ERA Forum (2020) 20:683–690
https://doi.org/10.1007/s12027-019-00590-w

ARTICLE

National court review in environmental matters: part of the problem or part of the solution?

Matthias Keller[1]

Published online: 27 November 2019

Abstract This article constitutes a report on problems that may typically arise for domestic legal practitioners when they are called upon to apply EU environmental law. Strict standing requirements in some countries of Central Europe are mentioned. German *Schutznormtheorie* is explained and criticised. The ongoing problem of direct access to justice so as to challenge plans and programmes is described. Consistent interpretation in the light of the Aarhus Convention and/or relevant European Union law is presented as a solution. The example of Sweden and Italy shows that the European Union has a remarkable diversity of different systems when it comes to administrative justice. One important issue when it comes to the implementation of European Union law is whether the national administrative judge may carry out an *ex officio* review of the relevant law or is bound by the grounds of the appeal.

Keywords Environmental law · *Actio popularis* · Aarhus Convention · EIA Directive · SEA Directive

1 Introduction

This article is a report and reflects discussions among judges and prosecutors from all over Europe during several workshops on European Union environmental law organised by the Academy of European Law Trier. It takes a critical view of national court review in environmental matters and is meant to raise awareness about national traditions and practices concerning administrative justice that may jeopardise the proper

✉ Dr. M. Keller
matthias.keller@vg-aachen.nrw.de

[1] Presiding Judge, Administrative Court, Verwaltungsgericht Aachen, Adalbertsteinweg 92, 52070 Aachen, Germany

implementation of European Union environmental law. The text is written in an informal style and—*nolens volens*—in plain English. The author is a practitioner[1] with a German legal background who is looking forward to continuing the debate on these issues.

2 Are national standing requirements still too strict?

2.1 Central Europe

Especially in Central Europe (*e.g.*, Austria, the Czech Republic and Germany) strict standing requirements for individuals still constitute a problem which merit discussion among legal practitioners. The deeper reason for this "unsolved issue" of wide access to administrative justice in environmental matters may be found in the specific role that administrative justice plays in some Central European countries.

For instance in Germany, it is seen as a historic achievement, disrupted only by totalitarian legal thought,[2] that the function of administrative justice is to provide effective redress when subjective (public) rights (*recours subjectif*) are violated. To use a metaphor, it is an *Autobahn* for individual rights against harmful public action and a "dead end" for all other (political) controversies that may arise in the sphere of public law. This approach is an affirmation of the principle of the separation of powers. The administration with its executive powers enforces the law, whereas the (administrative) judiciary guarantees redress for the violation of individual rights.

2.2 Testing the test to identify protective public norms (Schutznormtheorie)

In German legal practice there is a special test for discerning between the "protection of individual rights" and the "public interest". The test is called *Schutznormtheorie* (meaning 'protective norm theory'). Protective norms are those norms that pursue not only a public interest but (at least) also a private interest (*e.g.*, protection of neighbours from noise). Protective norms can be invoked by an individual claimant before a court of law. If a protective norm is violated, it constitutes a violation of individual rights with all its legal consequences.

For the sake of precision and to avoid a wide spread misunderstanding: if an individual claimant seeks the annulment of a non-favorable administrative act of which he or she is the addressee, a safeguard provided under the German constitution is that he or she can invoke any (!) illegality. In such a typical annulment case, *Schutznormtheorie* does *not* apply. In other words, in such a case the *recours subjectif* is (within the limits of the subject matter) also a *recours objectif*.

The test of *Schutznormtheorie* only applies in so called "third party cases" which are typically neighbourhood cases. The neighbour brings an action against a permit for the construction of a wind farm. The action for annulment will be successful only

[1] An administrative law judge.

[2] *Gutmann* [3].

if the court can establish a violation of norms that protect the (private) interests of the neighbour (termed '*nachbarschützende Normen*'). Examples in the given case would be legal norms that protect the neighbours from noise nuisance or from disturbing light effects. Legal norms on the protection of flora and fauna pursue a public interest and therefore are considered irrelevant to solving a neighbourhood case. In principle they cannot be invoked in legal proceedings that are brought by the neighbour. This is—very briefly—the position of the individual claimant under *Schutznormtheorie*.

