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Vortrag: „The Impact of EU Legislation on Cultural Heritage – Observatory Function of EHLF and Implementation in the Federal Republic of Germany"

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Workshop III – Legislation:
Overview of regional and European legislation regarding modern cultural heritage protection

by Wolfgang Karl Göhner

Ladies and Gentlemen,

on behalf of the German National Committee on the Protection of Monuments and of the European Heritage Legal Forum I like to welcome you to this lecture. Thank you for giving me the opportunity to provide an insight into the impact of EU legislation on Cultural Heritage, the observatory function of the EHLF and the implementation in the Federal Republic of Germany.

The European Heritage Legal Forum (EHLF)
The EHLF was founded as a European consultation body in 2008 in Brussels. It is composed of representatives of several European countries who investigate the effect of EU legislation on European Cultural Heritage. Although Cultural Heritage is a major economic factor for Europe, especially from a touristic point of view, the European Union has no direct say on this. This field is reserved for the individual member states themselves. However, legislation in other areas, on which Europe has a say, such as the environment, working conditions or energy efficiency etc., increasingly affects the preservation of our historical monuments and landscapes. Of course, European legislation never purposely harms historical monuments, but there may often be harmful side effects, resulting from a law or a measure, whose consequences could not be assessed sufficiently in advance.

Time and again such harmful side effects to Cultural Heritage have to be countered in individual countries by implementing special or exception clauses if and where possible. In this respect, the EHLF aims to achieve, that in the future all intended EU legislation is assessed in advance, in order to detect harmful side effects that legal measures may have for Cultural Heritage. Recommendations for exceptions or for developing alternatives can then be formulated at an early stage and may even be integrated into the intended legislation.

The EHLF is the continuation of a former working committee, called ECHO (European Working Group on EU Directives and Cultural Heritage), which had been active in this field for some years. The EHLF is managed by a secretariat on which representatives of Norway (Riksantikvaren, Directorate for Cultural Heritage), the UK (English Heritage), the Netherlands (Monumentenwacht Noord-Brabant), France (Ministry of Culture and Communication) and Germany (German National Committee on the Protection of Monuments [DNK]) have a seat.

The actual discussion and situation in Germany
The main discussion in Germany the years before was dominated by the extended utilization of nuclear power and nuclear power plants as a bridging technology as well as now in the days after the Fukushima-Desaster the German society wants to step out of this technology as soon as possible. Our society has to find longterm sustainable solutions to the energy problems of the future on responsibility for our survival and future generations. Germany therefore needs a comprehensive energy concept. The main political task will be to shape the transition to renewable energies in a pretty short period of time.

Who is pleading for the building up and the reduction of distributed structures of national energy supply, has to be responsible for the efficient expansion of distribution networks, although this is in many places out-of-favour. The debate on energy policy needs more honesty, generally. The task of policy is to design the

targeted transition to renewable energies, to avoid social and economic rejections. Under this guideline, it is to decide about the terms of nuclear power plants and priorities of investments.

However, one has to keep in mind that concessions are necessary and compromises have to be found. Especially in the energy sector long-term strategy and security in planning is essential for investors. Security and strong leadership is also expected by the citizens in this socially controversial debate. If politics succeeds in this matter the people's faith in politics could be strengthened again.

Promotion of energy efficiency measures on built monuments by law
For years the European Union as well as national and federal (Länder) administrations in Germany are engaged to support energy efficiency measures by law, to realize the ambitious aims of the energy efficiency legislation of the EU and the energy policy concept of the German government. The amendment of the Directive [2010/31/EU of May 19th, 2010] on the energy performance of buildings came into effect on July 18th, 2010 and became national law in all the Member States. In Germany the directive will lead to an amendment of the German Energy Saving Ordinance (EnEV), presumably in 2012.

During the debate on the directive it was tough to stress, that apart from the aim to get the impending dangers of climate change under control, other matters – like culture and CH – are of interest too. However, they often seem to be neglected, which can not be excused by the lack of direct authority of the EU in cultural matters. Of course, the protection of our nature and our environment is of special importance to me – as former environmental representative – and to all of us, however, all our acting – normatively and virtually – has to be led by balance, sense of proportion and requires respect towards other people and the consideration of all matters important to society.

