Response of the Federal Republic of Germany to the additional questions with regard to communication ACCC/C/2008/31

Please provide examples of the recently developed jurisprudence drawing from the jurisprudence of the Court of Justice of the European Union and opting for a wider interpretation of traditional standing rules for NGOs in Germany.

The Court of Justice of the European Union (CJEU) held in its judgment in Case C-115/09 (*Trianel*) that the requirement of an infringement of legislative provisions which confer rights on individuals imposed by the Environmental Appeals Act (Umwelt-Rechtsbehelfsgesetz) governing the right of environmental organizations to access the courts is incompatible with the final sentence of the third paragraph of Article 10a of Directive 85/337/EC which has almost the same wording as article 9, paragraph 2, subparagraph 2, third sentence of the Aarhus Convention. Therefore, the CJEU ruled that environmental organizations have access to German courts directly on the basis of Article 10a of Directive 85/337/EC to challenge the infringement of all environmental provisions which are derived from EU law.
Since this judgement of the CJEU of 12 May 2011 **17 judgements of German courts relating to access to justice of environmental organizations** have been delivered. A list with further information on these judgments can be found enclosed.

- In **none of these cases** the **action** of the environmental organization was **dismissed** due to a **missing infringement of provisions which establish personal rights for individuals**. Thus, the access to justice of environmental organizations is independent of the infringement of legislative provisions which confer rights on individuals.
- In **13 judgments** German courts **directly applied Article 10a of Directive 85/337/EC**. Hence, in all of these cases environmental organizations could challenge the infringement of *all* environmental provisions independent of the fact whether these provisions confer individual rights.
- In **two cases** the courts (No. 11 and 15 of the enclosed table) even **declared Article 9, paragraph 2, subparagraphs 2 and 3 of the Aarhus Convention directly applicable**. Accordingly, the environmental organizations' right to take legal action was not restricted to provisions which confer rights on individuals.
- Therefore, for now environmental organizations can challenge the infringement of all environmental provisions at German courts either in accordance with the *Trianel*

...

judgment on the basis of Article 10a of Directive 85/337/EC or directly on the basis of Article 9, paragraph 2, subparagraphs 2 and 3 of the Aarhus Convention.

- In the **remaining two judgements** (No. 3 and 16 and partly in No. 10 of the enclosed table) the courts drew from the *Lesoochranárske zoskupenie* judgment of the CJEU (C-240/09) and **extended the standing of environmental organizations to cases which do not subject to Article 9, paragraph 2 of the Aarhus Convention**.

Further information on the individual cases can be found in the table enclosed.

On what basis are courts able to review and set aside a decision on procedural grounds?

Judicial review of procedural errors is ensured, under German law, by the fact that each procedural error is reviewed to determine whether it could have had a bearing on the outcome of the decision according to section 46 of the Administrative Procedures Act.
That is because, in the German legal order, the significance accorded to procedural law differs from that accorded in many other legal orders.
In many legal systems, the public administration is accorded a wide discretion, not amenable to review by the courts. In those systems, the courts have only a very limited possibility to review administrative decisions. As the function of procedural rules is to specify the route by which an authority is most likely to come to the correct decision – for example, through a scheme for public participation which ensures that all concerns can be identified and taken into account – in the legal systems in question, it is especially important that those procedural rules are strictly observed. In that context, control of those procedural rules is the most important (and only) means of ensuring good decision-making. Thus, in those legal orders, the substantive 'correctness' of decisions is ensured, above all, by ensuring observance of the correct procedure (which may include a sanctioning of the administration).
In contrast, German law does not need to rely to the same extent on upholding procedural correctness in order to ensure the legality of substantive decisions. That is because, under German law, but for a few exceptions, all administrative decisions are amenable to full substantive review by the courts. In the German legal order, the administration is accorded very limited discretion in the interpretation of whether conditions are satisfied. Namely, the substantive conditions to be satisfied for the issue of a permit are, as a rule, laid down in law. The satisfaction of those conditions and the conduct of the administration are amenable in their entirety to judicial review. As a rule, in its review of the substantive conditions to be satisfied, a court will undertake its own assessment. Only in a clearly defined set of exceptions – where

. . .

an interpretative discretion has been recognised – will a court simply review whether errors occurred in the authority's assessment of the conditions without, at the same time, carrying out an assessment of its own. In addition, where the administration is accorded a discretion as to the action to be taken, that, too, is amenable to review for errors of assessment.

