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How to Represent the Silent Environment? An Update on Germany's Struggle to Implement Article 9 (3) of the Aarhus Convention

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Abstract

With Germany's signature to the Aarhus Convention in 1998, the country committed to strengthening the legal position of environmental Non-Governmental Organisations (eNGOs). Since, traditionally, in Germany, "public interest litigation" was legally impossible, the country had to consider fundamental changes to its system of judicial review. More than 20 years later, the German implementation of Article 9(3) of the Aarhus Convention (AC) has seen several amendments, but is still cause for controversy. Despite Germany's prolonged efforts to adapt its legislation, there are, currently, two admitted complaints concerning Germany's system of legal standing of eNGOs waiting for a (final) decision by the AC Compliance Committee, while several CJEU judgments have clarified the much-needed interpretation of Article 9(3) AC particularly also in view of the notion of effective judicial protection. These developments, together with scholarly criticism, indicate a need for further legal change in the German approach.

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Keywords

Article 9(3) Aarhus Convention – access to justice for eNGOs – public interest litigation – Germany – enforcement of (EU) environmental law

1 Introduction[1]

In April 2020, the owner of a sheep farm in Germany was granted an exceptional permission to put to death two wolves, which had previously killed several dozen of his sheep.[2] This permission – an administrative act, creating an exception to the general prohibition to kill wild animals -[3] was successfully challenged in court by a German environmental NGO (eNGO). Although the court's decision stated that, generally, the exemption to kill the wolves was lawful, the court agreed that the permission, which was awarded for a period of almost three months, was not proportionally limited in time.[4] This case is an example of a proceeding in which an eNGO was granted legal standing through the national implementing measures of Art. 9(3) of the Aarhus Convention (AC),[5] allowing the association to challenge a potential non–compliance with environmental law. The case shows the importance of Art. 9(3) AC, namely to ensure that non-compliance with provisions of national law relating to the environment can be successfully addressed. Considering that particularly eNGOs can play a crucial role in ensuring compliance with obligations under both EU and national environmental law, legislative regulation of legal standing for eNGOs is as relevant as ever.[6] However, Germany still struggles with granting standing to eNGOs so as to ensure that they can effectively play a watchdog role to address non-compliance with environmental law. Indeed,

1 The date of conclusion of this research is 1 April 2021.

2 OVG 4 ME 116/20 Higher Administrative Court (OVG) Lüneburg (26/06/2020).

3 Para. 44(1) 1 Bundesnaturschutzgesetz (BNatSchG) henceforth, the German Federal Nature Protection Act. The legal basis for the exemption can be found in para. 45 (7) 1 German Federal Nature Protection Act.

4 OVG 4 ME 116/20 Higher Administrative Court (OVG) Lüneburg (26/06/2020), para. 41.

5 More precisely, in this case para. 1 (1) 5 Umweltrechtsbehelfsgesetz (UmwRG) henceforth, the Environmental Appeals Act (EEA). See further OVG 4 ME 116/20 Higher Administrative Court (OVG) Lüneburg (26/06/2020), paras. 12 – 14.

6 *T. Bunge*, Die Verbandsklage im Umweltrecht, Juristische Schulung (JuS) 2020 (8), p. 740. See generally about the need to recognize in law the role of eNGOs to protect the environment, *M. Peeters*, About Silent Objects and Barking Watchdogs: The Role and Accountability of Environmental NGOs, European Public Law (EPL) 2018 (24/3), pp. 449–472. This article also points at the need to consider the accountability of eNGOs in case they become very powerful through procedural rights.

