Questionnaire
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Access to Justice in matters of environmental law

Statement of
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Introduction

The topic of the 2013 Conference of EUFJE is access to justice in matters of EU environmental law.

The principle of effective judicial protection has been recognized as a general principle of EU law. The Charter of Fundamental Rights has incorporated in Art 47 the principle of effective judicial protection.

Art 9.1 and 9.2. of the Aarhus Convention provide for access to justice in cases involving environmental information, EIA and industrial permitting procedures and decisions. Art 9.3. of the Aarhus Convention aims at a wider access of justice requiring contracting parties to ensure members of the public have access to judicial procedures to challenge acts or omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. Art 9.4. of the Aarhus Convention requires that access to justice procedures should provide adequate and effective remedies, and be fair, equitable, timely and not prohibitively expensive

Several pieces of EU secondary legislation in the field of environmental law contain specific provisions on "access to justice" reflecting the requirements of Art 9.1 and 9.2 as well as Art 9.4. of the Aarhus Convention (cf. Art 11 EU EIA Directive and Art 25 Industrial Emissions Directive – IED).

The Court of Justice of the European Union (CJEU) has delivered a number of rulings on issues of access to justice in environmental matters both with regard to specific secondary legislation as well as with referral to rights of access based on general principles of EU law and in engagement with Art 9.3 of the Aarhus Convention (c.f. C-237/07, Janecek; C-263/08, Djurgarden; C-115/09, Trianel; C-240/09, Slovak Brown Bear; C-416/10, Križan). The relevant case-law of the Court is constantly evolving and raises challenging issues for national judges in applying EU law.

The Commission has commissioned a number of studies on the issue of effective justice and the implementation of Art 9.3 and 9.4 of the Aarhus Convention and in its proposal for a 7th Environment Action Programme it has identified a need to ensure that national provisions on access to justice reflect the case-law of the court. Moreover, it has reflected several options for a new commission initiative on access to justice. In June 2013 the Commission has launched a public consultation on options for improving access to justice at Member State level.

It is in the light of the relevant EU law, the Aarhus-Convention, the case-law of the CJEU and recent policy documents and political developments that the 2013 EUFJE Conference will tackle the topic of Access to Justice in environmental matters.

A. General Questions

Introduction: Access to Court in Germany – the Basics

In Germany an action shall only be admissible if - unless provided otherwise (1st alternative) - the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or omission (2nd alternative - Art 42 (2) Code of Administrative Court Procedure <Verwaltungsgerichtsordnung – VwGO>).

1. In the field of environmental law no other rules (1st alternative) are provided for **natural or legal persons**. They have to maintain the impairment of a subjective right. "Right" in this context always means a legal subjective right. No action is admissible against the infringement of mere political, cultural, religious, ecologic or economic interests.

In cases concerning the construction of infrastructure projects such as highways, railways, waterways and airports natural or legal persons who are to be expropriated because their property is needed for the project can contest the substantial and procedural legality of the plan which contains the permission of the project on all grounds. Their property right includes the right to full judicial review. In contrast, individuals who are affected by the operation of the project only (e.g. noise, air pollutants) do not have access to full judicial review. They can contest the plan only on the ground that a rule is infringed which protects their individual interest and not the public interests only. As far as they are affected they can, for example, claim that the plan does not observe the limit values for immissions of noise or air pollutants or that the limit values the plan is based upon do not protect their health sufficiently. Furthermore, the administrative courts acknowledge an individual right to have one's private interests possibly affected by the project fairly balanced against the public interest supporting the project. But individuals cannot claim that the plan infringes upon national or EU law which protects the public interests only. For example national and EU rules relating to nature protection and conservation are regularly construed as protecting the interests of the general public only. The FAC ruled that the Bird Directive and the Habitat Directive do not confer on individuals the right to question a decision on the ground that Article 4 (4) Directive 79/409/EEC or Article 6 (2), (3) and (4) Directive 92/43/EEC have been infringed (judgment of 26 April 2007 – BVerwG 4 C 12.05).

The principle of legal standing applies in the same way if an administrative permission of private projects is concerned. A natural or legal person (e.g. neighbour) is entitled to file a lawsuit only if an infringement of their individual rights is in question. A public action of individuals ("actio popularis") on behalf of the environment or an action to enforce rights of third parties is not admissible. In general, limit values for immissions are construed as protecting individual rights, limit values for emissions as protecting the public interest for precautionary reasons only. But if limit values for immissions are not available natural or legal persons can require the limit values for emissions to be observed.

