Measures on access to justice in environmental matters
(Article 9(3))

Country report for Germany

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Executive summary

German law does not provide for extensive access to justice in environmental matters.

A priori, German administrative law follows the principle that access to justice is limited to matters wherein the plaintiff can claim an infringement of his subjective rights. An action claiming a violation of environmental protection rights in the public interest is therefore not admissible.

The only exception is for actions that may be brought by acknowledged nature protection associations (Verbandsklage), as foreseen in the federal Nature Protection Act, and in the nature protection legislation of the *Länder*.

These actions are only possible against certain administrative decisions enumerated in the law, however, and subject to certain conditions.

Nevertheless, the German goverment considers Article 9(3) as fully implemented by existing EU and national legislation.

1. Introduction

1.1. Overview of the administrative and judicial structures in Germany

Germany consists of a central federal government and 16 federal states, the *Länder*, with their own governmental and administrative structures. The German Constitution, the Basic Law (Grundgesetz), determines which issues fall within federal jurisdiction and which within the jurisdiction of the *Länder*.

1.1.1. Legislative competences in the areas relevant for the study

In terms of legislative competences, there are areas of exclusive legislative powers at the federal level and areas of concurrent powers.

The areas relevant for the current study are areas of concurrent powers. In those areas, as a rule, the Länder may not legislate after the federal government has passed legislation. However, in some areas, the German Basic Law foresees framework competence at the federal level only and allows the Länder to pass their own legislation.

This is the case, for example, in the nature protection area, but also in the water sector. It is why there is federal nature protection legislation, the federal Nature Protection Act (Bundesnaturschutzgesetz), and also nature protection legislation at the Länder level.

Outside these areas, environmental legislation is federal legislation and the Länder may not legislate anymore if and to the extent that the federal level has passed legislation.

Also, all legislation relating to the establishment of the judicial system and legal proceedings is under the concurrent competence of the federal level and the *Länder*. The federal level has passed the Administrative Court Act (Verwaltungsgerichtsordnung) which regulates access to justice against acts of the administration.

1.1.2. Administrative system

The main role of implementing and enforcing legislation falls upon the *Länder*, irrespective of whether the legislation is federal or Länder legislation.

Different *Länder* have a different administrative set-up, resulting in variations as to the administrative level competent for the implementation and enforcement of environmental legislation.

Typically, the *Länder* have a three-tiered structure, but in some *Länder*[1] and in two of the three German "city states" (Berlin, Hamburg) a two-tiered structure prevails. Bremen, the third German city state, has a one-tiered structure only.

In the three-tiered structure, the upper administrative level consists of the *Länder* ministries, the medium administrative level of the regional authorities (Regierungspräsidien/, Bezirksregierungen) and the lower administrative level of county/city administrations

[1] Brandenburg, Mecklenburg-Vorpommern, Saarland, Schleswig-Holstein, and Thüringen.

(*Landkreise*/kreisfreie Städte). In the two-tiered structure, there is an upper and a lower administrative level only[2].

1.1.3. Judicial system[3]

The Basic Law gives anyone violated in his or her rights a guarantee of access to justice against acts of the public administration. It also protects a number of procedural rights at the consitutional level, such as independence of judges, prohibtion of ad hoc courts, the right to be heard, etc.

Germany has five different branches of jurisdiction which act completely independent of each other. One of those branches comprises the general administrative courts. The other four branches are the so-called "ordinary courts" comprising civil and criminal jurisdiction, the labour courts, the fiscal courts and the social courts. Each branch has its own Federal Court as supreme instance.

Furthermore, the Federal Constitutional Court adjudicates upon constitutional issues and the validity of parliamentary laws only.

The general administrative jurisdiction is competent for all kinds of non-constitutional public law matters, including protection of the environment. The administrative courts are strictly independent from any executive branch of the government.

Administrative court organisation

Regarding the institutional structure for judicial proceedings in administrative matters, the present system of administrative jurisdiction in Germany consists of three levels, with 52 administrative tribunals of first instance at the bottom, 16 High Administrative Courts in the middle and the Federal Administrative Court at the top of the hierarchy.

The tribunals of first instance and the High Administrative Courts are financed, administered and staffed by the constituent state (*Land*)) to which they belong. Every *Land* maintains one High Court. The number of tribunals of first instance varies according to the size of the respective *Land*.

A lawsuit normally begins in the administrative tribunals of first instance, unless the respective legal matter is assigned by law to the High Administrative Courts or to the Federal Administrative Court.

The High Administrative Courts are mainly courts of appeal ("*Berufung*"). They re-examine decisions of the tribunals of first instance as to the facts and to the law.

