Access to justice falling outside of the scope of EIA, IPPC/IED, access to information and ELD

1.1. Decisions, acts or omissions concerning specific activities falling within the scope of EU environmental legislation outside the scope of the EIA and IED Directives

This category covers those acts, etc. that are regulated by EU law in some way, but do not require an EIA, do not fall under the IED, do not trigger environmental liability, etc.

The CJEU's case C-664/15 ("Protect") is a good example. In plain language: The admitted project in that case was not subject to an EIA, being below the relevant threshold, but still triggered the CJEU to decide that there had to be access to justice and legal standing before a national court, due to fact that the proper application of the Water Framework Directive should be reviewed in a court of law.

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission and its content (in particular, the conditions to be fulfilled and any time-limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

The question relates to the types of proceedings that are described in the beginning of the chapter. The second questions asks if in practice the case law of the CJEU prevails and if that is followed by the national courts, and also how effective that access to courts is in the national context.

For decisions, acts or omissions concerning specific activities falling within the scope of EU environmental legislation outside the scope of the EIA and IED Directives either § 1 (1) sentence 1 numbers 2a, 2b, 5 or 6 Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz, UmwRG*) apply.

a) § 1 (1) sentence 1 numbers 2a and 2b UmwRG comprise a smaller range of explicitly named specific activities, inter alia those related to the Seveso Directive.

In these cases, individuals have standing according to the usual rules.

According to § 2 (1) no. 2 UmwRG, NGOs have standing according to the usual rules, provided that they can assert an infringement of legal provisions that are related to the environment in the meaning of § 1 (4) UmwRG.

The special deadlines of § 2 (3) sentence 1 UmwRG and § 6 UmwRG apply.

b) For all other decisions, acts or omissions of the category 2.1, § 1 (1) sentence 1 no. 5 UmwRG applies.

Individuals have standing in these cases according to the general rules, § 42 Law on Administrative Court Procedure (*Verwaltungsgerichtsordnung, VwGO*), i.e. if they can maintain a possible violation of their own rights. The question is then whether "a law related to the environment" provides for such a right. For more details see 1.4 3).

NGOs have standing according to the usual rules, provided they can assert an infringement of legal provisions that are related to the environment in the meaning of § 1 (4) UmwRG, § 2 (1) sentence 2 UmwRG.

The special deadlines of § 2 (3) sentence 1 UmwRG and § 6 UmwRG apply; the deadline of § 2 (3) sentence 2 UmwRG also applies.

§ 1 (1) sentence 1 no. 5 UmwRG provides for access to justice if the decisions, acts or omissions in question qualify as administrative decisions (*Verwaltungsakte*) or public law contracts (*öffentlich-rechtliche Verträge*). For all other decisions, acts or omissions, there is no standing except if one can maintain a possible violation of one's own rights, § 42 (2) VwGO. This is e.g. the case for statutory orders or merely factual acts (Realakte).[1] However, a statutory order may be challenged indirectly by appealing an administrative decision based on said order. In that case, the lawfulness of the statutory order is a prerequisite to the lawfulness of the administrative decision.

It is noteworthy that there is a pending case before the CJEU[2] on the question "whether" and, if so, "how" access to justice in environmental matters concerning product approvals, for example with regard to vehicles, has to be granted.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

§ 2 (1) sentence 2 Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz, UmwRG*) stipulates that the scope of review for appeals by NGOs is restricted to the infringement of legal provisions that are related to the environment in the meaning of § 1 (4) UmwRG. Legal provisions related to the environment can be procedural as well as substantive.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Launching administrative proceedings without success is a prerequisite to the admissibility of judicial proceedings before the court, unless determined otherwise by federal or state law, see § 68 (1) sentences 1 and 2 VwGO, see 1.3 2).

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

In the cases described under 2.1, standing does not require participation in the public consultation phase of the administrative procedure.[3]

5) Are there some grounds/arguments precluded from the judicial review phase?

§ 2 (1) sentence 2 UmwRG stipulates that the scope of review for appeals by NGOs is restricted to the infringement of legal provisions that are environment-related according to § 1 (4) UmwRG.

6) Fair, equitable - what meaning is given to equality of arms in the national jurisdiction?

The national jurisdiction uses the framework given by the principles of an effective procedure as guaranteed in Article 19 (4) Basic Law (*Grundgesetz, GG*) to provide for a fair and equitable procedure as required by Article 9 (4) of the Aarhus Convention.