2. For **NGOs** "other rules" (Art. 42 (2) 1st alternative) are provided. Recognized NGOs can file appeals against decisions concerning the admissibility of projects for which there may be an obligation to conduct an EIA and certain other decisions without

having to assert that their own rights have been violated (Art. 1 (1), Art. 2 (1) of the Environmental Appeals Act of 7 December 2006 <Umwelt-Rechtsbehelfsgesetz – UmwRG>). They only have to assert that the decision or failure to take it violates statutory provisions that protect the environment and that these provisions could be of importance for the decision. An NGO shall be recognized if

1. According to its bylaws, it predominantly, and not just temporarily, encourages the objectives of environmental protection;

2. It has existed for at least three years at the time of recognition and has been active as defined in number 1 during that period;

3. It offers guarantees of proper performance of its duties; the type and scope of its previous activity, its membership, and the effectiveness of the association must be taken into account in that regard;

4. It promotes public-benefit purposes as defined in Article 52 of the German Tax Code [Abgabenordnung]; and

5. It allows any person who supports the objectives of the association to become a member.

In addition NGOs which are recognized pursuant to Art 3 UmwRG may file appeals against certain decisions relating to the protection of nature independently of whether their inherent rights are violated or not (Art 64 of the Nature Conservation Act <Bundesnaturschutzgesetz – BNatSchG>). They can for example appeal if exemptions from requirements and prohibitions for protection of areas, in particular Natura 2000 sites, are granted.

1. What was the influence on your national legal order, if any, of the recent developments in the case law of the Court of Justice of the European Union (CJEU) on standing of individuals and/or NGOs (notably cases C-237/07 *Janecek*; C-263/08 *Djurgarden*; C 115/09 *Trianel*; C 240/09 *Slovak Brown Bear; C 416/10, Krizan*). Have environmental laws been amended? Please illustrate.

The CJEU's case law has been of utmost importance for the legislature as well as for the judiciary. Following *Trianel* the UmwRG (see introduction) was amended[1]. In the ambit of that statute recognized NGOs can now file appeals without being required to assert that the decision violates statutory provisions that establish individual rights. They only have to assert that the decision contravenes legislative provisions 'which seek to protect the environment, and which may be relevant to the decision' (Art 2 (1) UmwRG). Whether the statutory provision protecting the environment flows from EU or national law is not relevant. The lawmakers acknowledged that otherwise the law would still infringe upon Art 9 (2) of the Aarhus Convention (AC). For the influence on our national case law see question 2.

2. Have there been any changes in the jurisprudence of the national courts concerning standing of individuals and/or standing of NGOs as a result of CJEU's recent judgements? Have the courts in your country relied on the principle of effective judicial protection or used arguments about CJEU case law

[1] Gesetz zur Änderung des Umwelt-Rechtsbehelfsgesetzes und anderer umweltrechtlicher Vorschriften vom 21. Januar 2013, BGBl I S. 95

in order to widen up standing for individuals and/or NGOs in environmental procedures since the signing/ratification of the Aarhus Convention? If so, please illustrate.

In a recent judgment (5 September 2013 – 7 C 21.12) the Federal Administrative Court (FAC) ruled that not only natural or legal persons directly concerned by the risk that limit values or alert thresholds for air pollutants may be exceeded, but also recognised NGOs can require to draw up an air quality plan which is consistent with mandatory air quality rules. This was for the first time that the FAC granted access to court for an NGO in the field of Art 9 (3) AC. The court did not state that there was an "other provision" (see introduction) allowing NGOs to file appeals without having to assert that their rights have been impaired. The UmwRG does not apply to air quality plans which can be drawn up without implementing an EIA. The UmwRG was designed to transpose Art 9 (2) AC and Directive 2003/35/EC only. In the view of the legislative bodies there was no need to grant NGOs access to court in the field of Art 9 (3) AC. The FAC held that this view was no longer consistent with the findings and recommendations of the AC Compliance Committee which although not legally binding were of great importance for the interpretation of the Convention. According to the Compliance Committee national law may lay down criteria for granting access to court but these criteria cannot be so strict that they effectively bar all or almost all environmental organisations or other members of the public from challenging acts or omissions that contravene national environmental law. However, the FAC did not expand the UmwRG to all acts and omissions falling under Art 9 (3) AC. This would have been an interpretation contra legem which is not required by EU law. But the FAC construed Art 47 (1) of the Federal Immission Control Act (Bundes-Immissionsschutzgesetz – BImSchG), which transposes Art 23 Directive 2008/50/EC into national law, as conferring a subjective right to NGOs which are recognized pursuant to Art 3 UmwRG. Due to this right they can – as affected natural persons - require the drawing up of an air quality plan. It stated that the concept of "rights" in EU law is broader than it used to be in national law. In EU law subjective rights have never been confined to protect individual rights such as health and property; members of the public concerned have always been regarded as stakeholders to enforce environmental law in order to protect the environment as a whole. Therefore in the light of EU law the national concept of subjective rights had to be widened up. In *Slovak Brown Bear* the CJEU postulated that in proceedings falling within the scope of EU law NGOs should have wide access to court. Thus, Art 23 Directive 2008/50/EC and its transposition into national law (Art. 47 (1) BImSchG) have to be construed as conferring rights to them. But EU law and Art 9 (3) AC do not require subjective rights for all NGOs or even an "actio popularis". The Directive and the national statute confer rights to NGOs only if they are members of the "public concerned" (Art 2 (5) AC). In the field of air quality planning and Art 9 (3) AC in general, national law does not provide criteria which must be observed by NGOs to be members of the "public concerned". But with regard to the UmwRG it is clear that only NGOs which are recognised pursuant to Art 3 shall have access to court. The FAC found no indication that in the field of air quality planning the recognition criteria could be stricter than those of the UmwRG transposing Art 9(2) AC.

