones in the neighbourhood).

The regulations of the Lander concerning the use of sound reproduction devices or music instruments usually state that devices and instruments may only be used in such volume that uninvolved persons are not substantially troubled. In public swimming pools and in public transport, the use of these devices is generally expressly forbidden if others can be troubled them. The regulations of the Lander provide for exceptions of these regulations for individual cases if a public or predominantly private interests exists. In particular, it is possible for the municipalities to give a general permission for temporally limited presentations in inner-city pedestrian precincts, in particular for music performances. The third group of regulations which exists in all regulations of the Lander on behaviour-related noise protection concerns the burning-down of fire works. According to the regulations, the burning down fireworks in residential areas or in areas visited by persons is – except on New Year's Eve – subject to licensing. Additionally, the fireworks usually may only last for 30 minutes and must be terminated at a certain time, usually between 10 p.m. and 11 p.m.. Minors are forbidden to burn down fire

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<sup>53</sup> See explicitly Art. 1 para 2 Emission Control Act North Rhine-Westphalia.

works. Apart from three core regulations, there are some other provisions in the different Lander statutes that are relevant for noise protection, amongst other things concerning noise caused by the keeping of animal, which however cannot be generalised as a specification of a general behaviour-referred noise protection in Germany.

Part of the behaviour-related noise protection is also a federal law regulation concerning the closing hours of pubs. According to Art. 18 Gaststaettengesetz<sup>54</sup>, the Lander are authorised to specify a general curfew for pubs and restaurants by statutory instrument. All Lander of the Federal Republic have made use of this authorization.

### *V. Noise Reduction Plans*

Art. 47 a Federal Emission Control Act serves purpose of area-related noise protection irrespective of the kind of the source of noise. According to this provision, in areas that are affected or endangered by harmful environmental effects caused by noise pollution the municipalities or the responsible authorities according to the law of the Lander, have to record the exposure to disturbing noises and their impact on the environment. Art. 47 a Para. 2 Federal Emission Control Act prescribes that for residential areas noise reduction plans are to be set up if the relevant areas are affected by harmful effects on the environment caused by noise not only of a temporary nature and if their reduction requires co-ordinated action against different sources of noise.

Noise reduction plans are new means of environmental protection planning. Their practical manageability beyond pure information character can only be proved by future practice. The provision will gain relevance when the Directive on Environmental Noise<sup>55</sup> will be implemented into German law.

### *VI. Conclusion and Prospects*

This overview on the legal bases of noise protection in the Federal Republic of Germany has shown that the legal situation is unclear for several aspects. On the one hand, a distinction is to be drawn between federal law and the law of the Lander, on the other hand, different connecting factors arise according to whether the noise protection is related to traffic, to the behaviour of persons, or to plants. In addition to this, the relevant legal provisions are to be found either on the level of formal legislation or are set by statutory instrument – partially even by pure

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<sup>54</sup> Federal Act on permissions for the management of restaurants, inns and hotels (Gaststaettengesetz) of 20 November 1998 (Federal Law Gazette I p. 3418); last amended by Act of 25 November 2003 (Federal Law Gazette I p. 2304).

<sup>55</sup> Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise – Declaration by the Commission in the Conciliation Committee on the Directive relating to the Directive relating to the assessment and management of environmental noise (OJ L 189, p. 12).

administrative regulations (Technical Instruction on Noise Abatement, see above II 1 b.). This leads to the fact that in the process of implementation of European Directives, different questions have to be answered: First of all it has to be clarified whether the federal legislator or the Lander are entitled to enact legislation (see above under I). Beyond this, the question arises on which level of legislation the directives are to be implemented into national law. Generally, an implementation is possible both by formal legislation and by statutory order. Only an implementation of Directives of the EC by purely administrative regulations such as the Technical Instructions on Noise Abatement is illegitimate. This has been expressly decided by the ECJ in 1991 with regard to the Technical Instruction on Air Quality Control.<sup>56</sup>