The modern concept of legal standing in environmental matters is not fully recognised. Public interest litigation launched by an individual claimant (rather than a non-govermental organisation) may still be rejected as inadmissible because of *Schutznormtheorie*. The Aarhus Convention and corresponding European Union law, both of which seek to permit effective public interest litigation in environmental matters, are not comprehensively followed. It has to be recalled that the Aarhus Convention and corresponding European Union law have a key concept when it comes to identifying those persons and associations who are entitled to bring an action to court: this is the "public concerned" to which environmental non-govermental organisations *and* individuals may belong. It takes further efforts to open up *Schutznormtheorie* for green public interest litigation. In the opinion of the author this needs nothing more than a state-of-the-art interpretation in the light of the existing legal framework which—again—is the Aarhus Convention and corresponding European Union law. Only then can the concept of "public concerned" become the decisive test to identify those individuals who enjoy green rights to information, participation and—which is important here—enjoy full access to justice in environmental matters.

2.3 Less problems with standing issues under the French model of administrative justice

Experience drawn from conducting case studies at ERA workshops has shown that Member States that (more or less) follow the traditional French system[3] of administrative justice seem to have less problems in granting wide access to justice in environmental matters. Public interest litigation does not cause such a major problem. The fear that the role of the administrative judiciary might change to that of an "enforcement agency" does not seem so prominent. A different legal culture and different historical development may constitute one explanation for this interesting phenomenon.

The French *Conseil d'État* has been a model for many European countries (*e.g.*, Greece, Italy, Luxemburg, Belgium and the Netherlands) in reconciling administrative functions (advising the legislature) and administrative justice (deciding individual administrative cases) in one institution. Under this tradition the strict separation

[3] See, on the nineteenth century background of the Franco-German divide on administrative justice: *Keller* [4].

between administrative and judicial functions was not of a fundamental concern. Up to now, no more than a "qualified interest"[4] is sufficient for an individual to start judicial proceedings before a French administrative Court and invoke public law (*recours objectif*).

It comes as a certain element of surprise that the United Kingdom where the power of judicial review of public power is conferred on the ordinary judiciary, and the French concept of *justice administrative* has always been vividly rejected, follows—as the British colleagues summarised—a "sufficient interest test" when it comes to the question of whether an individual claimant is enabled to launch court proceedings (*locus standi*) against the exercise of a public law power.

3 No European Union requirement of a "green *actio popularis*"

In discussions a "green *actio popularis*" is sometimes referred to as a serious threat to the proper functioning of national court systems. Therefore, it should be made clear that the European Union law does not at all require an *actio popularis* in environmental matters. A good example for the flexible European Union law approach on standing issues can be found in Article 11(1) of EIA Directive. This provision (transposing the Aarhus Convention) allows Member States—if they deem such an approach necessary—to avoid an *actio popularis* in environmental matters and to confine the standing of claimants to those who can demonstrate "a sufficient interest, or alternatively, the impairment of a right". This provision encompasses the two major restrictions on standing in the European Union and respects the different traditions of administrative justice in Member States.[5]

4 Sufficient access to justice against "plans and programmes"?

Former and recent case studies and discussions among national judges and prosecutors in ERA seminars have also shown that in some Member States direct access to justice against "plans and programmes" (*e.g.*, forest management plans) cannot be taken for granted. For whatever reason, some Member States seem to be quite reluctant to accept that "abstract plans and programmes" or, more technically, administrative acts of general scope may be reviewed and invalidated by judges.

This situation clearly jeopardises the proper enforcement of the Strategic Environmental Assessment (SEA) Directive at national level. This Directive requires an environmental assessment of plans and programmes which are likely to have significant effects on the environment. A specific process has to be followed when identifying and assessing environmental effects. At international level, things seem quite clear. According to Article 7 and 9 (3) of the Aarhus Convention, plans and pro-

[4]The qualified interest may be more 'narrow' (*e.g.*, in the case of Hungary) or 'wide' (*e.g.*, in the case of Belgium, England/Wales, France and Sweden) cf. *Eliantonio et al.* [2], p. 67.