In another judgment the FAC decided on an appeal of an NGO against a federal motorway passing through residential areas of Berlin (judgment of 10 October 2012 – 9 A 18.11 – BVerwGE 144, 243). It was undisputed that the plan for this project fell under Art 9 (2) AC and the UmwRG; therefore the NGO had access to court. But under the UmwRG an appeal shall only be justified if the decision violates statutory provi-

sions "that protect the environment". The FAC held that this term does not encompass statutes which protect the environment as a whole only; it could rather be construed according to Art 3 EIA-Directive. Therefore the NGO's appeal was justified on the ground that the plan did not sufficiently provide for noise protection walls in favour of certain houses. Whether NGOs can question the substantive or procedural legality of decisions in the ambit of Art 11 EIA Directive under all – including non-environmental - aspects remained open.

3. What are, to your opinion, the main challenges for judges in your national legal system when it comes to access to justice in the field of environment and the development of the CJEU´s case law?

Since NGOs have access to court length and detailedness of party observations and administrative decisions have increased substantially. NGOs usually raise a great number of intricate questions, in particular questions of fact. In court cases are usually prepared by a reporting judge. There is no or very little staff that could assist him or her. In the FAC one research assistant (usually a lower instance judge in the beginning of his or her career) is assigned not to each judge, but to each Senate (5 or 6 judges).

In my view, the traditional case management in court and the human resources for it are not adequate for NGO lawsuits against huge projects which have been audited and authorized in a lengthy and complex administrative proceeding with a great number of expert opinions and observations. These cases are too complex, cumbersome and time-consuming for one single reporting judge. Instead, the report and the judgement should be prepared by a team of judges assisted by legal and technical staff. Up to now Parliament does not provide a budget for additional staff, but expects proceedings it deems of "national importance" finalized in short term.

4. Taking into account that access to justice in environmental matters is required to not be prohibitively expensive (cf. Art 25.4. IED; Art 11.4. EIA Directive, both reflecting Art 9.4. Aarhus Convention): How do you, all in all, evaluate the system of access to justice in your country when it comes to costs and liability for costs (e.g., court fees, lawyer´s fees, cost for administrative procedure, expert fees)? Do costs have a chilling effect in environmental litigation?

In Germany, the losing party shall pay the costs of the proceedings (Art 154 (1) VwGO). Costs are constituted by the court costs (fees and expenses) and the expenditure of the parties necessary to properly pursue or defend their rights, including the costs of preliminary proceedings (Art 162 (1) VwGO). So if the plaintiff wins his case he does not have any costs at all. On the other hand, if his action is finally dismissed he has to bear the court fees and the expenses for his lawyer, for the lawyers of his opponent and – quite often – a third party and the further necessary expenses of all parties all alone. If he cannot afford the fees for the court and the expenses he has a right to obtain legal aid.

The court and the lawyers fees are assessed on the basis of the value in dispute which usually is not higher than 30 000 € in NGOs lawsuits and 15 000 € in lawsuits filed by individuals (neighbours) who are affected by the operation of the project only; if they shall be expropriated the value in dispute is higher. In a first instance law suit at the FAC the court fees would sum up to 1 700 € (30 000 € in dispute) or 1 210 € (15 000 € in dispute), the fees for one lawyer to 2 525 € (30 000 € in dispute) or 1 909 € (15 000 € in dispute). In addition the losing party has to cover its own expenses and reimburse necessary expenses of the winning parties, for example for

copies, travel costs and accommodation for the oral hearing and expert fees. A court officer decides on the necessity of these expenses. In particular if experts were needed or if experts had to answer questions in the oral hearing, expenses can be higher than court and lawyers' fees; above all it is more difficult to calculate them.

