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in Decision-making and Access to Justice
in Environmental Matters

Task Force on Access to Justice

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Access to justice in cases
on the right to environmental information

Information paper N4 revised

QUESTIONNAIRE
Access to justice in cases on the right to environmental information

At its sixth session[1], the Meeting of the Parties to the Aarhus Convention set out the mandate of the Task Force on Access to Justice to promote the exchange of information, experiences, challenges and good practices relating to the implementation of the third pillar of the Convention with special attention to information cases. Available information sources such Aarhus Convention national implementation reports and e-justice initiatives provide very basic overall description of existing framework but do not go in the details about its elements such as scope of review, time limits, remedies, costs and etc.

To overcome the information gaps, the Aarhus Convention Task Force on Access to Justice will carry out a survey to collect more detailed information, examples of legislation provisions and case law relevant to access to justice in cases on the right to environmental information. The survey could be an important contribution to identifying good practices, addressing key challenges, populating the jurisprudence database and fostering capacity-building efforts to support work in this area. The survey outcomes will lay the ground for advancing the implementation of article 9, para. 1, of the Aarhus Convention and contribute to the monitoring of SDG 16 targets 16.3 and 16.10.

A draft questionnaire was discussed at the eleventh meeting of the Task Force on Access to Justice in Geneva in Geneva on 27-28 February 2018[2] and thereafter revised by the secretariat in consultation with the Chair in the light of the discussion at the meeting and further comments received.

The present questionnaire is distributed to a selection of institutions specialized in information cases in a representative number of Parties from different subregions. In addition, representatives of judiciary, judicial training institutions, other review bodies, non-governmental organizations and stakeholders are welcome to contribute with input on any issue in the questionnaire.

The outcomes of the survey will be synthesized with information from the national implementation reports to a report which will be discussed at the next meeting of the Aarhus Convention Task Force on Access to Justice in Geneva in 2019 and further reported to the subsequent meeting of the Working Group of the Parties to the Aarhus Convention.

Those who want to take part in the survey are kindly invited to complete and return the questionnaire to the following email address: **aarhus.survey@un.org** with the subject line “11TFAJ survey from [name of country, organization]”. Kindly be informed that the completed questionnaires will be posted on the website of the twelfth meeting of the Task Force.

[1]See para. 14(a) (i) of decision VI/3 of the Meeting of the Parties adopted at its sixth session (Budva, Montenegro, 11–13 September 2017) available from http://www.unece.org/env/pp/aarhus/mop6_docs.html.
[2]More information is available from http://www.unece.org/env/pp/aarhus/tfaj11.html.

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Introductory remarks on the implementation of the access to environmental information provision of the Aarhus Convention in the German law:

Germany is a federal state, subdivided into 16 “Bundesländer” (states). The provisions of the Aarhus Convention (AC) on Access to Environmental Information (AtEI) were implemented on both the federal and the “Bundesländer”-level. Hence, 17 different acts transpose the provisions into the national law.

In nine of these “Bundesländer” the access to environmental information is guaranteed by specific AtEI - acts. In the other “Bundesländer”, the AtIE is incorporated within more general freedom of information acts.

The following answers therefore refer to the provisions of the federal act only: At federal level, AtEI is provided by the Environmental Information Act (EIA) (in German: Umweltinformationsgesetz (UIG)).

The EIA-text can be found - in German - under the following link:[3] https://www.gesetze-im-internet.de/uig_2005/BJNR370410004.html.

Legal protection for disputes on AtEI is regulated in § 6 EIA. This provision transposes Art. 6 UIRL and Art. 9 para. 1 AC into federal national law.

§ 6 EIA can be summarized as follows:

- § 6 para. 1 EIA establishes, in a general and exhaustive way, that under the act, the competence to deal with disputes lies with the administrative courts.

Hence, the general rules of the Administrative Procedure Code (*Verwaltungsgerichtsordnung, VwGO*) are also applicable for disputes under the EIA.

- According to § 6 para. 2 EIA, legal proceedings against a decision by a public administrative authority must go through various instances, starting with the pertinent public authority.

§ 6 para. 3-5 EIA stipulate special regulations on how to proceed against rejections of requests for information issued by private bodies falling under the obligation to disclose environmental information.

- According to § 6 para. 3 sentence 1 EIA, the applicant has the option to initiate a review procedure (a procedure *sui generis*) with the private body instead of (administrative) appeal procedures. This review is,

[3] Unfortunately, no official English translation of this provision is publicly available.

however, according to § 6 para. 3 sentence 2 EIA, not prerequisite to bringing action before an administrative court.

- § 6 para 4 EIA includes procedural and formal requirements regarding the review procedure of the private body. A request for review must be made within a period of one month.
- According to § 6 para. 5 EIA, the "*Bundesländer*" are free to allow actions against private bodies to be brought before administrative courts, according to the conditions of § 6 para. 1 EIA.

The legal protection regime on "environmental information" can be described by the distinguishing "scenarios" - legal actions for the "enforcement", or for the "prevention" of access to environmental information:

1. Scenario: Legal protection can support the enforcement of the right of access to environmental information

   In this case, the following scenarios are possible:

   - An applicant can bring an action against an authority falling under the obligation to provide information according to § 2 para. 1 sentence 1 EIA (authority),
   - An applicant can file a suit against a private body falling under the obligation to provide information under § 2 para. 1 sentence 2 EIA or
   - A supervisory authority can act against a private body falling under the obligation to provide information.

