SRU German Advisory Council on the Environment

Access to Justice in Environmental Matters: The Crucial Role of Legal Standing for Non-Governmental Organisations

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Contents

Access to Justice in Environmental Matters: The Crucial Role of Legal Standing for Non-Governmental Organisations

1 The Situation

1. For some thirty years or more, there have been calls in Germany for non-governmental organisations (NGOs) to be given legal standing at federal level to ensure correct application and enforcement of environmental law.[1] The German Advisory Council on the Environment (SRU) has long advocated such legal standing for NGOs,[2] emphasising in particular that the right to bring a representative action in no way constitutes privileged treatment of environmental interests. Rather, it redresses the inequalities of a legal protection system that places the interests of environment users above those of environment protection.[3] The Council maintains its position and sees representative action as a much-needed form of legal standing for public interests that have up to now been unenforceable before the courts.

2. When the Federal Nature Conservation Act (BNatschG) was drawn up in 1976, calls for the introduction at federal level of legal standing for NGOs were rejected. A range of subsequent legislative initiatives[4] have suffered a similar fate. Germany's Länder (states) – with the exception of Baden-Württemberg, Bavaria and Mecklenburg West Pomerania – all grant representative action rights to a greater or lesser degree in their respective nature conservation legislation.[5] At federal level, however, it was only in 2002 – and with opposition from Baden-Württemberg, Bavaria, Hamburg, Hesse, Saarland, Saxony and Thuringia[6] – that para. 61 of the Federal Nature Conservation Act was introduced to provide limited rights to take representative action in environmental matters. To date, there is no further provision for environmental protection and nature conservation interests to be defended before the courts by bringing an altruistic representative action entirely divorced from individual interests.

3. As laid down by the Aarhus Convention (UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters), Germany is now required by international law to make it significantly easier for NGOs to legally challenge environmental decisions. Corresponding provisions under European law will step up the pressure to ensure this requirement is implemented. The first two pillars (Access to Information and Public Participation) of the Aarhus Convention have already been transposed into binding EU law with the enactment of EU Directive (2003/4/EEC) regarding public access to environmental information and EU Directive (2003/35/EEC) regarding public participation. Both directives contain, moreover, provisions on access to justice for violations of access to information law, legal breaches in proceedings involving environmental impact assessments (EIAs) and issuance of permits for industrial installations. This constitutes partial implementation of access to justice in environmental matters, which is the third pillar of the Aarhus Convention. Further implementation of this third pillar is planned

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1 Rehbinder et al., 1972; more recently Pernice and Rodenhoff, 2004, p. 150; Calliess, 2003; Schmidt and Zschiesche, 2003, p. 22; Rehbinder, 2001, p. 366; Jarass, 2000, p. 952; Wegener, 2000.

2 SRU, 2004, Para. 201; 2002, Para. 181; 1996, Para. 705; 1994, Para. 464; 1978, Para. 1512 et seq.; 1974, Para. 650 et seq.

3 SRU, 1996, Para. 705.

4 For example: Bundestagsdrucksache 10/2653 (SPD), 10/1794, 11/1153, 13/9323 (Die Grünen or Bündnis 90/Grüne). With the demise of the Environmental Code (UGB) in 1999, the introduction of representative action rights into federal legislation in response to a recommendation by the Independent Commission of Experts failed once again (see BMU, 1998).

5 SRU, 2004, Para. 195.

6 Bundesratsdrucksache 65/1/02.

with the Commission's proposal for a directive on access to justice in environmental matters, which entails expanding judicial review procedures to all provisions contained in European environmental law.[7]

4. Some of the main opposition to the Commission's proposed directive comes from Germany, where scepticism towards representative action abounds.[8] While the former Conservative-Liberal coalition government refused to sign the Aarhus Convention even after having applied considerable pressure to influence its wording, the present Red-Green coalition government has at least seen fit to make Germany a signatory state to this international agreement. The introduction under para. 61 of the Federal Nature Conservation Act of limited legal standing for NGOs at federal level signals some willing to follow the international trend. Nevertheless, Germany – not just as a member of the former EU-15, but of the expanded EU-25[9] and when compared to the US[10] – lags behind when it comes to the legal standing of public interests in matters of environment protection and nature conservation and their defence before the courts. Furthermore, and in obvious contrast to the trends at European and international level, some of Germany's federal Länder presently restrict the right to take representative action to nature conservation law at Länder level.[11]

This is a situation that is no longer acceptable in the light of the enforcement shortcomings in environmental legislation, practical experience with legal standing for NGOs and the need to grant legal standing to allow 'a level playing field' where public interests are concerned. The requirements of both the Aarhus Convention and EU legislation are thus to be welcomed without reserve.

2 Legal Standing for NGOs as a Remedy for Enforcement Shortcomings: Outcomes of Empirical Research

2.1 Shortcomings in the Enforcement of (European) Environmental Law

5. In justifying its proposal for a directive on access to justice in environmental matters,[12] the EU Commission rightly points to the need for judicial controls to reduce shortcomings in the implementation of EU environmental law. Enforcement shortcomings of considerable scope are especially evident in environment protection and nature conservation law. This is confirmed in the EU Commission's annual surveys on implementation and enforcement of EU environmental law,[13] which report on the many environment-related treaty violation proceedings initiated by the EU Commission against Member States and which it has successfully taken before the European Court of Justice (ECJ). The reports also contain implementation statistics compiled by the EU Commission, in which Germany ranks in the lower mid-field.[14]

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7 EU Commission, 2003.

8 See Krämer, 2004; Schrader, 2004; SRU, 2002, Para. 175.

9 Dross, 2004, p. 155; de Sadeleer et al., 2003, p. 21 et seq.; Jendroska, 2002; SRU, 2002, Para. 155; see also Schoch, 1999, p. 465; Woehrling, 1998, p. 464.