In contrast to that, the Federal Administrative Court reviews the decisions of the lower courts only on points of law. The respective proceedings are called “revisions” (“*Revision”*). Generally, the actions brought before the Federal Administrative Court are directed against decisions of the courts of appeal. With the consent of both parties, however, it is also admissible to bypass the remedy of appeal and to challenge the ruling of a tribunal of first instance directly before the Federal Administrative Court.

[2] E.g.ministries and Landkreise/kreifreie Städte (in the case of the city states) or senate administrations and burrough administrations (Bezirksämter) in the case of Berlin and Hamburg. In the case of the Land Bremen, the single structured administrative level consists of the senate administration.

[3] The following section consists largely of excerpts from the website of the German Federal Administrative Court , at http://bundesverwaltungsgericht.de/enid/0,dc08b5092d09093a09616e7369636874776563687365 6c092d096b6f6e747261737472656963 68/Information_in_English/The_Federal_Administrative_Court_g3.html

Procedural principles

The administrative court procedure is inquisitorial, which means that administrative courts are obliged to investigate the truth without being bound by the evidence presented by the parties. However, "the procedure is always at the disposal of the litigants", *e.g.,* the plaintiff is "master of the proceedings", meaning that the court is prohibited from going beyond the claims of the plaintiff and the plaintiff always has the right to terminate proceedings by amicable settlement or withdrawal of his action at any time.

The procedure is oral, direct and open. As a rule, the court is obliged to conduct an oral hearing that is open to the public. During the hearing the parties have full opportunity to make their presentations and to discuss all factual and legal points. All evidence is produced, recorded and discussed during the oral proceedings as well.

The court decides according to its free conviction formed from the overall result of the proceedings. There are no statutory rules that give superiority to one kind of evidence over another.

Actions brought before an administrative court have suspensive effect unless the contested administrative act has been declared provisionally enforceable by the issuing public authority, or where so prescribed by law. In those cases the suspensive effect may be restored by way of interim relief granted by the administrative court. Restoration of the suspensive effect may be linked to the obligation to provide a security or other conditions being imposed.

Upon application, the administrative courts may also issue interim injunctions, even before commencement of the main proceedings. This presupposes that there is otherwise a danger that the legal relief sought by the plaintiff may be pre-empted or substantially impeded.

Decisions are issued in writing. They are pronounced orally in public session if there has been an oral hearing open to the public, and are subsequently notified in writing to the parties.

In the courts of first instance no specific form of filing an action is prescribed. Any person can file his action personally on an ordinary piece of paper or get it recorded with the help of a court clerk. In the Higher Administrative Courts and before the Federal Administrative Court, however, the parties need to be represented by a professional attorney or a university professor of law.

1.2. Environmental protection within that context

Environmental protection procedure

Besides an exception in the nature protection area, which will be described in detail in the following section, there is no specific procedure foreseen in Germany neither under administrative nor judicial structures, for challenging violations of environmental law as such, *i.e.,* as so-called "altruistic" actions without individual rights of the plaintiff being affected[4].

However, an individual or an NGO can always bring a case before the administrative courts in environmental matters, if they have standing, *i.e.,* if they can claim that legally proctected interests, "subjective rights", *e.g.,* their private property, have been infringed upon by an

[4] As will be seen below, even in the nature protection area, the procedure allowing nature protection associations to file legal proceedings challenging the violation of nature protection law, is not so much a specific procedure as provided for specific standing of nature protection associations. Procedurally, the general rules of the Verwaltungsgerichtsordnung apply.

administrative decision ("egoistic" action); for example, where the expropriation of a property in the interest of an infrastructure project, such as a highway, can be challenged by the propery owner on the basis of the right to property. Another example of a relevant administrative act that may also have environmental implications could be an administrative decision to grant a construction permit, which may be challenged by neighbouring property owners, e.g. on the grounds of emissions from the project for which the permit has been granted.

Developments in the context of the ratification of the Aarhus Convention

Germany passed the Act on ratification of the Aarhus Convention on 9 December 2006 and ratified the Convention on 15 January 2007.