Therefore it has to be considered in the case of the EC-Directive 2002/49/EC<sup>57</sup> to be implemented by July 18<sup>th</sup> 2004 – which, however, has not taken place yet in Germany – in which way such an implementation can be realised. On the basis of Art. 74 para. 1 no. 24 GG, a competence of the federal legislator can be assumed (cf. above I). An independent legal act appears of little help, since already in the existing law there are some provisions which deal with parts of the aim and contents of the Directive. Art. 9 para. 1 no. 24 BauGB for example provides for the classification of noise protection areas in the land-use plan, and the example of Art. 47 a Federal Emission Control Act shows that already the existing law offers a regulation showing significant parallels to the aims and instruments of the Directive. Therefore it has to be examined to what extent Art. 42 a Federal Emission Control Act realises the aims pursued with the Directive and if or alternatively how the provision has to be modified in order to meet the requirements of the Directive. Possibly a specification of Art. 47 a Federal Emission Control Act will take place via statutory order. At any rate, the prognosis appears justified that a new, independent legal regime such as the Spanish one will not be established in Germany.

## *Part 2*

### *I. Introduction*

Hungary, as a Member State in the European Union, has assumed the obligation to incorporate the legislation of the Union in the Hungarian legal system, to carry out

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<sup>56</sup> C-361/88 (TA-Luft); ECR I-2567 [1991]; since the external effect of an administrative rule is subject to considerable restrictions and individual legal protection is less intensive as in the case of a formal legal act.

<sup>57</sup> Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 Relating to the Assessment and Management of Environmental Noise (Official Journal L 189, 18/07/2002 P. 12 – 26).

legal harmonization and to adopt an institutional practice in line with the European norms in the field of environmental protection as well.

On the basis of the Treaty establishing the European Community, upon the proposal from the Commission and with the consideration of opinion of the Economic and Social Committee and the Committee of the Regions, Directive 2002/49 of 25 June, 2002<sup>58</sup> on the assessment and management of environmental noise was adopted by the European Parliament and the Council of the European Union.

The Directive declares that it is part of Community policy to achieve a high level of health and environmental protection, and one of the objectives to be pursued is protection against noise.

The European Parliament expressed its support for the Green Paper of the Commission<sup>59</sup>, urged that specific measures and initiatives should be laid down in a Directive on the reduction of environmental noise, and noted the lack of reliable, comparable data regarding the situation of the various noise sources.

Certain categories of noise emissions from products are already covered by Community legislation, such as Council Directive 70/157/EEC of 6 February 1970<sup>60</sup> on the approximation of the laws of the Member States relating to the permissible sound level and the exhaust system of motor vehicles. In connection with this direction it is interesting to note that when this regulation was published, the Community did not have authority to regulate the problem of environmental protection. The reason of the acceptance of the direction was to harmonise the internal market and to influence the law making process in this field. So, this directive is not an independent environmental regulation, on the contrary, it is only the outcome of the economic integration. The legal ground of the regulation of environmental protection was established by the Unified European Charter.

In accordance with the principle of subsidiary, the Treaty objectives of achieving a high level of protection of the environment and of health will be better reached by complementing the action of the Member States by a Community action achieving a common understanding of the noise problem.

The aim of the Directive shall be to define a common approach intended to avoid, prevent or reduce on a prioritised basis the harmful effects, including annoyance, due to exposure to environmental noise.

Member States shall designate the competent authorities and bodies responsible for implementing this Directive.

## *II. Constitutional Background*

Article 18 of the Constitution of the Republic of Hungary states that „The Republic of Hungary recognizes and implements everyone’s right to a healthy environment.”

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<sup>58</sup> OJ L 189, 2002. 07. 18. p.12–16.

<sup>59</sup> Commission Green Paper of 4 November 1996. On future noise policy.

<sup>60</sup> OJ L 42, 1970. 2.23. p. 16–20.

The right to a healthy environment included among the general provisions is also recognized in the catalogue of fundamental rights, where it is expressly defined by legislators as a state obligation that is the obligation to protect the built and natural environment is imposed on the state. The right to a healthy environment as a so-called third generation fundamental right is a fundamental right in the interpretation of the Constitutional Court.

The Constitution provides for the right to physical and mental health among the so-called fundamental rights.

