

2014-05-20

Case Summary posted by the Task Force on Access to Justice

Germany: Darmstadt case, BVerwG 7 C 21.12

1. Key issue	NGO standing (Art. 9.3 AC) – The Federal Administrative Court granted an environmental NGO standing to appeal a clean air plan, as section 42 (2) (2) of the German Code on Administrative Court Procedure needed to be interpreted in light of Art. 23 of directive 2008/50/EC and Art. 9 (3) Aarhus Convention
2. Country/Region	Germany
3. Court/body	Federal Administrative Court (Bundesverwaltungsgericht)
4. Date of judgment /decision	5 September 2013
5. Internal reference	BVerwG 7 C 21.12
6. Articles of the Aarhus Convention	Art. 9, para 3; Art. 2, para 5
7. Key words	Admissibility, Access to Justice; NGO standing, National implementation
8. Case summary	<p>The case concerns the enforcement of the air quality thresholds for fine particles and NO_x under Directive 2008/50. The Land Hessen had adopted an air quality plan for the city of Darmstadt which is situated in the Rhein/Main metropolitan area. The NGO Deutsche Umwelthilfe, which is qualified to bring actions concerning EIA and IPPC issues under Directive 2003/35/EC, filed a complaint against the Land Hessen, arguing that the Land is required to take stricter measures than envisaged in the plan. According the plaintiff, the establishment of an environmental protection zone (Umweltzone) where older vehicles are prohibited in the town centre does not suffice to ensure that the thresholds were to be met by the targeted year of 2015.</p> <p>The lower administrative court granted the claim both in terms of procedure and substance. The opponent appealed against the judgment. Upon agreement of the parties, the case was directly submitted to the Federal Administrative Court (BVerwG), bypassing an intermediate appeal - a so called jumping revision (Sprungrevision).</p> <p>The BVerwG considered whether the claim was admissible on the basis of an interpretation of section 42 (2) of the Code of Administrative Court Procedure in accordance with section 3 of the Environmental Appeals Act. Under section 42 (2)(1) Code of Administrative Court Procedure, an NGO has standing if it is stipulated by a legal provision, such as section 2 of the Environmental Appeals Act or section 64 of the German Nature Conservation Act. The Environmental Appeals Act, however, does not apply to the adoption or amendment of clean air plans. The BVerwG found that that law could not be extended by analogy to cover the cases pursuant to Art. 9 (3) of the Aarhus Convention. The law was explicitly adopted to implement Art. 9 (2) of the Aarhus Convention. Thus, any analogy extending the provisions of the German Environmental Appeals Act runs against the express view of the legislator. Though this view needed reconsideration, in particular with regards to the case law of the Aarhus compliance committee, no analogy could be construed on the basis of the Environmental Appeals Act.</p>

Moreover, according to the BVerwG, Art. 9 (3) of the Aarhus Convention does not apply directly at the national level. The norm lacks a self-executing character. Thus, it cannot be regarded as a *lex specialis* giving access to German administrative courts in accordance with section 42 (2)(1) of the Code of Administrative Court Procedure.

The BVerwG then moved on to the question of subjective rights as a basis for standing. According to Art. 42 (2) (2) of the Code of Administrative Court Procedure, standing is dependent on an allegation of violation of a subjective individual right. Considering the findings of the CJEU in the Slovak Brown Bear case (C-240/09), the Court did not find that the doctrine of individual legal protection (Schutznormtheorie) needed repealing. Rather, the provision on standing in the law needed to be interpreted in conformity with the findings of the CJEU in the Slovak Brown Bear (C-240/09) and Janecek (C-237/07) cases. In the latter case, the CJEU had affirmed that individuals as well as legal persons could bring actions regarding clean air plans, if maximum permissible values had been exceeded.

As rightful protectors (prokuratorische Rechtsstellung) of objective environmental interests on matters concerning EU environmental law, the Court found that registered environmental interest organisations according to section 3 of the German Environmental Appeals Act can claim standing before German administrative courts. According to the BVerwG, this provision establishes a general principle that recognised NGOs can be considered as the public “concerned” (following article 2 paragraph 5 of the Aarhus Convention). Hence, they must now be regarded as individually affected – and, consequently, given access to justice in decisions concerning the amendment of clean air plans following Art. 23 of directive 2008/50/EC.

9. Link address

<http://www.bverwg.de/entscheidungen/entscheidung.php?ent=050913U7C21.12.0>