10 On extensive public interest and civil action rights in the US, see Blume 1999; Kokott and Lee, 1998, p. 235 et seq.

11 See SRU, 2004, Para. 196.

12 EU Commission, 2003.

13 See EU Commission, 2002; 2003a, 2004.

14 See the respective annexes to the referenced EU Commission annual surveys and also EU Commission, 2003b.

6. One of the main causes of the shortcomings in enforcement is the lack of enforcement controls in environmental law.[15] While under competition law, EU citizens – as decreed by the ECJ – have had the right since the 1960s to make direct use of Article 28 EC Treaty in matters concerning realisation of the internal market and may take any violations before the ECJ,[16] suspected violations of environment protection provisions do not necessarily give rise to a similar right to file a claim with the court. Although ECJ decisions on EU environmental law would appear to lean towards greater recognition of subjective rights,[17] this does not alter the fact that in environment protection and nature conservation there are often no individual entities who are able to act in their own interests and defend their personal rights and so take action before the courts to demand enforcement.[18, 19]

Treaty violation proceedings initiated by the EU Commission and taken before the ECJ under Article 211 and 226 EC Treaty are of course an important resource in enforcing implementation of EU law. But they are not sufficient to effectively combat and ensure sustained remedy of any shortcomings in enforcement in the various Member States. As an instrument of centralised control, they have inherent structural weaknesses.[20] EU law is for this reason based on the concept of decentralised enforcement and control.[21] In competition law, the competitor's right to take legal action has proven to be a sound instrument of such decentralised control.[22] Similar effects can be achieved with legal standing for NGOs in environmental law, as shown by the practical experience gained in a number of countries.

2.2 Practical Experience with Legal Standing for NGOs

7. Where environmental matters are concerned, legal standing for NGOs can serve as a decentralised instrument of control and make a significant contribution to eliminating the shortcomings in enforcement. Practical experience with legal standing for NGOs at international level and at Länder (state) level in Germany has been overwhelmingly positive. Representative actions have proven to be significantly more successful than the average number of cases taken before the judiciary. Thus, the anticipated flood of claims, over-burdening of the courts and disproportionate blocking or delay of important (infrastructure) projects caused by public interest groups making unjustified use of legal protection provisions for the sake of sheer obstructiveness must be seen as empirically disproven.

8. The German Advisory Council on the Environment's Environmental Report 2002 contained the results of a study conducted on representative actions at Länder level during the period 1997 to 1999.[23] The study showed that 28.4 per cent of representative actions brought by officially

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15 Dette, 2004, p. 5; EU Commission, 2003, p. 3; Krämer, 1996, p. 12 et seq.

16 Krämer, 2004; see also EU Commission, 2003, p. 2.

17 See, for example, ECJ Case C-131/88 on groundwater, [1991] ECR I-825, 867; Case C-361/88 on sulphur-dioxide/sulphur particulates, [1991] ECR I-2567, 2601; Case C-59/89 on lead, [1991] ECR I-2607, 2631, see also Sach and Simm, 2003, No. 59; Schoch, 1999, p. 464; Gale, 1997; Wegener, 1996.

18 Pernice and Rodenhoff, 2004, p. 150; Krämer, 1996, p. 7 et seq.; Marcrory, 1992, p. 367 et seq. and No. 3.

19 Except in the case of noise and air pollution, where individual rights may be enforced where specific thresholds are exceeded.

20 Sach and Simm, 2003, No. 43 et seq.; Epiney and Sollberger, 2002, p. 232; Krämer, 1996, p. 9 et seq.; Winter, 1996, p. 107 et seq.

21 Epiney and Sollberger, 2002, p. 344; Wegener, 1996, p. 150 et seq.; Pernice, 1990, p. 423; see also ECJ Case 26/62 - van Gend & Loos, [1963] ECR 3.

22 Krämer, 2004, 1996, p. 7; Pernice and Rodenhoff, 2004, p. 150.

23 SRU, 2002, Para. 156 with reference to Blume et al., 2001.

recognised environment protection and nature conservation organisations during the period studied were either entirely successful or partially successful. In contrast, statistics for 1998 on the total number of cases brought before the administrative courts showed that only 20 per cent were either fully or partially successful. Omitting the partial successes, only 7.5 per cent of administrative judicial proceedings overall versus some 14.8 per cent of representative actions were successful. Similar findings resulted from a study covering the period 1996 to 2001. Cases that were either successful or partially successful at final instance level amounted to 26.4 per cent.[24] Incorporating all decisions alongside those made at final instance level, including those involving injunctive relief, the combined success/partial success rate rises to as much as 30 per cent.[25] The anticipated flood of claims failed to materialise, even in those Länder whose nature conservation legislation contains broad legal standing for NGOs. What the study in fact showed was that – if only due to their scarce resources – NGOs think very hard before taking legal action.[26]

9. Similar results were obtained in a study on Access to Justice in Environmental Matters,[27] a legislative comparison compiled for the EU Commission as part of the consultation process for its proposed directive on access to justice in environmental matters. The study looked at the numbers and outcomes of altruistic representative actions involving environment protection issues over a six-year period (1996 – 2001) in Belgium, Denmark, England and Wales, France, Germany, Italy and Portugal. Although the types of legal standing for NGOs differed greatly between the various Member States, it is nevertheless possible to draw a number of significant conclusions.[28] In the main, legal standing is granted in all areas of environmental law, with any restriction to specific nature conservation provisions being unique to Germany. Only 115 representative actions were brought before the courts in Germany during the period 1996 to 2001, making up a mere 0.0148 per cent of administrative judicial proceedings overall.[29] Even in cases where the number of representative actions involved a tangible share of environment-related proceedings, such as in France (1197 public interest appeals during the period 1996–2001) and in the Netherlands (4000 public interest appeals in the same period), there was no evidence of the courts being overburdened.[30] In fact the cost-related risk and the time and effort involved in taking a case to court forced NGOs to demonstrate great caution when exercising their access to justice rights. Once they had decided to take legal action, their decisions were generally well-founded. Although the success rates varied between the eight Member States, environment-related representative actions were extremely successful on the whole.[31] The proportion of (partially) successful representative actions during the period covered by the study amounted to 56.5 per cent in France, between 40 and 50 per cent in the Netherlands, 46 per cent in Portugal, around 39.4 per cent in Belgium, 39 per cent in Great Britain, 34 per cent in Italy and 26.4 per cent in Germany (no reliable statistics were available for Denmark).

10. The situation is similar in Switzerland. In a review published by the Swiss Agency for Envi-

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24 Schmidt et al., 2004, p. 33.

25 Schmidt et al., 2004, p. 33.

26 Schmidt et al., 2004; Blume et al., 2001; see also Seelig and Gündling, 2002, p. 1035 et seq.

27 De Sadeleer et al., 2003; see also Dross, 2004, p. 154 et seq.

28 Differences exist in particular with regard to the preconditions for access to justice for non-governmental organisations, the degree of judicial control, organisation of the courts and the opportunity for injunctive relief.