The implementation of the Aarhus Convention in Germany was coordinated with the transposition of the EU Directives implementing the Aarhus Convention. Thus Directive 2003/4/EC on public access to environmental information, Directive 2003/35/EC providing for public participation in environmental plans and programmes and amending with regard to public participation and access to justice, Directive 85/337/EEC and Directive 96/61/EC were transposed in Germany through the following legal measures:

- *Gesetz zur Neugestaltung des Umweltinformationsgesetzes (Umweltinformationsgesetz), i.e.,* Act on the Revision of the Environmental Information Act (initially of 1994), adopted on 22 December 2004, and entered into force on 14 February 2005;

- *Gesetz über die Öffentlichkeitsbeteiligung in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EC (Öffentlichkeitsbeteiligungsgesetz), i.e.,* Act on public participation in environmental matters according to EU Directive 2003/35/EC, adopted on 9 December 2006, and entered into force on 15 December 2006. The Act amends several pre-existing pieces of legislation to bring them fully in line with the Directive, in particular the German EIA legislation;

- *Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Umwelt-Rechtsbehelfsgesetz), i.e.,* the Act on additional provisions regarding access to justice in environmental matters according to EU Directive 2003/35/EC, adopted on 7 December and entered into force on 15 December 2006.

The last Act introduced legal standing of environmental protection associations in transposition of Article 3 No. 7 and Article 4 No. 4 of Directive 2003/35/EC and thus Article 9 (2) of the Aarhus Convention. It is limited to judicial actions against projects subject to EIA or IPPC authorisations.

The current study is concerned with the implementation of Article 9 (3) rather than Article 9(2) of the Aarhus Convention, and the possibilities under this Act are thus not further explored in detail.

It may be noted, however, that recognised environmental protection associations may bring claims only with regard to the breach of provisions protecting the environment, and establishing rights for individuals. At the same time, the association has to be affected in its environmental protection aims laid down in its own articles of association. Claims are limited to those made in the prior administrative proceedings. They may be considered founded in case of the breach of substantial provisions affecting environmental protection aims reflected in the aims of the

association according to its statutes. Claims against procedural failings are limited to very substantial issues (e.g., the EIA has not been carried out)[5].

No further legislation has been adopted to date that would otherwise implement the Aarhus Convention, in particular its Article 9(3).

The German government has stated in its submission to the German Parliament, the *Bundestag*, of the draft Act for ratification of the Aarhus Convention[6] that Article 9(3) is considered fully implemented by way of existing European and national law. The wording of that Article leaves broad discretion to Aarhus parties based on the understanding during negotiations that countries wished to maintain their respective legal traditions, ranging from civil law-dominated systems to administrative systems focusing on subjective rights to ombudsman-proceedings.

Thus, in Germany, the existing possibilities for citizens to bring claims before the courts both and administrative are considered sufficient for the purposes of Article 9(3) of the Aarhus Convention. In particular, it has been emphasised in the German understanding that Article 9(3) does not require a specific instrument granting NGOs access to justice, nor does it require an instrument based on the violation of public interest rights, such as in the field of environmental protection.

2. Access to justice in environmental matters

As mentioned above, access to justice in environmental matters in a broad sense may be realized by citizens or NGOs outside any specific procedure for access to justice in environmental matters on the basis of an infringement of their individual rights by the administration, such as the right to property.

Such cases are governed by the general procedures foreseen by the above-mentioned Administrative Court Act regulating access to justice against acts of the administration.

As also mentioned above, under the Nature Protection Act, in specific cases, standing is afforded to nature protection associations, claiming the violation of nature protection legislation. Also in those cases, the general procedures established by the Administrative Court Act apply.

In the following, the procedure established is described.

2.1. Administrative procedure

There is no specific administrative appeals procedure foreseen in environmental matters, but the generally applicable administrative appeals procedure, which forms part of the judicial procedure, applies: under German administrative law[7], before a case can be brought before the courts, all possibilities for administrative appeals have to have been exhausted. In turn, as is the case with subsequent judicial claims, the instrument of the administrative appeal (Widerspruchsverfahren) presupposes that the claimant is directly affected in his/her own rights by the administrative act challenged.

[5] Two German associations, BUND (Bund Naturschutz Deutschland e.V.) and UfU e.V. (Unabhängiges Institut für Umweltfragen e.V.) have lodged complaints against Germany with the EU Commission for non-conform transposition of Directive 2003/35/EC, insofar access to justice is concerned.
[6] Accessible at http://dip.bundestag.de/btd/16/024/1602497.pdf.
[7] There are exceptions, see below for more detail.

Thus, in the German legal systematic, the administrative appeals procedure is a preliminary procedure, and prerequisite to the court appeal procedure. It is regulated in the German Administrative Court Act.

It does not only apply in cases where the violation of individual rights is claimed but also in the area of nature protection, where German law provides for standing of nature protection associations claiming a violation of nature protection law. Also here, prior to bringing an action before a judicial court the association must go through the administrative appeal procedure.

