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AARHUS CONVENTION
for our environment

**THE CASE OF THE GERMAN ACT ON ACCESS TO COURTS IN
ENVIRONMENTAL MATTERS
(UMWELTRECHTSBEHELFSGESETZ)
(C-137/14)**

AARHUS CONVENTION TASK FORCE ON ACCESS TO
JUSTICE
GENEVA, 14-15 JUNE 2016

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Agenda

Preliminary Remarks

I A practical problem

ECJ Judgment of 15.10.2015 (C-137/14)

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I

Preliminary remarks: a practical problem

- An **example** for practical problems for national courts
 - **Case** of Celle bypass, Higher Administration Court of Lower Saxony (Judgment of 22.04.2016, 7 KS 27/15)
 - **Problem:** restriction of the standing to bring proceedings and the scope of the review by the courts to objections made during the administrative procedure acc. to German Administrative Law
 - **ECJ:** restriction of standing infringes EIA-Directive 2011/92 (Case C-137/14)
 - **German** Federal Administrative Court has not decided, German law not adopted yet
- **Question:** should current German law be followed or should it be neglected?



Niedersächsisches
Oberverwaltungsgericht



Source: http://www.bund.net/themen_und_projekte/mobilitaet/infrastruktur/fernstras-senplanung/dusseliges_dutzend/b_3/



II Case C-137/14

Three of the EU-Commission's points:

- **Federal Republic of Germany has failed to fulfil its obligations under Article 11 of Directive 2011/92/EU (EIA) and Article 25 of Directive 2010/75 (IED) by restricting**
 1. annulment of administrative decisions covered by the above mentioned Directives to only those cases where an **infringement of an individual public-law right** has been established (Paragraph 113(1) of the *Administrative Court Rules* (Verwaltungsgerichtsordnung; 'the **VwGO**')
 2. annulment of decisions on the basis of **procedural errors in the absence of an environmental impact assessment** or pre-assessment (Paragraph 4(1) of the *Law on supplementary provisions governing actions in environmental matters under Directive 2003/35/EC* (Umwelt-Rechtsbehelfsgesetz) ('the **UmwRG**') to cases in which the applicant proves that the procedural error was causative as regards the result of the decision and the applicant's legal position is affected (Paragraph 46 of the *Law on Administrative Procedure* (Verwaltungsverfahrensgesetz; 'the **VwVfG**'),
 3. the standing to bring proceedings and the scope of the courts' review to **objections previously raised** within the period allowed for raising objections in the administrative procedure that led to the adoption of the decision (Paragraph 2(3) of the UmwRG



III The legal context – EU-Law

➤ Article 11 of Directive 2011/92 (EIA-Directive)

1. Member States shall ensure that, in accordance with the relevant national legal system, **members of the public concerned:**

- (a) **having a sufficient interest, or alternatively;**
- (b) **maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;**

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

2. Member States shall determine at **what stage** the decisions, acts or omissions may be challenged.

3. What constitutes a sufficient interest and impairment of a right shall be determined by Member States, consistently with the objective of giving the public concerned **wide access to justice.**

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

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

5. In order to further the effectiveness of the provisions of this article, Member States shall ensure that **practical information** is made available to the public on access to administrative and judicial review procedures.'



The legal context – German Law I



➤ VwGO (Administrative Court Rules)

Paragraph 42:

1. An **action** can seek to have an administrative measure set aside or to have the adoption of an administrative measure ordered in the event of a refusal or failure to act.
2. Except where otherwise provided by law, such an action is **admissible only if the applicant asserts that his rights have been impaired** by the administrative measure at issue or by the refusal or failure to act.'

Paragraph 113(1):

'To the extent that an administrative measure is unlawful and as a consequence **a claimant's rights have been infringed**, the court shall annul the administrative measure and any internal appeal decision thereon.'