2. Scenario: Legal protection can also aim at preventing access to environmental information

   In this case, the following scenarios are possible:

   - A third party concerned can take action against an authority falling under the obligation to provide information under § 2 para. 1 sentence 1 EIA (authority),
   - A third party concerned can take action against a private body falling under the obligation to provide information under § 2 para 1 sentence 2 EIA coj. § 2 para. 2 EIA or
   - A private body falling under the obligation to provide information under § 2 para. 1 sentencce 2 EIA coj. § 2 para 2 EIA can take action against an order issued by a supervisory authority (§ 13 EIA) obliging the private body to provide information to an applicant

Questions concerning access to justice in cases on the right to environmental information:

Questionnaire:

1. **Please indicate *time limits* for public authorities holding environmental information to respond to requests for environmental information.**

The EIA does not state an obligation to confirm the receipt of the request. For granting[4] and / or (partial) rejection[5] of the request, the time limit for responding is generally one month after the request has been issued.[6] Only insofar as the volume and complexity of the environmental information are as such that the one-month period cannot be complied with, the period in which to answer the request is two month after the request has been issued.[7]

a) **Is there a requirement for the issuance of a *refusal in writing and stating reasons* for the decision?**

The *stating of reasons* for the refusal of environmental information is mandatory – both for oral[8] and written requests.[9] However, it needs only be in written form if the request itself has been issued as such, or if the applicant explicitly demands it in written form.[10]

b) **How is the applicant *informed* about the possibilities to appeal the decision?**

Both, in the written and oral issuance of a refusal, the applicant must be informed about the possibilities to appeal, including information on the appeal body and the deadline for the appeal.[11]

2. **What are the *time limits to appeal* a decision on access to environmental information?**

The mandatory administrative appeal procedure concerning decisions on access to environmental information by public authorities must be filed within one-month after the decision has been issued to the applicant.[12] After the review decision of the administrative authority which is competent to deal with the complainant's administrative appeal, the applicant can appeal to the court within one month from receiving the review decision. Concerning decisions of private bodies, the time limit for the review procedure is the same.[13] However, there is no defined time limit for the appeal to the courts.[14] A time limit is only set by the principle that the appeal must be filed "without unreasonable delay" - which is decided on a case-by-case basis.

a) **What are the most frequently used grounds for appeal?**

[4] § 3 para 3 sentence 1 EIA.
[5] § 5 para 1 sentence 1 EIA.
[6] § 3 para 3 sentence 2 No. 1 EIA.
[7] § 3 para 3 sentence 3 No. 2 EIA.
[8] § 5 para 1 sentence 3 EIA.
[9] § 5 para 2 sentence 1 coj. § 5 para 1 sentence 3 EIA.
[10] § 5 para 1 sentence 3 EIA.
[11] § 5 para 4 EIA.
[12] § 6 para 2 EIA in coj with § 70 Administrative Procedure Act (Verwaltungsgerichtsordnung, VwGO.
[13] § 6 para 4 sentence 1 EIA.
[14] The type of legal action filed at the administrative courts against private bodies is considered a declaratory action, an action acknowledged only as customary law. For this legal action, the law defines no strict time limit.

Within an EIA-evaluation project,[15] the grounds of appeal for all (publicly available) legal proceedings[16] on access to environmental information referring to the act were analysed: Of the relevant 48 legal proceedings, 34 were issued because none of the requested environmental information was granted. 12 proceedings were issued because not all the requested information was made accessible. Finally, one legal proceeding was a third party complaint – aiming at the prevention of access to environmental information, and one was filed due to the complete inactivity of the competent authority.

b) Are there any issues concerning *who has standing* in such cases?

No; there are currently no open questions regarding who has standing in cases concerning AtEI. The requirements for standing can be summarized as follows: Individual persons always have standing at the administrative courts when they can claim that their own rights have been infringed by public action. They, therefore, always have standing to appeal the (partial) refusal of an information request. The same applies to legal entities under private law.

Citizen's initiatives without legal capacity have standing – according to the Federal Administrative Court (BVerwG) - when they have a sufficient organizational structure, meaning that they can guarantee a continuous legal proceeding.[17]

In 2017, the Federal Administrative Court ruled that legal entities under public law (e.g. municipalities) have standing in environmental information requests cases whenever "their need for information is comparable with the need of private entities."[18]

c) To *what body and in which form* is the appeal made; recourse for review within the public authority or to the higher authority; Information Commissioner, Ombudsman or any other independent and impartial body; or directly to court of law?

The administrative appeal must be issued in written form to the same public authority that decided upon the environmental information request.[19] Only in the case of a dismissal of the administrative appeal by this authority, will the next superior authority have the final decision upon the appeal.[20] If the information was requested from a supreme federal authority, the review must be conducted within this supreme federal authority only.[21] Concerning the appeal on decisions of private bodies, the review procedure must be started by the applicant with a written request to the body that decided upon the request for environmental information. The same body will also decide upon the appeal.[22]

3. If appeal to the review body other than a court of law is available in any form, does that request suspend the time limits to appeal to the court?

