Rechtsanwälte Günther

Partnerschaft

Rechtsanwälte Günther • Postfach 130473 • 20104 Hamburg

United Nations Economic Commission for Europe
Palais des Nations
Aarhus Convention
Compliance Committee
CH-1211 Geneva 10

Fiona Marshall <Fiona.Marshall@unece.org>

Michael Günther *
Hans-Gerd Heidel *1
Dr. Ulrich Wollenteit *2
Martin Hack LL.M. (Stockholm) *2
Clara Goldmann LL.M. (Sydney) *
Dr. Michéle John *
Dr. Dirk Legler LL.M. (Cape Town) *
Dr. Roda Verheyen LL.M. (London) *
Dr. Davina Bruhn
Jenny Kortländer LL.M. (Brisbane)

1 Fachanwalt für Familienrecht
2 Fachanwalt für Verwaltungsrecht
* Partner der Partnerschaft
AG Hamburg PR 582

Mittelweg 150
20148 Hamburg
Tel.: 040-278494-0
Fax: 040-278494-99
www.rae-guenther.de

08.06.2016
16/0345Z/R/dr

Mitarbeiterin: Jule Drzewiecki
Durchwahl: 040-278494-11
Email: drzewiecki@rae-guenther.de

Submission by the Public to the Aarhus Compliance Committee
Progress Report and Monitoring - Decision V/9h (Germany) -
ACCC/C/2008/31

Dear Madams and Sirs,
Dear Ms. Marshall,

I.
This submission is sent to inform the Compliance Committee of the implications of the impeding changes to the German Environmental Appeals Act (Umweltrechtsbehelfsgesetz, **UmwRG**), with regard to the implementation of decision V/9.h which found Germany to lack in implementation of Art. 9.2 and Art 9.3 of the Convention.

In this matter, I have the pleasure to represent the five largest environmental organizations in Germany

- Naturschutzbund e.V.
- Bund für Umwelt und Naturschutz e.V.
- Deutscher Naturschutzring e.V. (DNR)
- WWF Deutschland

- Greenpeace e.V.

Power of attorney can be submitted if you so wish.

The latter two organizations have not been able to register under the UmwRG and are thus currently unable to invoke Art. 9.2 and 9.3 of the Aarhus Convention, yet Greenpeace has applied to be registered[1] and the WWF has launched a complaint before this Committee to appeal against registration restrictions in Germany (PRE/ACCC/C/2015/137).

All five organizations, representing several millions of German citizens, wish to inform the Committee that the current proposal of the Environmental Appeals Act will not rectify the violation of the Convention found and adopted by Decision V/9h.

II.
On 12th May 2016, the Party concerned (Germany) submitted a translation of the "Draft Bill aligning the Environmental Appeals Act and other provisions to Stipulation of European and International Law" to the Committee.

On page 1, the Party concerned (Germany) describes explicitly that this Bill, which also amends the Environmental Impact Assessment Act, is meant to fully implement Art 9.2 and 9.3 in accordance with Decision V/9h. However, major gaps remain, as follows.

1.
With regard to Art 9.2 Decision V/9h notes that the requirement to restrict appeals to legal provision "serving the environment", fails to comply with Art. 9.2.

This provision has indeed been deleted from the draft UmwRG[2]. However, a stipulation remains which will again serve to effectively restrict legal challenges to environmental issues:

Section 2 subsection 4 (§ 2.4 UmwRG) requires for an annulment of any decision subject to the UmwRG that "the breach relates to the objectives which the association promotes in accordance with its statutes." Since a registered environmental organization in Germany must focus on environmental and nature protection matters in accordance with Section 3 UmwRG, this provision reinstates the breach in implementing Art 9.2 of the Aarhus Convention, which

[1] This registration was denied by the competent authority, the Federal Environmental Agency, and a court challenge seems to be inevitable.
[2] § 2, subsection 1 (p. 5 of the Draft - English translation)

requires "access to a review procedure […] to challenge the substantive and procedural legality of any decision […]".

