

# Approval procedures for biogas plants and the protection of neighbours' rights in Germany

Conference on approval procedures and the regional integration of biogas projects in Germany and France

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BBH is known as “the” law firm of public utilities. But we are far more than that – in Germany and also in Europe. The decentralised utilities, the industry, transport companies, investors as well as political bodies, like the European Commission, the Federal Government, the Federal States and public corporations appreciate BBH’s work.

- ▶ Accredited professionals: ca. 250; total staff: ca. 550
- ▶ Offices in Berlin, Munich, Cologne, Hamburg, Stuttgart and Brussels

## Andreas Große



Andreas Große has a special focus on administrative and renewable energy law as well as the legislation governing the energy industry in general.

- ▶ Born in Erfurt in 1969
- ▶ Studies of law in Bremen and Cologne
- ▶ 2002 to 2006 lawyer at a law firm specialising in public law in Würzburg
- ▶ Since 2007 specialist lawyer for administrative law
- ▶ Since 2007 lawyer at BBH Berlin
- ▶ Publications in the area of renewable energy and administrative law, among other activities, co-author of the EEG commentary published by C.H. Beck Verlag

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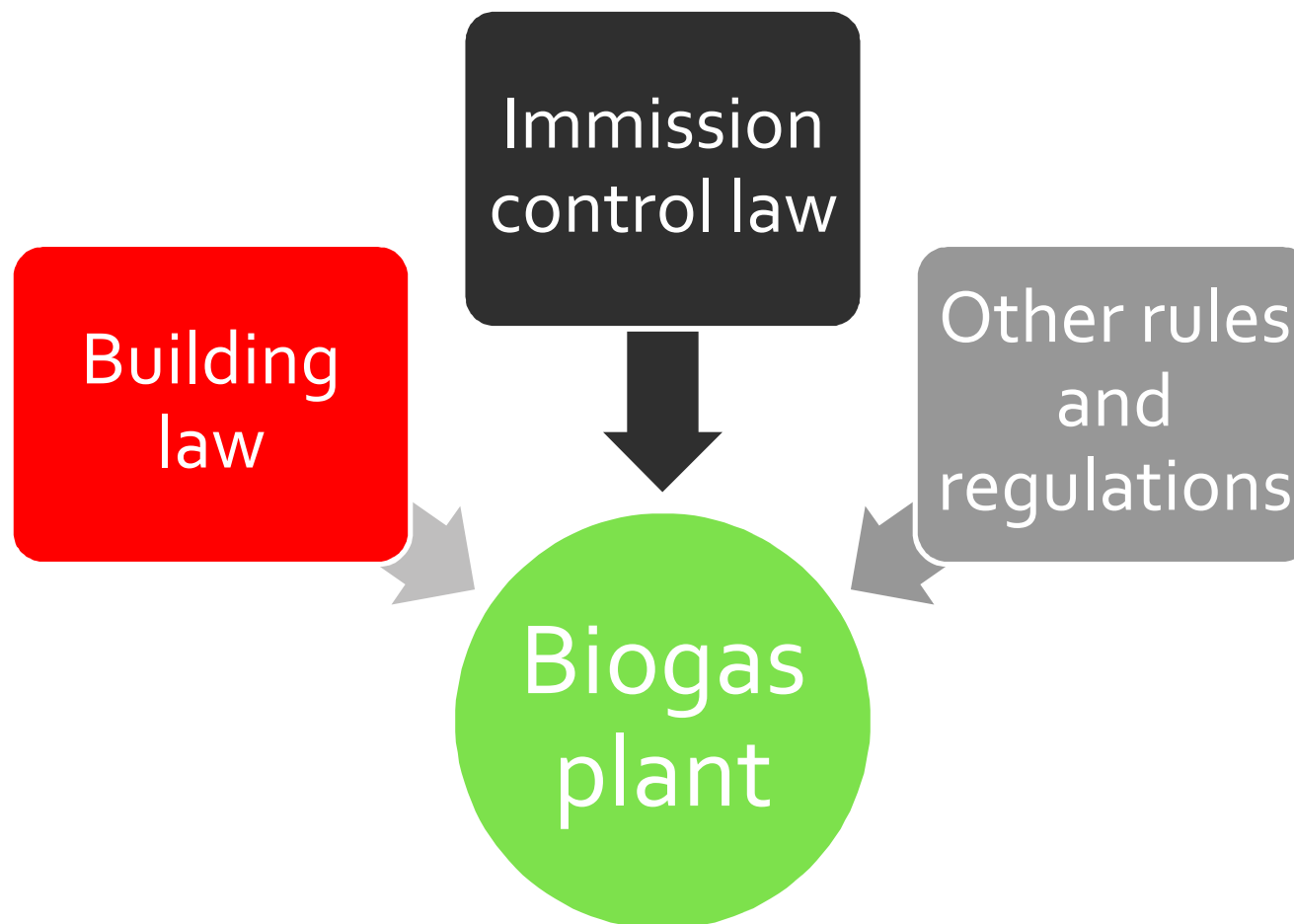
# Agenda

