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‘Front-door’ versus ‘back-door’ law-making
A case study concerning German responses to the challenges of the Aarhus Convention

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Content

1. Introduction[1]

In most countries, the relationship between international and national law was never simple nor straightforward. In order to comply with international obligations, two main instruments have been applied at the national level. First of all, there is the royal road via the ‘front-door’. If national law is not in sync with international obligations, the legislature assumes its responsibilities and takes action. National law will then be amended accordingly to comply with international law. However, there is also another way of dealing with national incompatibilities. We could call this the ‘back-door’ way of law-making.[2] With this method, the main actor is not the *legislator* but the *court*. The court performs law-making by interpreting national law in such a way that it is consistent with international obligations. In some countries, for instance the Netherlands, Germany and the United Kingdom, the courts have a duty to interpret in such a manner as a matter of national constitutional law.[3] Furthermore, the Court of Justice of the EU requires, as a

[1] This text builds upon previous publications of the first author, in particular the publications mentioned in footnotes 2, 3 and 5. The text of this contribution was finished on 1 October 2015.

[2] Cf. on the concept of ‘back-door’ law-making: J.H. Jans, ‘Harmonisation of National Procedural Law Via the Back Door? Preliminary Comments on the ECJ's Judgment in Janecek in a Comparative Context`, in: Bulterman, Hancher, McDonnell and Sevenster (eds), *Views of European Law from the Mountain*, (Liber Amicorum P.J. Slot), p. 267-275.

[3] Cf. J.H. Jans, S. Prechal, R.J.G.M. Widdershoven (eds.), *Europeanisation of Public Law* (Groningen: Europa Law Publishing 2015), chapter 3.

matter of EU law, that national courts interpret national law 'as far as possible' in the light of EU law; the doctrine of consistent interpretation.[4]

This contribution will discuss both methods of law making, by presenting a concise case study concerning German responses from both the legislator and the courts, towards German obligations under Article 9(2) and (3) of the Aarhus Convention.

2. The front-door method

The front-door method of lawmaking is lawmaking by the legislator and normal legislative procedures. The case of access to justice of environmental organisations in German administrative procedural law and the implementation of Article 9(2) of the Aarhus Convention in the German legal order, can serve as an example of this front-door method.

The Aarhus Convention is a so-called 'mixed agreement' which means that both the European Union and the Member States are party to the Treaty.[5] The official name of the Aarhus Convention is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.[6] The official name reflects the three pillars of the convention, namely (1) access to information, (2) public participation and (3) access to justice. In this chapter, we will focus on access to justice, the third pillar of the Convention, which is laid down in Article 9 of the Convention. The aim of the Convention is to provide wide access to justice and this pillar provides effective enforcement of the two other pillars. The paragraphs 1 to 3 of Article 9 Aarhus Convention provide different possibilities for access to justice. The first paragraph only relates to disputes concerning the right to environmental information. The second paragraph stipulates access to justice with respect to the public participation pillar of Article 6 Aarhus Convention. The third paragraph provides an additional right with regard to the first and second paragraph, which will be discussed below in the context of the back-door method. The second paragraph is of particular importance for the description of the front-door method.

Article 9(2) of the Aarhus Convention provides:

> '2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:
>
> (a) having a sufficient interest or, alternatively,
>
> (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

[4] I.a. Case C-106/89 *Marleasing* ECLI:EU:C:1990:395; Joined Cases C-397/01 to C-403/01 *Pfeiffer* ECLI:EU:C:2004:584. Cf. also the literature referred to in footnote 1, with further references in that chapter.

[5] Cf. J.H. Jans, 'Who is the referee? Access to Justice in a Globalised Legal Order'. *Review of European Administrative Law*, 4(1), 2011, p. 87-99.

[6] There is abundant literature on this treaty. See, i.a., M. Pallemaerts (ed.), *The Aarhus Convention at Ten; Interactions and Tensions between Conventional International Law and EU Environmental Law* (Groningen: Europa Law Publishing 2011).

> What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5) shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.
>
> The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.'