since Art. 9(3) AC remains very vague with regard the question of what persons should be given standing, there are opportunities for governments to take a conservative approach in this matter.[7] Moreover, with its accession to the Aarhus Convention, Germany had to consider potential fundamental changes in its system of judicial review, in light of which it is understandable that no radical approach has been taken. While the German implementation of Art. 9(3) AC has witnessed several amendments, its compliance with Art. 9(3) AC is still cause for controversy. This article will, therefore, provide an analysis of the current legal situation in Germany regarding eNGOs' right to access to justice as provided in Art. 9(3) AC. It will be shown how – even though much progress has been made and the legal situation has changed multiple times – the dilemma Germany is facing with respect to Art. 9(3) AC has only been resolved partially. Section 2 of this article will briefly set out what exactly Germany's supranational obligations are concerning the implementation of Art. 9(3) AC and will also explain the EU's role in this respect. Section 3 will examine Germany's current implementation of Art. 9(3) AC, thereby also explaining the underlying reasons as to why Germany seems to be encountering so many issues in this respect. Section 4 will delve into the complaints against Germany with the Aarhus Convention Compliance Committee in relation to Art. 9(3) AC and will consider further potential shortcomings of the German approach by presenting several points of criticism Germany is facing at the moment. Section 5 concludes, thereby pointing at the need for further improvements of the German legislative framework.

2 The Important but Contentious Commitments Made in Art. 9(3) AC

As is well-known, the Aarhus Convention establishes several procedural rights of the public with regard to the environment.[8] Its Art. 9 provides for three kinds

7 Art. 9(3) AC mentions "members of the public" which includes according to Art. 2(4) AC "associations, organizations or groups"; both Art. 9(3) and Art. 2(4) AC provide wide discretion to parties to delineate access, but if no access at all were given to eNGOs, that would be presumed to be against the aim of Art. 9(3) AC. See about the need to avoid a too restrictive interpretation *M. Van Wolferen & M. Eliantonio*, Research Handbook on EU Environmental Law, 2020, Chapter 10, p. 156. See also UN Economic Commission for Europe, The Aarhus Convention – An Implementation Guide, First Edition, 2000, p. 131, referring to the notion of broad standing in proceedings on environmental issues.

8 For further information concerning the Aarhus Convention in general see i.e. *J. Wates*, The Aarhus Convention: a Driving Force for Environmental Democracy, Journal of European and Environmental Planning Law (JEEPL), 2005 (2/1), pp. 2 – 11.

of review procedures, of which Art. 9(3) AC was truly the most contentious one during the treaty negotiations.[9] Because of its very wide scope – it concerns review procedures "to challenge acts and omissions of private persons or public authorities which contravene provisions of its national law relating to the environment" – it provides a general right of access to a review mechanism to address non-compliance in environmental matters.[10] However, given its broad wording, and the ample discretion left to parties for implementation, not much legal certainty is provided by this provision. Moreover, parties can choose between administrative or judicial procedures, although, as we will see below, the CJEU has pointed at the need to provide access to a court. Furthermore, a particular challenge is the exact delineation between the scope of application of Art. 9(2) and (3) AC. For instance, Art. 9(2) AC merely addresses standing of "members of the public *concerned*" whilst Art. 9(3) AC is directed more generally at "members of the public."[11] Yet, in many jurisdictions – including the German one – the implementation of these two subsections has been, at least partly, merged, which complicates the differentiation between the respective criteria for legal standing.[12] A further item of discussion is the margin of discretion allowed by the phrase "criteria, if any, laid down in national law" with respect to the requirements for eNGOs' access to the review mechanism.[13] Nonetheless, any limitations should be as constrained as possible, and never so far that the right's use effectively becomes impossible.[14] Using their discretion

9 *J. Jendroska*, Access to Justice in the Aarhus Convention – Genesis, Legislative History and Overview of the Main Interpretation Dilemmas, JEEPL 2020 (17), p. 24. Art. 9(1) AC deals with access to justice in cases relating to access to information, and Art. 9(2) AC addresses legal standing regarding governmental decisions for projects that may significantly impact the environment.

10 Jendroska explains that "the original reference to "national environmental law" was extended to the broader concept of "national law relating to the environment" – showing a strengthening, rather than a further weakening during the finalisation of the treaty text (p. 28).

11 For a specific interpretation of this delineation, Case C-826/18 [2020] *LB Stichting Varkens in Nood, Stichting Dierenrecht, Stichting Leefbaar Buitengebied v College van burgemeester en wethouders van de gemeente Echt-Susteren*, ECLI:EU:C:2020:514. In this case, the right of individuals to rely on Art. 9(3) AC has been further clarified and interpreted to the benefit of the possibility of individuals to go to court in order to enforce their public participation rights contained in Art. 9(2) AC which is granted by Dutch legislation to everyone, and not only to the public concerned.