[15] Schomerus, Stracke, Zschiesche, Evaluation des Umweltinformationsgesetzes, Anhang III, (to be published May 2019).
[16] Between 14.02.2005 – entering into force of the current EIA - and 31.12.2017.
[17] BVerwG, judgement of 21. February 2008 - 4 C 13/07, juris, para. 22.
[18] BVerwG, judgement of 23. February 2017 – 7 C 31/15, para 38.
[19] § 70 para 1 Administrative Procedure Act.
[20] §§ 72, 73 para 1 No. 1 Administrative Procedure Act.
[21] § 73 para 1 No.2 Administrative Procedure Act.
[22] § 6 para 3 and 4 EIA.

To appeal decisions on environmental information requests of public bodies, an administrative appeal procedure is mandatory before appealing to the court; the limited period to appeal to the court starts after the decision on the administrative appeal. Concerning appeals on decisions of private bodies, the review procedure does not suspend the time limit for appealing to the court. Both options (administrative review procedure/court) can be executed in parallel.

a) Is there a requirement of *exhaustion* of administrative review procedures prior to bringing the case to court?

Yes; concerning requests at public bodies, the administrative appeal is mandatory before bringing a case to the court.[23] Concerning the appeal against decisions of private bodies, the situation is different: here, the review procedure is optional, it is no prerequisite for bringing an action before an administrative court.[24]

b) If appeal is made to an independent body mentioned above, how is the *independence and impartiality* of that body ensured?

At federal level, no such independent body for appeals exists.

4. What *costs (fees, charges)* are connected to review before the court of law or other review bodies in these cases?

For the administrative appeal procedure, no costs will be charged if the request for environmental information itself was free of charge according to the EIA-regulation of fees[25]. In the case of administrative appeal procedures dealing with information requests where fees are payable, the costs will be charged proportionally.[26] According to the EIA-regulations, the maximum fee for processing the request itself is 500 €. The amount for the administrative appeal procedure cannot precisely be predicted and is dependent on the specific environmental information request.

In Germany, court fees and fees for lawyers at the administrative courts can be predicted precisely because they are based on the definition of "the value of dispute" (*Streitwert*) and pre-determined fee rates according to the specific "*Streitwert*". The value of dispute lies at the discretion of the judge but needs to determined according to the subject-matter of the case. For environmental information requests it is generally specified at 5000 €.[27] For a "*Streitwert*" of 5000 €, the court fees in the Administrative Court (first instance) will be e.g. 438 €. At the second instance (Higher Administrative Court) - for the appeal proceedings – the fees will be 584 €. The attorney fees for the first instance trial are 925 €, and 1,033 € for the second instance for each party to the proceeding. The total costs of a court-review covering two instances would amount to 4,938 €. The losing party bears these costs. If the judgement only partly grants or denies the information request, the costs will be divided proportionally between the parties.

[23] § 6 para 2 EIA.
[24] § 6 para 3 sentence 1 and 2 EIA.
[25] UIGGebV: http://www.gesetze-im-internet.de/uiggebv/.
[26] § 10 BGebG: https://www.gesetze-im-internet.de/bgebg/__10.html; § 6 para 2 EIA cof § 73 para 3 Administrative Procedure Act, Attachment I UIGGebV, § 10 BGebG. According to the EIA-regulations, the maximum fee for the processing of the request itself is 500 €.
[27] According to § 52 para 2 GKG.

5. **What is the average time needed for the court of law or another independent and impartial body to decide an information case, i.e. from the introduction of the appeal to the notification of the decision? If the national rules of appeal require administrative reconsideration before the appeal is submitted to the court of law or another review body, that time should also be separately specified.**

There are no available statistics regarding the average time needed for a court of law in Germany to decide on environmental information cases. Information cases are one of a number of topics at the adminstrative courts. The average duration of proceedings varies according to the different Länder, the courts and the relevant senates and judges. However, the following number can give a – non representative impression regarding information cases – on adminstrative proceedings: In 2017, the nationwide average time for the finalization of administrative (principle) proceedings – with the exception of proceedings concerning asylum law - was 11.2 months for the first instance.[28]
The average time-frame for the administrative appeal proceedings is also difficult to specify: As mentioned above, the time-limit for the initiation of the administrative appeal proceedings and for bringing the case to the court is one month for each (see above 2.). The EIA, however, defines no such time limit for the administrative review authority decisions upon the administrative appeal. No such time limit exists in the general administrative law either. In the absence of available statistics for administrative appeals, the average time cannot be further specified.

6. **Are decisions of courts and other review bodies in information cases in writing, publicly available, binding and final?**

Not all court decisions on access to environmental information are publically available. The courts themselves only select cases of special importance for publication. Moreover, some private operators[29] provide extensive fee-based databases on selected judgements regarding access to environmental information cases. However, these databases do not include all existing judgements.

Judgements of courts of last instance are binding and final: In Germany, the administrative jurisdiction has a three-tier structure, which can be summarized as follows: First, the Administrative Courts as the courts of first instance, then the Higher Administrative Courts as the Courts of Appeal, and finally the Federal High Administrative Court, responsible for appeals on points of law. Depending on the legal questions concerning each individual case, different instances will be the binding and final judicial body. The right to appeal or to bring a case to the Federal High administrative court is examined in each judgement on a case-by-case decision.

