

“Transboundary Access to Justice for Environmental NGOs – the Legal Concept according to International, European and German Law”

Presentation given at the Workshop

**"Transboundary Access to Justice for Environmental NGOs"
of the German Federal Environment Agency (Umweltbundesamt)
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I. Access to Justice: Aarhus-Convention

Transboundary Access to Justice is one of the key ideas of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus-Convention). It was adopted on 25 June 1998 in the Danish city of Aarhus on the occasion of the Fourth Ministerial Conference in the 'Environment for Europe' process and came into force 30 October 2001.¹

The genesis of the convention took only two years. Especially due to proposals by the German delegation, the draft provisions concerning access to justice were modified in this process. The German position in the negotiations was based on the specific properties of the German system of administrative justice.

There are two models of legal administrative justice in Europe:

- Interest-based system: Access to justice is granted where an individual or a legal entity (including env. associations) has a sufficient interest – this is the model of the French system or the common law system like Great Britain.
- On the other hand, as in the German case, there are legal systems which entitle persons or entities to bring an action only for infringement or violation of a subjective right.² Granting access to justice and legal control based on interests alone would therefore have been new and “alien” to the German approach.

The German interventions resulted in the following amended final provision of the Convention (Art. 9 para. 2):

¹ United Nations, *Treaty Series*, vol. 2161, p. 447.

² The basic rule concerning access to justice is contained in Art. 42 para. 2 of the Code on Administrative Court Procedure which states that access is to be granted only in case a party can substantiate the infringement of a subjective right.

„Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
(a) having a sufficient interest or, alternatively
(b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,
have access to a review procedure (...).“

According to this Article access to a review procedure has a member of the public concerned who has a sufficient interest or, alternatively maintains an impairment of a right.

That means that the member states of the Aarhus-Convention are free to decide whether the claimant has to claim an infringement of a right or a sufficient interest. Germany achieved with this stipulation that the requirements of the German Code on Administrative Court Procedure (Verwaltungsgerichtsordnung) could continue to be applied.

But there is one exception regarding non-governmental associations mentioned in Art. 9 para. 2:

„To this end, the interest of any non-governmental organization meeting the requirements (...) shall be deemed sufficient for the purpose of subparagraph (a) above. Such organization shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.“

Consequently, a non-governmental organization meeting the general requirements under a party's national law (e.g. official recognition; certain fields of activity) enjoys access to justice without having to show the impairment of a right.

Conclusion: Aarhus Convention sees environmental NGOs as privileged claimants.

II. Implementation into EU-Law

The EU has transposed the Aarhus-Convention by two legal acts:

- access to justice in the member states is covered by the Council directive 2003/35/EC³ (concerning participation and access to justice for the public concerned). It modified the Council Directives of environmental impact assessment and the directive of *Integrated Pollution Prevention and Control*,
- directive 2004/35/EC⁴ (concerning questions of environmental liability duties to clean in case of environmental damage).

³ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC OJ L 156 of 23 June 2003, pp.17-25.

⁴ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage

Both directives foresee a request for an action for natural or legal persons.

- The European provisions have taken over nearly completely and verbatim Art. 9 para.2 of the Aarhus convention. That means that NGOs have access to a review procedure to challenge the substantive or procedural legality of decisions, acts or omissions which are subject to the public participation provisions of the directives.
- Precondition for the access to justice is that the NGO has a sufficient interest or maintains an infringement of a right. The EU-directives contain the exception for recognized NGO's mentioned above so that these can in particular not be held to the standard of claiming the violation of a right.

In addition, regulation 1367/2006⁵ contains rules on access to justice against acts of the European institutions or bodies. Access to justice is only possible after an internal review procedure has taken place.⁶

III. Transformation into German law

General approach before: access to justice for natural and legal persons restricted by the "subjective-rights"-requirement. A person who goes to an administrative court has to enforce an individual, subjective right. This subjective right also limits the extent and power of judicial review.