12 This problem will be addressed in section 3. For an overview of the interpretation difficulties concerning Art. 9 AC see further *J. Jendroska*, o.c.

13 *Id.* at pp. 33 – 36.

14 ACCC, Findings and Recommendations with regard to Compliance by Belgium with its obligations under the Aarhus Convention (ACCC/2005/11) 28/07/2006, para. 35.

to transpose Art. 9(3) AC, parties must take account of other requirements laid down in Art. 9(4) AC regarding "adequate and effective remedies" and Art. 9(5) AC with practical but important conditions such as the need for mechanisms to reduce financial barriers to access to justice.

Germany did not make any reservations to the Aarhus Convention. However, in the declarations annexed to the treaty, Germany announced that:

The Aarhus Convention raises many difficult questions regarding its practical implementation into the German legal system which it was not possible to finally resolve (...) (*and which*) *require careful consideration* (...). *Germany assumes that* (*the implementation*) *will not lead to developments which counteract efforts towards deregulation and speeding up procedures.*[15]

The fact that Germany issued such statement but did not make *any* reservation to the Convention may illustrate the conflicted position the country was in at the time: On the one hand, Germany clearly wanted to adhere to the movement towards codifying environmental democracy. On the other hand, the developments throughout the following years lead to believe that the country was not fully ready to adopt certain changes to its long-lasting legal traditions as 'radically' as particularly Art. 9(3) AC requires.

However, Germany's obligations do not only flow from international law, but also from the EU level.[16] The Aarhus Convention has become an integral part of the EU legal order and is binding on the member states within the scope of Art. 216(2) TFEU.[7] Given the lack of transposition of Art. 9(3) AC by means of EU legislation, the compliance of Member States with Art. 9(3) AC is promoted by the CJEU in its case law, together with Commission communications referring to such case law. The latest Commission communication dates from 14 October 2020, in which it is stressed that Member States should respect the CJEU case law which is summarised in Commission notices.[18] The first "Commission notice on access to justice in environmental matters" was published in 2017

15 Chapter 27 (13) AC.

16 R. *Caranta, A. Gerbrandy & B. Müller*, The Making of a New European Legal Culture: The Aarhus Convention: at the Crossroad of Comparative Law and EU law, Europa Law Publishing 2017 (1), p. 4; *F. Heß*, Aktivierung der Umweltverbandsklage, Zeitschrift für Umweltrecht (ZUR) 2018 (12), p. 688. This has also been confirmed by the CJEU e.g. in Case C-459/03, *Commission v Ireland* [2006] ECLI:EU:C:20`06:345, para. 82.

17 See also European Commission, Commission Notice on access to justice in environmental matters, (2017/C 275/01), para. 24.

18 European Commission, Improving access to justice in environmental matters in the EU and its Member States, Brussels, 14.10.2020 COM(2020) 643 final.

19 European Commission, Commission Notice on access to justice in environmental matters (2017/C 275/01), para. 59. Until now, three updates covering new CJEU case law have

and has been updated three times until now.[19] With regard to Art. 9(3) AC, the notice observes that the definition of "the public" includes eNGOs.[20]

It is indeed the CJEU which in the 2012 *Slovak Brown Bear* ruling has urged national courts to "interpret, to the fullest extent possible" Art. 9(3)AC, "in order to enable an environmental protection organisation (…) to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law."[21] While the CJEU clarified that Art. 9(3) AC does not have direct effect,[22] it made a clear call on national courts to realize the potential of Art. 9(3) AC in light of the principles of effectiveness and effective judicial protection.[23] In practice, this means that a national court needs to interpret its national law, as far as possible, in a such way that an eNGO has the possibility to contest a potential violation of EU environmental law before a court. This also concerns "a species protected by EU law, and in particular the Habitats Directive."[24] Also in cases that are not directly related to individuals' rights, "it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention."[25]

3 Germany's Current Implementation of Art. 9(3) AC

3.1 *The Adoption of the Environmental Appeals Act (EEA)*

Already since the promulgation of para. 61 of the Federal Nature Conservation Act (*Bundesnaturschutzgesetz*) in 2002,[26] there had been an opportunity for

been provided on the website of the European Commission, see https://ec.europa.eu/environment/aarhus/legislation.htm.