With regard to this basic ideals, I was very pleased to see that the amendment of the directive on the energy performance of buildings once again allows special procedures for built monuments (about 1-3 % of the existing buildings in Germany) – possibly for archaeological artefacts and sites inter alia in connection with photovoltaic systems in open spaces as well. So the preservation of the substance of the cultural remains of our common past is now a little bit safer than before.

Unfortunately, purpose and function of senseful and substantial preservation of our Cultural Heritage, in accord with the main principles of the Charta of Venice, including characteristic features of material and form, still seems not to be understood by many people, although the "special case of built monuments" is getting more and more attention. I would be glad if I – as a lawyer and Senior Legal Adviser for Cultural Heritage – could add a little to further this understanding.

Assessment of energy efficiency measures on built monuments in German jurisdiction
In German jurisdiction and legal literature as well as in na-tional and federal (Länder) legislation no clear understanding is found, that the promotion of electricity production from renewable energy sources has in the current constitutional situation no priority over other matters of society, like environmental protection, nature conservation and the protection of our built and archaeological heritage. In so far, according to the homogeneous German jurisdiction "no official interest for the adaption of external insulation on built monuments exists, because built monuments don't have to meet the legal thermal insulation requirements for new buildings."

In the political debate on the amendment of 16 – let me re-peat: 16! – Monument Protection Laws in Germany not seldom there are increasing concerns about the possibility of legal decisions, instead of singlecase arbitrary decisions about measures on a historical monument, as the implementation of energy efficiency measures should have priority over the matters of Cultural Heritage – all this in Cultural Heritage Protection Laws, of course!
It is a very important, basic necessity in principle, to analyse such legislative attempts for legal priorities in favour of singular public interests over other public interests: very seldom that would do justice in each case, but such priorities of singular public interests opens legislative floodgates. Nevertheless, art. 20 a of the German Federal Constitution (GG) doesn't change this result: "The natural basis of life and the animals are protected by legislation and in order of law and justice by the executive authorities and the jurisdiction in responsibility for following generations within the framework of constitutional order." Affected by the woebegone political and personal experiences he had to go through in the first half of the 20th century, in 1946 the former Prime Minister of the Free State of Bavaria, Dr. Wilhelm Hoegner just asked:

"If this is our nation and if it is not addicted to Mammon, will it finally stand up to protect and shield what belongs to it, what our ancestors loyally preserved for us and what future generations can ask of us as a legacy? With thousands of our nation's best I will continue to fight for the salvation of our home as long as I shall live." Home is just an achievement made and influenced by men, and our historical monuments and archaeological sites, traditionally established over generations, are part of it, as historical documents of our Cultural Heritage.

Above environmental concerns, there are "examples for another kinds of public interests" and so far represent a "conceivable criterion for balancing legally protected interests". A privilege is expressly not intended: priority for climate change, in particular, over the preservation of cultural monuments does not exist. A comprehensive balancing of interests with the interests of preservation of Cultural Heritage is imperative. Only then, an appropriate solution, depending on local conditions, can be achieved in every single case.

Promotion of energy efficiency measures on built monuments by law: "Scrap bonus for replacement buildings after demolition of older buildings."
In current plans of the Federal Government of Germany a "scrap bonus for replacement buildings after demolition of older buildings" is discussed, which will, figuratively speaking, urge the owners of old buildings and built monuments to demolish their buildings, in order not to loose the economic profits promised by the government. It goes without saying that this will cause fatal damage to our historic towns, villages and cultural landscapes and therefore the Bavarian Advisory Board for Cultural Heritage totally rejects these kind of plans. To grant a scrap bonus for replacement buildings after the demolition of buildings, unsuitable for energetic modernisation to the standards requested, creates unacceptable hardships for the owners of built monuments, just like the no longer pursued plans, to bring all buildings in Germany to a "zero-emission-level" by 2050. On the one hand, owners of built monuments are bound to preserve their property by Monument Protection Law. On the other hand, a suitable support programme for energetic modernisation, in a monument friendly way, does not exist. So, special funding regulations for energetic modernisation of these built monuments should be found. This would open the door to recognize the eligibility of built monuments for the first time and to make the funding of energy-saving improvements possible, even if the energetic standards of new buildings might not be reached in the end, with respect to the characteristic features of the built monuments.