1. Overview of the legal framework
2. Formal requirements
3. Material requirements
  1. Building law
  2. Immission control law
  3. Other rules and regulations
4. Protection of neighbours' rights
  1. Preventive protection of neighbours' rights
  2. Repressive protection of neighbours' rights
5. Summary

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# 1. Overview of the legal framework



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## 2. Formal requirements

### Requirement of consent under building law

- Pursuant to building regulations (competence of the federal states)

### Permit obligation pursuant to immission control law

- For particular types of biogas plants (sec. 4 subs. 1 BImSchG [Federal Immission Control Act] i. c. w. Appendix 1, 4<sup>th</sup> BImSchV [Federal Immission Control Ordinance])

### Requirement of approval purs. to REG (EC) 1069/2009

- For the use of certain animal by-products

### Concentration effect

- of the licence obtained under the BImSchG (sec. 13), i.e. in principle only one licence required

### Further approvals/permits

- May be required in individual cases



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## 3.1. Building law (1)

### ► Overview of the construction and planning law

#### Qualified area in a land-use plan (sec. 30 BauGB [Federal Building Code])

- Biogas plant in principle business enterprise; permissibility depends on the designated area
- Option of a special designation of an area (Sondergebietsfestsetzung, sec. 11 BauNVO [Federal Land Utilisation Ordinance])

#### Undesignated space within a built-up area (sec. 34 BauGB)

- In particular: Blending with the immediate environment

#### Undesignated outlying area (sec. 35 BauGB)

- Exceptional permit pursuant to sec. 35 subs. 1 no. 6 BauGB
- Otherwise in principle inadmissible (sec. 35 subs. 2 BauGB)

## 3.1. Building law (2)

### ► Construction and planning law in detail

Privileged status in undesignated outlying areas (sec. 35 subs. 1 no. 6 BauGB)

- Biogas plants *within the scope* of agricultural, forestry and horticultural enterprises
- Underlying concept: on-site recovery of biomass; only one plant per enterprise; limitation of the permissible volume of electricity and gas

Classification as a specially designated area

- Permissibility under construction and planning law irrespective of sections 34, 35

Principle of consideration

- Fine-tuning
- “Gateway” for the protection of neighbours’ rights

## 3.1. Building law (3)

- ▶ Building regulations
  - State law, but widely conforming provisions
  - General requirements for
    - parking spaces
    - spatial provisions
    - fire safety
    - other requirements to prevent threats to public safety and order
  - No biogas-specific provisions