The second paragraph of Article 9 stipulates the access to a review procedure for members of the public concerned with challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of the Convention. Pursuant to Article 9(2), the parties of the Convention have the choice to implement one of two admissibility criteria: either sufficient interest or the violation of a right. France has, for example, chosen the first option whereas Germany has chosen the second option. Environmental organizations within the meaning of Article 2, paragraph 5 Aarhus Convention are deemed to have a sufficient interest or to have a right that can be violated according to Article 9(2) Aarhus Convention. The European Union has adopted the provision of paragraph 2 with nearly identical wording in the EU Directive 2003/35 (public participation Directive) through the amendment of Directive 85/337 (Environmental Impact Assessment Directive (EIA Directive)) by the addition of Article 10a EIA Directive.[7] These directives have been transposed by the Member States.

In the German literature, there has been significant controversy over whether §42(2) *Verwaltungsgerichtsordnung* (hereinafter: *VwGO* (administrative procedural law)) is compatible with these international and European provisions.[8] The provision reads in English:

> 'Except where otherwise provided by law, such an action is admissible only if the claimant asserts that his rights have been impaired by the administrative measure or by the refusal or failure to act.'[9]

The *VwGO* contains a very strict eligibility criterion and the consequence thereof is a limited right of appeal. The German criterion is a stricter criterion than, for example, the criterion used in the Netherlands. The German legislature has chosen for the 'violation of a right'-criterion, wherefore sufficient interest grants no standing. The appellant is required under §42(2) *VwGO* to demonstrate that his subjective rights have been violated by a decision. An appellant only has a subjective right when the violated norm intends to protect the appellant's individual interests. Therefore, the violation must be a breach of a so-called *Schutznorm*. The decision on whose rights

[7] Directive 2003/35/EC, OJ 2003 L 156/1.

[8] Cf. A. Epiney, K. Sollberger, *Zugang zu Gerichten und gerichtliche Kontrolle im Umweltrecht* (Berlin 2002), p. 85; A. Epiney, 'Verwaltungsgerichtlicher Rechtsschutz in Umweltangelegenheiten in Europa', *EurUP* 2006, p. 242, at pp. 243 et seq., who compares the legal systems of different EU Member States with regard to access to justice; Cf. also Nicolas de Sadeleer, Gerhard Roller; Dross, Miriam (eds*), Access to Justice in Environmental Matters and the Role of NGOs; Empirical Findings and Legal Appraisal* (Groningen: Europa Law Publishing 2005).

[9] And in the original German text: '*Soweit gesetzlich nichts anderes bestimmt ist, ist die Klage nur zulässig, wenn der Kläger geltend macht, durch den Verwaltungsakt oder seine Ablehnung oder Unterlassung in seinen Rechten verletzt zu sein.'*

a legal provision protects lies with the legislator and is therefore a purely legal decision. As a result, damage suffered by an individual does not result in access to a court if the law does not aim to protect the injured party. Consequently, the interpretation of legal provisions is of crucial importance. Due to this system, there is, in principle, no appeal possible for the protection of general interests, such as the environment. These general interests cannot be protected by environmental organizations either since they cannot have subjective rights. As mentioned, the German literature raised the question whether §42(2) *VwGO* was compatible with Article 9(2) Aarhus Convention and Article 10a of the EIA Directive.

The legislator decided to keep on the safe side and adopted a new act for the transposition of the EIA Directive, namely the *Umweltrechtbehelfsgesetz* (hereinafter: *UmwRG*).[10] According to Paragraph 2(1)(1) of the UmwRG a 'recognised'[11] domestic or foreign association may, without being required to maintain an impairment of its *own* rights, bring an action to challenge a decision, provided that the association asserts that the decision contravenes legislative provisions 'which seek to protect the environment, which confer individual rights and which may be relevant to the decision'.[12]

The problem, however, in this new provision was that although environmental organisations were granted access to the administrative courts, they still had to show that the decisions they want to challenge in a judicial review violate rules 'which confer individual rights'. The problem with this condition is that, once again according to German legal doctrine, many provisions in environmental legislation, in particular on nature protection and air quality, do not confer 'individual rights' but are enacted to protect the public at large. In short the result of this is that environmental organisations had access to the court, but there were hardly any provisions they could rely on to challenge decisions in a judicial review. This triggered advocate general Sharpston to her remark that the German system of judicial review looked 'like a Ferrari with its doors locked shut, an intensive system of review is of little practical help if the system itself is totally inaccessible for certain categories of action.'[13]