Exemptions for energy efficiency measures on built monuments
The dena-guidelines, set up by the German Energy Agency (dena) without involvement of the German Cultural Heritage authorities, are completely contradictable to the European and national legislative efforts, to emphasize the special legal status of built monuments and archaeological heritage particularly with regard to the field of energy efficiency. So in the dena-guidelines no exceptions are permitted. In this way the dena-guidelines are turning the exemption clauses for Cultural Heritage in the German Energy Saving Ordinance (EnEV 2009) up side down. The EnEV 2009 regulations do no longer provide such ex-emption clauses for built monuments in accordance with EU legal requirements, when the owner offers his monument for rent or sale in situations of economic need, as described in connection with the so called "scrap bonus".

In the view of Federal German legislators – German Bundestag (Deutscher Bundestag) and Bundesrat (Federal Council of Germany) – the owner of a built monument will decide – in consultation with the Cultural Heritage authorities or not - wether an exemption clause will be applied and energy efficiency mea-sures should be conducted. An official decision of the responsible Cultural Heritage or Building authorities, as determined by state law, is not and was no longer necessary.

However, in § 24 par. 1 EnEV 2009 it is clearly stated that matters of Cultural Heritage have priority over the implementation of energy efficiency measures.
In accord with this legislation, built monuments and archaeological artefacts are neither renewable, nor can they be translocated to other sites as a rule. Besides, built monuments represent a relatively small proportion of the building stock in Germany. From the constitutional and practical perspective climate protection goals have to be realized in those fields, in which a maximum of change can be achieved. This does not mean, however, that built monuments are not "adaptable" in terms of energetical performance. In general, I like to underline, that the granting of a licence for energetic modernisation of a built monument as a rule has to be refused according to State Protection Laws, if the intended measures can adversely affect substance and appearance of a monument.

Activities of the European Committee for Standardiza-tion (CEN) with regard to standardization
The dena-guidelines show in a very specific way, that it would be very crucial and helpful, to improve the quality of energetic consulting and restoration with regard to the guidelines of monument protection as well as professional staff by implementing the initiative of the kingdom of Norway on the activities of the European Committee for Standardization (CEN) - New Work Item "CEN/TC 346- Stan-dard for assessment and measures for energy efficiency in protected buildings".

"The obligation of the state, to preserve monuments as an active part of our culture includes, apart from conservation and preservation of the present status, also the adaption of the monument to new requirements. The process of the increase of energy efficiency may not have unbearable ef-fects on the appearance and the material of the monuments. Actual tendencies to standardize the practice of monument-preparation with regard to measures of climateprotection have to be defeated. An establishment of common criteria with regard to the increase of energy efficiency of monuments, which on the one hand follow predominantly the

system of the Laws of Monument Protection, on the other hand deal with the possibilities and limits of the increase of energy efficiency would be worth to be aspired."

However, it is crucial, that in this European process of standardization, the two different technical committees TC 346 and TC 89 "Thermal performance of buildings and building components" work together. The results will be exciting!

The restrictions of private property with regard to social matters and the reasonability for the owner, to implement energy efficiency measures according to the guidelines of monument protection or to surrender any energy efficiency measures

The obligation, to preserve monuments and to use them in a suitable way causes the effect, that the owner, who is openminded towards monument protection (see BVerfG, decision of March 2nd, 1999 [file number: 1 BvL 7/91, Juris]) may not expect to use one's monument with profits similar to those which are left by a building, which is not object to Monument Protection Law. However this law could be interpreted in the way, that, apart from this obligation, the private aim to change the building - or in extraordinary cases to destroy it - , overwhelms the public aim to preserve the monument. It is not reasonable for the owner to preserve the monument, if it cannot be used in any suitable way. There is no suitable way to use a monument, if an owner, who is open-minded to matters of monument protection, cannot use the monument in a reasonable way and cannot sell it, if the owner has to bear the costs of the preservation, without being able to enjoy the advantages of private use. The check-up, whether the preservation is economically reasonable, has to be conducted only according to objective criteria. It has to be seen as a forecast into the future throughout a longer time. The preservation is not economically reasonable, if the costs of preservation and management are higher than the profits or the value in use [see BVerfG, decision of March 2nd, 1999; OVG Sachsen, judgement of June 10th, 2010 [file number: 1 B 818/06, Juris], BayVGH, judgement of October 18th, 2010.

