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The Distance Requirement under Article 12(1) of the Seveso II Directive

The ECJ's *Müksch* Ruling[1]

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Abstract

The 'Seveso' legislation[2] is designed to protect humans and the environment against the hazards of major accidents.[3] It not only imposes duties to ensure the safety of particularly dangerous installations and establishments in industrial areas, but also lays down requirements regarding the use of the surrounding land stating that appropriate distances must be maintained between establishments subject to the special duties imposed by the Seveso legislation and types of land use requiring protection (Article 12 of Directive 96/82/EC – Seveso II Directive). The most important instrument in ensuring compliance with this distance requirement is the land-use plan specifying the location of future developments.

On the 15th September 2011, the European Court of Justice (ECJ) ruled that account must be taken of the Article 12(1) requirement that appropriate distances be maintained between hazardous establishments (Seveso II establishments) and certain types of land use requiring protection not only in planning decisions relating to the use of that land, but also in non-discretionary authorisation decisions, i.e. in a procedure seeking planning permission.

The ECJ's ruling will have a considerable impact on German legal practice because the national provision implementing the distance requirement – Section 50 of the Bundes-Immissionsschutzgesetz (Federal Immission Control Act – BImSchG) – has so far only been applied to regional planning decisions. This practice, endorsed by decisions from the highest courts, is no longer tenable.

The ECJ ruling has also provided other new insights: the European distance requirement does not impose on the member states an absolute duty to comply with the

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1 ECJ judgment of 15 September 2011 in Case C-53/10.

2 See Council Directive 82/501/EEC of 24 June 1982 on the major-accident hazards of certain industrial activities (Seveso I) and Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances (Seveso II). Whereas the Seveso I Directive focused on controlling certain high-risk installations, the Seveso II Directive applies where certain dangerous substances are present, broadens the scope of the obligations from installations to include establishments and places the emphasis on their organisation and management.

3 For more detailed information on the fundamental features of the Seveso legislation: Köck, 'Störfallrecht', in: Gesellschaft für Umweltrecht (Hrsg.), Dokumentation der 35. Wissenschaftlichen Fachtagung 2011 (Berlin 2012) (still to be published).

distances deemed 'appropriate' but rather leaves room for discretion.[4] *In this connection, the ECJ expressly stated that, in exercising their discretion, states may consider socio-economic factors in addition to safety criteria.*[5] *These findings are particularly significant for Germany as nowadays many hazardous industries are situated in densely populated regions and any scope for further development will depend on how this discretion is exercised.*

1 The Underlying Case and Background

The ECJ's ruling followed a reference of the 3rd December 2009 from the *Bundesverwaltungsgericht* (Federal Administrative Court – BVerwG) for a preliminary ruling on the following three questions:[6]

1. Is the obligation to maintain appropriate distances under Article 12(1) of the Seveso II Directive imposed only on land-use planners, or is it also imposed on planning permission authorities having to take a non-discretionary decision on the authorisation of a project in an already built-up area?
2. If the obligation to maintain appropriate distances is also addressed to such planning permission authorities, must they refuse permission for a project which cannot maintain an appropriate distance from a hazardous establishment?
3. If planning permission authorities are not strictly required to refuse permission for such a project, does a legislative provision conferring on a developer a right to planning permission where the statutory conditions are met take sufficient account of the obligation to maintain distances?

The questions were referred in a case concerning a dispute as to whether a garden centre with a sales area of more than 10,000m² (incl. 1,340m² open space) could be built at a distance of 250m from an industrial area subject to the Seveso II Directive. The plot in question had previously been occupied by a scrap and metal-recycling installation authorised under the BImSchG. In addition to a hazardous establishment in the industrial area, there are various commercial premises in the vicinity, including several DIY shops and a hotel i.e. similar areas in public use and, as such, land use requiring protection within the meaning of Article 12 of the Seveso II Directive. The area was not covered by any land-use development plan, which meant that the decision whether to authorise the garden centre had to be taken in a planning permission procedure under Section 34 of the *Baugesetzbuch* (Building Code – BauGB).

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4 Case C-53/10, paragraph 40.
5 Case C-53/10, paragraph 44.
6 See BVerwG decision of 3 December 2009, *Zeitschrift für Umweltrecht* (*ZUR*) 2010, 139, 140 (paragraph 4).

