Questionnaire on National Laws, Practices and Experiences on Enforcement
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Report on Germany
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1. Please describe generally the most import tools for the enforcement of environmental law in your country. Also describe the relative "weight" of private law, administrative law and criminal law for the enforcement.

In Germany, administrative law is clearly predominant in the enforcement of environmental law. Private and criminal law nowadays play only a very minor role.

Important tools are federal laws (Bundesgesetze) and federal regulations (Rechtsverordnungen des Bundes). Practically very important are also federal administrative rules (Verwaltungsvorschriften des Bundes). Examples for the latter are the Technische Anleitung Luft (TA Luft = technical guidance air) or the Technische Anleitung Lärm (TA Lärm = technical guidance noise). The federal administrative rules have a somewhat unclear status concerning the creation of individual rights and their possible enforcement in court-proceedings. The ECJ therefore declared them to be insufficient tools for the transposition of EC-directives. Since then, the German lawmaker uses proper laws or regulations only to the extent that they have to transpose EC Directives.

Below the federal level, the Bundesländer (states like Bavaria or Bremen) are responsible for some lawmaking. After the Federal Reform of 2006 their law-making powers are more limited than before.

Laws can delegate powers of rule-making to the government or individual ministers if they specify the content, scope and goals. Federal or Land government or ministers may in this way be empowered by Federal or Land laws.

In principle, the Bundesländer are responsible for the actual execution of the law in individual cases, provided the Constitution or federal laws do not specifically endow a federal administrative body with such competences (as e.g. in the field of pestide licensing or other product related environmental regulation). If competent the state authorities are executing the following kinds of laws:

- Directly applicable EC law (regulations, directly applicable directives and decisions)
- Federal and state laws transposing directives or complementing regulations
- Free standing federal and state laws.

The tools of executing laws are most often

- the providing of authorisations if an activity is subject to prior authorisation
- receival of prior or ex post notification by actors if the law so provides
- administrative surveillance of actors concerning the lawfulness of their activities

If by enforcement it is meant that unlawful activities are stopped the following powers are at the disposal of administrative authorities:

- to *revoke an unlawful administrative act* (e.g. an authorisation that was provided unlawfully); in cases of legitimate trust the authority must provide compensation)
- to *order a party to desist* from an activity *or to undertake* an activity; such orders

specify a legal obligation of the party established by law or a condition to an administrative act (e.g. if an operator discharges noxious substances exceeding the thresholds established by law or conditions attached to an authorisation). If there are no sectoral provisions explicitely providing these powers they can be based on the general police ower (power to intervene in cases of unlawful behaviour). In cases of environmental damage and absent sectoral law the environmental damages law (which transposes the Environmental Liability Directive) is applicable empowering authorities to order preventive or remedial action

- to take measures of *administrative execution* (Verwaltungsvollstreckung), e.g. if the operator does not follow the order. Such measures are either a compulsion payment (Zwangsgeld), the mandating of a third person to realise the order at the cost of the operator (Ersatzvornahme), or direct force (unmittelbarer Zwang). In the normal case the application of a measure must be announced beforehand giving the operator a last delay for compliance. In practice administrative agencies will negotiate with the operator about remedial steps ('bargaining in the shadow of the law')
- to impose a fine as a punishment for law violations under administrative infringement law (Ordnungswidrigkeitenrecht). Mens rea is required for this. Such a fine can go together with measures of administrative execution but not with criminal prosecution.An appeal against such fine will be decided by criminal courts (which is criticised by some because most cases involve scientific and technical questions which can better be decided by administrative chambers which used to handle complex environmental matters). While the prosecution under Administrative Infringement Law must identify a responsible individual the fine may nevertheless be addressed to the corporation if the perpetrator acted on its behalf.
- to inform the public prosecutor who may initiative prosecution under criminal law. Criminal law normally presupposes that a damage was caused while administrative infringement sanctions react to the simple violation of laws. Until now criminal prosecution is possible only against natural persons, sanctions against legal persons will have to be established according to directive 2008/99/EG).

It should be noted that all these sanctions (except criminal ones) can be imposed by the competent administrative body without going to court and asking for a judgement. We believe this marks a fundamental difference between common and civillaw systems.

If under enforcement we also understand administrative action in cases where the operator acts lawfully but new conditions require an alteration of her activities the administrative body may under certain conditions withdraw the authorisation. Normally compensation is due in such cases. However, dangerous installations and discharges of waste water which were authorised are subject to subsequent alterations of conditions without compensation.