20 European Commission, Commission Notice on access to justice in environmental matters (2017/C 275/01), para. 91.

21 Case C-240/09, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECLI:EU:C:2011:125, para. 1.

22 Case C-240/09, para. 54. This has been reiterated e.g; C-404/12, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network* [2011] ECLI:EU:T:2016:18.

23 *Id.* at para. 54.

24 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992.

25 *Id.* at para. 50.

26 Since an amendment adopted in 2009, the relevant provision is para. 64 of the Federal Nature Conservation Act.

eNGOs to have access to court without an infringement of their subjective rights on the federal level in Germany.[27] However, this (still existing) right is so limited in scope that it cannot be seen as *the* transposition of the Aarhus Convention's obligations.[28] The same is true for other, later emerged, specific pieces of legislation dealing with standing of eNGOs, such as para. 11(2) of the Environmental Damage Act.[29] Therefore, in order to comply fully with the Aarhus Convention, Germany enacted the Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz*) in 2006.[30] Although the Environmental Appeals Act (EAA) is a merged implementation of obligations stemming both from Art. 9(2) and (3) AC,[31] the following discussions will set the focus on the latter.

In particular, para. 2 EAA allows associations that primarily promote the objectives of environmental protection and meet the further requirements for recognition contained in para. 3(1) EAA to bring certain environmentally relevant decisions before a court without having to show the infringement of their subjective right.[32] This provision is considered to be an exception to the general rule of para. 42(2) of the German Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*), entailing the fundamental "impairment of rights" doctrine.[33] The EAA is sometimes described as a "special procedural law order", because it is not integrated within the general

27 *W. Kluth & U. Smeddinck*, Umweltrecht: Ein Lehrbuch, 1ed., 2013, p. 375. eNGO action had already been introduced on the Länder level as early as of 1979. Bremen was the first State to introduce it with all others to follow suit except Bavaria and Baden-Württemberg see further *Deutscher Bundestag*, Die Verbandsklage im Naturschutz- und Umweltrecht – Historische Entwicklung, europarechtliche Vorgaben, Klageberechtigung, WD 7 – 3000 – 208/18, p. 4.

28 para. 64 Federal Nature Conservation Act only allows actions against certain decisions relating to nature conservation law see *B. Spießhofer*, Verbandsklagen im europäischen, deutschen und US-amerikanischen Umweltrecht, Studentische Zeitschrift für Rechtswissenschaft (StudZR) 2009(3), pp. 420–423.

29 This provision transposes Directive 2004/35 EC.

30 There was much political disagreement and time pressure during the legislative process leading to the enactment of the EAA, see *P. Zentgraf*, Die Entwicklung des Umwelt-Rechtsbehelfsgesetzes unter dem Einfluss des Europarechts, Würzburger Online-Schriften zum Europarecht (WOSE) 2019 (8), p. 5.

31 *T. Bunge*, Die Verbandsklage im Umweltrecht, JuS 2020 (8), pp. 741 – 743.

32 This includes decisions falling within the scope of Art. 9(3) AC: see below next section.

33 The German system makes a distinction in this context: it does not call the right for eNGOs in para. 2 EAA a right to "legal standing" (*Klagebefugnis*), but a "right to notify defects/reprimand" (*Rügebefugnis*). For an easier understanding, this paper will continue to use "legal standing" also when referring to the "*Rügebefugnis*."

Code of Administrative Court Procedure and Administrative Procedure Act (*Verwaltungsverfahrensgesetz*).[34]

The specific conditions to be met for para. 2 EAA to be applicable have developed significantly since the EAA's initial adoption.[35] In the following section, those conditions causing particular controversy and those still relevant today will be addressed.