7) How is the notion of "timely" implemented by the national legislation?

The notion of timely is an essential component of the constitutional guarantee for an effective remedy enshrined in Article 19 (4) Basic Law (*Grundgesetz, GG*). There are no fixed deadlines for the courts to deliver a judgement. After Germany was criticised by the European Court of Human Rights in November 2011, new legislation was enacted which enables the parties to a court case to warn a court when the procedures are on the verge of taking excessive time, and to claim special damages if the procedure takes too long.[4] The main provisions can be found in §§ 198 et seq. of the Courts Constitution Act (*Gerichtsverfassungsgesetz – GVG*).

8) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Injunctive relief is available according to the general rules, see 1.7.2 6).

9) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible

consequences if one loses a case before court? What are the safeguards against the costs being prohibitive, and do these include express statutory reference to a requirement that costs should not be prohibitive?

The general rules on costs apply, see 1.7.3.

1.2. Decisions, acts or omissions concerning the administrative procedures to be followed to comply with national implementing legislation for the Strategic Environmental Assessment (SEA) Directive 2001/42/EC[5]

Please describe only the national SEA procedures and the adjacent administrative or judicial review procedures. Plans and programs that are specifically required by the EU legislation to be prepared will be detailed under subchapter 2.4. If you wish, you can write a more general description here and then add only the specificities under subchapter 2.4.

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

§ 1 (1) sentence 1 no. 4 Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz, UmwRG*) applies to decisions, acts or omissions that potentially require a SEA procedure (a requirement originating in the Strategic Environmental Assessment (SEA) Directive 2001/42/EC). According to § 1 (1) sentence 1 no. 4 clause 2, standing is excluded for plans and programmes adopted by a legislative body.

Individuals have legal standing if they can assert a possible violation of their personal rights, § 42 (2) VwGO, see above, 1.1.3) and 1.4.3). In the case of most plans and programmes it is difficult to demonstrate the infringement of personal rights, which limits the scope of standing for individuals with regard to plans and programmes. Plans and programmes might be challenged indirectly, however, if their lawfulness is a prerequisite to the lawfulness of an appealable administrative decision. However, for air quality plans, following the CJEU's judgment in the Janecek case, C-237/07, individuals are considered to be affected in their personal rights by courts if no, or no sufficient air quality plan has been established by the authority.[6]

NGOs have standing according to the usual rules, provided they can assert an infringement of legal provisions that are related to the environment in the meaning of § 1 (4) UmwRG, § 2 (1) sentence 2 UmwRG.

The special deadlines in § 2 (3) sentence 1 UmwRG and § 6 UmwRG apply. § 7 (2) sentence 1 UmwRG stipulates that the Higher Administrative Courts are competent in first instance.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

§ 2 (1) sentence 2 Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz, UmwRG*) stipulates that the scope of review is restricted to the infringement of legal provisions that are related to the environment in the meaning of § 1 (4) UmwRG. Legal provisions related to the environment can be procedural as well as substantive.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Launching administrative proceedings without success is a prerequisite for the admissibility of judicial proceedings before the court, unless determined otherwise by federal or state law, see § 68 (1) sentences 1 and 2 VwGO, see 1.3. 2).

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

For plans and programmes, this is the case according to § 1 (1) sentence 1 no. 4, § 2 (1) sentence 1 no. 3 b), § 7 (3) sentence 1 Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz, UmwRG*), except for land-use plans, § 7 (3)

sentence 2 UmwRG. Any points that were not put forward during the public consultation when there was the possibility to raise concerns are precluded from the subsequent court procedure.

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Injunctive relief is available according to the general rules, see 1.7.2 6).

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

The general rules on costs apply, see 1.7.3.

1.3. Decisions, acts or omissions concerning the administrative procedures to be followed to comply with the public participation requirements of Article 7 of the Aarhus Convention in respect of plans and programmes not submitted to the procedures set out in the Strategic Environmental Assessment (SEA) Directive 2001/42/EC[7]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

Individuals do not have standing for cases in this category, except if they can assert a possible violation of their own rights, § 42 (2) Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung, VwGO*), see above, 1.1.3) and 1.4.3).