„People living within the territory of the Republic of Hungary have the right to the highest possible level of physical and mental health.” (Paragraph (1) of Article 70/D of the Constitution)

The constitutional right to the highest possible level of physical and mental health is interpreted as an obligation of the state to provide a social and legal environment, limited by the economic strength of the state, by the possibilities of the state and of the society, which ensures the highest attainable conditions for the citizens' healthy way of life and lifestyle. Thus the highest level shall be compared to the prevailing economic strength of the state and not to the prevailing state of development of medical science [Constitutional Court Decision 56/1995 (IX.15.)].

The right to health has a broader content than the right to health services. The former one includes the right to a healthy environment and the state support for a healthy way of life, for sports as well.

### *III. Legal regulation of protection against noise and vibration*

#### *1. Act LIII 1995 on the General Rules of Environmental Protection*

In Hungary the general rules of environmental law include special regulations on the protection against noise and vibration. The system of the various levels of legal norms, built on and supplementing each other, also defines the bodies responsible for the tasks of environmental protection and their scope of authority.

Pursuant to the principles laid down in the Constitution, the general rules of environmental protection are provided for in detail by Act LIII of 1995 on the General Rules of Environmental Protection. Chapter II of the Act lists the major provisions of protection against noise and vibration under the title 'Protection of environmental components and factors posing hazard to the components'.

In the first place, the subject of protection against noise and vibration is specified by the legislators. Protection against noise and vibration in the environment shall cover all artificially generated energy emissions, which cause an unpleasant, disturbing, endangering or impairing noise or vibration load.

Within the framework of the protection against noise and vibration, technical and organizational methods shall be used for the abatement of the noise emission or vibration generation of sources of noise and vibration, for the reduction or



prevention of an increase in the noise or vibration load and for the posterior protection of environments loaded above standard levels on a permanent basis.

Prevention is the aim of the regulations in which the Act sets forth that action plans developed on the basis of strategic noise maps shall be implemented, pursuant to a separate Act, to reduce noise in areas subject to substantial environmental noise and to preserve the favourable state of areas not yet exposed to noise.

*2. Council of Ministers Decree 12/1983. (V.12.) on the Protection Against Noise and Vibration*

The Decree was issued by the Council of Ministers pursuant to Paragraph (1) of Article 53 of Act II of 1976 on the Protection of human environment.

The objective of the Decree is, with a view to protecting human environment and human health, to set forth the basic rules of protection against noise and harmful vibrations endangering them.

Pursuant to the Decree, the extent and nature of pressure fluctuation exceeding the permissible limit value of noise load (noise emission) perceived in the human environment shall be regarded as dangerous. Noise shall also be regarded as noise to a dangerous extent if no limit values can be specified for it due to its character, or if the noise cannot be repeated under the same circumstances but it disturbs people's peace perceptibly by the senses.

*a) Requirements of noise and vibration protection during area development*

The requirements of noise and vibration protection shall be observed in the area development plan<sup>61</sup>. New facilities emitting noise and vibration shall be planned and placed in the environment with noise and vibration below the specified limit values.

The Ministry of Environment and Nature Protection and the first instance Inspectorate of Nature Protection shall be consulted about regional plans concerning the country or the regions and counties with respect to noise protection.

*b) Requirements of protection against noise with regard to establishment*

A new industrial facility, equipment, technology, site or other localized external noise source (industrial facility) shall be planned, established, put into operation, and an already existing industrial facility shall be extended, renovated, modernized and constructed in such a way that the noise or vibration arising during their normal use or construction shall not exceed the noise limit permitted for the area or the vibration limit permitted for the facility.

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<sup>61</sup> The rule of law states that no deviation from the noise load limit determined pursuant to area classification is permitted. EBH2002.826.

When a new railway line or civil airport is established or planned to be renovated or modernized entailing a significant and long-lasting impact on traffic conditions, a plan on noise and vibration protection shall also be prepared.

Before the use of land, construction (establishment) or permitting operation related to a motorway, motor road, national main road or its inner-city section, municipal expressway or railway line and civil airport, the permission issued by the authority of environmental protection in respect of noise and vibration protection shall be obtained.

*c) Requirements of noise and vibration protection imposed on existing facilities*

The dangerous extent of noise and vibration emitted by existing sources of noise and vibration shall be reduced according to a plan. The authority of nature protection may set limit values of noise emission for existing industrial facilities and may prescribe the deadline for the accomplishment thereof.

