

For our Environment

Annual EELF Conference 2016

Procedural Environmental Rights: Principle X in Theory and Practice

Unfair access to justice for environmental NGOs under German Law?

The criteria for recognition as “requirements under national law” for access to justice for environmental NGOs in the light of the Aarhus Convention

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“Unfair access to justice for environmental NGOs under German Law?”

Content

1. Access to Justice in Germany and its Relevance for the Implementation of the Aarhus Convention
2. The Recognition of environmental NGOs (eNGOs) in Germany
3. “Single Issue Organizations” (citizen’s initiatives)
4. Organizations without free Access to Membership

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Access to Justice in Germany and its Relevance for the Implementation of the Aarhus Convention (AC)

- The “subjective rights-doctrine” and its relevance for the implementation of the AC
- The German approach to the implementation of art. 9 AC: Restricted litigation rights for individuals but wider access to justice for eNGOs
- Art. 9 para. 3 AC: implementation currently under way which will significantly widen standing for eNGOs

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The Recognition of eNGOs in Germany

- The recognition as a precondition for A2J for eNGOs
- The recognition criteria in art. 3 para. 1 EAA (Environmental Appeals Act, Umwelt-Rechtsbehelfsgesetz):

The association shall be recognized if it

- 1. predominantly, and not just temporarily, encourages the objectives of environmental protection according to its bylaws,**
2. has existed for a minimum period of three years and has been active as defined in No. 1 during that period,
3. guarantees proper performance of its duties [...],
4. pursues public-benefit purposes [...],
- 5. allows any person who supports the objectives of the association to become a member; members are persons who are given full voting rights in the general meeting of the association [...].**

- 111 eNGOs recognized on the federal level

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“Single Issue Organizations” (Citizen’s Initiatives)

- Art. 3 para. 1 no. 1 EAA:

“[...] if it **predominantly, and not just temporarily, encourages the objectives of environmental protection** according to its bylaws, [...]”

- Questions over the application of art. 3 para. 1 no. 1 EAA on eNGOs (in part. citizen’s initiatives) operating with regard to a specific environmentally harmful project (or its approval procedure)
- Legal issues concerning art. 3 para. 1 no. 1 EAA:
 - *general* env. objectives vs. *any* env. objectives
 - Required degree of *permanence* of an NGO?
- The need for a wide interpretation of art. 3 para. 1 no. 1 EAA

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Organizations without free Access to Membership

- Art. 3 para. 1 no. 5 EAA:

“[...] it allows any person who supports the objectives of the association to become a member; members are persons who are given full voting rights in the general meeting of the association, [...]”

- Issues:

- organizations not based on membership at all: foundations
- organizations with a closed circle of members

- Communication ACCC/C/2016/137 against Germany submitted by WWF Germany

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Organizations without free Access to Membership – Questions of Compliance with the AC

- (Limited) discretion of parties to the AC to determine “any requirements under national law” (art. 9 para. 2, art. 2 para. 5 AC)
- “Parties should ensure that these requirements are not overly burdensome”, “unnecessarily exclusionary” and respect the AC’s principles “such as non-discrimination“ (quotation from “The Aarhus Convention: An Implementation Guide”, 2014, page 58)
 - “non-discrimination”: no restriction on a specific legal form
 - “not overly burdensome”: statistical evidence
 - “not unnecessarily exclusionary”: rationale of art. 3 para. 1 no. 5 EEA

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SUMMARY

- The German approach to the implementation of art. 9 AC: Preservation of the “subjective rights-doctrine” for A2J for individuals but special litigation rights and wider access to justice for eNGOs
- The legal criteria for recognition of eNGOs respect the AC’s principles, such as non-discrimination and wide access to justice
- The implementation of the AC calls for a wide interpretation of the recognition criteria though
- Nevertheless: the exclusion of organizations without free access to membership according to art. 3 para. 1 no. 5 EAA is well-founded and in line with the requirements of the AC

Thank you for your Attention !

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