29 De Sadeleer et al., 2003, p. 4 et seq.

30 De Sadeleer et al., 2003, p. 3, 5; see also Busson, 2001, p. 59.

31 De Sadeleer et al., 2003, p. 6 et seq., 33.

ronment, Forests and Landscape on representative action rights, which Switzerland grants in connection with projects for which an environmental impact assessment is required, the success rate for representative actions taken before the courts covered by the study was 1.5 times higher than the average for administrative judicial proceedings overall and some 3.5 times higher in cases taken before Switzerland's Federal Supreme Court.[32]

11. Against this backdrop, it is hardly surprising that the mere existence of the option to exercise (broad) representative action rights has a preventive effect in that it forces public authorities into more consistent enforcement of (national and European) environmental law.[33] The German Advisory Council on the Environment has observed this as being the key impact of legal standing for NGOs, because the potential for environmental interests to be enforced puts pressure on public authorities to give adequate consideration to environmental needs in their decision-making.[34] If (more) appropriate weighting is given to environmental interests when compared with private economic interests and if this allows NGOs the possibility of defending those environmental interests by bringing a representative action before the courts, then the prospect of a judicial review influences administrative decisions right from the outset. A closer look at the causes of the shortcomings in enforcement of environmental law actually highlights a certain imbalance where legal standing is concerned.

3 The Relevance of the Judiciary: Equality for Public Interests

12. In Germany, those who seek to exploit the environment have the right to protect themselves from infringements of their personal liberty, and permit holders, for example, have the right to legally challenge administrative provisions on environment protection. But those who seek to protect the environment are often denied the legal standing to take action based on specific provisions of environmental law. If no impairment of individual rights is established, then under para. 42 (2) of Germany's Federal Code of Administrative Procedure (VwGO) the right to take a claim before the administrative courts is denied. Environment protection standards can only be enforced in the courts if an objective violation of those standards could lead to a legally recognised impairment of individual rights, particularly those involving health and property. Also, while the legislature provides for individual rights to protect people against risk, this does not take in preventive standards contained in environmental law, such as para. 5 (1) No. 2 of the Federal Immissions Control Act (BImSchG).[35] This is also meant to apply in cases where harm to individuals or their property is evident.[36]

Environmental law designed to manage the commons thus perpetuates an imbalance in the legal standing of individual 'users of the commons' on the one side and individual 'protectors of the commons' on the other.[37] Essentially, the problem lies in the lack of individual claimants, not just in matters of nature conservation. Though

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32 Flückinger et al., 2000, p. 42.

33 Dette, 2004, p. 12; European Economic and Social Committee, 2004, Section 3.1; de Sadeleer et al., 2003, p. 12 et seq., 33 et seq.; Schmidt and Zschiesche, 2003; EU Commission, 2002a, p. 6; SRU, 2002, Para. 156; Flückinger et al., 2000, p. 137 et seq., 157 et seq., 165 et seq.; on the preventive effect in promoting enforcement see also Führ et al., 1994; Winkelmann, 1994, 1992.

34 SRU, 1996, Para. 705.

35 See, for example, Federal Administrative Court (BVerwGE) 61, pp. 256, 267; 65, p. 313, 320.

36 See also the critique by Wegener, 1996, p. 148 et seq.

37 Sach and Simm, 2003, Section 44 No. 65; EU Commission, 2002a, p. 5; Schoch, 1999, p. 458; Wegener, 1998, p. 36; 102; 1996, p. 148; Lübbe-Wolff, 1996, p. 102 et seq.; SRU, 1996, Para. 705; Wolf, 1994, p. 3 et seq.

safeguarding nature conservation by environmental organisations might be extremely important, there are also other areas of environment protection in which public interests cannot be defended before the courts by individual claimants. This is obviously the case with climate protection and pollution control when dealing with CO_2 and other greenhouse gases and long-distance pollution. It also applies equally well, for example, to issues of water conservation, water pollution control and marine environment protection. The lack of protection, which would effectively be universal in nature conservation law were it not for the option to take representative action, exists in a similar way in many other areas of environmental legislation.[38] Likewise, with the exception of para. 61 of the Federal Nature Conservation Act (BNatSchG), there is no provision for judicial review other than by exercising the individual rights granted under para. 42 (2) of the Federal Code of Administrative Procedure (VwGO).

13. Yet, the exercise of control and consideration of public interests in administrative decisions as performed by an independent court is essential in a state governed by the rule of law. It is a misconception that decisions made for the public good, such as those involving environment protection and nature conservation, lie solely and finally with public authorities and that only individual interests may justifiably be granted legal standing. Public authorities themselves often face a direct conflict of interests and are also under pressure to achieve results, which at the very least might put their neutrality into question.[39] And with the widely observed reduction in administrative capacities, the almost unavoidable softening of enforcement will doubtless occur most visibly in those areas where judicial controls are absent. In this arena of tension, the judiciary can and must act as a neutral, independent adviser to public authorities to avoid any possibility of inappropriate influence. The fact that certain decisions that touch upon public interests are not subject to judicial controls must not be allowed to detract from the idea of the separation of powers.

Because the final instance in deciding on representative actions lies with an independent judiciary, altruistic defence of environment protection and nature conservation interests before the courts can hardly be equated with notions of private organisations usurping the state's responsibility to act in the public interest.[40] In real terms, the granting of a more active role to the public or, in compliance with specific criteria, to recognised organisations in the enforcement of environmental law and thus the enforcement of public interest in an intact environment mirrors the trend towards a modern pluralistic political system.[41]

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38 SRU, 2002, Para. 161.

39 See also Calliess, 2003, p. 100.

40 But see Möllers, 2000; Ipsen, 1999, and also Breuer, 1978; Weyreuther, 1975.

41 See also Dette, 2004, p. 4; SRU, 2002, Para. 155; Rehbinder, 2001, p. 366; Rehbinder and Loperena, 2001, p. 286; Wegener, 2000.