The authority of nature protection<sup>62</sup> may order that the activity emitting a dangerous extent of noise and vibration be restricted or suspended in the event of the obliged party failing to comply with the regulations pertaining to observing the limit values of noise emission.

*d) Requirements of noise protection of certain industrial products*

The Minister of Environmental Protection and Regional Development specifies, in agreement with the competent ministers, the range of products the manufacturer of which – or in the case of imported products the importer of which – shall indicate the noise and vibration characteristics on the product or on their accompanying documents as part of the quality attestation process.<sup>63</sup>

*e) Area subject to an increased degree of noise protection*

The limit values of noise load are determined for areas subject to an increased degree of protection by the Minister of Welfare in agreement with the Minister of Environmental Protection and Regional Development.

*f) Quiet zone*

A quiet zone may be designated around facilities requiring an increased degree of noise protection (institutions of health care, education, culture etc.).

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<sup>62</sup> The right to the protection of possession due to the owner of the real property is also enforced in the procedure for setting the noise protection limit values referred to administrative scope of authority. EBH2002.827.

<sup>63</sup> See KTM Decree 7/1991 (IV.26)

*g) Noise inhibiting protective zone*

A noise inhibiting protective zone may be designated in the vicinity of a facility (e.g. airport) with noise emission which is substantial and cannot be reduced below the limit values of noise load in order to protect the population and the environment from noise.

*h) Noise and vibration fine*

The operator or constructor shall pay a noise and vibration fine if – after the putting into operation of an industrial facility or during the construction thereof – the limits of noise emission specified for the facility are not observed or if the permitted limits are exceeded.

*3. Government Decree 280/2004 (X.20) on the Assessment and Management of Environmental noise*

The scope of the Decree covers the assessment and management of noise arising within the administrative areas of Budapest, its agglomeration and towns with a population exceeding 100 000 residents, produced by major and other traffic facilities as well as industrial facilities, and also emitted by major traffic facility in areas intended for construction pursuant to a separate piece of legislation<sup>64</sup> as well as in areas subject to increased noise protection, as well as data submission related to the said assessment and management of noise.

In the Decree fundamental concepts<sup>65</sup> in noise protection such as e.g. categories of environmental noise, harmful effect, noise indicator and assessment are defined. In addition to the detailed provisions concerning strategic noise maps, the establishment of a noise committee<sup>66</sup> functioning as a body with the purpose of consultation, counselling and harmonization of interests is also set forth in the Decree.

*4. KvVM Decree 25/2004 (XII. 20.) on Regulations for Preparing Strategic Noise Maps and Action Plans*

It is generally a really technical norm which is used everywhere in the country.

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<sup>64</sup> Act LXXVIII of 1997

<sup>65</sup> Such is e.g. the category of environmental noise, harmful effect, noise indicator and quiet zone.

<sup>66</sup> Pursuant to the decree, the obligant of the major traffic facility obliged to prepare an action plan may set up a noise committee for the implementation of the action plan. The noise committee is a body for consultation, counselling and harmonization of interest.

#### *IV. Organisational structure of environmental protection*

The state and local governments have an active role in environmental protection. The state and local government bodies are responsible for the legal regulation of environmental protection, for supervising the assertion of rights and fulfilment of obligations related to the protection of the environment and for planning and managing the protection of the environment.

The Parliament shall enforce the environmental interests in its legislative work. It shall adopt and evaluate the National Environmental Programme, shall decide on the report of the Government on the state of the environment, and shall determine the environmental duties of the Parliamentary Ombudsman, the Government and the local governments. Its duty to approve the funds serving the attainment of environmental objectives and to control the use thereof is of equal importance.

The National Environmental Programme sets the environmental goals and targets to be attained, the order and deadline of their implementation, the means for the attainment of the goals set and designates the areas in which special environmental measures are required.

The Government shall direct the implementation of the responsibilities of the state regarding environmental protection, shall determine and co-ordinate the environmental protection activities of the ministries and the organs placed directly under the Government.

Local governments – among others – shall issue municipal by-laws and shall pass resolutions to attain objectives related to environmental protection. Moreover, they shall work out a municipal environmental programme which includes the tasks and regulations of protection against air pollution, noise and vibration. The settlements which are under the obligation to prepare a so-called strategic noise map are also specified statutorily.