Section 34 BauGB provides that projects in built-up areas are to be permitted if the type and scale of the building's use is in keeping with the features of its immediate surroundings. One aspect of this compatibility requirement is the principle established by case law that consideration must be shown for the other buildings that exist in the vicinity (Rücksichtnahmegebot). According to the BVerwG's case law, the consideration principle (Rücksichtnahmegebot) is designed to ensure that 'uses liable to lead to tension or impairments are zoned in such a way as to avoid such conflict as far as possible'.[7] However, the duties arising from the consideration principle do not just apply to hazardous establishments. A developer planning to locate a project close to an existing hazardous establishment ('encroachment'), and so expose it to hazards, may likewise be found to infringe the principle.[8]

In the action prompting the reference for a preliminary ruling, brought by the claimant Müksch, who wished to build a garden centre close to the hazardous establishment operated by Merck, the Hesse Administrative Court, ruling as court of appeal in a judgment of the 4th December 2008, took the view that the consideration principle had not been infringed because normal operation of Merck's establishment was unlikely to produce hazardous emissions and because, in view of the existing land use requiring protection (DIY shops and a hotel), it could not see how Mücksch's project might subject Merck to more onerous duties under the law on accident control.[9] In other words, because the project for which permission was sought would not significantly alter the hazard risk, the Administrative Court could not find that Mücksch's planned 'encroachment' on Merck's neighbouring establishment was 'inconsiderate'.

Section 50 BImSchG – the main national provision implementing the European requirement that an appropriate distance be maintained – was not applicable because, in the Administrative Court's view (and in the majority view taken in academic literature and the BVerwG's case law), the duties imposed by that provision[10] apply only in the case of regional planning decisions and not in the case of non-discretionary decisions authorising individual building projects. The Administrative Court could find no basis for interpreting Section 50 BImSchG more broadly in the light of Article 12(1) of the Seveso II Directive as, in its view, the distance requirement under the latter directive was likewise limited to planning decisions.[11]

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7 See BVerwG decision of 3 December 2009, *ZUR* 2010, 139, 140.
8 See the Hesse Administrative Court's judgment of 4 December 2008, par. 57.
9 See the Hesse Administrative Court's judgment of 4 December 2008, par. 63.
10 On this point, see also the BVerwG's analysis of the law in its decision of 3 December 2009 to refer questions to the ECJ, *ZUR* 2010, 139, 142 (par. 11).
11 See Hesse Administrative Court's judgment of 3 December 2008, par. 74 ff.

This view, the accuracy of which BVerwG doubted in its reference for a preliminary ruling,[12] and which has also been criticised in academic literature,[13] is no longer tenable following the ECJ's ruling. The Federal Administrative Court will have to decide whether it broadens the scope of Section 50 BImSchG to appropriately enrich the consideration principle of Section 34 BauGB (see below 4 and 5.

2 The ECJ's Ruling

Under the second subparagraph of Article 12(1) of the Seveso II Directive, the member states must ensure that 'their land-use and/or other relevant policies and the procedures for implementing those policies take account of the need, in the long term, to maintain appropriate distances between establishments covered by this Directive and ... areas of public use'. The duties arising from this requirement have been the subject of controversy in academic literature, but the ECJ's ruling has settled a series of unanswered issues at the highest judicial level:

– The ECJ ruled, first of all, that the distance requirement under the second subparagraph of Article 12(1) not only applies to the drawing up of land-use plans but must also be observed by planning permission authorities because they 'contribute to the implementation of the land-use policies referred to by Article 12(1)'.[14] Planning permission authorities may refrain from considering the distance requirement only if it has already been taken into account in a preceding planning procedure.[15] However, that is not at all the case where planning permission is issued under Section 34 BauGB. Consequently, the distance requirement ought to have taken into account in the case at issue.
– Secondly, it ruled that, in the context of an 'encroaching' project, the distance requirement is not strictly applicable in the form of an absolute prohibition on any worsening of the situation so that not all projects falling short of the appropriate distance must necessarily be refused planning permission.[16] It expressly conferred on the member states room for discretion in applying the distance requirement[17] because their duty under Arti-

12 See BVerwG decision of 3 December 2009, *ZUR* 2010, 139, 141 (par. 9).
13 For a comprehensive account, see Berkemann, 'Der Störfallbetrieb in der Bauleitplanung', *ZfBR* 2010, 18, 22.
14 See Case C-53/10, par. 20.
15 See Case C-53/10, par. 26.
16 See Case C-53/10, par. 42. This was also the view expressed by the BVerwG in its decision of 3 December 2009 to refer questions to the ECJ; see BVerwG, *ZUR* 2010, 139, 142 f.
17 See Case C-53/10, par. 40.

cle 12(1) is merely to 'take account' of it, i.e. they must consider it when taking their decision, but need not apply it strictly.[18]