4 Legal Standing Under the Aarhus Convention

14. The third pillar – Access to Justice – of the Aarhus Convention contains the following requirements for signatory states to provide legal standing to recognised non-governmental organisations:

4.1 Legal Protection Against Violation of Access to Information Rights

15. Article 9 (1) of the Aarhus Convention requires that any person whose right under Article 4 to access environmental information is impaired be given access to a review procedure in order to provide for the enforcement of such rights in practice. The Aarhus Convention neither links access to justice to specific interests nor does it stipulate any preconditions. NGOs are deemed to have equivalent standing to individual citizens.[42]

4.2 Legal Protection Against Violation of Public Participation Rights

16. With regard to the practical implementation of access to public participation, Article 9 (2) requires that 'the public concerned' be given access to a review procedure by a court of law to allow them to challenge decisions on specific issues made under Article 6, meaning procedures to approve new installations and infrastructure projects under the directives on Integrated Pollution Prevention and Control (IPPC) and Environmental Impact Assessment (EIA). In Germany, this includes permits issued under the Federal Immissions Control Act (BImSchG) and decisions on roads, railways and waterways made under applicable planning laws. Article 6 also refers to other activities subject to national law which may have a significant effect on the environment.[43]

17. Access to a review procedure under Article 9 (2) is not limited to the impairment of public participation rights. Apart from the review procedure itself, the public also has the right to challenge the substantive and procedural legality of the decision under review.[44] The provisions of Article 9 (2) extend significantly beyond the 'mere' provision of public participation rights. This aspect is often overlooked.

18. Environmental NGOs who fulfil the requirements of national law are members of 'the public concerned' and thus enjoy the same rights.[45] Under Article 9 (2), access to a review procedure before a court of law may be made subject to the public concerned having a sufficient interest (sub-para. (a)) or maintaining the impairment of a right, where the administrative procedural law of a Party requires this as a precondition (sub-para. (b)).[46] The contracting parties are not however entirely at liberty to define what is deemed sufficient interest and what constitutes an impairment of a right under national law:

Article 9 (2) 2 sentence 2 and Article 2 (5) second half-sentence state that, within the scope of

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42 See the definition of 'the public' in Article 2 (4) of the Aarhus Convention and also the UNECE Aarhus Convention Implementation Guide (p. 125).

43 Reference to national law affords the Parties an element of flexibility. Nevertheless, a general exclusion of optional projects not listed in Annex I to the Aarhus Convention would not be compatible with the requirements of the Convention, see Epiney, 2003, p. 178; see also ECJ Case C-301/95, [1998] ECR I-6135, on interpretation of the EIA Directive between installations subject to the obligations set out in the EIA and other installations.

44 See also the Implementation Guide on Article 9 (2), p. 128: „The public concerned within the meaning of the paragraph can challenge decisions, acts or omissions if the substance of the law has been violated (substantive legality) or if the public authority has violated procedures set out in law (procedural legality)", and Epiney and Sollberger, 2002, p. 327.

45 See the definition in Article 2 (5) first half-sentence in conjunction with Article 2 (5) second half-sentence.

46 See the Implementation Guide on Article. 9 (2), p. 129: „Paragraph 2 (b) was devised for those countries with legal systems that require a person's right to be impaired before he or she can gain standing. (...) Where this is already requirement under a Party's legal system, both individuals and NGOs may be held to this standard."

their statutory activities, the interest of any NGO recognised under national law is deemed sufficient within the meaning of Article 9 (2) (a) for them to be granted access to justice.

Further, Article 9 (2) subparagraph 2, third sentence explicitly deems NGOs as having rights that are capable of being impaired when engaging in their statutory activities.[47] A restriction to specific individual rights cannot be interpreted from the wording of the provision.[48] It would in any case contradict both the object and purpose of the Aarhus Convention.[49] Provision must thus be ensured for review of both the substantive and procedural legality of environmental decisions in their entirety and not just of one specific aspect of a decision.[50] This will be difficult to achieve if cases can only be brought for specific environmental provisions. Environmental law has no hierarchy which would predetermine that certain legal provisions are more 'enforceable' than others. With regard to NGOs, Article 9 (2) subparagraph 2, first sentence expressly refers to 'giving the public concerned wide access to justice'. This can only be provided to recognised NGOs through 'access-friendly' mechanisms.

19. The Aarhus Convention should not result in a widening of the gap between those legal systems that merely require a sufficient interest as a precondition for access to justice and those that contain a stricter definition requiring that a person's right be impaired before he or she can gain legal standing, whereby the former must by default assume that NGOs have a sufficient interest while the latter may maintain their restrictive legal system unchanged:

'However, Parties must provide, at a minimum, that NGOs have rights that can be impaired. Meeting the Convention's objective of giving the public concerned wide access to justice, moreover, will require a significant shift of thinking in those countries where NGOs have previously lacked standing in cases because they where held not to have maintained impairment of rights.'[51]

A general exclusion of recognised NGOs from access to justice by means of an appropriate restrictive definition of the 'impairment of a right' cannot be maintained for much longer. The time has come to introduce broad legal standing for NGOs in all instances covered by Article 6.

4.3 Legal Protection Against Violations of Other National Environmental Laws

20. Article 9 (3) requires that 'In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial proceedings to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment'.

Thus, in contrast to Article 9 (2) subparagraph 2, Article 9 (3) does not clearly define NGOs' rights. This could be interpreted in such a way that Article 9 (3) is subject exclusively to national law criteria and does not extend beyond the requirement for provision of access to review

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47 Von Danwitz, 2004, p. 276; SRU, 2004, Para. 197; Epiney, 2003, p. 179.

48 Contrary opinion von Danwitz, 2004, pp. 276, 279; Seeling and Gündling, 2002, p. 1039 et seq.; similarly Scheyli, 2000, p. 245; Baake, 1999, p. 18.

49 For a comparison see Bunge, 2004, p. 147; Fisahn, 2004, p. 140; Schlacke, 2004, p. 632; Schrader, 2004; Epiney, 2003, p. 179; Epiney und Sollberger, 2002, p. 327; Sparwasser, 2001, p. 1048; SRU, 2002, Para. 160; Zschiesche, 2001, p. 182.

50 See the preamble to the Aarhus Convention and the Implementation Guide on Article 9 (2), p. 128. The preamble sets out the Convention's concern 'that effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced'. (Author's emphasis)

51 Implementation Guide on Article 9 (2), p. 129.

procedures by the administrative courts to challenge violations of national environmental law.[52] This interpretation is not, however, compatible with the object and purpose of the Aarhus Convention, namely to contribute to enforcement of environmental law in its entirety. The Convention's very structure prevents such a restrictive interpretation. The Aarhus Convention is in fact based on the notion of equality between all three standard review procedures contained in Article 9:

'Under the Convention, members of the public have the right to challenge violations of national law relating to the environment, whether or not these are related to the information and public participation rights guaranteed by the Convention. (...) Paragraphs 1, 2 and 3 of article 9 each describes particular grounds for the public to pursue a review procedure. (...) The Convention allows decisions, acts and omissions to be challenged. It allows both access to justice in terms of its own provisions and in terms of enforcing national environmental law.'[53]

Thus within the scope of Article 9 (3), too, requirements exist for specific procedural mechanisms within Party states.[54] There are also limits to the flexibility allowed to the Parties as regards their formulating restrictive access criteria.