Judgements of lower courts are binding if no further appeals are possible, for instance when the deadline for an appeal has expired.

a) **If the appeal is successful, how is the independent body's/court's *decision enforced*; by ordering the public authority to disclose the information; by disclosing the information directly; by suing the public authority if they persist in refusing to disclose the information or by any other means?**

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[28] See https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Verwaltungsgerichte2100240177004.pdf?__blob=publicationFile p. 24.
[29] E.g. Beck-online.de; juris.de.

The court's decision against public bodies will be either enforced by ordering the public authority to disclose the information directly,[30] or – in cases where further facts need to be considered by the public authority – to decide anewed upon the information request in accordance with the legal opinion of the court (the so-called "*Bescheidungsurteil*").

7. **Can disciplinary, administrative or criminal *sanctions be exercised* against the public officials if disclosure of environmental information is refused unlawfully?**

In general, the exhaustion of (administrative) legal remedies as mentioned above forms the main option available for members of the public if information is refused unlawfully.

In addition, customary law accepts that a disciplinary complaint (*Dienstaufsichtsbeschwerde*) can be filed against a specific public official acting unlawfully. Such a complaint could also be filed if the disclosure of environmental information is refused in a clearly unlawful manner. The complaint must be directed to the supervisor or supervising authority and address the unlawful behavior of that public official. The addressed supervisor/supervising authority must inform the complainant whether any actions were taken against the public official.

If a final and binding court judgement orders the disclosure of environmental information and the public authority continues to refuse disclosure, the applicant can demand the court of first instance to order a penalty payment against the opposing authority of up to 10.000 €.[31] This penalty payment can be determined several times. Should the authority still not follow the ruling of the court, the possibility of arresting the representing public officials of the opposing authority and enforcing the binding ruling of a Court is currently part of the German legal debate. In 1999, the Federal Constitutional Court referred to this question and generally supported the possibility of such action in a decision.[32] So far, however, this „option" remains theoretical, it has never been "necessary" or as yet executed in practice.

a) **Would it be possible for the applicant or other members of the public to be a party to such proceedings?**

Concerning the disciplinary complaint and the request for the penalty payment – yes, as the requesting party. With regard to the theoretical option of public official-detention, the rules of procedure are not determined.

8. **Do you have any experience of situations/cases where individuals or ENGOs asking for environmental information have been *penalized, persecuted or harassed* in any way for their involvement?**

No - no such cases have been reported or come to our knowledge yet.

9. **Do you have any experience of *misuse or abuse* of the right to environmental information and the consequences thereof?**

We do not know about any cases of misuse or abuse of the right to environmental information.

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[30] §§ 42 para 1, 113 para 5 sentence 2 Administrative Procedure Code.

[31] § 172 Administrative Procedure Code.

[32] BVerfG, decision of 09. August 1999 - 1 BvR 2245/98, para 10 and 11.

10. In your view, what are the *main barriers* in your legal system concerning access to justice for the members of the public in cases on the right to environmental information?

The legal remedies for members of the public are part of the administrative legal system: Other than in other environmental issues, the rules on standing are clear and create no barrier for access to justice for the members of the public.

One barrier – as mentioned above under 5. – is the undefined time period for the mandatory administrative review.

In practice, further main barriers are the remaining uncertainties as to interpretation of grounds for refusal by the courts e.g.

- on the definition of "emissions",
- the margin of discretion on the part of the public authorities to define negative impacts on public interests as "public security, international relations, confidentiality of consultations within the authority etc.,
- and questions on copyright law and trade and business secrets.

11. Does your legal system provide with any *innovative approaches* concerning administrative and judicial review procedures in cases on the right to environmental information, for example concerning the requirement for the procedure to be expeditious, the use of alternative dispute resolutions (ADRs), costs, remedies, means for execution of review decisions on disclosure or use of e-justice initiatives?

The concept of in-camera proceedings is established under German law[33] and serves the purpose of avoiding the early settlement of the main case due to the general right to access files within the court proceedings.[34]

12. Can you please provide us with a short description of particularly important or innovative information cases, as well as cases which illustrate the main barriers concerning access to justice in these matters.

A large number of court decisions on information cases exist, but only a small selection can be shown here. Generally speaking, German courts have paved the way for a wide interpretation of provisions for granting access to information, and for a narrow interpretation of exception clauses.

This applies, for instance, for the <u>interpretation of the term "*informationspflichtige Stellen*" (public authorities) in § 2 para 1 and 2 EIA:</u>

> The Higher Administration Court Berlin-Brandenburg ruled, for instance, that the federal government falls under this term, and that no exemption such as the "*Kernbereich exekutiver Eigenverantwortung*" (core area of executive self-responsibility) exists.[35] With regard to public

[33] § 99 para 2 Administrative Procedure Code.
[34] § 100 Administrative Procedure Code.
[35] OVG Berlin-Brandenburg, Judgement of 13. November 2015 – OVG 12 B 6.14, ZUR 2016, 170.