Not very surprisingly was that this 'individual rights' condition was challenged in court with the argument that it was not in line with the Aarhus Convention and the Aarhus implementing directive at EU level. The Court of Justice of the European Union decided on this in the *Trianel* case.[14] In this case the German company Trianel was granted permits to build a coal fired thermal power plant near five Natura 2000 sites, even though the environmental impact assessment of the project did not show that it was unlikely to have a significant effect on the special areas of conservation located nearby. And that therefore the permits were granted in violation with German nature protection law and Article 6(3) of the Habitats Directive. The environmental organization BUND wanted access to court to challenge the decision authorising this project.

[10] Gesetz Ober ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Umwelt-Rechtsbehelfsgesetz) of 7 December 2006, BGBI. I 2006, p. 2816, 14 December.
[11] See § 3 UmwRG.
[12] In German: 'dem Umweltschutz dienen, Rechte Einzelner begründen und für die Entscheidung von Bedeutung sind'.
[13] ECLI:EU:C:2010:773, point 77.
[14] Case C−115/09, *Trianel*, ECLI:EU:C:2011:289.

The national court dealing with the case (*Oberverwaltungsgericht Nordrhein-Westfalen*) argued that most of the provisions BUND relied upon primarily concerned the general public and not the protection of individual rights and that according to German administrative procedural law they had to be declared inadmissible in their appeal. However, the *Oberverwaltungsgericht* wanted to be sure that the restrictions on access to justice in German were compatible with EU law and asked the Court of Justice for a preliminary ruling.[15] The Court of Justice ruled as follows:

> 'If, as is clear from that provision (*Article 10a EIA Directive* (addition authors)), those organizations must be able to rely on the same rights as individuals, it would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness if such organizations were not also allowed to rely on the impairment of rules of EU environment law solely on the ground that those rules protect the public interest. As the dispute in the main proceedings shows, that very largely deprives those organizations of the possibility of verifying compliance with the rules of that branch of law, which, for the most part, address the public interest and not merely the protection of the interests of individuals as such.'[16]

The Court concluded that Article 10a of the EIA Directive precludes legislation that deprives the access to court from environmental organizations on the ground that the violated environmental provision only protects the interests of the general public and not the interests of individuals.

Although in the aftermath of *Trianel* German courts recognised the access of NGOs without requiring the infringement of an individual right,[17] it was quite clear that the German legislator had to become active again and introduced new legislation whereby the requirement that an environmental standard should protect individual rights was deleted from the *UmwRG*. The new provision entered into force on 29 January 2013 and reads as follows:[18]

> § 2 Rechtsbehelfe von Vereinigungen
>
> (1) Eine nach § 3 anerkannte inländische oder ausländische Vereinigung kann, ohne eine Verletzung in eigenen Rechten geltend machen zu müssen, Rechtsbehelfe nach Maßgabe der Verwaltungsgerichtsordnung gegen eine Entscheidung nach § 1 Absatz 1 Satz 1 oder deren Unterlassen einlegen, wenn die Vereinigung
>
> 1. geltend macht, dass eine Entscheidung nach § 1 Absatz 1 Satz 1 oder deren Unterlassen Rechtsvorschriften, die dem Umweltschutz dienen und für die Entscheidung von Bedeutung sein können, widerspricht, [...].

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[15] OVG NRW, Beschluß vom 05.03.2009, 8 D 58/08.AK. Cf. i.a. A. Schwerdtfeger, ''Schutznormtheorie' and Aarhus Convention - Consequences for the German Law', *JEEPL* 2007, p. 270-277. See also the overview from S. Schlacke, 'Die Novelle des Umwelt-Rechtsbehelfsgesetzes – EuGH ante portas?', *ZUR* 2013-4, p. 195.

[16] Case C−115/09, *Trianel*, ECLI:EU:C:2011:289, para. 46.