– Thirdly, it ruled that, in deciding whether an appropriate distance must be maintained, the decision-making authorities must consider a series of factors. As examples, it expressly mentioned an increase in the risk of accidents or their impact which might result from the nature of the activity at the new site or the intensity of its use by the public.[19] Another factor to be assessed and taken into account is 'the ease with which emergency teams may act if there are accidents'. However, the ECJ did not restrict the member states' scope for discretion with aspects related to the risk of accidents and their consequences but also permitted consideration of socio-economic factors.[20] In that connection, it expressly stated that the member states' duty to maintain appropriate distances and implicitly determine those distances does not mean that they 'must establish such distances as the sole criterion for authorisation or refusal in the light of the location of projects for new sitings in the vicinity of existing establishments'.[21] In other words: the European law on accident control leaves room for other criteria as a basis for decision making.
– Fourthly, it ruled that appropriate distances are to be maintained in areas where they are already observed and that action should be taken to introduce them as a long-term goal where they have not yet been implemented.[22] However, it also made clear in this regard that this did not rule out all cases where the situation is made worse. In other words: the Seveso legislation does not prescribe a mandatory "phasing out" of existing mixed uses in the vicinity of hazardous establishments, but it does require that the aim of maintaining appropriate distances be borne in mind in any fresh land-use planning procedure for a mixed-use area or any individual planning permission procedure not preceded by such new general planning.

3 Implications for Application of the Distance Requirement in Planning and Permission Procedures

All in all, the ECJ's ruling leads to the following programme of duties of investigation and assessment in compliance with the obligations under Article 12(1) of the Seveso II Directive:

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18 See Case C-53/10, par. 41.
19 See Case C-53/10, par. 43 f.
20 See Case C-53/10, par. 44.
21 See Case C-53/10, par. 45.
22 See Case C-53/10, par. 47.

1. First of all, the area covered by Article 12 must be identified, i.e. the boundaries of the area surrounding a hazardous establishment in which the Article 12 duties to consider distances and thus constituting the area subject to the controls prescribed by the first subparagraph of Article 12(1) must be determined.[23] There are no national legislative provisions for this; nor is anything prescribed at the European level. In Germany, the authorities may refer to the 'compliance boundaries' set by the Installations Safety Commission in its 'Recommendations for separation distances between establishments under the major accidents ordinance and areas requiring protection within the framework of land-use planning' (Guide KAS-18). The recommended compliance distances differ depending on the nature of the dangerous substances used or stored in the hazardous establishment.
2. Secondly, the appropriate distances from neighbouring land use requiring protection must be determined.[24] These distances cannot be determined solely on the basis of the nature and amount of dangerous substances stored or used, but also depend on the precautions taken to guarantee the safety of hazardous establishments, in particular the technical measures to limit the impact of any accident,[25] such as protective walls amongst others, and on the specific characteristics of the hazardous establishment, the surrounding land and it specific use.[26] Once again, in the absence of specific legislative provisions, the Installations Safety Commission's recommendations (Guide KAS-18) are very helpful in German practice.
3. Thirdly, it must be established whether any special safety factors associated with the surrounding uses requiring protection may mean that the distances have to be changed. As examples of such factors, the ECJ mentions 'the nature of the activity of the new site or the intensity of its use by the public; and the ease with which emergency teams may act if there are accidents'.[27] The crucial question is whether these or similar factors are such as to alter the outcome of the risk or impact assessment so that the distances must be adjusted to the new findings.
4. Fourthly, it must be ascertained whether or not any other factors, in particular socio-economic factors,[28] e.g. job creation and security or workplace safety, but also sustainability considerations, e.g. the aim of reducing land consumption and sparing non-built-up areas not covered by a development

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23 See Case C-53/10, par. 37.
24 See Case C-53/10, par. 45.
25 For more detailed information on the duties to prevent major accidents and limit their impact, see: Köck, *Störfallrecht* (footnote 2).
26 See Case C-53/10, par. 44.
27 See Case C-53/10, par. 44.
28 See Case C-53/10, par. 44.

plan, may justify the acceptance of less stringent measures setting appropriate distances.[29]

At each of the above stages, there is room for discretion, which the legislature may delegate to the decision-making bodies, e.g. to local authorities in the case of planning decisions on land use and development. This room for discretion also covers the consideration to be given to other criteria, such as the socio-economic factors referred to by the ECJ or the sustainability factors mentioned above. Such factors must be sufficiently important to justify non-compliance with the minimum appropriate distance. As a general rule, if a land use requiring protection could be located elsewhere, there is unlikely to be any good reason for failing to comply with the appropriate distance.

Given the above, and in light of the circumstances of the case leading to the reference for a preliminary ruling, namely the re-use of brownfield land in an area already subject to intensive commercial use, it is clear that land-use planning procedures are a considerably better means of meeting the requirements under the second subparagraph of Article 12(1) of the Seveso II Directive than individual planning permission procedures because the entire planning area can be used to achieve the best possible compliance with the appropriate distances, e.g. through specifications designed to limit the impact of major accidents. The more planning authorities succeed in using their procedures to this end, the more likely other criteria, e.g. socio-economic factors, will be of sufficient importance to justify a deviation from the distances deemed appropriate. Nevertheless, the greater the deviation from the appropriate distance, the more cogent the reasons for the deviation must be.