authorities, it was also questioned whether federal ministries fall under this term when preparing legislative drafts for parliament. In the so-called Flachglas Torgau case, the ECJ interpreted the term in a narrow way, ruling that exemption for ministries under the German EIA can only be applied while the legislative procedure is ongoing.[36] In the 2013-case of the Deutsche Umwelthilfe, the ECJ also decided that the preparation of ordinances (*Rechtsverordnungen*) underneath the formal federal acts would not be covered by the exemption.[37] These judgements led to an alteration of the EIA.[38] The Administration Court Berlin ruled in a decision from 2017, that the participation of German federal ministries in EU-legislation does not fall under the exemption.[39]

Although the interpretation of the term "*natural or legal person having public responsibilities or functions, or providing public services, relating to the environment*" („*natürliche oder juristische Personen des Privatrechts, soweit sie öffentliche Aufgaben wahrnehmen oder öffentliche Dienstleistungen erbringen, die im Zusammenhang mit der Umwelt stehen*") leads to several problems, only very few German court-rulings can be found. Following the "Fish Legal & Shirley" case,[40] the German Federal Administration Court (*Bundesverwaltungsgericht*) ruled that the "DB ProjektBau GmbH", 100%-daughter of the German Railway Company (Deutsche Bahn AG), falls under the term.[41] According to the court, planning and construction of railway lines is considered a public responsibility and also falls under public services. The term "*under the control of a body or person*" („*Kontrolle des Bundes oder einer unter der Aufsicht des Bundes stehenden juristischen Person des öffentlichen Rechts*") is also interpreted widely in this decision. There are as yet, however, no court decisions on questions whether energy companies, waste disposal companies, the telecommunications sector, airport operators, water utilities, private forest management companies, and many other possible private authorities fall under the above mentioned term.

The term "environmental information" in § 2 para 3 EIA is also interpreted widely by German courts.[42] In the legal evaluation, only marginal differences can be found:

For instance, it was unclear whether § 2 para 3 EIA shows a definitive list of the term "environmental information". According to the Administration Court Oldenburg, the list is not final, but allows a wider interpretation of the term.[43] However, this was overruled by the Higher Administration Court Lüneburg, which considered the list final.[44] In a decision of 2007, the German Federal Administration Court found that information on plans which were no longer expected to be realized does not fall under environmental information.[45] Perhaps the most interesting cases are those regarding agricultural state aids. The information requests were backed

[36] Flachglas Torgau GmbH v. Federal Republic of Germany, Judgement of the Court, Grand Chamber, of 14 February 2012, C‒204/09.
[37] Deutsche Umwelthilfe eV v Federal Republic of Germany, Judgement of the Court, Second Chamber, of 18 July 2013, C‒515/11.
[38] See Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Umweltinformationsgesetzes, BT-Drs. 18/1585 of 18.5.2014, p. 8.
[39] VG Berlin, Judgement of 1.12.2011 - VG 2 K 91.11.
[40] Fish Legal, Emily Shirley v Information Commissioner, United Utilities Water plc, Yorkshire Water Services Ltd, Southern Water Services Ltd, Judgement of the Court, Grand Chamber, of 19 December 2013, C‒279/12.
[41] BVerwG, Judgement of 23 February 2017, 7 C 31/15.
[42] See, for instance, BVerwG, Judgement of 23 February 2017, 7 C 31/15.
[43] VG Oldenburg (Oldenburg), Judgement of 11 January 2017 – 5 A 268/14.
[44] OVG Lüneburg, Judgement of 27 February 2018 – 2 LC 58/17.
[45] BVerwG, Judgement of 1 November 2007 – 7 B 37/07; see also OVG Berlin-Brandenburg, Judgement of 6 March 2014, 12 B 19.12.

by NGOs in Germany, UK and Denmark. Some German courts ruled that information on aids awarded to farmers from the EU-budget do not fall under environmental information because a connection to environmental issues was denied.[46] Other courts did, however, see such a connection and ruled that the request for information be followed by the relevant authorities.[47] The Federal Administration Court did not decide upon this matter. The court granted access to the requested information, although not on the basis of the EIA but according to the Federal Freedom of Information Act.[48] According to a wide interpretation regarding indoor air, the High Court Berlin-Brandenburg found that this falls under the term environmental information.[49] Further court rulings apply to information on property which, according to the Administration Court Coblenz is not covered by the term environmental information.[50] The Higher Administration Court Lüneburg ruled that also information on the transport of animals for immediate slaughter does not fall under the term,[51] while the Administration Court Oldenburg had a different opinion.[52]

Further, some court rulings deal with questions who holds the requested information (§ 2 para 4 EIA):

The Higher Administration Court Münster, for instance, ruled that simply holding environmental information is not sufficient; the court also required a legal power of disposition.[53] However, this was criticized in the literature as a too narrow interpretation.[54] A further question was whether non-prepared data must be considered. The Administration Court Saarlouis found that a request to transfer data from analogue to digital should be denied.[55] However, in a more user-friendly manner, other courts ruled that such a preparation can be requested.[56]

There are also some court rulings on the question of who is entitled to issue a request for environmental information (§ 3 para 1 EIA):

Initially, only private persons were considered to be entitled. However, according to the German Federal Administration Court, public sector entities (*Körperschaften des öffentlichen Rechts*) may also fall under § 3 para 1 EIA if their situation is comparable to that of private persons. This can apply, for instance, to municipalities[57] or church congregations.[58] Moreover, political parties fall under the section; a formal recognition is not necessary.[59]