2.
With regard to Art. 9.3, Decision V/9h describes Germany to be in violation of the Convention by "not ensuring the standing of environmental NGOs in many of its sectoral laws to challenge acts or omissions of public authorities or private persons which contravene provisions of national law relating to the environment".

The Draft inserts new areas of application ("new numbers 4-6)[3]. The following gaps remain:

a) Decisions about the adoption of "Plans and Programs"
Should the Bill be adopted, legal challenges against "decisions on the acceptance of plans and programs" would be possible only if these plans and programs are subject to a strategic environmental impact assessment under national law.[4]

There is no basis in the Aarhus Convention to restrict Art 9.3 to plans and programs which are subject to a strategic environmental impact assessment.

The Draft also includes specific exemptions:

- the federal road and railroad (requirement) plan (which is currently being revised)[5]
- the national grid extension and construction plans[6]
- any spatial plans relating to resource use (such as lignite) and wind energy generation[7]

These types of plans are highly relevant to the environment and the public, as well as to the development consent for any physical projects to be implemented. For example, the federal road and railroad plan will irrevocably decide which road and railroad projects are "required" – a decision central to the development consent, which can *de facto* not be challenged in court.[8] The current

[3] § 1 subsection 1, sentence 1, numbers 4 to 6 (p 4, 5 of the Draft)
[4] § 1 subsection 1, sentence 1, number 4: "Decisions on the acceptance of plans and programmes within the meaning of section 2 subsection (5) of the Environmental Impact Assessment Act …"
[5] § 19b Abs. 2 S. 2 UVPG (Environmental Impact Assessment Act, p.12 of the Draft)
[6] § 1 subsection 1, sentence 3 number 3 (page 5 of the Draft)
[7] § 16 section 4 UVPG, page 12 of the Draft)
[8] The federal administrative court has decided that a decision in the federal plan that a project is "required" is binding and challengeable only if it is "obviously arbitrary" – a threshold which has never been met in practice and which leaves the federal plan *de facto* "unchallengeable". See only BVerwG, Decision of 8th June 1995 - BVerwG 4 C 4.94 – juris.

draft plan sets out a requirement for the construction of hundreds of kilometers of new roads for the next decade on German territory.

There is no basis in the Aarhus Convention to exclude such plans and programs from the application of Art 9.3.

The exclusion leads to a situation where, years after a plan/program is adopted, a plaintiff could theoretically challenge certain aspects of a plan/program incidentally when challenging a decision based on this plan/program, such as a development consent[9]. This is insufficient to grant the necessary wide access to justice,[10] and will lead to a situation where a plan and program – despite it being in violation of rules with regard to the environment - can be kept in force forever since there will be no option to the public to claim annulment.

Also, the draft Bill restricts challenges to environmental provisions in line with Art. 9.3[11] but employs a too narrow definition of those.[12] Indirect environmental implications must be included in accordance with the Committee's interpretation of the term "relating to the environment".[13]

b) Restriction to "Admistrative Acts"
The proposed new Numbers 5 and 6[14] restrict application to "administrative acts" and also relate these to "undertakings" ("Vorhaben").

The term "Vorhaben" (undertaking) is defined in the Environmental Impact Assessment Act (UVPG, § 2.2) and refers essentially to the construction of and changes to physical projects as well as any direct interference in nature and landscape (Eingriffe in Natur und Landschaft). The wording of Number 6 (new) does not explicitly include this term, but it is interpreted to be restricted to undertakings in the explanatory notes to the draft.

Art. 9 Abs. 3 of the Convention is not restricted to such formal administrative acts but explicitly refers to "acts and omissions"

Even though such decisions are of high importance to the environment and the public, § 1 UmwRG as proposed would exclude challenges to:

[9] The Party concerned also employs this explanation (Draft p. 42)
[10] See Aarhus Implementation Guide (S. 194)
[11] § 2 Subsection 1, 2nd sentence UmwRG (Draft p.6: "In the case of appeals against a decision in accordance with section 1 subsection (1), sentence 1, numbers 2a to 6, or against omission of such, the association must furthermore assert a violation of environmental legal provisions.")
[12] § 1 new subsection 4 which refers to "conditions of environmental components" or "factors within the meaning of section 2 subsection (3) number 2 of the Environmental Information Act.", (Draft p.5)
[13] ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2.; ACCC/C/2011/58 (Bulgaria), ECE/MP.PP/C.1/2012/14, para. 83)
[14] Of § 1 UmwRG, see note 2).