21. As Article 9 (2) requires access to legal review not just concerning public participation rights but, moreover, the entire substantive and procedural legality of environment-related decisions on the issuance of permits for new installations and infrastructure projects (see above), then it is only logical that provision be made to the same extent for representative action rights concerning environmental law not covered by Article 9 (2). Although Article 9 (2) and Article 9 (3) differ in their reference points (decisions in processes involving public participation on the one hand and all other national environmental law on the other), review of substantive legality is already provided for by Article 9 (2). Within the jurisdiction of the Aarhus Convention, Article 9 (3) does not in effect introduce anything new but rather continues the thrust of Article 9 (2) and sets out the required conditions. Due to their very nature, procedures in which public participation rights are granted under Article 6 and Article 9 (2) generally involve activities which result in severe environmental impacts. But this does not mean that other projects should be neglected as regards their impact on the environment. For example, an NGO that receives environmental information under Article 4 and learns of the issuance of an unlawful permit allowing discharge into a waterbody should be able to enforce remedy of that unlawful situation even if the permit was issued by means of a procedure that was not subject to public participation provisions.[55] Access to such environmental information is not an end in itself whereby it becomes exhausted at the point where knowledge of an unlawful permit issue might be obtained. Further, national environmental law encompasses, for example, construction planning, which up to now has been excluded under para. 61 of the Federal Nature Conservation Act but is relevant to nature conservation not least in the light of demands for land for development.[56]

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52 Thus von Danwitz, 2004, p. 276; Epiney, 2003, p. 179; Seelig and Gündling, 2002, p. 1040.

53 Implementation Guide on Article 9 (3), pp. 131, 132, 136.

54 See also Dette, 2004, p. 7; EU Commission, 2003, pp. 4, 5, 10; Ebbeson, 2002, p. 24; Zschiesche, 2002, p. 2; Brady, 1998, p. 72.

55 Implementation Guide on Article 9 (3), p. 131.

56 No provision for strategic environmental impact assessment with public participation is planned in the construction planning sector.

22. If the intention was not to derive further requirements from Article 9 (3) for mechanisms to allow NGOs access to review by a court of law, there would be a real risk that at national level two legal procedures would exist for NGOs depending on whether the issue subject to review involved national environmental law within the meaning of Article 6 in conjunction with Article 9 (2) (see above) or Article 9 (3). A provision of this type would not only contradict the equality of the three pillars under Article 9, it would also invite further conflict as to which right of access is to be demanded in which case. This would in turn hardly be conducive to timely remedy of any shortcomings in the enforcement of environmental law. Therefore, Article 9 (3) can only be complied with through the introduction of rights to take altruistic representative action to enforce 'all other' environment-related national law not covered by the other two conditions of Article 9.[57]

5 The EU's Path to Representative Action in Environmental Law

23. The EU has already implemented the first two pillars of the Aarhus Convention with the ratification of Directive 2003/4/EC providing for public access to environmental information and Directive 2003/35/EC 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. With the Council's proposal for a directive on access to justice in environmental matters,[58] it is now on its way to implementing the third pillar. These new EU instruments serve stricter enforcement of Community environmental law.

5.1 Access to Information and Access to Justice: Directive 2003/4/EC

24. Directive 2003/4/EC implements not only the first pillar of the Convention but also the third with regard to access to justice where access to information is concerned. Its Article 6 matches almost verbatim the wording of Article 9 (1) of the Aarhus Convention. The provisions on access to justice for recognised NGOs thus apply accordingly. In consequence, Member States' obligations concerning implementation are not only set out in international law but may also be subject to judicial review by the ECJ. Member States have until 14 February 2005 to transpose Directive 2003/4/EC into national law.

5.2 Public Participation and Access to Justice: Directive 2003/35/EC

25. Directive 2003/35/EC implements the third pillar of the Aarhus Convention concerning public participation in environmental impact assessments and issuance of permits for new installations, meaning Article 9 (2) in conjunction with Article 6 of the Convention. The Directive's expressed aim is to contribute to fulfilment of the obligations arising from the Aarhus Convention through provisions on access to justice contained in the EIA and IPPC directives (Article 1 (b)). Member States have until 25 June 2005 to align national legislation with EU law.

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57 EU Commission, 2003, p. 10. The Aarhus Convention Implementation Guide refers within the scope of Article 9 (3) (p. 131) to broad access and makes particular mention of recognised non-governmental organisations.

58 EU Commission, 2003.

26. Directive 2003/35/EC amended the EIA Directive to include access to justice by inserting an Article 10a. The wording of the IPPC Directive was changed to include an identically worded Article 15a. Paragraph 1 of the new articles in both directives matches almost verbatim Article 9 (2) subparagraph 1 of the Aarhus Convention, while paragraph 3 in both cases matches the Convention's Article 9 (2) subparagraph 2. The definitions of 'the public' and 'the public concerned' contained in Article 1 (2) of the EIA Directive and Article 2 Nos. 13 and 14 of the IPPC Directive mirror Article 2 (4) and (5) of the Aarhus Convention. Thus, in the first instance, EU law allows Member States to maintain their differing legal systems in principle. They may make the provision of access to judicial review dependent either on the existence of a sufficient interest or on maintaining the impairment of a right. In this context, NGO interests are deemed sufficient on grounds of an irrefutable presumption and NGOs are also deemed to have rights capable of being impaired within the meaning of the second alternative.

The assumption made under the Aarhus Convention (see above) is therefore mirrored in EU law. With regard to access to justice for recognised NGOs, the flexibility afforded to Member States in defining what constitutes a sufficient interest and the impairment of a right under Article 10a (3) of the EIA Directive and Article 15a (3) of the IPPC Directive exists because ultimately, provision has to be made for altruistic representative action within the scope of the EIA and IPPC directives. Therefore, the considerations made in Article 9 (2) of the Aarhus Convention apply to the same extent in the EU directives. However, the almost verbatim use of the provisions of the Aarhus Convention in Article 10a of the EIA Directive and Article 15a of the IPPC Directive places Member States under even greater obligation to implement than the Aarhus Convention can as an international agreement.