Environmental organisations also have, de lege lata, no standing for the cases described in this category, as they have access to justice exclusively with regard to the subject matters listed in § (1) sentence 1 no. 1 Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz, UmwRG*), and the cases of this category do not fall into the scope of § 1 (1) sentence 1 no. 4 UmwRG or other cases of § (1) sentence 1 no. 1 UmwRG.

This means, that there is no access to justice with regard to e.g. the designation of conservation areas by legislative decrees and not requiring a SEA.[8]

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

Not applicable, see above.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Not applicable, see above.

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

Not applicable, see above.

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Not applicable, see above.

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

Not applicable, see above.

1.4. Decisions, acts or omissions also concerning plans and programmes required to be prepared under EU environmental legislation[9]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the content of the plan (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

National law does not differentiate between plans and programmes required to be prepared under EU environmental legislation. The plans and programmes in question are subject to national implementing legislation for the SEA Directive, the provisions listed above at 2.2 apply.

2) Does the form in which the plan or programme is adopted make a difference in terms of legal standing (see also Section 2.5 below)?

The question is about whether there are different locus standi conditions if the plan or program is adopted by legislation, by an individual resolution of a legislative body, or a single act of an administrative body, etc.

According to § 1 (1) sentence 1 no. 4 clause 2, standing is excluded for plans and programmes adopted by a legislative body.

3) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

The provisions listed above at 2.2 apply.

4) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

The provisions listed above at 2.2 apply.

5) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

The provisions listed above at 2.2 apply.

6) Are there some grounds/arguments precluded from the judicial review phase?

§ 2 (1) sentence 2 UmwRG stipulates that the scope of review for appeals by NGOs is restricted to the infringement of legal provisions that are related to the environment in the meaning of § 1 (4) UmwRG.

For plans and programmes, in order to be able to initiate judicial proceedings, it is a requirement to participate in the public consultation phase of the administrative procedure– i.e. to make comments, participate at the hearing, etc., see § 1 (1) sentence 1 no. 4, § 2 (1) sentence 1 no. 3 b), § 7 (3) sentence 1) UmwRG. Any points not put forward during the public consultation when there was the possibility to raise concerns are excluded from the subsequent court procedure.

7) Fair, equitable - what meaning is given to equality of arms in the national jurisdiction?

The national jurisdiction uses the framework given by the principles of an effective procedure as guaranteed in Article 19 (4) Basic Law (*Grundgesetz, GG*) to provide for a fair and equitable procedure as required in Article 9 (4) of the Aarhus Convention.

8) How is the notion of “timely” implemented by the national legislation?

The notion of timely is an essential component of the general guarantee for an effective remedy enshrined in Article 19 (4) Basic Law (*Grundgesetz, GG*). There are no fixed deadlines for the courts to deliver a judgement. After Germany was criticised by the European Court of Human Rights in November 2011, new legislation was enacted which enables the parties to a court case to warn a court when the procedures are on the verge of taking excessive time, and to claim special damages if the procedure takes too long[10]. The main provisions can be found in §§ 198 et seq. of the Courts Constitution Act (*Gerichtsverfassungsgesetz – GVG*).

9) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Injunctive relief is available according to the general rules, see 1.7.2 6).

10) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

The general rules on costs apply, see 1.7.3.

1.5. Executive regulations and/or generally applicable legally binding normative instruments used to implement EU environmental legislation and related EU regulatory acts[11]

These are legislative acts that are supposed to transpose and implement EU environmental laws (to the extent possible, indeed, when talking about Regulations). Other EU regulatory acts are also relevant here if they have implementing national rules. Please focus on the national legislative processes and the related review procedures. When talking about courts, these can be regular courts, the Supreme Court or the Constitutional Court (as appropriate). Otherwise, the questions are mostly the same as in the previous subchapters.

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedure for adopting or the content of the decision, act or omission of the national regulatory act (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

In principle, neither individuals nor NGOs have standing to challenge national regulatory acts, except when requesting a “preventive declaratory judgment” to stop an upcoming criminal sanction or where an “incident review” might offer the possibility to challenge the validity of the underlying regulatory act, which is no option if the regulatory act does not require further implementing acts.

Citizens have the option to apply to the Federal Constitutional Court to ascertain whether their constitutional rights have been violated (so-called Verfassungsbeschwerde, i.e. constitutional complaint). However, the jurisdiction of the Constitutional Court is restricted to matters directly touching questions of the constitution. This option is not a regular remedy.