[17] See *Oberlandesgericht Münster* 1 December 2011, Az: 8 D 58/08.AK.juris, and *Oberlandesgericht Mannheim* 20 July 2011 10 S 2102/09. Cf. also M. Eliantonio and Ch.W. Backes, 'Access to Courts for Environmental NGOs at the European and national level: Improvements and room for improvement since Maastricht', in: M. de Visser & A.P. van der Mei (eds.), *The Treaty on European Union 1993-2013: Reflections from Maastricht* (Cambridge: Intersentia 2013), p. 557-580; F. Grashof, 'Judicial Coherence in Public Environmental Law', to be published in *Review of European Administrative Law* 2015/2.

[18] BGBl. 2013 I, 95

The problematic condition '*Rechte Einzelner begründen*'[19] in the old text of the *Umwelt-Rechtsbehelfsgesetz* were deleted and as a consequence, environmental organisations in Germany can now appeal against decisions where an environmental impact assessment should have been prepared (correctly). However, as the new text added some new conditions, in particular in §4a *UmwRG*, it is not quite clear whether the current text of the *UmwRG* is in line with the Aarhus Convention and the implementing EU legislation.[20] Whatever the case may be, it is clear from the judgment of the Court of Justice in Case C-137/14, that the German legislator is bound to change the *Umwelt-Rechtsbehelfsgesetz* once again, as various provisions of it were declared incompatible with EU law.[21]

The example of access to justice of environmental organisations in German law provides a fine example of what we call 'front-door lawmaking'. In order to align German administrative procedural law with its international and EU obligations the standard provision of §42(2) *Verwaltungsgerichtsordnung* was supplemented by the German *legislator* with new rules in the *Umwelt-Rechtsbehelfsgesetz*. However, these new rules were, according to the Court of Justice of the EU, not good enough and therefore the German *legislator* acted again and amended the *Umwelt-Rechtsbehelfsgesetz.* But also these changes were not adequate according to the Court of Justice and therefore the German legislator has to become active once again and change the law accordingly. And we cannot exclude that this will be the end of the saga! This case is therefore a good illustration of judicial dialogue in a complex multi-facetted shared legal order. The current text is the result of a dialogue between a national administrative court (*Oberverwaltungsgericht*), the EU Court of Justice and the German legislature, with input from legal doctrine in Germany and throughout the EU and beyond.

3. The back-door method

Let us now compare the example of the *Umwelt-Rechtsbehelfsgesetz* and alignment with international and EU via the national legislation (front-door law making) with the following example of back-door lawmaking. It concerned, once again, alignment of the German law on access to justice with the Aarhus Convention. In this case Article 9(3) of the Convention. That provision states:

> 'In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid

[19] In English: 'which confer individual rights'.

[20] See *inter alia* D. Schmitt, 'Das neue Umwelt-Rechtsbehelfsgesetz und seine Vereinbarkeit mit dem Unionsrecht', *ZEuS* 2013, pp. 359-384 and F. Grashof, *National Procedural Autonomy Revisited. Consequences of differences in national administrative litigation rules for the enforcement of environmental European Union law – The case of the EIA Directive*. Dissertation Maastricht University 2015, p. 158. It seems that one of the problems of the new provision is that the intensity of judicial review is somewhat less intense than the default standard of review. And because the *Umwelt-Rechtsbehelfsgesetz* is exclusively meant to implement EU Directive 2003/35, one could argue that this is incompatible with the principle of equivalence from the *Rewe/Comet*-case law of the Court of Justice. See on this principle J.H. Jans, S. Prechal, R.J.G.M. Widdershoven (eds.), *Europeanisation of Public Law* (Groningen: Europa Law Publishing 2015), chapter 2.

[21] Case C-137/14 *Commission* v. *Germany*, ECLI:EU:C:2015:683.

> down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.'

Although attempts have been made by the European Commission to implement the third paragraph into a EU directive and a draft was published, the directive never became reality because of strong resistance from some Member States.[22] Unlike Article 9(2) of the Aarhus Convention, Article 9(3) never resulted in any changes in German administrative procedural law. The special provisions of the German *Umwelt-Rechtsbehelfsgesetz* only deal with access to justice regarding decisions falling within the scope of Article 9(2) Aarhus Convention. That implies that access to justice for environmental organisations with respect to decisions falling within the scope of Article 9(3) of the Aarhus Convention are still governed by the 'default' provision of §42(2) *Verwaltungsgerichtsordnung*, discussed earlier in this chapter. And as we have stated above, this means that environmental organisations are *de facto* precluded to challenge acts and omissions which contravene environment law.