5.3 Access to Justice in Environmental Matters: Proposal for a Directive

27. The planned directive on access to justice in environmental matters[59] paves the way for review by the national courts of violations of national environmental law whose origins lie in Community legislation. It encompasses legislation on water protection, noise abatement, soil protection, atmospheric pollution, town and country planning and land use, nature conservation and biodiversity, waste management, chemicals (including biocides and pesticides), biotechnology and other emissions, and discharges and releases into the environment (Article 2 (1) (g)). This definition ensures coverage of all areas of the environment and enforcement of environmental law.[60] Additionally, Article 2 (2) allows Member States to include environmental law of exclusively national origin.

28. With regard to the 'legal standing of members of the public', Article 4 (1) allows Member States the possibility of stipulating as a precondition for access to review procedures either a) a sufficient interest or b) the impairment of a right if the administrative procedural law requires it. However, this flexibility in definition is rendered almost non-existent as regards the legal standing of 'qualified entities', meaning any association, organisation or group whose objective is protecting the environment. Article 5 (1) of the Commission's proposal for a directive provides that 'qualified entities':

'Have access to environmental proceedings, including interim relief, without having a sufficient interest or maintaining the impairment of a right, if the matter of review in respect of which an action is brought is covered specifically by the statutory activities of the qualified entity and the review falls within the specific geographical area of activities of that entity.'

The provision of altruistic representative action is thus required for all environmental standards

59 EU Commission, 2003.

60 Dette, 2004, p. 17 et seq.; Krämer, 2003, p. 145.

contained in national law enacted in implementation of EU requirements. The regulation of access to justice then complies with the requirements arising from the objective and mechanisms of Article 9 (3) of the Aarhus Convention. And as regards their effect, the provisions to grant rights to qualified entities under Article 5 (1) of the proposed directive also match those contained in Directive 2003/35/EC. Although the definition of the legal standing of qualified entities in Article 5 of the proposed directive differs from the wording of Article 10a of the EIA Directive and Article 15a of the IPPC Directive (and also Article 9 (2) of the Aarhus Convention), the outcome is the same. The waiver for proof of having a sufficient interest or maintaining the impairment of a right under Article 5 (1) of the proposed directive also indicates an irrefutable presumption that both preconditions for having access to administrative and judicial proceedings have been fulfilled. For reasons of legal simplification, it would thus have been far more desirable for the wording of Article 10a of the EIA Directive and of Article 15a of the IPPC Directive to have taken a similar form to that contained in Article 5 (1) of the proposed directive. But the different wording does not necessarily imply differing practical outcomes or differing legal protection systems granting access to justice for NGOs.

5.4 EU Competence to Enact Provisions on Access to Justice in Environmental Matters

29. In some instances, the EU's authority to enact provisions on access to Member State courts is refuted.[61] This standpoint is not, however, compatible with overriding European primary legislation. Under Article 175 (1) of the EC Treaty in conjunction with its Article 174, the EU has the authority to regulate access to justice in environmental matters. The EU also bears overall responsibility for enacting the provisions required under Article 9 (1) to (3) of the Aarhus Convention.

30. The EU can only comply with the requirements of the Aarhus Convention if it ensures at a minimum that individual citizens and non-governmental organisations have access to national courts in issues concerning EU environmental law. To ensure that access to justice within the EU is as uniform as possible, a joint framework of minimum requirements is needed which applies equally to all Member States.[62] Apart from its obligations under international law, the three directives outlined above also serve in fulfilling the EU's original responsibilities as defined in European primary legislation:[63]

The European Union is both an economic and an environmental community. Its authority to realise the internal market under Article 15 of the EC Treaty has been supplemented by the explicit authority to enact EU environmental policy.[64] Article 2 of the EC Treaty places the EU under obligation to provide the highest possible level of environmental protection and to demand improved environmental quality. Article 3 of the EC Treaty requires that the EU pursue environmental policy that contributes to achieving the objectives of Article 174 of the EC Treaty – those of preserving, protecting and improving the quality of the environment, protecting human health, and prudent and rational utilisation of natural resources. Article 175 (1) of the EC Treaty in conjunction with its Article 174 authorise the EU to enact provisions to achieve environment protection and improve environmental quality, and to aim for a high level of protection to ensure sustainable and environmentally sound development.

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61 Von Danwitz, 2004, p. 276 et seq.

62 European Economic and Social Committee, 2004, Section 4.1; EU Commission, 2003, p. 4; 2003c, p. 3.

63 EU Commission, 2003, p. 2, 3, 4; 2003c, p. 3.

64 SRU, 2004, Para. 1244.

The EU's competence to act is neither restricted to specific instruments nor does it exclude any.[65] Its responsibility for achieving the environmental objectives of the EC Treaty as outlined above thus requires that, where necessary, it regulate mechanisms to ensure enforcement of 'its' legislation. Without such action, the provisions of the EC Treaty would be rendered meaningless.[66]

The decision to pursue EU environmental law effectively gave the EU additional decisionmaking authority on central issues regarding enforcement of that law before the courts.[67] For the EU to meet the demanding environmental objectives contained in the EC Treaty, Member States must implement and consciously apply EU environmental law. This is where representative action can serve as an instrument that contributes to elimination of any shortcomings in enforcement and to achievement of the objectives of Article 174 of the EC Treaty (see above).

31. From the primacy of the EC Treaty, it is evident that acceptance of EU authority does not require a direct link between the granting of subjective legal standing and its enforcement before the courts as in Directive 2003/4/EC and Directive 2003/35/EC, on access to information and public participation in decision-making respectively.[68] Article 175 (1) of the EC Treaty does not simply provide annexatory powers to allow enforcement of certain environmental provisions. To achieve the objectives of Article 174 of the EC Treaty, EU environmental law must be enforced in its entirety. In a similar way to the provision for public participation and access to information, the provision for access to justice provides a regulatory instrument to serve environment protection – the only difference being that it affects the law governing judicial review and not the law governing administrative procedure.[69] Access to information, public participation and access to justice are interrelated in that all three instruments are of a cross-sectoral nature and serve two main objectives: effectiveness (effet utile) and achievement of the highest possible level of environmental protection. Access to justice need not, therefore, be regulated in each separate environmental directive. It could, instead, be enshrined as a broad right – without being restricted to specific provisions. In this vein, access to justice under Directive 2003/35/EC could not only regulate public participation but also the substantive legality of decisions made in procedures for which public participation is required (see above). Further, with regard to better enforcement of all other environmental law not covered by Directives 2003/4/EC and 2003/35/EC, the EU has authority under its (proposed) directive on access to justice in environmental matters to grant broad access to justice rights.