➤ VwVfG (Administrative Procedure Rules)

Paragraph 46:

'An application for the setting aside of an administrative measure ...cannot be made solely on the ground that it was adopted in infringement of provisions governing **procedure, form or [territorial] competence**, where it is clear that that infringement has not affected the substance of the decision.'

Paragraph 73:

4. Within two weeks of expiry of the deadline of the submission for consultation, any person whose interests are affected by the project may, in writing or by statement included in the record, **raise objections** to the plan before the municipality or authority responsible for the investigation. ... **Upon expiry** of the deadline for raising objections, any objection not based on individual claims in private law shall be **excluded**.



The legal context – German Law II

➤ EIA-Law (UVPG)

Paragraph 2(1)

1. 'The environmental impact assessment shall be an **integral part of the administrative procedures** for making decisions on the lawfulness of projects.'

➤ UmwRG (Umwelt-Rechtsbehelfsgesetz)

Paragraph 2:

1. A domestic or foreign **association** ... may bring an action in accordance with [the VwGO] to challenge a decision ... or a failure to adopt such a decision, without being required to maintain an impairment of its own rights, provided that the association – asserts that a decision within the meaning of the first sentence of Paragraph 1(1) or a failure to adopt such a decision **contravenes legislative provisions which seek to protect the environment** and which may be relevant to the decision...
3. If the association has had the opportunity to make observations during the procedure ..., it is **prohibited from raising, during the appeal procedure, any objection** which it did not raise, or did not raise in good time according to the provisions in force, but which it could have raised

Paragraph 4:

1. An application for the **annulment of a decision on the lawfulness of a project** ... may be made if:
 - an **environmental impact assessment** or
 - a preliminary assessment of the requirement in the individual case for an environmental impact assessment, has **not been carried out** and that omission has not been made good.



IV The action – the first complaint

- **Restriction** of the review of the legality of administrative decisions to consideration only of the provisions of national law which confer **rights on individuals**
- **Arguments** of the parties:
 - ❖ **Commission:** review of decisions ought to be capable of review of both the substance and of compliance with the procedural rules
 - ❖ **Germany:** Member States have discretion in their organisation of the judicial sphere; only actions admissible under Paragraph 42(2) of the VwGO being likely to lead to an annulment under Paragraph 113(1) VwGO
- **Findings of the Court:**
 - ❖ 'members of the public concerned' must be able to bring court proceedings 'to **challenge the substantive or procedural legality** of decisions, acts or omissions'
 - ❖ Member State is **authorised** to provide that the annulment of an administrative decision by the court having jurisdiction **requires the infringement of an individual public-law right** of the applicant
 - ❖ The first sentence of Paragraph 113(1) of the VwGO **cannot be regarded as being incompatible** with Article 11 of Directive 2011/92...



The action – the second complaint



- **Restriction** of the situations in which annulment of an administrative decision falling within the scope of Directives 2011/92 and 2010/75 may be sought on the ground of **procedural defect**
- **Arguments** of the parties:
 - ❖ **Commission:**
 - If an **EIA-assessment** was carried out, following a procedure which did not satisfy the requirements of Article 11 of Directive 2011/92, it is **not possible to challenge it before a German court** (Paragraph 113(1) VwGO)
 - A challenge by an individual to the legality, on the ground of a **procedural defect**, of an administrative decision concerning an EIA **cannot lead to the annulment** of that decision unless it is possible that the decision would have been different without the procedural defect (Paragraph 46 VwVfG); if an administrative decision affects the public-law right of an individual and if that person has an interest in bringing proceedings, the national court having jurisdiction must carry out a full review of the legality of that decision
 - ❖ **Germany:** Paragraph 46 VwVfG is a **specific provision** which enables the public authority to defend itself against an application for annulment of an administrative decision
- **Findings of the Court:**
 - ❖ Compare 'Gemeinde **Altrip** and Others (C-72/12) and Bund **für Umwelt und Naturschutz Deutschland** (C-115/09)
 - ❖ **Paragraph 4(1) UmwRG** must be regarded as **incompatible** with Article 11 of Directive 2011/92
 - ❖ The **second complaint** raised by the Commission is **well founded**, with the exception of the argument alleging the requirement that there be an infringement of an individual public-law right of the applicant, in accordance with Paragraph 46 of the VwVfG, read in conjunction with Paragraph 113(1) VwGO