The main traits of the generally applicable administrative appeals procedure may briefly be summarised as follows:

- The administrative appeal has to be submitted within one month of notification in cases where the claimant has been the addressee of the administrative act challenged, and in other cases within one month of the claimant's first learning about the act. As a specificity, the Nature Protection Act establishing access to justice for nature protection associations foresees that, unless the nature protection association is itself addressee of the administrative act challenged, the time period of one month begins to run from the time from which it first learned either about the act, or could have had knowledge about the act, e.g., from newspaper reports.

- The administrative appeal has to be raised with the authority that has adopted the act at issue, or with the authority responsible for deciding on the appeal. This is typically the next higher authority, unless the initial authority is an authority at the upper federal or *Länder* level, in which case it is at the same time the appeals authority. In the latter case, the appeals authority makes the appeal available to the authority that has adopted the act.

- The authority that has adopted the act may annul the act if it considers the appeal substantiated.

- Where the adopting authority does not annul the act, the appeals authority decides on the appeal. The decision, which has to be issued in writing, is subsequently subject to judicial review. Such review has to be initiated within four weeks of notification of the Decision in the appeals procedure.

- The appeal regularly has suspensive effect, except in certain cases enumerated in the Administrative Court Act. In certain cases where the appeal concerns an administrative act favouring a third party, the appeals authority may order the immediate execution of the act. Such decisions may be independently appealed before the administrative courts.

2.2. Judicial procedure

2.2.1. General aspects

As noted above, in principle[8], any judicial proceeding against an administrative act has to be preceded by an administrative appeals proceeding.

Once this possibility is exhausted, a legal claim can be raised before an administrative court.

[8] In some cases the Administrative Court Act prescribes that no prior administrative proceeding is necessary, i.e. where the act was issued by an uppermost federal or uppermost Länder authority and no other legal act prescribes the administrative appeals procedure

Administrative court proceedings against an act of the administration, claiming either the violation of individual rights or the violation of nature protection rights as afforded by the Nature Protection Act, follow the principles described below[9].

2.2.2. Legal standing and participatory status

An "*actio popularis"* or an action to enforce rights of third parties is, as a rule, not permissible before German administrative courts. The petitioner must always establish that his individual rights have been infringed. Unless the plaintiff can claim to be affected in individual rights afforded to him by the legislation, he will not be heard by the courts, *i.e.*, the action will be considered inadmissible.

Thus, access to justice in environmental matters in Germany regularly presupposes an infringement of own rights of the claimant, e.g. the right to property, otherwise the action will be inadmissible. If the plaintiff is affected in own rights by an administrative act, according to the Administrative Court Act, the action must be brought within one month of the notification of the act, where it was addressed to the plaintiff, otherwise within one month of knowledge of the act by the plaintiff.

However, there is an exception to the above for actions brought by acknowledged nature protection associations in the nature protection area as afforded under the Nature Protection Act ("Verbandsklage").

At Länder level, in the nature protection area, the possibility of nature protection associations to gain access to justice against administrative acts of Länder authorities had been recognised since the 1980's, through introduction in the state legislation on nature protection of access to justice in favour of nature protection associations ("Verbandsklage").

In 2002, such right was recognised at the federal level, through amendment of the Federal Nature Protection Act. This meant that all Länder which had not already done so at that time (namely Bayern and Baden-Württemberg) had to introduce the possibility for acknowledged nature protection associations to bring actions based on an infringement of nature protection legislation. The Federal Nature Protection Act also foresees explicitly the possibility of the Länder to maintain their own legislation on standing in favour of nature protection associations. Indeed, in some cases, certain Länder had provided for access to justice going beyond the possibilities now afforded by the amendment of the federal Nature Protection Act[10].

The text of the relevant provisions is reproduced in the Annex to this Country Report.

Legal standing and rights of participation under the federal Nature Protection Act are characterised by the following:

- Members of the public or citizens, are not entitled to initiate a judicial proceeding alleging violation of nature protection law. Only recognised nature protection associations have such standing to claim violations of nature protection law.

[9] The same procedure, based on the principles of the Administrative Court Act also applies in those cases where the Administrative Court Act, exceptionally, does not require a prior administrative proceedings - see previous footnote.

[10] However, the German Council of Experts for Environmental Issues ("Rat von Sachverständigen in Umweltfragen") noted in its 2004 report, that the Länder were in the process of adapting their legislation to the requirements of the Federal Nature Protection Act, repealing previously existing wider access to justice regulations.