32. Acceptance of such EU authority in no way contradicts the general principle of Member States' procedural autonomy. Article 10 of the EC Treaty places Member States under obligation to apply Community law and to take all necessary measures to ensure its enforcement. The principle of Member States' procedural autonomy does not, however, result in a categorical exclusion of all administrative law provisions. According to an ECJ judgement, the principle of Member States' procedural autonomy only applies subject to special Community rules.[70] Only when Community law does not already provide an appropriate provision, for example as regards legal standing, does Member States' procedural autonomy apply

65 Pernice and Rodenhoff, 2004, p. 149; Calliess, 2003, p. 99; 2002, Art. 175 No. 1; Epiney and Sollberger, 2002, p. 348; Epiney, 1999, p. 491 et seq.

66 EU Commission, 2003, p. 4; 2002a, p. 6 et seq.; Epiney and Sollberger, 2002, p. 349; Epiney, 1999, p. 492; Wegener, 1996, p. 158 et seq.; see also related ECJ Case 205-215/82 Deutsche Milchkontor, [1983] ECR 2633, 2667.

67 Wegener, 1996, p. 159.

68 Conflicting opinion in von Danwitz, 2004, p. 279; Seelig and Gündling, 2002, p. 1040.

69 Pernice and Rodenhoff, 2004, p. 150.

70 See ECJ Case C-290/91, [1993] ECR I-2981, 3005; Case 33/76 REWE, [1976] ECR 1989.

from the outset.[71] This is confirmed by Article 175 (4) of the EC Treaty, which states that 'Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the environment policy'. The provisions contained in the access to justice directive (and the directives regarding access to information and public participation) are therefore measures of a 'Community nature' or 'special Community rules'.

33. Any concerns regarding the compatibility of the provisions in question, and particularly the proposed directive on access to justice in environmental matters, with both the subsidiarity principle (Article 5 (2) EC Treaty) and the proportionality principle (Article 5 (3) EC Treaty) are unjustified. In light of the issues outlined above, it is only fitting to conclude that elevation to EU level is necessary. The vast discrepancies between the Member States as regards compliance and enforcement of environmental law show that action is needed at EU level to ensure Community-wide compliance with the environmental provisions of the Aarhus Convention. As the EU Commission's annual surveys on implementation and enforcement of environmental law have shown, it cannot be left to the Member States alone to ensure Community-wide (and uniform) application of environmental provisions.

The grinding implementation process in, for example, Germany highlights the obstacles faced as regards the conflicting interests arising from transparency and equality-focused rights that are granted to individuals and public interest organisations. While Member States might compete with one another in terms of having the 'leanest' procedures, this is not the case when it comes to having the fairest and most transparent procedures.[72] Thus, the EU requirement for procedural standards should and must ensure full and determined application of applicable EU environmental law on the part of the Member States – while this should be a matter of course, the situation is quite different in reality.[73]

Apart from achieving the objectives of Article 174 of the EC Treaty, that is, realisation of an environmental union, the issue also involves realisation of the internal market – meaning economic union. The discrepancies in enforcement of environmental law by the Member States leads as a consequence of environment protection standards of differing levels of effectiveness not only to a lowering of the degree of environment protection achieved within the EU but also to unequal market conditions which pose a risk to the internal market.[74] The enactment of EU provisions on access to justice in environmental matters thus serves the objective pursued in EU environmental law of harmonising both living and market conditions for EU citizens. But as far as the internal market is concerned, there can be, a fortiori, no doubt at all about compatibility with the subsidiarity principle.

Finally, the EU has competence because of the cross-border relevance of environmental problems: it must prevent conflicts between the Member States in dealing with the cross-border dimension of water management, air quality and pollution control.[75]

Access to justice provisions do not extend beyond what is necessary to achieve the objectives of the EC Treaty. In the same way as directives 2003/4/EC and 2003/35/EC, the proposed directive on access to justice in environmental matters gives consideration to Member States' administrative and judicial mechanisms. It does not

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71 Pernice and Rodenhoff, 2004, p. 151; Epiney and Sollberger, 2002, p. 340; for a critical assessment of this approach see Wegener, 1998, p. 83 et seq.

72 Koch, 2004.

73 Koch, 2004; Epiney, 1999, p. 491 et seq.; Steinberg, 1995; p. 302 et seq.

74 EU Commission, 2003, p. 2; 2002a, p. 5; see also Pernice, 1990, p. 423.

75 European Economic and Social Committee, 2004, Section 4.1; EU Commission, 2003, p. 5.

establish an all-encompassing EU legal system that overrides national procedural rules: monitoring responsibility remains with the Member States and decentralisation is enhanced.[76] At EU level, only those essential minimum standards are defined that are crucial to the introduction of EU-wide representative action rights. This creates a framework for access to justice in environmental matters to allow an administrative act or the omission of an administrative act to be contested. Responsibility for defining issues such as compliance with criteria for recognition of non-governmental organisations remains with the Member States.[77]

6 Summary and Recommendations

34. With its restrictive legal system, Germany lags behind – not just as a member of the former EU-15, but of the expanded EU-25 and when compared to the US – as regards the legal standing of public interests in matters of environment protection and nature conservation and their defence before the courts. Except for the limited legal standing for NGOs under para. 61 of the Federal Nature Conservation Act (BNatSchG), Germany currently makes no provision for environmental protection and nature conservation interests to be defended before the courts by bringing an altruistic representative action entirely divorced from individual interests. Nevertheless, as laid down by the Aarhus Convention, the German government is now required by international law to make it significantly easier for NGOs to legally challenge environmental decisions. Respective provisions under European law will step up the pressure to ensure this requirement is implemented.