In Germany, two federal acts have been created with the aim of transforming the rules of the aforementioned directives and the Aarhus Convention into German law:

- Council directive 2003/35/EC has been transformed into German law by the Environmental Appeals Act (EAA) of 15 September 2006⁷ (one and a half year too late)
- Council directive 2004/35/EC has led to the creation of the Env. Damage Act (EDA) of 14 November 2007⁸ (half a year too late). The Act refers to the EEA with respect to rules for access to justice.
- Both are *lex specialis* in relation to Code of Administrative Court Procedure

Other remedies for NGOs in the field of the environment

OJ L 143 of 30 April 2004 pp. 56-75.

⁵ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies,

OJ L 264 of 25 September 2006, pp. 13-19.

⁶ Regulation 1376/2006, Art. 10-12.

⁷ Federal Law Gazette I p. 2816; currently the version of the act dating from 31 July 2009 which came into force 1 March 2010 (Federal Law Gazette I p.2585) is applied.

⁸ Federal Law Gazette part I p. 666.

- The Environmental Appeals Act is not the first act which foresees an association suit. The German law has already known association suits since 1979 in the area of nature conservation law.⁹
- The type of remedy created by the EEA differs substantially from the remedies accessible for associations in the area of nature conservation law.
- the association suit according to the Environmental Appeals Act extends on one hand the categories of projects that can be subject to remedies brought by environmental associations. Nature conservation law mainly allowed remedies against planning approvals for large infrastructure projects and exemptions from the regime on protected areas. The EEA in addition allows for remedies against construction and operation permits of classified industrial facilities for which an environmental assessment is mandatory as part of the permitting procedure
- on the other hand, the EEA contains more restrictive prerequisites with respect to standing and the extent of judicial control than the Federal Nature Conservation Act.
- Since March 2010, the recognition procedures for nature conservation associations and general environmental associations have been unified.¹⁰ Foreign associations can as a result now explicitly be recognized also in the field of nature conservation law¹¹

IV. Preconditions for a legal action under the Environmental Appeals Act

- The association has to be formally recognized by the Federal Environmental Agency
- The decision attacked must fall into the limited categories of projects that can be subjected to review (e.g. industrial facilities)¹²
 - Claims can also be brought against projects in the Exclusive Economic Zone and on the Continental shelf (e.g. offshore wind energy projects)¹³
- The association must have participated accessory in the administrative procedure concerning the project approval. Arguments and concerns that have not been presented in the administrative procedure are precluded in the

⁹ They first were introduced by the Länder over several years, in 2002 the federal legislator created a federal rule on association suits rooted in the Federal Act on Nature Conservation (Bundesnaturschutzgesetz); currently Art. 63 and 64 of the act contain the rules on association suits.

¹⁰ See now Art. 3 of the EEA.

¹¹ A foreign association recognized by the UBA can then only raise remedies against projects approved on the federal level (Art. 63 para. 1, 64 para 1,2 of the Federal Act on Nature Conservation).

¹² Art. 1 para. 1 EEA.

¹³ Art. 1 para 2 EEA.

judicial review¹⁴

- Tests to be passed to gain standing¹⁵
 - association has to claim the infringement of a legal rule protecting subjective rights¹⁶
 - legal rule must (also) intend protection of the environment
 - infringed rule must (potentially) have been relevant for the decision that taken by the authorities
- The extent of judicial control is also limited
 - Art 2 para. 5 of the EEA mirrors the requirements for standing
 - Project decision must be in breach of legal rules
 - (also) intending the protection of the environment
 - protecting subjective rights
 - relevant for the decision by the public authorities
 - special rules in case the remedy concerns a zoning plan
 - no control of 'objective' rules protecting the general public interest
 - for a foreign associations this means that it has to know the subjective rights in German environmental law in order to evaluate the prospects of a potential lawsuit.
 - Subjective rights controlled by the courts are for example contained in the Federal Immission Protection Act, where the court will control the infringement of technical „threshold values“ which define in detail the subjective right of the neighbours to be protected from harmful influences. The infringement of other rules, for example nature conservation law and precautionary rules, will not be controlled by the courts.
 - Example case: *The competent authority releases a planning permission for a motorway with the following stipulation: Forest clearing could not begin until the end of the breeding season. In fact the project in fact begins with forest clearing before the end of the breeding season which constitutes an infringement of nature conservation law.*
An environmental association recognized under the EEA files a lawsuit with the aim of stopping the forest clearing. The federal administrative court decided that the lawsuit is not legitimate. The law which was infringed was an objective right, it was nature conservation law and not a subjective right.
- no isolated control of an infringement of a procedural rule
 - The EEA only allows for the judicial control of procedural errors only in case of a total failure of the authorities to conduct an environmental assessment¹⁷