- Nature protection associations have to be recognised as such and the nature protection legislation provides for a recognition procedure in § 59 Federal Nature Protection Act. The recognition is granted by the federal Environment Ministry. The main conditions for the recognition are:

  - Submission of an application;

  - The association must, according to its articles of association, support nature protection and landscape conservation aims in a durable manner;

  - The association must be active beyond the area of a single *Land*;

  - It has to have actively existed for at least three years at the time of the application;

  - It must be safeguarded that the association pursues its tasks in a proper manner; when evaluating this condition, the past activities of the association, its membership and capacities are considered;

  - The association must be based on open membership.

Those *Länder* who have separate access to justice provisions in favour of nature protection associations in their *Länder* legislation also provide for recognition procedures. Associations recognised at the *Länder* level are also recognised for the purposes of the Federal Nature Protection Act.

A list of recognised associations is published on the Federal Environment Ministry's website[11]. The website lists only 24 associations. However, according to a 2003 publication,[12] around 120 associations were acknowledged as having access to justice under the Federal Nature Protection Act. The difference is presumably owing to the fact that the Ministry's website lists only those associations recognised under the federal act, whereas the higher number includes those associations recognised by the *Länder*.

The entitlement of recognised nature protection associations to lodge a complaint is outlined in the Nature Protection Act. Judicial action may be lodged against the following acts:

- Exemptions from prohibitions and orders relating to the protection of nature conservation areas (Naturschutzgebiete), national parks (Nationalparke) and other protected areas

- Decisions of plan establishment procedures (Planfeststellungsbeschlüsse) relating to projects involving intervention in nature and landscape as well as plan approvals (Plangenehmigungen) where the general public's involvement has been provided for in relevant provisions.

Admissibility of actions is subject to the following conditions. The association concerned must:

- Assert that the adoption of the administrative act in question conflicts with provisions of the Nature Protection Act, legal provisions laid down on the basis of or within the framework of that Act, or with any other legal provisions to be complied with/taken into

[11] www.bmu.de/naturschutz_biologische_vielfalt/bundesnaturschutzgesetzt/gesetzestext/doc/37890.php
[12] M.Zschiesche, M.Rosenbaum, A.Schmidt ;Naturschutzrechtliche Verbandsklagen in Dtl. im Zeitraum 1996-2001.

consideration when adopting the administrative act concerned and which are also at least intended to serve the interests of nature conservation and landscape management;

- Be affected within the scope of activities set forth in its articles of association, to the extent this is covered by the recognition granted;

- Have been entitled to involvement in accordance with the Nature Protection Act or on the basis of *Länder* legislation and has expressed its views on the matter in this context or was given no opportunity to express its views.

As is the case for lodging an administrative appeal as preliminary to the proceedings before the administrative court, the court case has to be brought within one month of notification of the decision issued from the appeals proceeding[13]

The following may be concluded from the above, with respect to the possibility of access to justice in environmental matters in favour of nature protection associations:

- The nature protection association must be recognised, implying inter alia a durable activity, thus excluding the possibility of individual citizens convening in an ad hoc citizens initiative in order to challenge administrative action;

- Only specified acts of the administration may be challenged, thus, for example, the failure to name an area as a nature protection area cannot be challenged;

- Claims can only be based on the violation of nature protection related legislation, but not environmental legislation in the wider sense.

2.2.3. Possibilities for appeal

Possibilities for appeal in both scenarios, *i.e.*, where an individual or an NGO claims violation of own rights, or in the framework of the Nature Protection Act, follow the general rules applicable to administrative court proceedings according to the Administrative Court Act. Those parties to the court case in the first instance may raise an appeal in the competent High Administrative Court (see above, "*Berufung*"), and, subsequently for breach of points of law only before the Federal Administrative Court (see above, "*Revision*").

An appeal presupposes admissibility. Admissibility presupposes either serious doubts on the correctness of the first instance judgment; that the matter is factually or legally complicated; that the matter is of principal interest; that the judgment deviates from the jurisprudence of the higher administrative courts, including the Constitutional Court and is based on this deviation; or that a procedureal fault is claimed which may have been instrumental for the judgment. Depending on which admissibility claim the appeal is based, the appeal must be raised within one or two months from the first instance judgment.

The subsequent revision ("third instance") again presupposes admissibility, which in turn requires that the matter is of principal interest; that he judgment deviates from the jurisprudence of the higher administrative courts, including the Constitutional Court and is based on this

[13] In cases, where, exceptionally, no such administrative appeals proceeding was required, the action has to be raised within within one month after notification of the initial administrative act, where that was addressed to the Nature Protection Association, or within one month after knowledge of the act, or within one month after the nature protection association could have had knowledge of the act (e.g. newspaper articles). Regarding the latter, see above: this is regulated specifically in the Nature Protection Act. Otherwise, the general rules, as above apply.

deviation; or that a procedureal fault is claimed which may have been instrumental for the judgment.