Municipal local governments shall ensure the execution of the tasks set in the municipal environmental programme and shall provide the conditions for their implementation. The programme and its implementation shall be supervised according to need, but at least every two years.

In cases of noise and vibration protection the scope of authority at the level of first instance shall belong – with the exception of certain defined cases – to the notary of the local government and in Budapest to the notary of the district local government.<sup>67</sup>

#### *V. Summary*

In the Republic of Hungary the legal regulation of environmental protection, and within this the legal background of noise and vibration protection is orderly and is

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<sup>67</sup> Cases of noise and vibration protection belonging to the notary's scope of competence are listed in the Annex of the Council of Ministers (MT) Decree 12/1983 (V.12.).

in harmony with European norms. However, problems may arise during the enforcement of legal regulations and during their application in practice.

In the course of the application of law the economic and social interests associated with the spreading of technical, technological, scientific results, with the establishment of new investments and facilities have to be balanced against the constitutional fundamental right to healthy environment. In addition to the concrete analysis of the properties of the cases, legislation on environmental protection has to keep pace with the new achievements of technical and economic development and with the management of their undesirable consequences (environmental, noise and air pollution etc.).

THOMAS MANN – HEIDE WEDEMEYER – ZOLTÁN JÓZSA

## A ZAJVÉDELEM SZABÁLYOZÁSA NÉMETORSZÁGBAN ÉS MAGYARORSZÁGON

(Összefoglalás)

A zajvédelem szabályozása Németországban a föderatív berendezkedésnek megfelelően különböző szintű jogi normákon keresztül valósul meg. A német alaptörvény kimondja, hogy a tartományok jogalkotói hatásköre adott terület vonatkozásában akkor lép életbe, ha az életviszony szabályozását az alaptörvény nem tartja fenn kifejezetten a szövetségi szint számára.

A hatályos rendelkezések szerint szövetségi hatáskör a hulladékkezelés, a légszennyezés és a zajvédelem kérdéseinek általános rendezése. Az össznemzeti szempontokat érvényesítő szövetségi szabályozás célja elsődlegesen a jogi és gazdasági egyenlőség fenntartása, a közös nemzeti érdekek védelme. Ezen túl az egyes tartományok a szövetség által nem szabályozott kérdésekben viszonylagos önállósággal rendelkeznek.

A zajvédelem területén szövetségi szintű normák csak a beruházások, új létesítmények megvalósítása, valamint a közlekedés során keletkező zaj elleni védekezés kérdéseit rendezik. Az egyéni tevékenységek során keletkező zajproblémák jogi rendezése már tartományi hatáskör. Az Európai Parlament és Tanács 49/2002 Irányelvének a végrehajtása felvetette a szövetségi és a tartományi hatáskörök koordinációjának, összehangjának a kérdését, mivel az uniós elvárások nemcsak a tartományi hatóságok struktúráját, de azok eljárását is befolyásolják. Erre figyelemmel a tartományok növekvő mértékű részvételére van szükség a zajvédelemmel kapcsolatos alapvető jogi normák kidolgozása terén.

A zajvédelem intézményi és technikai kérdéseinek a bemutatásán túl a tanulmány első része részletesen tárgyalja a különböző zajforrások (építkezések,

beruházások, sportlétesítmények, közlekedés, repülőterek, egyéni tevékenységek stb.) során keletkező zajártalom megelőzésének és szabályozásának egyes kérdéseit a Német Szövetségi Köztársaságban.

A dolgozat második része a Magyar Köztársaság zajvédelemmel kapcsolatos normáit tekinti át. Az alkotmányos keretek mellett, a környezetvédelmi törvény, valamint a zajvédelem speciális (intézményi és technikai) rendelkezéseinek az elemzése megalapozza azt a következtetést, hogy a hazai szabályozás összhangban van az európai követelményekkel. Ugyanakkor a vonatkozó jogszabályok végrehajtása, következetes alkalmazása nem mentes az ellentmondásoktól, mivel megfelelő egyensúlyt kell találni az egészséges környezethez való jog és a gazdasági, műszaki, technikai fejlődéssel együtt járó mellékhatások kezelése terén.