All in all, I think that in Germany litigation costs are still reasonable; for individuals legal aid is available. In NGO proceedings the value in dispute, which is the basis for the fees, is assessed with regard to the public interest pursued by them. Of course, the resources of NGOs are limited. They have to focus on projects they deem crucial for the environment. But obviously they are able to litigate against nearly all major projects.

B. Examples:

The aim of the following examples is to facilitate understanding of standing rules and conditions for access to justice in the various legal systems. The aim is to illustrate how different countries provide for access to justice in environmental matters and to prepare a discussion on the topic. **Please highlight the specific aspects of your legal system without going to much into detail. If possible, please deal with all the examples.** *Please feel especially welcome to illustrate your answer by referring to examples of national case law.*

Example 1: The competent authority has adopted an action plan on air quality that will not adequately reduce the risk of exceeding EU air quality limits (contrary to relevant secondary EU law).

Questions Example 1:

B.1. What are the possibilities open for the public to legally challenge the plan and to ensure that an adequate plan is adopted and implemented? If any, who (individuals, NGOs, other) is entitled to challenge the plan? Is the appellant/plaintiff required to provide evidence on potential harm/damage and to specify the measures that should have been taken?

Natural and legal persons directly concerned by a risk that the limit values or alert thresholds for air pollutants may be exceeded, and recognised NGOs can file a lawsuit against the competent authority demanding either to draw up an air quality plan or to amend an existing air quality plan in order to make it consistent with mandatory air quality rules (see question A.2). They have to demonstrate that the immission values will not be observed. In addition, natural and legal persons have to substantiate that they are affected by the exceedance of the immission values. The claimants do not have to specify the actions that should have been taken. It is sufficient to call for an air quality plan providing the "necessary measures" (judgement of 5 September 2013 – 7 C 21.12).

The competent authorities shall take the necessary measures to ensure compliance with the immission values laid down in Directive 2008/50 EC (Art 47 (1) BImSchG). The competent road traffic authority shall restrict or ban motor vehicle traffic in accordance with relevant road traffic regulations, if such is provided for by a clean air plan or action plan (Art 40 (1) BImSchG). Individuals who are affected by the exceedance of the immission values are entitled to enforce these obligations (judgment of 29 March 2007 – 7 C 9.06 – BVerwGE 128, 279 para 21 – 27). Up to now there is no case law concerning the possibilities of NGOs to enforce the implementation of air quality plans. In my view, NGOs who are entitled to enforce the drawing up of air

quality plans should - for the same reasons - be entitled to enforce their implementation.

Example 2: The competent authority has issued a permit for an infrastructural construction project (e.g., a motorway, a power line or a funicular). Part of the site concerned is situated in a Natura 2000 area. In spite of a negative assessment of the implications for the Natura 2000 site, the competent authority agreed to the project for imperative reasons of overriding public interest (Art 6.4. Habitats Directive).

Questions Example 2:

B.2.1. Who (individuals, NGOs, other) is entitled to challenge this decision by legal means? In what way do individuals need to be affected by the decision in order to have standing? With regard to standing rules for individuals and NGOs, does it make any difference whether the project in the example is subject to an EIA or not?

Individuals are entitled to challenge the permit (in Germany infrastructural construction projects are usually authorized by the approval of a plan) with regard to Art 6 (4) Habitats Directive if they are to be expropriated for the project itself or for compensatory measures and if the usage of the Natura 2000 site can be relevant for the need to use the individual's property. If individuals will be affected by the operation of the project only they are entitled to challenge the approval of the plan alleging that the project does not comply with immission values protecting their health or property and that the interests of the affected neighbours have not been fairly balanced against the public interest supporting the project. But they cannot claim that the approval of the plan does not comply with Art 6 (4) Habitats Directive.

Recognised NGOs are entitled to challenge the approval of the plan including the decision under Art 6 (4) Habitats Directive if there "may be" an obligation to conduct an EIA (Art. 1 (1) UmwRG). That is not only the case if the project has to be subject of an EIA but also if a case by case examination is required to determine whether an EIA has to be implemented. I am not aware of any infrastructural construction project against which recognised NGOs did not have access to court.

B.2.2. Does an administrative appeal or an application for judicial review automatically have a “suspensive effect” on the decision at stake?