2.2.4. Costs and length of the procedure

Generally speaking, the costs are determined by the rules applicable to general administrative proceedings, as articulated in the Administrative Court Act.As a rule, the Act foresees all costs borne by the defeated party. The costs vary in relation to the amount in dispute, which is set by the court.

For proceedings with legal standing of nature protection associsations on the basis of the Nature Protection Act, only indicative estimates are possible.

According to information from the Naturschutzbund Deutschland e.V.,[14] a typical amount in dispute in nature protection claims is EUR 25,000 (but it can be lower; the lower the amount, the lower the court fees).

According to the Naturschutzbund Deutschland e.V., the following court fees arise:

- In the first instance: between EUR 4,200 and EUR 5,800 (depending on whether evidence discovery is ordered by the court, e.g., in the form of expert evaluation);
- In the second instance ("appeal"): between EUR 5,600 and EUR 7,700 (again depending on the costs arising from evidence discovery);
- In the third instance ("revision"): approx. EUR 5,600 (see above, no evidence discovery at this stage, as the revision is limited to a re-examination of the legal aspects only, not of factual circumstances).

Costs for legal representation are only reimbursed to the party that has won the case up to the limits set by law. These limits are also determined by the amount in dispute set by the Court and are estimated by the Naturschutzbund Deutschland e.V. as follows:

- in the first instance: between EUR 700 and EUR 2,500;
- in the second instance ("appeal"): between EUR 900 and EUR 3,000;
- in the third instance ("revision"): between EUR 900 and EUR 2,000.

In practise, costs for legal representation will be negotiated between the party and its lawyer and is estimated by the Naturschutzbund Deutschland e.V. at a five-figure amount. Expert reports and evaluations submitted by the parties have to be fully borne by the parties themselves, and the above rule of reimbursement by the defeated party does not apply.

In principle legal aid is available, also to associations, provided they do not have the necessary funds to bring the case, where not bringing the case would be contrary to the public interest. This possibility does not appear to play any role in practise.

In terms of length of proceedings of administrative legal proceedings in general, the average first instance proceeding before an administrative court lasts 15.3 months, but with large deviations between the Länder (shortest average duration 3.9 months, longest average duration 25.7 months). 12% of proceedings last more than 2 years, 10 % more than 3 years[15].

[14] http://www.nabu.de/m06/m06_02/01281.html.

[15] According to a press release of the German Ministry of Justice of 26 August 2005, accessible at: http://www.bmj.bund.de/enid/1d0302e03c6b0037a8d2380fdbc05ef8,57d5ab706d635f6964092d0932323334093a095f7472636964092d0933303334/Pressemitteilungen_und_Reden/Pressemitteilungen_58.html

According to information from the Naturschutzbund Deutschland e.V., the following estimates may be given; for proceedings; based on legal standing of nature protection associations under the Nature Protection Act:

- First instance proceedings: between 1.5 and 5 years
- Second instance ("appeal") proceedings: 2 years
- Third instance ("revision") proceedings: 2 years,
- In the case of a claim going through all instances up to 9 years.

Interim injunctions[16]are regularly delivered within more narrow time frames, between 3 and 12 months.

As noted above, in principle both the administrative appeals procedure and the appeal to an administrative court have suspensive effect.

According to a 2003 publication[17], on average 30 cases are ruled upon per year in the nature protection area before administrative courts at all levels. This compares to a yearly number of some 200,000 administrative court proceedings[18].

3. Assessment of the legal measures for implementing Article 9(3) requirements on access to justice

In Germany, access to justice is limited to those cases in which the plaintiff can claim to be affected in his or her own rights, *e.g.*, the right to property but there is no possibility for the individual citizen or an NGO to act as an advocate for the environment and claim the violation of environmental protection legislation in the public interest.

However, in the nature protection area, exceptionally, standing is provided to regognised nature protection associations for challenging certain administrative decisions claiming a violation of nature protection legislation. Legally, the panel of decisions against which claims are possible are limited. Also, costs present a considerable risk for NGOs.

The German Federal Ministry of the Environment notes on its website[19] that in terms of the Aarhus Convention's third pillar, the intention of the Convention is to grant broad access to justice in environmental matters. At the same time, the Ministry website states, as in the submission to the Bundestag in connection with the proposal for ratification of the Aarhus Convention, that the Convention leaves a certain discretion to the national legislator in terms of the scope and content of such access to justice. Germany has recently ratified the Aarhus Convention. From the perspective of the German government all implementation measures taken so far are considered sufficient to guarantee the full implementation of the Aarhus Convention, including its Article 9(3) in Germany.