Energy-related modernisation in historic districts or Ensembles:
Basic information

In recent German jurisdiction social restrictions on individ-ual property are interpreted in the way that it is of general interest to take into account the legal obligations of Cultural Heritage owners. According to the judgement of the Federal Administration Court of Germany (Bundesverwaltungsgericht) every owner of a built monument can legitimately challenge permissions for building projects on neighbouring properties in courts, if these projects affect the historical value of his built monument. So, not only the building substance of a built monument is protected by monument protection law, but also the appearance of historic districts or Ensembles as a whole, in most cases regardless of the worthiness of protection of individual built monuments found in it. A historic district or Ensemble – an entire area containing different structural works – has to be recognized and treated like a built monument and changes in the surrounding area of a historical monument are also defined by law, just like changes on built monuments. In order to implement energy-related measures on built monuments in historic districts, it is therefore absolutely necessary to take into consideration the protection and the appearance of the built monument as well as the historic district.

Energy-related modernisation in historic districts or Ensembles:
Construction-related case studies

Built monuments in historic districts (like the Old Town of Nuremberg) can surely be actively revitalized. In general, historical building substance is capable of adaptation in various ways. However, the legitimate interest to reduce primary energy needs and operation costs of historical monuments should not have priority to monument protection. The characteristics of a historical monument have to be preserved without restrictions, when energy-related measures are conducted.

In the decision-making process, concerning the pros and contras of energy-related modernisation of a historical monument, it is necessary to look at the overall picture. Not only costs and environmental advantages of the recent usage of the historical monument should be considered part of an integrated energy balance, but also environmental pollution, attributable to the production of insulating materials, its sustainability or the timeframe for paybacks. Besides, energy expenditure is determined by individual user behaviour. Calculations on energy saving have therefore to be put into perspective.

Contrary to new buildings, which have to meet common energetic norms and standards, the opposite should be applied to Cultural Heritage. A reverse approach for Cultural Heritage is useful and necessary. Energy-related modernisation of historical monuments can not be carried out ac-cording to the same standards, applied to new buildings (inter alia façade insulation). It must be conducted in a component-specific way, however, in due consideration of the legal status of the historical monument as a whole.

Energy-related modernisation in historic districts or Ensembles:
Example: External insulation

Around the turn of the year a heated debate arouse in Germany about the question: "Why should it be wrong to hide our buildings and towns behind uniformed thermal insulating panels?" Terms like "German

insulationmania" and "disfigurement of historical monuments" could be heard and the demand for higher sensibility in reconstruction was expressed in public and in the media.

Güntersleben, Administrative District of Würzburg:
Comparison "External insulation: arguments pro and contra on the usage on historical monuments"

In the middle of this discussion external insulation could lead the way to reach an acceptable reconciliation between energy efficiency and monument preservation, if:

- the substantial loss and the reduction of aesthetic quality on historical surfaces are taken into consideration;
- external insulation can be attached on facades, which are only of secondary concern for the appearance of a built monument or historic district, but – as a rule – can not be attached on facades, which are shaping its appearance and is not permitted on aesthetically significant facades without exception
- regular rejection of modern reconstructions of structural elements without using original materials for being incompatible with monument preservation standards.

"Salus publica suprema lex (The welfare of the general public is the highest commandment)." This advice of Cicero was taken up by former German Chancellor Dr. Helmut Schmidt in his book "Sechs Reden" (six speeches) and should lead all our thinking, even if the conflict between climate concerns and Cultural Heritage is preventable in my point of view. To meet the requirements of the welfare of the general public integrated approaches have to be found. That is the only way to guarantee substantial and durable solutions which will find the acceptance of the general public.

I like to add one more statement, written in one of the leading Munich newspapers, before I finish my lecture. It says: "To protect our towns, villages and landscapes from further depletion, careful examination of our historical monuments is necessary. Documentation on climate balance by qualified experts, experienced in the field of Old Building and Cultural Heritage, has to be guaranteed for every single building. These experts have to keep an eye on the whole circuit of materials and energy and have to develop individual solutions. This kind of advisory service has to be encouraged and must become prerequisite for the implemen-tation of all further measures to come in the future."

Thank you very much for your attention.

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