3.2 *The Conditions for Recognition of eNGOs*

As stated above, the EAA only addresses associations that primarily promote the objectives of environmental protection and meet the further requirements for recognition following para. 3(1) EAA. In June 2021, the Aarhus Convention Compliance Committee (ACCC) has decided that the current criteria for eNGOs to be recognized in accordance with para. 3(1) EAA are too restrictive.[36] Before analyzing the ACCC's recent draft findings, this article provides a short overview of the current requirements for recognition.

3.2.1 The Current Conditions of Recognition (para. 3(1) EAA)

Although there are different legal forms in which an environmental association can be set up in Germany, in order to be able to benefit from the more generous standing requirements of the EAA, its para. 3 sets out five criteria for recognition:

1) The organization must, predominantly, and not just temporarily, encourage the objectives of environmental protection.
2) It must have been legally constituted for a period of minimum three years.
3) The eNGO must have an organizational structure that enables it to ensure the proper performance of its statutory duties.
4) The association must pursue non-profit objectives.

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34 *S. Schlacke*, Die Novelle des UmwRG 2017, Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2017 (13), p. 912.

35 For more detail on the CJEU judgements which led to prior amendments of the EAA see further: *M Eliantonio & F Grashof*, Wir müssen reden! – We need to have a serious talk! The Interaction between the Infringement Proceedings and the Preliminary Reference Procedure in Ensuring Compliance with EU Environmental Standards: A case Study of Trianel, Altrip and Commission v Germany, JEEPL 2016 (13), pp. 325 – 349.

36 Aarhus Convention Compliance Committee, *Draft findings and recommendations with regard to communication* (*ACCC/C/2016/137*) *concerning compliance by Germany*, 8 June 2021. Since the research for this article was concluded on 1 April 2021, we only refer shortly to the draft findings of the ACCC concerning complaint number ACCC/C/2016/137, published on 8 June 2021.

5) Any person must be allowed to become a member and have a full voting right in the general meeting.[37]

As of mid- 2018, there are 327 eNGOs which are recognized under the EAA in Germany.[38] However, especially throughout the first years of the EAA's existence, only three of them made use of their right to legal standing: the BUND (*Bund für Umwelt und Naturschutz*), the NABU (*Naturschutzbund Deutschland*), and the DUH (*Deutsche Umwelthilfe*).[39] Lately, however, also other associations such as wind energy initiatives have started to make use of their rights.[40] The main reason why only so few associations are active is that substantial resources and/or expertise are required for an eNGO to be able to go to court.[41]

3.2.2 The Complaint by WWF to the ACCC

In 2016, the World-Wide Fund for Nature (WWF) Germany sent a complaint to the ACCC alleging that the recognition criteria for environmental organizations under para. 3 EAA are too restrictive, have a discriminatory effect and violate the principle of equivalence.[42] It argued that since the Aarhus Convention does not provide that only specific types of organizations can be able to have legal standing, also WWF as a foundation – and not association – should be able to be recognized per para. 3 EAA.[43] Furthermore, the WWF claimed that particularly the fifth condition (requiring a democratic structure) breached Art. 3(5), Art. 3(4), and Art. 9(2) of the Aarhus Convention.[44] The reason why

37 It also needs to be noted in this context that Germany's federal states can add requirements for recognition. This explanation of para. 3 EEA is inspired by: WWF Deutschland, Communication to the Aarhus Convention's Compliance Committee (2016), p. 4; *D. Lamfried*, Neue Rechtssprechung zur Anerkennung von Umwelt- und Naturschutzvereinigungen, ZUR 2020 (5), p. 295.

38 ACCC, Draft findings for parties' comments, 08/06/2021, ACCC/C/2016/137, p. 5.

39 *D. Lamfried*, Eine Frage der Kräfteverhältnisse, Kölner Stadtanzeiger (2019/132), p. 11 accessed via https://bit.ly/2JcowLS.

40 *D. Lamfried*, Neue Rechtssprechung zur Anerkennung von Umwelt- und Naturschutzvereinigungen, ZUR 2020 (5), p. 293.

41 *M. Führ et al.*, Evaluation von Gebrauch und Wirkung der Verbandsklagemöglichkeiten nach dem Umwelt-Rechtsbehelfsgesetz, Sonderforschungsgruppe Institutionenanalyse e.V. & Öko-Institut e.V. Darmstadt 2014 (14), p. 4.