[16] See above: upon application, the administrative courts may issue interim injunctions. This presupposes that there is otherwise a danger that the legal relief sought by the plaintiff may be pre-empted or substantially empeded.

[17] M.Zschiesche, M.Rosenbaum, A.Schmidt, Naturschutzrechtliche Verbandsklagen in Dtl. im Zeitraum 1996-2001.

[18] According to other information, at Länder level, only around 50 court cases have been brought in the Land of Hesse since 1980 on the basis of nature protection legislation. In Lower-Saxony 10 cases were brought in 10 years. Source: Website Naturschutzbund Deutschland e.V. http://www.nabu.de/m06/m06_02/01281.html

[19] http://www.bmu.de/buergerbeteiligungsrechte/die_aarhus-konvention/doc/2608.php, last paragraph.

From the perspective of NGOs, efforts currently concentrate on challenging the German transposition of Directive 2003/35/EC insofar as provisions on access to justice are concerned.

4. Conclusions

In summary, it may be concluded that access to justice in environmental matters in Germany is

- Limited to those cases where the plaintiff can claim an infringement of his own individual rights, e.g. the right to property;
- in the nature protection area, exceptionally, nature protection associations are afforded standing in cases directed against certain, enumerated administrative acts, claiming the infringement of nature protection legislation.

In practice, claims in such cases present a considerable cost risk to nature protection associations.

The German Government is of the view that no further action is necessary to implement Article 9(3): existing measures at EU and national levels, are considered sufficient.

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Persons contacted for information

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Annex: List of compiled national measures implementing the requirements of Article 9(3) of the Aarhus Convention

§§ 58-61 of the Federal Nature Protection Act

(accessible in German at http://bundesrecht.juris.de/bnatschg_2002/ , and in English at http://www.bmu.de/files/pdfs/allgemein/application/pdf/bundnatschugesetz_neu060204.pdf)

Section Seven:
Participation of Associations

Article 58
Associations Recognized by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety

(1) Incorporated associations recognized by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety shall be given the opportunity to express their views and to have access to the pertinent expert opinions
1. during the preparation of ordinances (Verordnungen), and other legal instruments ranking after laws, in the field of nature conservation and landscape management by the Federal Government or the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety;
2. during plan establishment procedures (Planfeststellungsverfahren) conducted by Federal authorities where these relate to projects involving intervention in nature and landscape and where the association's scope of activity covers the territory of the Federal Laender to which the procedure relates;
3. in the case of plan approvals (Plangenehmigungen) issued by Federal authorities that substitute any plan establishment procedure (Planfeststellungsverfahren) referred to in no 2 above, and for which the involvement of the general public has been provided for, where the project relates to the association's scope of activites as defined in its Articles of Association.

(2) Article 28 paragraph 2 nos 1 and 2, paragraph 3 and Article 29 paragraph 2 of the Administrative Procedures Act (Verwaltungsverfahrensgesetz) shall apply mutatis mutandis. Relevant similar, or more extensive, forms of participation and involvement prescribed in other legal provisions shall remain unaffected.

(3) Paragraph 1 nos 2 and 3 shall also apply to associations recognized by the Federal Laender in conformity with Article 60 where the issue concerned relates to their respective scope of activity.

Article 59
Recognition by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety

(1) Recognition is subject to prior application. It shall be granted if the association concerned meets the following criteria:
1. The main purpose of the association, as defined in its Articles of Association is to promote, for non-pecuniary purposes and not merely for a limited period of time, the causes of nature conservation and landscape management.
2. The scope of activity of the association extends beyond the territory of one Federal *Land*.
3. At the time of recognition, it has existed for at least three years, and has been active within the scope defined in no 1 during this period.
4. There is sufficient evidence confirming that the association will do appropriate work within the relevant scope; the assessment shall, inter alia, take into account the type and scope of the association's past activities as well as composition and active potential of its membership community.

5. Because of its non-profit character, the association is exempt from corporate income tax pursuant to Article 5 paragraph 1 no 9 of the Corporate Income
Tax Act (Körperschaftssteuergesetz).
6. Membership associated with full voting rights in the general assembly of members is open to anyone who supports the association's objectives. In the case of associations merely consisting of juridical persons, the requirement mentioned in the first sentence may be waived provided that the majority of the juridical persons concerned meet this requirement.
The recognition document shall identify the field of activities, as specified in the Articles of Association, to which the recognition relates.

(2) The Federal Ministry for the Environment, Nature Conservation and Nuclear Safety shall be the agency delivering recognition.