- The adoption of or changes to regulations and statutes, especially those outside the application of the Federal Nature Protection Act (BNatSchG)[15]
- The adoption of contracts with private parties
- Any decisions (actions) that are not taken in the form of an administrative act
- Any administrative acts that do not relate to undertakings, such as regulatory acts with regard to emission limits for cars etc.

During the public hearings, the Environment Ministry of the Party concerned has proposed to explicitly include contracts with private parties (öffentlich-rechtliche Verträge) in the list, but this will not solve the issue of non-compliance, as is evident from the list above.

Moreover, the draft fails entirely to establish standing rights directly with regard to "acts and omissions by private persons" (Art. 9.3).

c) Late Application

The Draft suggests that the improved rights to appeal ("Numbers 4 to 6") shall only apply to decisions that were taken after 31 December 2016[16].

The public believes this to be an inadequate implementation of Decision V/9h which dates from July 2014 with the Committee's decision preceding this by months.

The lack of retroperspective effect leads to a situation where many pending cases in Germany might be rejected by the courts on the basis of the old UmwRG in face of the new Draft law accepting that this law indeed represented an infringement of public international law.

This is unacceptable and violates the spirit of the Aarhus Convention as well as the objectives of the compliance procedure.

[15] This issue is fairly complicated due to the parallel standing provision in the federal nature protection act (BNatSchG). The Party concerned argues that these specific rights will cover statutes and regulations with regard to nature protection zones etc. sufficiently. It has been set out by the above mentioned organisations however, that this is untrue. For example, the current BNatSchG does not cover decisions with regard to the annulment of or changes to some nature protection zones regulations. This issue can be further explained, but the fact remains that Art. 9.3 demands access to justice to all decisions – there is no basis to exclude certain statutes and regulations if they clearly apply and even implement provisions of environmental law.

[16] § 7, page 10 of the Draft.

3.
With regard to both Art. 9.2 and 9.3 there is a further major issue of impeding non-compliance which must be raised, even if it was not explicitly at the core of complaint procedure 2008/31-Germany.

The Party Concerned seeks to restrict appeals by introducing § 5 new[17].

This provision seeks to exclude private parties and organisations from claiming a breach against procedural and substantive law if a matter has not been raised before during an administrative procedure "in bad faith".

The matter of precluding issues absolutely from legal challenge if the point has not been raised before ("Präklusion") has been subject to a ruling of the European Court of Justice (interpreting Directive 2011/92/EU (the EIA directive).[18] In this ruling, the Court held the pertinent provisions of German law to be in violation of EC law. However, it is also a matter for the Aarhust Compliance Committee since any such requirement will have profound impacts on whether "wide access to justice" is actually granted in practice.

If implemented in the way suggested by the Party Concerned, any legal challenge under Art 9.2 and 9.3 would be subject to a "bad faith" test, the boundaries of which are not defined by law.

At the very least, § 5 must be defined in such a way as to only preclude a legal challenge in case it can be proven that an environmental association has participated in the pertinent administrative procedure and has willingly and knowingly not reported a certain fact (such as the existence of a certain protected species in the area of a planned road or other undertaking) with the intention of only raising it in court.

We realize that the issues raised might warrant further explaination. This letter is kept deliberately short. I am at the disposal of the Committee should any further clarifications be required.

Thank you for considering the views of the public, in this case the major German environmental organisations, in determining compliance with Decision V/9h.

Sincerely yours

Dr. Roda Verheyen
Attorney at Law

[17] § 5, page 9 of the Draft.
[18] See ECJ, Decision of 15th October 2015, C -137/14, http://curia.europa.eu.