According to § 3 para 1 EIA, the applicant is not required to state an interest. If the applicant´s interests conflict with the purpose of the EIA, this can only be considered under the exception clauses in § 8 and 9 EIA, and not under § 3 para 1 EIA.[60]

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[46] See, for instance, VG Düsseldorf, Judgement of 24 August 2007 – 26 K 668/06.
[47] VG Köln, Judgement of 23 October 2008 – 13 K 5055/06; OVG Münster, Judgement of 1. March 2011 – 8 A 2861/07.
[48] BVerwG, Judgement of 28 May 2009 – 7 C 18/08.
[49] OVG Berlin-Brandenburg, Decision of 9 February 2015 – OVG 12 N 11.14.
[50] VG Koblenz: Judgement of 21 August 2008 - 7 K 2012/07.KO, 7 K 2012/07.
[51] OVG Lüneburg, Judgement of 27 February 2018 – 2 LC 58/17.
[52] VG Oldenburg (Oldenburg), Judgement of 11 January 2017 – 5 A 268/14.
[53] OVG Münster, Decision of 15 August 2003 - 21 B 1375/03.
[54] Schomerus, NVwZ-RR 2004, 169.
[55] VG Saarlouis, Decision of 03 November 2008 - 5 L 873/08.
[56] VG Köln, Judgement of 25 November 2008 - 13 K 4705/06; VG Schleswig: Judgement of 29 November2007 - 12 A 37/06.
[57] BVerwG, Judgement of 23 February 2017 – 7 C 31/15.
[58] BVerwG, Judgement of 21 February 2008 - 4 C 13/07.
[59] BVerwG, Judgement of 25 March 1999 - 7 C 21–98.
[60] BVerwG, Judgement of 24 September 2009 - 7 C 2/09.

Further question arise with regard to the mode of information.

According to § 3 para 2 EIA, in cases of high administrative burden the public authority may grant access to the information in another form than requested by the applicant. Neither additional costs nor a higher administrative workload constitute such a burden.[61] However, the necessary redacting of a large number of pages in a requested file can lead to a relevant administrative burden.[62]

§ 3 para 3 EIA sets a one month-period of time (in more complex cases, two months) for providing the requested information.

The Higher Administration Court Münster said that the older the information, the less important it can be. This leads to a general requirement of rapid action.[63] It seems problematic that failure to comply within a period of time does not lead to any sanction provisions in the EIA. § 75 of the Administrative Procedure Act allows an action for failure to act after three months. However, in a case regarding the Freedom of Information Act, the Administrative Court Berlin holds that one month period of time in § 3 para 3 EIA does not lead to a reduction of the 3-months-period.[64] In particular, in cases with third-parties, public authorities are often unable to comply with the given period of time. The EIA, however, does not provide any solutions for this practical problem.

§ 4 EIA provides requirements for the application and the procedure.

In the EIA, no provision exists regarding the requested amount of information. However, a request for a large amount of data is not necessarily formulated in too general a manner. The Federal Administration Court ruled that the requested information must not be specified in detail because the applicant cannot know exactly which data the public authority holds.[65] Nevertheless, the dilemma remains that a request for a large amount of data may paralyse a public authority.

Another question which has not yet been ruled upon by a court is whether anonymous requests must be answered by public authorities. Due to the fact that an applicant is not required to state an interest, the applicant´s name plays no role in the procedure carried out by the public authority. In principle, such request must therefore be dealt with by the authority.

§ 5 EIA provides regulations for the refusal of a request for information.

The Higher Administration Court Cassel ruled that such a refusal must be considered a national administrative measure (*Verwaltungsakt*), with the consequence that the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) and the Act of the Administrative Courts (*Verwaltungsgerichtsordnung*) become applicable.[66] However, procedures carried out by persons under private law cannot be regarded as an administrative measure, but rather as a measure sui

[61] BVerwG, Judgement of 25 March 1999 - 7 C 21–98; VGH Mannheim, Judgement of 25 November2008 - 10 S 2702/06.
[62] VG Frankfurt a.M., Decision of 7 May 2009 - 7 L 676/09.
[63] OVG Münster, Decision of 23 May 2011 – 8 B 1729/10.
[64] VG Berlin, Judgement of 27 June 2016 – 2 K 534.15.
[65] BVerwG, Judgement of 18 October 2005 - 7 C 5/04; judgement of 25 March 1999 - 7 C 21–98.
[66] VGH Kassel, Decision of 30 November 2006 - 10 TG 2531/06.

generis. Here, the rules for administrative measures must be applied in concurrence with (analogous) to the public law-rules.

According to § 5 para 3 EIA, environmental information held by, or for public authorities which has been requested by an applicant, shall be made available in part where it is possible to select information. In a 1999-judgement, the ECJ ruled that the former version of the EIA did not fully comply with this requirement.[67] After this judgement, the German legislator changed the EIA.

§ 6 EIA provides rules regarding legal protection.

Problems can arise particularly in cases with third party-involvement. § 6 EIA guarantees legal protection for the applicant, as well as for the third party. This includes temporary legal protection by interim measures according to the Act of the Administrative Courts (*Verwaltungsgerichtsordnung*). In a case on information about a nuclear power station, the Administrative Court Schleswig ruled that the weighing up of interests regarding temporary legal protection must lead to the refusal of disclosure.[68] Otherwise, by disclosing the requested information, the main point of the legal dispute would have been anticipated.