Article 60
Associations Recognized by the Federal Laender

(1) The Federal Laender shall lay down rules and regulations concerning the involvement and recognition of incorporated associations, in conformity with the provisions set forth in paragraphs 2 and 3.

(2) Associations that have been granted recognition by Federal Laender shall be given the opportunity to express their views and to inspect and examine pertinent expert opinions:
1. during the preparation of ordinances (Verordnungen), and other legal instruments ranking below laws, by the Laender authorities responsible for nature conservation and landscape management,
2. during the preparation of the plans and programmes referred to in Articles 15 and 16,
3. during the preparation of plans as referred to in Article 35, first sentence no 2, during the preparation of programmes drafted by government anthorities and other public institutions for the re-establishment of displaced wild species of fauna and flora in the wild,
5. prior to the granting of exemptions from prohibitions and orders relating to the protection of Naturschutzgebiete ('nature conservation areas'), Nationalparke ('national parks'), Biosphärenreservate ('biosphere reserves') and other protected areas and parts thereof referred to in Article 33 paragraph 2,
6. during plan establishment procedures (Planfeststellungsverfahren) carried out by authorities of the Federal Laender, where these relate to projects associated with intervention in nature and landscape
7. during plan approvals (Plangenehmigungen) granted by authorities of the
Federal Laender, that substitute any plan establishment procedure (Planfeststellungsverfahren) as referred to in no 6 above, where the involvement of the public has been provided for in accordance with Article 17 paragraph 1 letter b of the Federal Highways Act (Bundesfernstraßengesetz).
The individual Federal Laender may provide for more extensive forms of involvement.
Furthermore, they may also
1. provide for the involvement of recognized associations in other procedures where such involvement is based on respective provisions of Laender legislation, as well as
2. provide that in cases where any impacts on nature and landscape are either not to be expected at all or only to a minor degree or scale, the involvement of recognized associations may be deemed not to be a binding requirement.
With regard to recognition, Article 59 paragraph 1 second sentence nos 1 and 4 to 6 shall apply mutatis mutandis.

Article 61
Legal Remedies available to Associations

(1) Without having been subject to any violation of its rights, an association recognized in accordance with Article 59 or on the basis of respective provisions of Laender legislation within the framework of Article 60, may lodge a legal remedy in conformity with the Rules of Administrative Courts (Verwaltungsgerichtsordnung) against
1. exemptions from prohibitions and orders relating to the protection of 'nature conservation areas' (Naturschutzgebiete), 'national parks' (Nationalparke) and other protected areas referred to in Article 33 paragraph 2 as well as against
2. decisions of 'plan establishment procedures' (Planfeststellungsbeschlüsse) relating to projects involving intervention in nature and landscape as well as 'plan approvals' (Plangenehmigungen) where the involvement of the general public has been provided for in relevant provisions.
The first sentence above shall not apply where the decision on an administrative act referred to therein has been taken on the basis of an Administrative Court decision within the framework of corresponding legal proceedings.

(2) Legal remedies pursuant to paragraph 1 above are only admissible if the association concerned
1. asserts that the adoption of an administrative act referred to in paragraph 1 first sentence is conflicting with provisions of this Act, legal provisions laid down on the basis of or within the framework of this Act or which continue to be applicable on the basis of or within the framework of this Act, or with any other legal provisions to be complied with/to be taken into consideration when adopting the administrative act concerned and which are at least also intended to serve the interests of nature conservation and landscape management,
2. is affected within the scope of activities set forth in its Articles of Association, to the extent this is covered by the recognition granted, and
3. was entitled to involvement in accordance with Article 58 paragraph 1 nos 2 and 3 or in accordance with respective provisions of Laender legislation within the framework of Article 60 paragraph 2 nos 5 to 6 and has expressed its views on the matter in this context, or, contrary to Article 58 paragraph 1 or to rules and regulations of the respective Federal Land laid down in conformity with Article 60 paragraph 2, was given no opportunity to express its views.

(3) If the association was given the opportunity to express its views within the framework of the respective administrative procedure, the procedure based on a legal remedy lodged by the association shall preclude objections raised which it had failed to put forward in the respective administrative procedure despite the fact that it would have been able to do so on the grounds of the documentation transmitted to it or inspected by it.

(4) If the association was not notified of the administrative act concerned the objection to be raised and the action to be filed must be transmitted within one year from the date the association had knowledge or ought reasonably to have had knowledge of the respective administrative act. The Federal Laender may also admit legal remedies lodged by associations in other cases where Article 60 paragraph 2 provides for the involvement of relevant associations concerned. The Federal Laender may provide further detail on applicable procedure.