Art 80 of the Code of Administrative Court Procedure states that in general the objection (preliminary administrative procedure) as well as the legal action have suspensive effect. This can be overruled, however, by statute which is normally the case for matters concerning environmental issues. Seeking legal protection against potentially harmful projects in the field of environmental issues will therefore not inhibit construction works to realise the project.

In case there is no automatic suspension in your national legal order: Under which conditions can the appellant obtain a suspension of the permit decision for the infrastructural project? Are there other measures of interim relief available to prevent negative harm to the environment until the final decision has been taken? In case of an automatic suspension: Can the developer of the infrastructural project ask for a “go-ahead-decision” in your national legal order?

Third parties often seek interim relief against projects with environmental impact. Deliberating whether to grant interim relief or not the court considers the consequences

of the interim decision as to all public and private interests affected. It usually does not inhibit construction works if the plaintiffs' rights can be safeguarded by additional protection measures (e.g. noise protection walls and windows, operation restrictions) which do not question the project as such. Otherwise it will balance the interests in the specific case and decide case by case. In the past the FAC has repeatedly inhibited the beginning of construction works on important infrastructure projects such as the extension of the central Berlin airport (judgment 19 May 2005 – BVerwG 4 VR 1001.04) and – at the request of an NGO - the excavation of the Elbe (judgment of 17 October 2012 – BVerwG 7 VR 7.12).

Recently the UmwRG has been amended in order to modify the conditions for granting interim relief at the request of NGOs. According to Art 4a (3) UmwRG the court shall grant interim relief if balancing all circumstances of the case leads to serious doubts that the administrative act is lawful. This rule does not hinder to grant interim relief without reviewing the administrative act for "serious doubts" if at the time being the operator is not prepared to start construction works to realise the project (Judgment of 13 June 2013 – 9 VR 3.13). Further judgments interpreting Art 4a (3) UmwRG have not yet been issued.

Example 3: The competent authority has issued a permit and established permit conditions for an installation falling under the scope of the Industrial Emissions Directive – IED (e.g., a waste treatment facility or a tannery). The national permit procedure had been carried out in accordance with requirements on public participation (Art 24 IED).

Questions Example 3:

B.3.1. Are individuals in your country entitled to challenge the permit decision on the grounds that permit requirements of the IED have not been met: say, that the best available techniques have not been applied and energy is not used efficiently?

Individuals are entitled to challenge the permit decision on the ground that it does not safeguard the compliance with immission values or – if such values are not available – with emissions values protecting their health or property. I am not aware of judgments answering the question whether individuals can claim that the permit decision does not sufficiently oblige the operator to apply the best available technics or to use energy efficiently. I would assume that these requirements would be regarded as flowing from the precautionary principle and that therefore lawsuits of individuals would be dismissed.

B.3.2. Is an NGO entitled to judicial review of the permit decision, even if it did not previously take up the opportunity to participate in the decision-making procedure?

An NGO appeal can only be successful if the NGO has taken part in the decision-making process or has been denied access to the procedure (Art. 2 (1) No. 3 UmwRG). So if an NGO did not previously take up the – given - opportunity to participate, its appeal will be dismissed.

Example 4: Citizens are concerned about a landfill that has been granted permission but is obviously operating in breach of permit conditions. Samples that have been taken by an NGO indicate that

there is imminent danger of a drinking water source being contaminated. The competent authority is not taking any action.

Question Example 4:

Evaluate the possibilities of members of the public (individuals, NGOs) to ensure that (remedial) action is taken.

In Germany public bodies – often the municipalities - are responsible for the public water supply. The water supplier competent for the drinking water source in danger would be entitled to file a lawsuit against the competent authority and seek interim relief requiring that the competent authority takes all necessary actions by itself or against the operator of the landfill to stop the danger for the water source. As long as the water supplier remains able to deliver drinking water observing all relevant limit values by purifying or blending the water individuals will not be directly affected by the danger for the water source; therefore their lawsuits would be dismissed. If the public water supply were endangered, individuals affected by this danger would probably be entitled to require all necessary actions to stop the danger. But I am not aware of any judgments concerning such claims. In contrast, operators of landfills or other installations claim that the actions they have to take in order to protect the groundwater are not necessary and not proportional. As far as ground or drinking water might be endangered, law enforcement is at a high level in Germany.

According to the Environment Appeals Act (UmwRG) and the Nature Conservation Act (BNatSchG) registered NGOs would not have access to court. The required actions would not fall in the ambit of Art 9 (2) AC. It seems worth considering following the judgment of 5 September 2013 (see question A.2) to construe the water statutes as conferring subjective rights to registered NGOs. But again, the question is rather theoretical.