¹⁴ Art. 2 para. 3 EEA.

¹⁵ Art. 2 para 1 EEA.

¹⁶ The courts and legal scholarship tend towards the opinion that this does not require the existence of a third persons the rights of which actually infringed; see Higher Administrative Court of Hesse (Kassel), ruling of 16 September 2009, case no. 6 C 1005/08.T; Schlacke, *Überindividueller Rechtsschutz*, 2008, p. 288; it is completely undisputed that it is not required for the association to have been instructed by a third person.

¹⁷ Art 4 EEA.

- Apart from that, procedural errors can only be claimed in case they are the cause of the infringement of a subjective right.
- prohibition of claims concerning the same matter in dispute¹⁸
 - It is not allowed to raise a claim concerning a matter in dispute which is already pending in or ruled by another court.
- the association must have legal capacity
- NGOs have to act through their legal representative(s)

V. **Costs of proceedings in administrative courts**

Court fees for remedies by environmental associations are comparatively moderate:

The German catalogue of the value of claims in administrative courts¹⁹ sets out (non-binding, but usually respected) values for administrative remedies. It foresees for environmental association claims a minimum value of EUR 15.000.-; it can be set higher by the acting court in case the interest defended by the association is deemed to have higher value.²⁰ If it is higher the court fees rise on a diminishing scale.

A value of EUR 15.000 results in court fees of

- EUR 726 on the first level of jurisprudence
- EUR 968 on the appeal level (additional)
- EUR 1210 on the revision level (additional)

This does not include fees for specialized lawyers and/or private technical experts, which can be much higher.

The fees for preliminary proceedings usually are 50 percent of the cost of main proceedings. If both types of proceedings are pursued in parallel, the respective fees have to be added.

VI. **Average duration of administrative court proceedings in selected Länder**

The graph below shows different durations of proceedings in **selected Länder – Bavaria, Lower Saxony and North Rhine-Westphalia**.²¹

¹⁸ Art. 1 para. 1 sentence 5 EEA.

¹⁹ The catalogue was drafted by a working group of judges from administrative courts and is not formally binding; it is occasionally updated, most recently in 2004; see catalogue e.g. at: <http://www.justiz.nrw.de/BS/Hilfen/streitwertkatalog.pdf>.

²⁰ See No. 1.2 of the catalogue on the value of claims in administrative court proceedings, 2004.

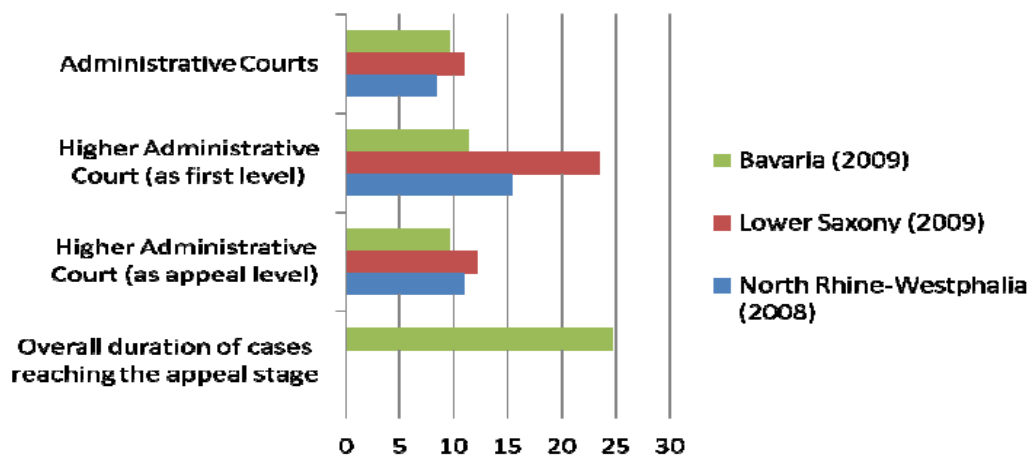
²¹ See the respective statistics online:

Bavaria:

<http://www.statistik.bayern.de/veroeffentlichungen/download/B6300C%20200900/B6300C%20200900.pdf>;

Lower Saxony:

<http://www.oberverwaltungsgericht.niedersachsen.de/download/46019>;



- The average duration of a proceedings before Administrative Courts is about 10 to 15 months for the first level of jurisprudence (Verwaltungsgericht or Oberverwaltungsgericht).
- The duration of proceedings on the appeal level (Oberverwaltungsgericht) is about 10 months.
- The overall duration of cases reaching the appeal stage is about 25 month in Bavaria (no detailed data published for the others).
- The diagram does not include the revision level which takes an additional 1 to 3 years.
- In some Länder and with respect to certain projects an administrative review is mandatory before access to the courts is possible; it may also be time-consuming.
- The time taken by proceedings concerning environmentally relevant projects can differ on a rather wide scale, depending on the complexity of a matter, the results of preliminary proceedings, negotiations on the project or delays of the project.

VII. German Environmental Appeals Act as a violation of European law

The German transformation acts have to be seen as contradictory to European law

- The Administrative High Court of North Rhine-Westphalia referred this question to the European Court of Justice by way of the preliminary ruling procedure (Case 115/09)²²
- The case is still pending, ruling to be expected in late 2010/early 2011
- The parties of this case are the German Association for Environmental and Nature Protection in the Federal State of North Rhine Westfalia (BUND) and the local government in Arnsberg.
- Case concerns a preliminary permit and the initial partial permit for construction of the coal-fired power plant in Lünen which were granted under the Federal Immission Protection Act. The plant is projected to start producing electricity in 2012.
 - In the immediate neighbourhood of the plant there are no less than five European nature conservation areas (so-called fauna-flora-habitat conservation areas). The wastewater feed-in point is located within one of these conservation areas.
 - The BUND is mainly claiming a violation of the precautionary principle set out by the laws governing nature conservation and water protection.
 - The administrative high court is of the opinion that such a violation can be substantiated, but had doubts as to the extent of standing BUND enjoys with respect to this kind of violation.
 - BUND argues that they have standing based on the Environmental Appeals Act. This is doubtful if only German law is taken into account, as the claimed infringements do not constitute violations of subjective rights, but rather violations of objective norms intended to protect the public interest.
- My opinion in this question is very clear: because of the wording and the aims of the Aarhus-Convention and the EU-Directives the German restriction of standing is contradictory to European law.

VIII. **German Environmental Appeals Act as a violation of European law**

- Although Germany knows meta-individual actions for NGO's it transformed the European provisions as a new version into national law. The German legislator invented a new model of association claims:
 - for access to justice it is not necessary for associations to proclaim the infringement of a subjective right *of their own* – that would be the requirement of „normal“ standing according to the code of administrative court process,
 - But they have to prove that there is another subjective right in conflict with the project.
- That means that an associations cannot claim the infringement of objective rules like the laws on nature conservation law but only the infringement of property rights or health. This excludes a substantial part of the body of

²² OJ C 46 p. 26.

(European) environmental law from access to justice and judicial control which is against the purposes of the directives.²³

- The German legislator will have to modify the German Environmental Appeals Act in order to bring it in accordance with European Law. Details on the requirements of European Law and the Aarhus Convention will result from the preliminary ruling of the ECJ.

²³ See Schlacke, *Überindividueller Rechtsschutz*, 2008, p. 306.