Similar problems can arise due to the doctrine of court procedure publicity. All court files must, in principle, be disclosed to all parties, including the applicant. This would lead to an anticipated disclosure of the requested information. For such cases, an in-camera-procedure is provided by § 99 Act of the Administrative Courts. The Higher Administration Court Berlin-Brandenburg ruled that only those files relevant to the issue fall under this rule.[69] Although cases with third party-involvement occur relatively often, not many court decisions based on in-camera procedures exist.

§ 7 EIA defines rules for public authorities how to support the public in seeking access to information.

These rules remain relatively vague, and there are no sanctions provided for non-compliance. Therefore, no court decisions in this matter exist. However, there is one point worth mentioning: while the implementation of the general Freedom of Information Act is supported by the Institution of the Information Commissioner (*Bundesbeauftragte für die Informationsfreiheit*), this institution is not responsible for the EIA. This leads to incoherent and incomprehensive support measures. Some public authorities provide practical arrangements such as guidelines (i.e. the Federal Environmental Ministry), other do not give such support. Publicly accessible lists of public authorities are not available. The non-responsibility of an advisory institution which is also in charge of providing support measures can be regarded as an effective barrier to access to environmental information.

§§ 8 and 9 EIA define rules for exceptions from the right of free access to environmental information. While § 8 EIA provides such rules for the protection of public interests, § 9 EIA aims at protecting private interests. These sections represent a main focus of court decisions. Both exceptions must be interpreted in a narrow way. Although not clearly mentioned in the EIA (other than, for instance, in the Aarhus Convention or the Directive 2003/4/EC), German courts follow this rule.

[67] Judgement of the Court (Sixth Chamber) of 9 September 1999. - Commission of the European Communities v Federal Republic of Germany, C-217/97.
[68] VG Schleswig, Decision of 13 February 2007 – 12 B 85/06.
[69] OVG Berlin-Brandenburg, Decision of 7 December 2012 - OVG 95 A 1.12.

In both sections, a public interest test must be carried out before deciding on the disclosure of the information. The Federal Administration Court made it clear that the applicant requesting environmental information acts as a representative of the public, not (merely) in his/her private interests. This must be considered when carrying out the test.[70] The public interest must explicitly prevail over the interest in non-disclosure.[71] It must also be taken into consideration if there is public pressure to gain the information, for instance in the case of malfunction in a nuclear power plant.[72]

Also in both, §§ 8 and 9 EIA, there is a counter-exception (*Rückausnahme*) for emissions. However, this term remains unclear. In the Stichting Greenpeace Nederland-case, the ECJ made some valuable definitions.[73] Some questions remain unanswered, however, such as whether substances in closed systems fall under the term "emissions". There are as yet no German court judgements on this matter from.

The Higher Administration Court Coblenz was of the opinion that in addition to the listed exceptions, further not explicitly mentioned reasons for a refusal can be accepted.[74] This does not comply with the Aarhus Convention or the Directive 3003/4/EC.

§ 8 EIA provides rules for exceptions for the protection of public interests.

The Administration Court Mainz denied disclosure of a list of companies falling under the Major Accident Ordinance (*Störfallverordnung*) for reasons of public security, arguing that terrorist groups such as Al Qaida might gain access to this list.[75] This was overruled by the Higher Administration Court Coblenz, ruling that there were no indicators for such a suspicion.[76]

Regarding the exception clause of internal communications, the Federal Administration Court ruled that data on expert opinions et al. given to the public authority before the begin of communication do not fall under the exception. Only the consultation itself is covered.[77]

The exception clause "*course of justice*" only addresses information relevant for the procedure, but not more general information on the party´s positions and their success in the court trial.[78]

A further exception can be made if the applicant misuses the right of access to information. The Federal Administration Court ruled that such misuse may exist if the only purpose of the request

[70] BVerwG, Judgement of 21 February 2008 - 20 F 2/07.
[71] BVerwG, Judgement of 24 September 2009 - 7 C 2/09.
[72] BVerwG, Judgement of 21 February 2008 - 20 F 2/07.
[73] Bayer CropScience SA-NV, Stichting De Bijenstichting v College voor de toelating van gewasbeschermingsmiddelen en biociden,, C-442/14.
[74] OVG Koblenz, Judgement of 2 June 2006 – 8 A 10 267/06.
[75] VG Mainz, Judgement of 24 April 2007 – 3 K 618/06.MZ.
[76] OVG Koblenz, Judgement of 20. February 2008 – 1 A 10886/07.
[77] BVerwG, Judgement of 2 August 2012 – 7 C 7/12.
[78] OVG Schleswig, Judgement of 6 December 2012 – 4 LB 11/12.

for information were industrial espionage. [79] However, this must be proven explicitly by the public authority.[80]

If an administrative decision is only available as a draft, the public authority may refuse disclosure until the document is finished.[81] This, however, does not apply to finalised expert opinions, even if the public authority does not agree with its results.[82]

Whether the exception regarding international relations also covers relations between the Federal Republic of Germany and the EU is a further question. The Higher Administration Court Berlin-Brandenburg ruled that relations to supra-national organisations such as the EU are covered also.[83] However, in the literature, a more narrow interpretation was preferred.[84]

§ 9 EIA deals with exceptions in favour of <u>private interests</u>.