2. Please answer sub-questions I-IV **for each situation listed as a-i below**. Also indicate whether you know of national cases where these issues have been dealt with. The situations are the following:
    a. When a project needing an EIA is authorised without prior EIA .
    b. When conditions attached to the EIA decision, granting a development consent, are disregarded.
    c. When an IPPC facility is established without an IPPC permit.
    d. When an IPPC facility is permitted without prior assessment in accordance with article 6(3) of the Habitat Directive.

e. When an IPPC facility is operated in violation of conditions of an IPPC permit.

f. When an IPPC facility releases greenhouse gases beyond what is provided for by allowances under the ET Directive.

g. When an IPPC facility has negative impact on Natura 2000 sites beyond the threshold in article 6(2) of the Habitat Directive.

h. When water plans adopted under the Water Framework Directive – or for the moment existing water quality standards laid down in the "old" water directives – are not complied with.

i. When air plans under the Air Framework Directive are not complied with.

Side remark on the question concerning discussions about direct effect of directives:

There was a controversy among the trustees and Jonas to what extent we should discuss direct effect of directives. Gerd and Jan agreed in proposing that problems of direct effect should not concern us too much. We can easily suppose as starting point that the EC law to be enforced is framed as Regulation. This already poses sufficient problems of enforcement. In the case of directives things are somewhat more complicated: (1) it can be the case that a permit is unlawful in relation to a directive but not in relation to national law (we should not discuss this because this sends us into endless debates about direct effect in general). (2) It can also be that the Directive was correctly transposed and the permit is lawful, but the MS agencies do not react in case the operator violates the permit conditions and by that the Directive. This raises the question of direct effect of the duty of MS to enforce (Art. 10 EC). There is no doubt that this duty exists independently of whether we deal with Regulations or Directives. (3) It can finally be that the horizontal Directives specifically aiming at improvement of enforcement and court review (Aarhus, Liability) are not properly transposed, the metadirectives, so to speak. Only in that regard we should address the question of direct effect of directives.

I: Which sanctions are provided under national law (criminal, administrative etc.)?

a. Procedural failure. The authority can in principle revoke the authorisation but legitimate trust must be respected.

b. The authority can order compliance and take measures of execution,see above 1.

c. The authority can impose a fine under Administrative Infringement Law and order to stop the activities based on police power.

d. Procedural failure. See above a.

e. See above b.

f. See above c.

g. A question to be dealt with in the authorisation procedure.

h. Plans are not directly applicable. They are binding only if specified in individual authorisations, by individual order or by generally applicable regulation.

i. See h.

II: Can NGOs and/or citizens challenge the enforcement – or lack of enforcement – by the

competent authority, or is it within the full discretion of the competent authority to decide whether and how offences should be sanctioned? (If NGOs and citizens can challenge such decisions and omissions, including failures of a procedural character, please describe how.)

Generally speaking, judicial review by administrative courts (Verwaltungsgerichte and Oberverwaltungsgerichte at state level and the Bundesverwaltungsgericht at federal level) is relatively dense. Standing to sue is however traditionally limited to encroachments on individual rights or legally protected indiviual interests. ECJ case law has somewhat broadened this concept. The realm of association action has been broadened by the "Umweltrechtsbehelfsgesetz" of 2007 which transposed Directive 2003/35. However the condition for such action (that individuals would also have standing) is actually reviewed by the ECJ. The plaintiff in the relevant German case before the Oberverwaltungsgericht Münster is the BUND, the biggest environmental NGO in Germany. The OVG referred the case to the ECJ (Decision of 5.3.2009, 8 D 58/08.AK, Zeitschrift für Umweltrecht, ZUR 2009, 380).

a. The authorisation is (procedurally) unlawful. Third parties and NGOs have standing to sue according to the Rechtsbehelfsgesetz. However, the authorisation will be revoked only if without the procedural failure it may have been denied or provided with other content. It is submitted that German law is somewhat negligent in relation to the self-standing importance of fair procedures.An association would have standing to sue, see preamble above.

b. Neighbours can challenge the establishment. NGOs can do the same under certain – disputed – conditions (see preamble above).

c. No association action. Neighbours if individually affected can invoke the court to order the administrative agency to intervene.

d. Association action under the Nature Protection Act. Individuals do not have standing.

e. Association action (see preamble). Standing of neighbours if condition protects them individually.

f. This is exactly the situation of the OVG Münster case, mentioned in the preamble above. When there is no local pollution by climate gases individals will not have standing to sue. Whether NGOs have standing depends on whether one considers climate gas emissions as an activity supervised according to the rules of the IPPC Directive.

g. If this is not prohibited in the authorisation an NGO may invoke a court based on the Nature Protection Act.

h. See II h.

i. See II i. Individuals which shall be protected by air plans have a right to that plans are set up as well as a right that the threshold values (for instance for particles) are enforced. The relevant doctrines were clarified through court decisions until up to he ECJ concerning a case located in München.