42 The system for recognition is alleged to be a violation of the principle of equivalence because the recognition criteria for representative action in other fields of law are not as strict as those for eNGOs see further WWF Deutschland, Communication to the Aarhus Convention's Compliance Committee (2016), p. 6.

43 According to WWF this is currently excluded by the clear wording of para. 3 EAA, see further WWF Deutschland, Communication to the Aarhus Convention's Compliance Committee (2016), p. 10.

44 WWF Deutschland, Communication to the Aarhus Convention's Compliance Committee (2016), p. 2.

the complaint did not also cover a potential violation of Art. 9(3) AC is that at the time of its submission, the EAA's scope did not yet expressly include Art. 9(3) AC matters.[45] The communicant has, however, asked to also extend the complaint in relation to Art. 9(3) AC at the hearing and has requested further clarification by the ACCC in this regard.[46]

The fifth condition is the main reason some of Germany's well-known eNGOs, such as Greenpeace (but also other, smaller eNGOs) do not fall under the scope of para. 3 EEA and cannot benefit from the EAA.[47] Keeping a democratic structure is especially challenging for larger organizations. The WWF claims that as a result, millions of Germans engaged in small citizens initiatives and/or large eNGOs are effectively barred from exercising the rights conferred on them by Art. 9 AC.[48]

In its recently published draft findings, the ACCC has concluded that the democratic structure requirement is "unreasonably exclusionary and not consistent with the objective of giving the public concerned wide access to justice."[49] Additionally, the ACCC has found that "the fact it would not even be legally possible for a foundation such as WWF to restructure as an association exposes the fact that the fifth criterion is overly burdensome."[50] The ACCC has, therefore, recommended that Germany remove the fifth requirement for recognition.

In its response to these findings, Germany has, however, already stated that it does not consider a complete removal of the fifth criterion – as recommended by the Committee – appropriate. Nonetheless, the response did acknowledge that there might be a need for a statutory exemption for the recognition of environmental organizations organized in the legal form of a foundation.[51]

Thus, amendments to para. 3 EAA can be expected.

45 The EAA's scope also includes Art. 9(3) AC matters since the EAA's revision in 2017.

46 WWF Germany, Draft Findings and recommendations Comments on the draft by the communicant, 15/07/2021, ACCC/C/2016/137, p. 2.

47 *D. Lamfried*, Eine Frage der Kräfteverhältnisse, Kölner Stadtanzeiger (2019/132), p. 11 access via https://bit.ly/2JcowLS.

48 WWF Deutschland, Communicant's opening statement at the hearing, 3 July 2018, p. 3; ACCC, Draft findings for parties' comments, 08/06/2021, ACCC/C/2016/137, p 12.

49 ACCC, Draft findings for parties' comments, 08/06/2021, ACCC/C/2016/137, p. 18.

50 ACCC, Draft findings for parties' comments, 08/06/2021, ACCC/C/2016/137, p. 18.

51 The Federal Republic of Germany, Comments of the Federal Republic of Germany on the draft findings and recommendations of the Aarhus Convention Compliance Committee dated 8 June 2021, 14/07/2021, ACCC/C/2016/137, p. 2.

3.3 *The Conditions for Legal Standing of Recognized eNGOs in the EAA*

As stated above, the central element of the EAA is its para. 2, which provides that recognized environmental associations[52] are enabled to bring certain environmentally relevant decisions to a court, so they can be judicially reviewed. This option, however, only exists provided that specific conditions are met. Below, two important conditions will be discussed.

