Für Mensch und Umwelt

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Effective access to justice in cases on the right to environmental information in Germany

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General aspects of access to justice in environmental information cases

1. In the German legal order access to a judicial review procedure depends on the possibility of a person to demonstrate an impairment of a subjective right (see section 42 par. 2 Code of Administrative Court Procedure, Verwaltungsgerichtsordnung, VwGO). In information cases, however, this threshold is easy to surpass. Section 3 Environmental Information Act (Umweltinformationsgesetz, UIG) confers a subjective right for “*Jedermann*” (anybody) to obtain environmental information held by a public authority. Therefore, any person (natural and legal persons, civil society organizations) who’s information request has been refused or not properly answered has standing.

2. Section 6 par. 2 UIG stipulates that prior to a judicial appeal an administrative review procedure must be carried out. Therefore, an applicant, wishing to appeal against a decision denying access to information, must file an objection generally to the public authority that made the original decision (see

section 68ff. VwGO). If the administrative authority confirms its refusal to supply the requested information, an appeal can be lodged to the court.

3. Upon an admissible appeal, administrative courts in environmental information cases perform a full review. Public authorities do not dispose of final decision-making powers that would limit the scope of judicial review. The Federal Administrative Court of Germany (Bundesverwaltungsgericht, BVerwG) denied any reduction in judicial control of a public authority's determination of the confidentiality of commercial and industrial information (see Bundesverwaltungsgericht, 28 July 2016, Case no.: 7 C 7/14, par. 26).

4. The allocation of the burden of proof reflects the general rule of freedom of access to information. A Person seeking access to information has to specify the requested information only. A public authority, in contrast, faces severe requirements to demonstrate and proof grounds for refusal if it decides not to disclose requested information (see i. a. Verwaltungsgerichtshof Baden-Württemberg, 29 June 2017, Case no.: 10 S 436/15, par. 28f.). This obligation passes on to third persons that wish to keep information – for example business information – secret (see Verwaltungsgerichtshof Baden-Württemberg, 21 March 2017, Case no.: 10 S 413/15, par. 44).

Specific challenges of access to justice in information cases:

Timely access to information – Interim injunctive relief

5. Important for the right on access to information is the time factor. In many cases, for example in the event of imminent threats to the environment or human health or where the exercise of participatory rights is concerned, access to information is urgent (see report by the AC Compliance Committee of the Aarhus Convention to the 6th MOP, ECE/MP.PP/2017/32). Therefore, the Aarhus Convention and – following its requirements – German law set strict and tight time limits for the administrative decision of an information request.

6. There is a tense relationship though between these time limits and the usual duration of a judicial review procedure. Before German Courts, a first instance procedure usually lasts for 8 to 12 months – depending on the German region and the field of law. Therefore, interim injunctive relief is an important tool in the judicial protection of the right to environmental information.

7. However, specific for injunctive relief in information cases is the imminent anticipation of the principal proceeding. By providing the requested information to the applicant as a possible result of the injunctive relief procedure, the case is decided also for the principal procedure, which will consequently terminate. Generally, a German Court will not grant injunctive relief which leads to the final decision of a case unless upon exceptional circumstances. Literally, there must be no other way to protect a person's rights.

8. However, in environmental information cases German administrative jurisprudence follows a modified approach: It emphasizes the need of a so-called "accelerated protection of rights" (*beschleunigte Rechtsdurchsetzung*) which it concludes – in absence of explicit time limits for the conclusion of a judicial review – from the time limits for the administrative response to an information request. Furthermore, by reference to the importance of a timely access to information, it acknowledged that not only the disclosure of an information as the result of an injunctive relief procedure can be anticipatory for the result of the principal proceeding but (de-facto) also the refusal of injunctive relief. Waiting for the conclusion of the principal proceeding for a requested information to be disclosed can be too late (see Oberverwaltungsgericht Nordrhein-Westfalen, 23 May 2011, Case no.: 8 B 1729/10, par. 13).

9. Consequently, administrative Courts perform a more exhaustive judicial control than usually in injunctive relief procedures. That applies in particular to three-polar-cases where interests of third parties have to be taken in consideration. In addition, Courts are willing to accept the anticipation of the principal proceeding already if there is a high degree of probability for the existence of the right on environmental information (see i. a. Oberverwaltungsgericht Sachsen-Anhalt, 29.07.2016, Case no.: 2 M 14/16, par. 31f.).

Specific challenges of access to justice in information cases:

Timely access to information – The obligation to bring about "maturity for adjudication"

10. Timely access to information is also an issue in case a Court in the principal procedure does not finally decide on the right to information but remits the case back to the public authority to carry out further investigation. A ping-pong

game between the public authority and the Court can occur if a public authority refuses an information request on the basis of one or more selected grounds leaving other legal grounds for refusal unverified. It might do so to avoid participation requirements if the grounds for refusal so far unverified require third parties to be heard. For a timely access to information, it would be beneficial if a Court, which hears the case upon an appeal of the applicant, determined all grounds for refusal carrying out legally required participation procedures within the trial.

11. Section 113 par. 5 sentence 1 Code of Administrative Court Procedure provides that an administrative Court in principle has the obligation to bring about “maturity for adjudication”. This means, the Court has to investigate and determine all relevant legal and factual conditions of the right in question in order to finally decide the case. This obligation has its roots in the constitutional right on effective protection of one’s rights (art. 19 par. 4 Basic Law, Grundgesetz). It is limited though in case administrative bodies have – for different reasons – autonomous decision-making powers, which the jurisprudence and legal literature generally accept for so-called “margins of discretion” and “margins of assessment”.

12. In environmental information cases another exception from the obligation of a Court to bring about “maturity for adjudication” applies. The Federal Administrative Court of Germany found that an administrative Court was not obliged to determine grounds for refusal, which pursuant to the legal regime of the Environmental Information Act (Section 9 par. 1 sent. 3 UIG) require the consultation of third parties. It based its reasoning on the principle of the separation of powers describing the consultation of third parties as a special procedure that should stay in the responsibility of the public authority. In correspondence, the Court decided that the public authority was not obliged to verify all reasons for refusal. It remitted the case to the public authority to decide the matter anew (see Bundesverwaltungsgericht, 28 July 2016, Case no.: 7 C 7/14, par. 24ff.).

13. However, a new decision of the higher administrative Court of Baden-Württemberg indicates an increased judicial emphasis on the timely access to environmental information. The Court found that in principle a public authority is required to raise all objections to an information request already within the administrative procedure. In the reasons to the decision, the Court precludes arguments of the public authority that it did not already raise in its original

decision of the information request (see Verwaltungsgerichtshof Baden-Württemberg, 29.06.2017, Case no. 10 S 436/15, par. 38, 59). This decision along with others shows a trend in German administrative jurisprudence to strengthen the right on environmental information.