III: In light of European Community law, including the possible direct or indirect effect of directives, does national law grant NGOs and/or affected citizens the right to take direct enforcement measures against the polluter?

Affected citizens have civil law rights against polluters of prevention of damages to their health or property if public law provisions including those contained in EC regulations and directly applicable directives provide protection for them (§ 1004 by analogy, 823 II BGB).

In addition they have a right of prevention based on traditional neighbourhood nuisance law (§

1004, 906 BGB). The criterion here is significance of possible damage and local custom of nuisances. EC law as well as other public law if establishing thresholds is considered as specifying the criterion of significance.

Besides preventive action there is the right to compensation of damage caused unlawfully and negligently. There is non-fault liability of certain dangerous installations.

Because of high court fees in civil law cases and frequent difficulties concerning causation proof plaintiffs do normally not go to civil courts but take the administrative law path.

IV: Could the competent authority under national law be held liable for erroneous acts and for omissions (non-enforcement) in the cases listed below? If so, how?

If a public official is proven to have unlawfully and negligently provided an authorisation or committed an omission the authority for which he or she acted has to pay compensation. No compensation is due if the victim did not seek primary legal protection by challenging the authorisation or omission.

Please, comment on whether you find the national means of enforcement adequate, and if, based on the national experiences, you have any general suggestions for improving the enforcement.

Enforcement tools as provided by German law are widely of the command style. A more constructive approach is however often being practiced in the shadow of command powers. It should be considered if some constructive means such as a remediating contract should be introduced as a legal concept. See for suggestions the Macrory principles.

3. How is article 9(3) of the Aarhus Convention, regarding access to administrative or judicial procedures for members of the public to challenge violations of environmental law, complied with? In which situations is it NOT complied with?

   According to the German Government, Art. 9 (3) AC needs no special transformation into German law. German law is considered already to be in conformity with the respective obligations.

   We would like to draw your attention to a case recently referred to the ECJ by the highest Slovakian Court, asking for a possible direct effect of Art. 9 (3) AC (case C-240/09).

4. Please identify possible factors, such as costs, length of procedures or other practical matters, that may prevent effective access to justice for members of the public.

   Costs (mainly the cost of good lawyers) and the length of procedures play a role. Biggest obstacle however is the low rate of success in cases against the public authorities.

5. Do NGOs and/or citizens have access to injunctive relief and interim legal remedies? Do you know any national cases which have dealt with this?

   Interim legal remedies are a standard element of administrative judicial review. They are available for all kinds of plaintiffs. They are much more often used and much more often successful than the similar interim legal remedies at the ECJ.

   Two kinds of relief are available:

   - A complaint seeking the quashing of an administrative act (eg if a neighbour or NGO challenges an authorisation of an installation) has suspensive effect both if it is filed for reconsideration by the issuing and p.p. superior body or if it is filed with the court. The operator who is hindered to make use of the act is however entitled to ask the court to set the susensive effect aside. It is also possible that the administrative agency attaches a

qualification to the administrative act establishing that a complaint against it shall not have suspensive effect. This will be done if the activity allowed or ordered by the administrative act is urgent and imortant. In that case the complainant is entitled to ask the court to reintroduce suspension. In all cases of deciding about the suspension the court will weigh the auspices of the complaint, the interest of the beneficiary in immediate action, and the possible creation of negative facts on the side of the complainant.

- A complaint seeking positive administrative action (eg the stopping of unlawful emissions from an installation) or desistance from action (eg the stopping of emissions from a public sewage treatment plant) can be sided by application for interim relief. Relief will be granted if the complainant has a right to ask for the administrative action or desistance from action, and if he or she would suffer harm if having to wait for the final court judgement.

6. Are there any examples where a final administrative decision has been reopened because of a complaint based on later case law from the ECJ?

   The Munich-case mentioned under 2. II. i. could be such a case. Until now, the competent authorities have ignored the judgement of the ECJ but sooner or later they will have to rethink their air-quality policy.

7. Has there been any national case in which the State or the local authority have been held liable for not remedying environmental damage or other damage in violation of EC environmental law?

   Wes do not know of any case.

8. Do you know of any significant developments, good practices or failures (e.g. cases, new laws, new institutional arrangements, or new policies) with regard to the enforcement of EC environmental law, not covered by the previous questions, that you would like to highlight?