[5]For detailed comparative studies on administrative justice see *Darpö* [1]; *Eliantonio et al.* [2]; and *Seerden* [5].

grammes relating to the environment are—in principle—considered to be reviewable. At European Union level, provisions such as Article 47 of the Charter of Fundamental Rights provide for access to justice. However, the SEA Directive has no explicit provision regarding access to justice. If the wording of domestic procedural law is not open to giving access to justice concerning plans and programmes, a situation of non-compliance with the SEA Directive may be without any consequences for a public authority. It is the task of the legislator to avoid such a denial of justice by enacting appropriate legislation concerning the administrative justice system—something which, according to Slovenian colleagues has happened in their home country.

5 Interpreting national law "to the fullest extent possible"

Whenever national law is not in compliance with the legal framework of the Aarhus Convention and/or European Union law, the question arises of whether a solution can be found by interpreting national law in conformity with that framework. Experience from workshops shows that national judges are reluctant to give national procedural norms "a new meaning" by construing them in the light of the Aarhus Convention and/or European Union law. However, the jurisprudence of the European Court of Justice encourages national judges to do so. National procedural law may be open to an interpretation in the light of Article 9(3) of the Aarhus Convention with its broad guarantee of access to justice. The national concept of an administrative act may be widened by interpretation and—as a result—come to include acts of general scope like plans and programmes. By doing so, the national judge can rely on the *Brown Bears I judgment*[6] where the European Court of Justice encouraged domestic courts to interpret their national law in accordance with the objectives of Article 9(3) Aarhus Convention "to the fullest extent possible".[7]

6 Are EIA requirements effectively reviewed by national courts?

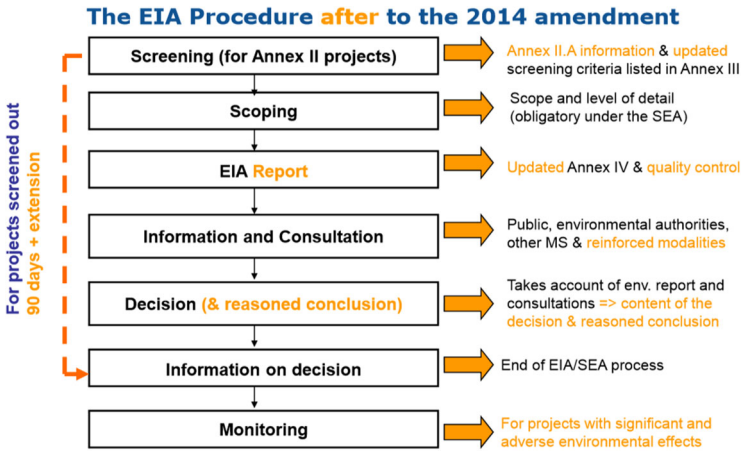
6.1 The legal framework

The Environmental Impact Assessment (EIA) is a core feature of European Union environmental law. The background can be found in the broader concept of Impact Assessment which is a means of sound decision-making. The objective of the EIA process is to identify, describe, and assess environmental impacts. How does the EIA procedure operate under existing European Union law? The following chart[8] provides an overview, highlighting the 2014 amendments:

[6] C-240/09 *Lesoochranárske zoskupenie* (*"LZ I"*), ECLI.EUC 2011:125, para 30 (*"Brown Bears I"*).

[7] C-240/09 *Lesoochranárske zoskupenie* (*"LZ I"*), ECLI.EUC 2011:125, para 52 (*"Brown Bears I"*).

[8] The European Commission, DG Environment uses this chart, which is not an official document, for didactical purposes. *Cf.* the conference on Effective Environmental Impact Assessment in the EU, 7–8 December 2017 Brussels, Stephano Ampatzis, p. 45: http://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf.



There is no doubt that it is the task of the competent national court to review the legality of the Environmental Impact Assessment procedure. Access to justice for the public concerned is a fundamental pillar of the concept established by Article 9 of the Aarhus Convention where court proceedings are a means to attain better enforcement of environmental law. The point of reference for activities that are subject to public participation is Article 9(2) in conjunction with Article 6 of the Aarhus Convention. This guarantee of access to justice has been adopted by Article 11 of Environmental Impact Assessment Directive, other European Union Directives[9] and the laws of Member States. Only here, in the legal context of public participation requirements, has the European Union attained the harmonisation by pieces of European Union secondary law.