35. Given the shortcomings in enforcement of environmental legislation, practical experience with legal standing for NGOs and the need to ensure a 'level playing field' where public interests are concerned, the German Advisory Council on the Environment welcomes both the requirements of the Aarhus Convention and those of EU legislation. The right to bring a representative action before the courts in no way constitutes privileged treatment of environmental interests. Rather, it redresses the inequalities of a legal protection system that places the interests of environment users above those of environment protection. Enforcement shortcomings of considerable scope are especially evident in environment protection and nature conservation law – one of the main causes being the lack of enforcement controls in environmental law. A closer look at the causes of these shortcomings highlights an imbalance where protection of interests is concerned. Those who seek to exploit the environment have the right to protect themselves against infringement of their personal liberty and permit holders, for example, have the right to legally challenge administrative environment protection regulations that may only affect them indirectly. Those who seek to protect the environment are often denied the legal standing to take action based on specific provisions of environmental law. Environmental law designed to manage the commons thus perpetuates an imbalance between the legal standing of individual 'users of the commons' on the one side and individual 'protectors of the commons' on the other. The exercise of control and consideration of public interests in administrative decisions as performed by an independent court is essential in a state governed by the rule of law. It is a misconception that decisions made for the public good, such as those involving environment protection and nature conservation, lie solely and finally with public

76 See also Calliess, 2002, Art. 175 No. 31 et seq.

77 European Economic and Social Committee, 2004, Section 2.1; EU Commission, 2003, p. 5.

authorities and that only individual interests may justifiably be granted legal standing. The fact that certain decisions that involve public interests are not subject to judicial controls must not be allowed to detract from the idea of the separation of powers.

36. Justification of the need for such judicial controls is confirmed by the outcomes of empirical research on representative action. Practical experience with legal standing for NGOs at international level and at Länder (state) level in Germany has been overwhelmingly positive. Representative actions have proven to be significantly more successful than the average number of cases taken before the judiciary. Thus, the anticipated flood of claims, over-burdening of the courts and disproportionate blocking or delay of important (infrastructure) projects caused by public interest groups making unjustified use of legal protection provisions for the sake of sheer obstructiveness must be seen as empirically disproven. The option to exercise representative action rights has a preventive effect in that the potential for environmental interests to be enforced before the courts puts pressure on public authorities to give adequate consideration to environmental needs in their decision-making. Legal standing for NGOs gives more appropriate weighting to environmental interests when compared with private economic interests.

37. The German Advisory Council on the Environment recommends that the German government ratify the Aarhus Convention without delay and transpose into national law the provisions of the Convention and those of EU Directive 2003/4/EC regarding access to information and EU Directive 2003/35/EC regarding public participation. At the same time, the German government should call for the EU Commission's proposal for a directive on access to justice in environmental matters to be placed on the Council of Ministers' agenda and thus for its timely adoption. Both the Aarhus Convention and the EU directives (existing and planned) open the door to more rigorous enforcement of environmental law. This must be recognised and accepted. The Council sees a need, therefore, for national law to be amended as follows:

38. Implementation of Article 9 (1) of the Aarhus Convention and Article 6 of EU Directive 2003/04/EC regarding access to information requires no amendment of German law governing judicial procedure.[78] Neither the Aarhus Convention nor the EU directive require as a precondition the impairment of a right similar to that under para. 42 (2) of Germany's Federal Code of Administrative Procedure (VwGO). If access to information rights are impaired, on the other hand, Germany's legal system results in the same outcome as that under international and European law. For the right to access to environmental information grants non-governmental organisations subjective rights within the meaning of Article 42 (2) of the Federal Code of Administrative Procedure, and these can be defended before the courts.

39. National law must be amended, however, as regards Article 9 (2) of the Aarhus Convention. Article 6 of the Aarhus Convention provides in its entirety for the granting of legal standing for NGOs in connection with procedures for which public participation is required, particularly under the IPPC and EIA directives. In implementing the provisions of this international agreement, EU law provides for legal standing within the scope of the IPPC and EIA directives by adding Article 10a to the EIA Directive and Article 15a in the IPPC Directive as amended by the Public Partic-

78 Implementation of the remaining provisions of Directive 2003/4/EC and of the first pillar of the Aarhus Convention by Germany's federal administration is intended with the Act Reforming the Environmental Information Act (Gesetz zur Neugestaltung des Umweltinformationsgesetzes). The respective draft legislation has already been passed by the Bundesrat so that it is expected to enter into force before the 14 February 2005 deadline. With regard to the Länder, the current situation invites the assumption that the necessary amendments to respective Länder legislation will not be completed by the deadline.

ipation Directive (2003/35/EC). The courts must thus review both the subjective and procedural legality of the decisions brought before them. This also results in recognised NGOs (and affected individuals) being able to contest EIA project-related decisions made by public authorities on grounds that an EIA was not conducted satisfactorily or was unlawfully omitted. In future, an action may be taken against the issuance of a permit for a project based solely on incorrect application of the EIA Directive, meaning it is no longer lawful and justified, if the claimant can maintain that the decision has impaired his or her subjective procedural rights and hence also subjective material rights, and the outcome of the decision could have been different had the legal provisions been correctly applied.[79, 80]

40. The object and purpose and also the structure of the Aarhus Convention all result in the fact that Article 9 (3) of the Convention can only be complied with through the introduction of legal standing for 'other' national environmental law in its entirety. The aim of the Aarhus Convention is to ensure that the public, including non-governmental organisations, receive effective access to justice to enforce environmental law. This broad approach would be countered by any restriction of legal standing to the provisions of specific legislation. This means, therefore, that national implementation must extend beyond any proposed directive on access to justice in environmental matters as it 'merely' requires that legal standing for NGOs be granted for environmental law whose origins lie in Community legislation.

41. For reasons of legal clarity and practicability, the changes called for under international and EU law should be followed up with uniform and clearly defined legislation. Instead of granting representative action rights in each piece of environmental legislation – as is the case with para. 61 of the Federal Nature Conservation Act – the most effective approach would be to standardise such provision by adding a new para. 42a to Germany's Federal Code of Administrative Procedure (VwGO).[81]

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79 According to existing case law, see Federal Administrative Court (BVerwGE) 100, p. 238 et seq., 252 et seq.; for more detail see Bunge, 2004; Erbguth, 1997.

80 Implementation of Directive 2003/35/EC is to be effected in Germany by 25 June 2005 with the Act on Further Development of Public Participation in Environmental Matters (First Act Implementing Directive 2003/35/EC) and the Act on Access to Justice in Environmental Matters (Second Act Implementing Directive 2003/35/EC). Both draft laws are currently under initial review at departmental level.

81 Consideration could also be given to standardising a provision of this kind in an appropriate separate law. This appears to be the direction taken in draft legislation on access to justice in environmental matters (Second Act Implementing Directive 2003/35/EC) with regard to legal standing in connection with public participation in decision-making.

Annex

Extract from the Aarhus Convention

CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

Article 9

ACCESS TO JUSTICE

(1) Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

(2) 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 before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

(4) In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

(5) In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.
(Source: http://www.unece.org/env/pp/documents/cep43e.pdf)

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