Therefore, to the extent that the substantive decision of an authority is amenable to a complete review by the court, for the purposes of ensuring the correctness of the decision, from the court's perspective, procedural errors are of secondary importance.

In Germany, therefore, procedure is intended primarily to facilitate decision-making. Procedural law is intended to ensure the substantive correctness of the decision and to promote the best possible realisation of the substantive legal position. This is reflected, above all, in section 46 of the Administrative Procedures Act. According to that provision,

> 'the setting aside of an administrative act which is not void pursuant to section 44 cannot be claimed simply on the basis that in the course of its adoption provisions on procedure ... were infringed where it is evident that the infringement did not affect the substantive decision.'

Consequently, the infringement of a procedural rule generally only results in the setting aside of a decision where that infringement may have affected the decision. This is intended to preclude unnecessary delays on mere grounds of form and with no substantive relevance and, thus, constitutes primarily a measure of procedural economy.

What is the legal basis for the concept of "fundamental procedural errors"?

"Fundamental procedural errors" are errors which regardless of the outcome of the procedure are regarded as substantial and which will result in the reversal of the decision. In relation to this kind of procedural error, the principle of section 46 of the Administrative Procedures Act specifically does not apply.

In line with the principles mentioned, the Federal Administrative Court has held in its case-law that, as a rule, a procedural error will only result in the setting aside of a decision or the mandatory observance of a procedural step if 'in the circumstances of the case there is a real possibility' that the error had a bearing on the outcome of the decision (see, for example, Federal Administrative Court, judgment of 20 May 1998, case no.: 11 C 3/97).

Hence, the concept of "fundamental procedural errors" is the result of the judicial review of procedural errors determining whether a procedural error could have had a bearing on the

outcome of the administrative decision according to section 46 of the Administrative Procedures Act.

As regards the **essential elements of the public participation procedure subject to Article 6 of the Aarhus Convention** their observance is ensured by section 4 of the Environmental Appeals Act and the interpretation reached by German administrative courts.
Section 4 of the Environmental Appeals Act expressly provides that the reversal of a decision may be requested if the necessary environmental impact assessment or the necessary preliminary assessment to determine whether a project is subject to the requirements on environmental impact assessments was not carried out. Pursuant to that provision, private individuals and non-governmental organizations may apply to the courts to require that an environmental impact assessment or a preliminary assessment prior to an environmental impact assessment is carried out in accordance with the German requirements on environmental impact assessments. Hence, these errors are explicitly regarded by law as fundamental procedural errors. Therefore, section 4 of the Environmental Appeals Act is *lex specialis* to section 46 of the Administrative Procedures Act having priority over it.
In addition, on that basis and in accordance with the abovementioned principles of German procedural law, the German courts also ensure that the essential elements of the procedure prescribed by article 6 of the Aarhus Convention are observed. Even before the entry into force of the Environmental Appeals Act, the Federal Administrative Court identified circumstances in which a court must hold a real possibility to exist that a procedural error could have had a bearing on the outcome (judgment of 13 December 2007, case no.: 4 C 9/06):

> 'If as a result of the omission to carry out a formal EIA that objective [of assessing the impact on the environment] was not achieved, *whether because the public concerned did not have the opportunity to comment on the project or whether because the impact of the project on the environment was not assessed or not assessed in full, it cannot be denied that there is a real possibility that a different decision might have been reached.*'

Therefore, if an essential element of the public participation was not carried out, it must be presumed that this had a bearing on the outcome of the decision and, thus, is actionable before a court.

Furthermore, a **new preliminary ruling** from the Federal Administrative Court regarding the judicial review of procedural errors according to Article 10a of Directive 85/337/EC which has almost the same wording as article 9, paragraph 2 of the Aarhus Convention is pending at

the CJEU (Case C-72/12). On the one hand it concerns the scope of application of section 4 of the Environmental Appeals Act. In particular, it is questioned whether cases have to be included in which an EIA was carried out but was incorrect. Another question affects the aspect of causality within the concept of fundamental procedural errors referring to whether it suffices that, in the circumstances of the case, there is a definite possibility that the contested decision would have been different without the procedural error or if the procedural error must be considerable on a wider scale.

Next to procedural errors, can you provide other examples where an alleged error is not of importance for the decision, and what is the legal basis for that conclusion?

Such examples are not known to the Federal Government.

Enclosures
- 1 -