However, in a remarkable judgment, the so called *Slovak Bears* case, the Court of Justice of the European Union ruled that, even in the absence of any implementing EU measures regarding Article 9(3) Aarhus Convention and irrespective of the fact that this provision is not directly effective in the Union's legal order, the Member States of the EU are required to interpret their national provisions on administrative law in such a manner that it is consistent with the obligations resulting from Article 9(3) Aarhus Convention:

> '(..)It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organization, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law'.[23]

According to this judgment the EU principle of judicial effective protection is 'coloured' by Article 9(3) Aarhus. As a matter of Union law, the national courts of the EU Member States are required to interpret their national access to justice law in order to be 'Aarhus-consistent'. [24] The German *Bundesverwaltungsgericht* took up this challenge in a remarkable judgment in 2013. In this case a German environmental organisation requested that the responsible authority changed its air quality plan in order to improve the air quality in the Rhein/Main-area. As no action was taken, judicial procedures followed. It was quite clear that under the default provision of §42(2) *VwGO* the NGO should have declared 'inadmissible' in court. The legal provisions regarding German air quality are not meant to confer an individual right for NGOs. The first court *Verwaltungsgericht*, however opened up §42(2) *Verwaltungsgerichtsordnung* and admitted the NGO in court. That judgment was upheld by the highest German administrative court the *Bundesverwaltungsgericht*. The *Bundesverwaltungsgericht* relied very heavily on the judgment of the Court of Justice in *Slovak Bears*. The *Bundesverwaltungsgericht* ruled that the case law of the Court of Justice with regard to the Aarhus Convention (i.e. *Slovak Bears* case) requires that environmental organizations are

[22] Cf. COM(2003) 624 final.
[23] Case C-240/09, *Lesoochranárske zoskupenie*, ECLI:EU:C:2011:125 (*Slovak Bears*).
[24] BVerwG 7 C 21.12, ECLI:DE:BVerwG:2013:050913U7C21.12.0

granted access to the courts in order to guarantee the implementation of European environmental law. In accordance with this, §42(2) *VwGO* in combination with Article 47(1) of the German Anti-Pollution Law (*Bundesimmissionsschutzgesetz*; *BImSchG*)) can be interpreted in such a manner that environmental organisations are granted a right, enforceable in court, to require compliance with the requirements of air pollution control legislation, adopted to comply with an EU directive. Via this method of 'Aarhus-consistent interpretation' of the German administrative procedural law, the *Bundesverwaltungsgericht* greatly expanded access to justice of environmental organizations under the default provision of §42(2) *VwGO*.

4. Concluding remarks

In this chapter two methods to comply with obligations from the Aarhus Convention to broaden access to justice for environmental organizations were shown. With respect to Article 9(2) of the Convention the traditional 'front-door' method was used. The German legislator assumed its responsibilities and changed German procedural law – in a dialogue with the EU Court of Justice – in order to comply with that provision. With respect to Article 9(3) of the Convention no legislative action was taken. Not by the EU, and not by the German legislator. Instead, it were the courts that took action. Triggered by a judgment of the EU Court of Justice the highest German administrative court decided to interpret national administrative procedural law in such a manner that it is consistent with Article 9(3) Aarhus Convention. Although not identical, the result from this 'back-door' way of law-making is quite similar to the 'front-door' method.

From a democratic and legitimation point of view, and hence from a public trust perspective, the route via the 'front-door' must be preferred for obvious reasons. Courts do not have the same democratic legitimation as the legislature. Moreover, as the German constitution so aptly states, Art 20(3) *Grundgesetz*: *Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und* ***die Rechtsprechung sind an Gesetz und Recht gebunden***. The *judiciary* is bound by the law, whilst the *legislature*, within the boundaries of the constitution, can change the law.

Indeed, courts always have to interpret the law, that is their job. And in order to bring the national legal order in sync with the countries international obligations courts are required to be active, innovative and if necessary to break new ground. However, a court is not a legislature and in order to avoid that it is blamed for having acted as a 'quasi-legislator', the court must exercise some restraint in law-making via the 'back-door'.