The first exception concerns the protection of private data. The Higher Administration Court Mannheim ruled that this clause is specific and prevails over the general data protection laws,[85] now governed by the Regulation (EU) 2016/679. There is an ongoing discussion whether companies can refer to the right of personal data. While the ECJ considers legal persons as potential holders of this right,[86] the Federal Administration Court denies this.[87] Property data and geo data which can be associated with private individuals also fall under data protection law.[88] This includes information on farming subsidies.[89] There are several court decisions on such questions. For instance, if a public authority claims the application of the data protection-exception clause, it must give substantial proof for this reasoning.[90] Generally speaking, data protection and freedom of information should not be considered as opposing principles but in a complementary way.[91]

§ 9 para 1 EIA provides a further exception clause for intellectual property rights. The Higher Administration Court Münster decided that experts´ opinions in application documents for a wind farm fall under this clause.[92] This judgement is being contested at the Federal Administration Court.[93] It remains unclear whether public authorities themselves can claim property rights. The

[79] BVerwG, Judgement of 24 September 2009 - 7 C 2/09.
[80] BVerwG, Judgement of 28 July 2016 – 7 C 7/14.
[81] BVerwG, Judgement of 21 February 2008 - 4 C 13/07.
[82] VG Dessau, Judgement of 23 November 2007 – 1 A 156/07.
[83] OVG Berlin-Brandenburg, Judgement of 10 September 2015 – OVG 12 B 11.14.
[84] See Wegener, Licht und Schatten in der (Umwelt-)Informationsfreiheit, ZUR 2016, 153, 155.
[85] VGH Mannheim, Decision of 16 October 2014 – 10 S 2043/14.
[86] Volker and Markus Schecke GbR, Hartmut Eifert v Land Hessen, Judgement of the Court (Grand Chamber) of 9 November 2010 (C-92/09/C-93/09).
[87] BVerwG, Judgement of 23 February 2017 – 7 C 31/15.
[88] See, for instance, VGH München, Decision of 22 November 2000 - 22 ZE 00.2779; OVG Koblenz, Decision of 3 November 2008 – 12 F 11054/08.
[89] OVG Münster, Judgement of 1 March 2011 – 8 A 2861/07.
[90] VGH Kassel, Decision of 31 October 2013 – 6 A 1734/13.Z.
[91] See Regulation (EU) 2016/679, reasoning 154.
[92] OVG Münster, judgement of 24 November 2017 – 15 A 690/16.
[93] File-No. 7 C 1/18.

Higher Administration Court Mannheim ruled that this not possible,[94] while the High Court Cologne is of a different opinion.[95]

Further questions arise regarding the exception for confidentiality of commercial or industrial information in § 9 para 1 EIA. According to the Federal Administration Court, private companies owned by the state such as the German Railway Network Company (DB Netz AG) can refer to this clause. Public authorities not taking part in competition, however, cannot claim the confidentiality of commercial or industrial information.[96] Another problem lies in differences in the understanding of the term "*confidentiality of commercial or industrial information*". While the Directive (EU) 2016/943 refers to a three-fold definition (secret, commercial value and reasonable steps to keep it secret), the German understanding does not refer to the last element. To date, no court decision is available dealing with this question.

§ 10 EIA provides requirement for public authorities to <u>actively disseminate environmental information</u>.

Other than in the case of the passive disclosure upon a person´s request, under § 10 EIA, private persons have no right to challenge public authorities. Therefore, no court decisions are known regarding § 10 EIA. Nevertheless, some legal problems can be identified. For instance, § 10 EIA does not provide an explicit requirement to actively procure information, while Art. 5 para 1 Aarhus-Convention requires the parties to ensure that public authorities possess and update environmental information which is relevant to their functions. Furthermore, no sanctions or legal protection exist if a public authority fails to comply with § 10 EIA.

§ 12 EIA provides rules regarding <u>charges for the disclosure of environmental information</u>.

In a 1999-judgement, the ECJ ruled in a case regarding the former German EIA that charges may not be made when the authority refuses access to environmental information. [97] The EIA was altered according to this decision.

The Higher Administration Court Münster ruled that charges can also be made for legal assessments necessary in cases with third-party participation.[98] This can be problematic because such administrative efforts should not be put on the applicants´ shoulders.

It also remains relatively unclear how "*simple information*" which is free of charge is defined. According to the Administration Court Karlsruhe, this is the case when administrative expenses and the necessary search for the information can be kept low.[99]

However, although charges can create considerable barriers for access to information, in the last years only a few court decisions can be found.

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[94] VGH Mannheim, Judgement of 25 November 2008 – 10 S 2702/06.
[95] OLG Köln, Judgement of 15 December 2006 – 6 U 229/05.
[96] BVerwG, Judgement of 23. February 2017 – 7 C 31/15.
[97] Judgement of the Court (Sixth Chamber) of 9 September 1999, Commission of the European Communities v Federal Republic of Germany, –C-217/97.
[98] OVG Münster, Decision of 18 July 2007 - 9 A 4544/04.
[99] VG Karlsruhe, Judgement of 21 January 2014 – 4 K 3315/11.