One such extraordinary exception may be the application of the new Admissions Act Preparation Act (*Maßnahmengesetzvorbereitungsgesetz, MgvG*) Though it has not been used yet, the MgvG provides the legal foundation for adopting a limited and specified number of infrastructure projects (namely 28 road, waterway and railway projects) by way of legislation instead of an administrative act. Legislative approval decisions could later only be challenged in the Federal Constitutional Court within the scope of its jurisdiction. In this regard, if the Act were to be applied, judicial review would be limited when compared to the standard laid out by the UmwRG. While e.g. some constitutional rights can thus far not be invoked by NGOs (such as the right to health), the case for a broader application remains pending. [12]

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it

cover both procedural and substantive legality?

Not applicable, see above.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Not applicable, see above.

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

Not applicable, see above.

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Not applicable, see above.

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

Not applicable, see above.

7) Is it possible to bring a legal challenge before a national court concerning any related EU regulatory act with a view to a validity reference under Article 267 TFEU, and if so how?[13]

In general, when a court is uncertain as to the interpretation or validity of an act adopted by the European Union it will stay the proceedings by analogy with § 94 Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung, VwGO*), and refer the matter to the CJEU to request a preliminary ruling according to Article 267 TFEU. After the decision of the CJEU on the interpretation or the validity of the provisions in question, the national court will continue its own proceedings. Individuals or NGOs cannot initiate a preliminary procedure but they can recommend it.

Nevertheless, individuals or NGOs, in principle, have no standing with regard to executive regulations and/or generally applicable legally binding normative instruments used to implement EU environmental legislation and related EU regulatory acts, see above.

[1] Schink/Reidt/Mitschang/Franzius. (2018). UmwRG. (1st ed., § 1 Rn.8, §1 Rn. 25 ff.).

[2] C-873/19.

[3] However, for plans and programmes, this is the case according to §§ 1 (1) sentence 4, § 7 (3) UmwRG, see 2.2. and 2.4.

[4]Act on Access to Justice with regard to overlong judical procedures and criminal investigation proceedings (*Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren*) of 24.11.2011, BGBl. I, S. 2302.

[5] The SEA Directive relates to plans and programmes. These are also covered by Article 7 and Article 9(3) of the Aarhus Convention.

[6] Federal Administrative Court (*BVerwG*), Order of 27 September 2007, case no.: 7 C 36.07.

[7] See findings under ACCC/C/2010/54 for an example of a plan not submitted to SEA but subject to the public participation requirements of Article 7 of the Aarhus Convention.

[8] Access to justice with regard to the designation of conservation areas might be judged differently depending on

the outcome of the following case: the Federal Administrative Court requested a preliminary ruling of the CJEU pursuant to Article 267 TFEU in its currently running case (*BVerwG* 4 CN 4.18) as to the question whether EU law requires a SEA, or at least a decision by the Member State on the need for such an assessment, prior to the adoption of a regulation establishing an area of outstanding natural beauty, C-300/20.

This constellation should also be reflected in the light of the CJEU´s decision in the Protect case, C-664/15.

[9] These fall within the scope of both Article 7 and Article 9(3) of the Aarhus Convention. See also relevant case-law of the Court of Justice of the European Union such as Case C-237/97, Janecek and cases such as Boxus and Solvay C-128/09-C-131/09 and C-182/10, as referred to under the Commission Notice C/2017/2616 on access to justice in environmental matters.

[10]Act on Access to Justice with regard to overlong judical procedures and criminal investigation proceedings (*Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren*) of 24.11.2011, BGBl. I, S. 2302.

[11] Such acts come within the scope of Article 8 and Article 9(3) of the Aarhus Convention. An example of such an act concerns the decision of the national administration that featured in Case C-281/16, Vereniging Hoekschewaards Landschap, ECLI:EU:C:2017:774.

[12] Whether an NGO has standing before the federal constitutional court challenging the omission of appropriate legal norms and measures against climate change is to be considered by the BVerfG in the ongoing case 1 BvR 2656/18 which was initiated by individuals and, inter alia BUND (Bund für Umwelt und Naturschutz Deutschland e.V.

[13] For an example of such a preliminary reference see Case C-281/16, Vereniging Hoekschewaards Landschap, ECLI:EU:C:2017:774.

Last update: 28/07/2021