4 Implications for German Law

In Germany, there is much debate with regards to the implications of the ECJ's ruling for national law. Observers disagree on whether legislative action is necessary or whether the ECJ's instructions can be heeded by interpreting the existing legislation on planning permission in conformity with European law. The latter could be achieved if, in future, the distance requirement under Section 50 BImSchG were to be added to the requirements to be met under planning permission law.

Despite this possible interpretative approach to acting on the ECJ's ruling, the better solution might nevertheless be to revise the legislation relating to the

[29] That it is actually a matter of making compromises in terms of the aim of setting appropriate distances and not of adjusting the set distances themselves in the light of socio-economic factors can, in particular, be gathered from the wording used by the ECJ in finding that the member states must, at least implicitly, determine such distances and then, where appropriate, take account of other criteria; see Case C-53/10, par. 45.

obligations imposed by Article 12 of the Seveso II Directive. The question is whether it would not be better for the German legislature to use the discretion granted by the ECJ as regards compliance with the distance requirement to devise a legislative scheme, rather than rely on guidelines issued by experts (KAS-18) and delegate responsibility for exercising that discretion to the authorities involved in planning land use and those issuing planning permission. The following areas would lend themselves to legislative regulation:

– statutory specification of compliance distances for use in determining the area subject to the special duties of investigation and assessment associated with the distance requirement (see 3 above)
– statutory specifications as to the investigative duties to determine appropriate distances in land-use planning and planning permission procedures and statutory rules on the conditions in which it is permissible to deviate from those distances (see 3 above)
– statutory rules on whether Section 34 BauGB is to continue to apply to cases of 'encroachment' on a hazardous establishment, or whether in future, re-planning procedures are, from the very outset to be the only possible means of ensuring the best possible protection against major accidents. The German legislature has particularly good reason to address the issue of mixed use because, given the country's large number of hazardous establishments in mixed-use areas and its ambitious objectives with regard to reducing land consumption and the associated incentives to re-use brownfield land, Germany is very much dependent on such legislative guidance.

5 Supplement – The judgment of the Federal Administrative Court from 20.12.2012

On the 20th December 2012 the BVerwG heard the case again on the basis of the ECJ's ruling. It ruled that it is possible to interpret the consideration principle resulting from Section 34 (1) BauGB in a matter consistent with the requirements laid down by the legislation of the European Union as far as the new settlement causes no tensions with regards to urban development which can only be managed by planning measures.[30]

The case was referred back to the *Verwaltungsgerichtshof* (Administrative Court – VGH) Hessen for a final judgment as the relevant findings of fact are still missing. In its press release the BVerwG emphasises that the VGH Hessen will have to decide on what distances are appropriate in the current case taking into account all accident specific (technical) factors and whether the garden

30 Federal Administrative Court, Judgment from 20th of December 2012 (Case 4 C 11/11).

centre under application lies within these distances. If necessary, the VGH Hessen will have to decide in the context of the consideration principle on whether important circumstances, especially social, ecological or economic ones, warranting the permission of the project despite being within the boundaries of the proscribed distances. [31]

It is somewhat surprising that the BVerwG declared Section 50 BImSchG inapplicable and sought the solution by only using the consideration principle as Section 50 BImSchG is the basic national regulation implementing the requirements of Article 12 of the Seveso II Directive. Against this background the application of the fundamental ideas of Section 50 BImSchG for decisions based on Section Section 34 BauGB appears to be more consistent with regard to the binding nature of the statute under the rule of law than an expansion of the consideration principle taking place without any reference made to the regulation.

The consideration principle now fully includes the programme of Article 12 of the Seveso II Directive in as far as it is possible to decide on the conflict according to technical criteria and the reciprocal relationship between hazardous establishments and the newly added building project. Where the conflict can only be solved by considering further criteria, for example alternative solutions or socio-economic criteria relating to public good, new planning is required (Section 1 (3) BauGB). In this case the decision can not be based on Section 34 BauGB but on a comprehensive planning decision (over-planning of the so far undeveloped inner zone). The BVerwG gave no answer to the question of whether the party willing to develop the land is entitled to claim that an urban land use plan has to be drawn up. In German planning law a claim for drawing up an urban land use plan does not, in principle, exist (Section 1 (3) s. 2 BauGB).

31 See the press release of the Federal Administrative Court from 20th of December 2012 (own translation).