## 3.2. Immission control law (1)

- ▶ Requirements differ depending on whether the installations are subject to a permit or not
- ▶ A permit is mandatory pursuant to sec. 4 subs. 1 BImSchG in conjunction with Annex 1, 4<sup>th</sup> BImSchV; e.g. in the case of:
  - installations producing electricity and/or heat from biogas with a rated thermal input between 10 MW and 50 MW, or between 1 MW and 10 MW in the case of combustion engine or gas-turbine installations
  - installations producing / processing biogas with an output capacity of 1.2 million standard cubic meters or more per year

## 3.2. Immission control law (2)

- ▶ Principal requirements
  - Obligation to protect against / to avert harmful environmental impacts
  - Obligations relating to waste
- ▶ Additional requirements for installations requiring a permit
  - Obligation to exercise due precaution
  - Obligation for an economical and efficient energy use
- ▶ specified by different ordinances and administrative regulations, such as “TA-Luft” (Technical Instructions on Air Quality Control” and “TA-Lärm” (Technical Instructions on Noise Abatement)

### 3.3. Other rules and regulations



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## 4. Protection of neighbours' rights

### Protection of neighbours' rights under public law

- Preventive reconciliation of interests through planning and approval procedures
- "Triangular relationship": installation operator – authority – neighbour
- Subjective legal protection, no objective control

### Protection of neighbours' rights under private law

- Nuisance claims and claims for damages in case of impacts on the property or other absolute rights
- Relationship: neighbour – installation operator

## 4.1. Preventive protection of neighbours' rights (1)

### Building law

- ▶ Issuance of land-use plans
  - Public participation (sec. 3 et seq. BauGB (Building Code))
  - Consideration of neighbours' concerns by weighing the interests affected (sec. 1 subs. 7 BauGB)
  - Political influence exercised by municipal committees
- ▶ Building permit
  - Neighbours' participation in accordance with the respective state law: neighbours are usually given opportunity for comment; potential objections are taken into consideration

## 4.1. Preventive protection of neighbours' rights(2)

### Immission control law

- ▶ Installations requiring a permit
  - Public participation in the approval procedure
  - Possibility of raising objections and discussing them with the applicant
- ▶ Installations not requiring a permit
  - Principally no preventive protection of neighbours' rights

## 4.2. Repressive protection of neighbours' rights (1)

### Building law

- ▶ Principle: Comprehensive legal protection for the affected parties, but no actions challenging administrative decisions for the benefit of individual interests (*Interessentenklagen*) or popular actions
- ▶ Legal remedies against consent under building law by recourse to an administrative action for annulment (particularly with reference to the “principle of consideration”)
- ▶ In the case of approval by means of a legally binding land-use plan: judicial review pursuant to sec. 47 VwGO [Code of Administrative Court Procedure] (Consideration of neighbours' interests in the context of the planning assessment)
- ▶ Interim relief measures / temporary injunctions may also be attainable

## 4.2. Repressive protection of neighbours' rights (2)

### Immission control law

- ▶ Appeal against the approval under immission control law if one's own rights are infringed
  - In particular: the obligation to protect against / avert harmful impacts (sec. 5 subs. 1 no. 1 BImSchG) extending to third parties; the obligation to exercise due precaution (sec. 5 subs. 1 no. 2 BImSchG) which does not extend to third parties as a matter of principle
- ▶ Administrative action for obtaining a subsequent court order or an prohibitive injunction in the case of violations of provisions protecting neighbours' rights

## 4.2. Repressive protection of neighbours' rights (3)

- ▶ Protection of neighbours' rights under private law
  - Nuisance claims and claims for damages in case of an inadmissible impairment of property or other absolute rights (cf. sections 823, 1004 BGB [German Civil Code])
  - Harmonisation of neighbours' rights under private as well as public law by way of case-law
  - Unless public limit values are exceeded, impacts on the property must normally be tolerated (sec. 906 subs. 2 BGB)
  - In the case of an approval under immission control law, private-law claims requesting the shutdown of a plant are precluded (sec. 14 BImSchG)
  - De facto of secondary importance

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Thank you for your attention.

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