The action – the third complaint



- **Restriction** of the standing to bring proceedings and the scope of the review by the courts to objections made during the administrative procedure
- **Arguments** of the parties:
 - ❖ **Commission:**
 - Restriction, in accordance with Paragraph 2(3) UmwRG and Paragraph 73(4) and (6) VwVfG, of the objections which may be raised in legal proceedings to those which were previously made in the administrative procedure **runs counter to Article 11 of Directive 2011/92...**
 - such a restriction constitutes a **disproportionate obstacle** to the right of the public concerned to challenge the legality of administrative decisions
 - ❖ **Germany:** provisions called into question seek to ensure legal certainty and efficient administrative procedures and ensures that only relevant facts are subject to the review
- **Findings of the Court:**
 - ❖ Provisions of EU law **do not allow restrictions on the pleas in law** which may be raised in support of legal proceedings
 - ❖ Such a restriction laid on the applicant as to the nature of the pleas in law which he is permitted to raise before the court reviewing the legality of the administrative decision which concerns him **cannot be justified by considerations of compliance with the principle of legal certainty**
 - ❖ The **third complaint** raised by the Commission in support of its action is **well founded**.



Summary & Conclusions

- The German principle of access to courts on the condition of a possible infringement of **individual rights** is stressed by EU-Law and Art. 9 (2) and (3) of the Aarhus-Convention.
- However, following the Trianel-judgment (C-115/09) the restriction of the review of the legality of administrative decisions to consideration only of the provisions of national law which confer **rights on individuals is regarded compatible with EU-law**.
- Restriction of the situations in which annulment of an administrative decision falling within the scope of Directives 2011/92 and 2010/75 may be sought on the ground of **procedural defect is not compatible with EU-Law**. The German legislator has already cured this defect (so-called Altrip-amendment of the Umweltrechtsbehelfsgesetz).
- Crucial point: German rules on the **restriction of the standing** to bring proceedings and the scope of the review by the courts to objections made during the administrative procedure infringe EU-Law.
 - Consequences for **administrative procedures**: decreasing importance of administrative procedures; claimants do not need to stress administrative procedures to mention all relevant facts because they can make their points within the court procedure.
 - Consequences for **court procedures**: increasing importance of court procedures; putting more of the burden on judges' shoulders.



Case C-137/14:

A further step in a line of ECJ-judgments, leading to a European administrative and court procedure law.

- 8 March 2011: C-240/09 (**Slovakian Brown Bear**)
- 12 May 2011: C-115/09 (**Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen e. V./Bezirksregierung Arnberg**)
- 7 November 2013: C-72/12 (**Altrip**)
- 15 October 2015: C-137/14 (**EU Commission/Bundesrepublik Deutschland**)
- Next: **full implementation** of Art. 9 (2) and (3) Aarhus-Convention?



Selected Literature

- Thomas Bunge, Der Rechtsschutz in Umweltangelegenheiten in Deutschland – Stand und offene Fragen, ZUR 2015, 531
- Frank Fellenberg, Weiter frischer Wind aus Luxemburg – Zu den Klagemöglichkeiten im Umweltrecht, NVwZ 2015, 1721
- Sabine Schlacke, Zur fortschreitenden Europäisierung des (Umwelt-) Rechtsschutzes - Schutznormdoktrin und Verfahrensfehlerlehre erneut unter Anpassungsdruck, NVwZ 2014, 11
- Bernhard Stürer, Präklusionsregelungen und Einschränkung der Verbandsklagerechte europarechtswidrig, DVBl. 2015, 1514



Thank you for your attention!

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