6.2 Scope and intensity of national court review

National courts do not review the legality of the Environmental Impact Assessment procedure in the same way at all. Sweden and Italy provide examples of two different approaches. In the Swedish system of a strict *ex officio* review it is the task of the ordinary or "technical" judge to explore and establish the relevant facts and provisions of law. Whereas in Italy, it is more or less up to the parties and their lawyers to raise the relevant grounds of a challenge to an administrative decision. From the perspective of the effective enforcement of relevant European Union law in the national court room, the *ex officio* system of administrative justice is clearly favourable.

Even in countries like Italy, where the claimant has to present "grounds of the appeal" (called, in French, *les moyens*), certain aspects of the case, such as the observance of rules concerning the jurisdiction of the court (in French, *les moyens d'office*) are reviewed *ex officio*. These rules are deemed to be in the public interest. It will be

[9] Article 25 of the Industrial Emissions Directive, 2010/75/EU; Article 6 (2) of the Access to Environmental Information Directive, 2003/4/EC; Article 13 of the Environmental Liability Directive, 2004/35/EC; Article 23 of the Seveso III Directive, 2012/18/EU.

interesting to see whether national courts without an *ex officio* system will nevertheless develop an *ex officio* review by analogy in cases where there is manifest breach of European Union environmental law and an important public interest involved. The principle of effectiveness (see below) would be a good starting point for such a turn towards stricter scrutiny of the administrative judge. Meanwhile, it is the law in many countries of the European Union that the administrative judge looks at the case files, sees that an environmental impact assessment is missing, but has to remain silent until the lawyer (hopefully) picks it up.

7 Respecting the limits of procedural autonomy

Well-established case law[10] of the European Court of Justice on the procedural autonomy of the Member States and its limits shows the interplay between European Union rights and domestic procedural rules. According to this case-law, it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of European Union law rights. However, there are limits. These procedural conditions

- must not be less favourable than those relating to domestic actions ('the principle of equivalence'),
- must not make it impossible in practice to exercise those rights ('the principle of effectiveness').

While the principle of equivalence is easy to apply and almost goes without saying, the principle of effectiveness requires access to justice and does not permit leaving rights conferred by European Union law without judicial protection. Otherwise domestic law would not be in compliance with the principle of effective judicial protection set out in the European Union Treaties and with the requirements enshrined in Article 47 of the Charter of Fundamental Rights of the European Union. The workshops showed that the limits of procedural autonomy can not be defined on an abstract level but on a case-by-case approach and—if necessary—by making a preliminary reference under Art. 267 TFEU.

8 How to proceed?

Exchanging experiences during the ERA workshops revealed practices of administrative justice that may jeopardise the implementation of European Union environmental law in the course of national legal proceedings. The Aarhus promise of a comprehensive access to justice including "all other environmental matters" (under Article 9 para. 3 of the Aarhus Convention) is still a "work in progress". Guidance can be found in the Commission's Notice on Access to Justice in Environmental Matters.[11]

[10] Beginning with Case 33/76 *Rewe v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, paragraph 5.

[11] Communication of the Commission of 28.4.2017: Commission Notice on Access to Justice in Environmental Matters, C(2017) 2616 final.

However, a fundamental part of the solution for a better understanding and application of the law will always be an open legal debate on difficult cases which, among judges and prosecutors from different Member States, has only just begun.

References

1. Darpö, J.: Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union. Available at: https://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/2013_A2J_Synthesis_report_Final.pdf
2. Eliantonio, M., et al.: Standing up for your right(s) in Europe, a comparative study on legal standing (Locus Standi) before the EU and Member States' Courts, Intersentia, Cambridge (2013). Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462478/IPOL-JURI_ET(2012)462478_EN.pdf
3. Gutmann: Ideologie der Gemeinschaft und die Abschaffung des subjektiven Rechts (2018). Available at: https://www.jura.uni-muenster.de/de/institute/lehrstuhl-fuer-buergerliches-recht-rechtsphilosophie-und-medizinrecht/studieren/recht-und-rechtswissenschaft-im-nationalsozialismus
4. Keller, M.: in: L'intérêt à agir devant le juge administratif, sous la direction de Olivier Renaudie, Berger-Levrault, Collection: Au fil du débat, p. 69 et s., 2015. n: Renaudie, O., (ed) L'intérêt à agir devant le juge administrative, Berger-Levrault, Paris 2016
5. Seerden, R. (ed.): Administrative Law of the European Union its Member States and the United States, 3rd edn. Intersentia, Cambridge (2012)