3.3.1 The Scope of Application of the EAA

For an eNGO to contest an issue in court, the matter needs to fall within the scope of EAA, as provided for in a list of possible areas of application in para. 1 EAA. This provision can roughly be divided into

1) The areas of application implementing Art. 9(2) AC,[53] and
2) The areas of application added to comply with Art. 9(3) AC).[54]

In the 2006 version of the EAA, an eNGO could essentially only ask a court to check whether obligations under environmental law had been complied with, if a project was at stake which required an environmental impact assessment (*Umweltverträglichkeitsprüfung*). Although already a few rather small extensions of scope had taken place through prior amendments, three relevant categories were added to this rule by a large amendment to the EAA in 2017, which was needed to comply with Art. 9(3) AC.[55]

Firstly, any decision concerning plans and programs that is subject to a "strategic environmental assessment" (*Strategische Umweltprüfung*) was included unless it was taken by means of a legislative act.[56]

Secondly, any administrative act or public law contract in the context of environmental legislation (*umweltbezogene Rechtsvorschriften*) was added to the scope of para. 1 EAA.[57] This rule includes e.g. the issuing of emission control permits or an authorization to build a plant for energy production.[58]

Thirdly, any administrative act or omission that serves – or should have served – as a supervisory measure for the compliance with environmental

52 As explained above, the eNGO needs to primarily promote the protection of the environment and be recognized per para. 3 EAA.

53 Para. 1(1) 1- 3 EEA.

54 Para. 1(1) 4 – 6 EEA See: *S. Schlacke*, Aktuelles zum Umwelt-Rechtsbehelfsgesetz, NVwZ 2019 (19), p. 1397; *S. Schlacke*, Die Novelle des UmwRG 2017, NVwZ 2017 (13), p. 907.

55 Para. 1(1) 4 – 6 EAA.

56 Para. 1(1) 4 EAA.

57 Para. 1(1) 5 EAA broadly defines "environmental legislation" as a legal rule that refers to the environment or human health in any way.

58 *S. Schlacke*, Aktuelles zum Umwelt-Rechtsbehelfsgesetz, NVwZ 2019 (19), p. 1399.

legislation was added.[59] Thereby, also the actions of private individuals can (indirectly) be challenged, where the plaintiff alleges that the state authorities have, unlawfully, failed to prevent an action breaching environmental law.[60] For instance, an eNGO could ask for the revocation of a construction permit based on newly found evidence that there is legally protected wildlife on a construction site. In this case, the administrative authority would not have fulfilled its supervisory duties by not revoking the permit.[61]

Identifying whether a project falls under the EAA's scope of application is thus not a straightforward matter because of the numerous amendments, many references to other, more specific legislation, and the enumerative structure chosen by the legislator.[62]

3.3.2 The Material Preclusion

A second limitation of legal standing awarded to eNGOs through the EAA is the concept of "material preclusion" (*Materielle Präklusion*). eNGOs often are given an opportunity to raise objections in an administrative procedure, such as during the initial approval procedure of a project or in the context of a public consultation process.[63] The "material preclusion" applies if, within this possibility, an issue or complaint is not voiced. In that case, it becomes impossible for a potential applicant to initiate any kind of judicial procedure regarding this missing element.[64] Therefore, any potential concern needs to be raised as soon as possible, or it may become inadmissible. This concept is a general element of German administrative law.[65] The rule can make an eNGO's role to oversee the correctness of administrative environmental law decisions challenging, particularly considering the scarce resources and tight deadlines that

59 Para. 1(1) 6 EAA.

60 Deutscher Bundestag, Die Verbandsklage im Naturschutz- und Umweltrecht – Historische Entwicklung, europarechtliche Vorgaben, Klageberechtigung 2018 (208), p. 11.

61 *Fachagentur Windenergie an Land*, Klagemöglichkeiten nach dem Umwelt-Rechtsbehelfsgesetz 2017 – Überblick für die Praxis, Backgroundpaper 2020, p. 12. *F. Fellenberg* in FA Wind, Nachträgliche Anpassung immissionsschutzrechtlicher Genehmigungen aufgrund artenschutzrechlticher Belange (2016), p. 4.

62 *Deutscher Anwaltverein*, Stellungnahme zum Referentenentwurf eines Gesetzes zur Anpassung des Umwelt-Rechtsbehelfsgesetzes und andere Vorschriften an europa-und völkerrechtliche Vorgaben, (2016), p. 6.

63 Public authorities even have a duty to allow them to be involved, see 10 K 118/17 Administrative Court (VG) Sigmaringen (2018), para. 113 ff.

64 Para. 2(3) EAA 2006 read in conjunction with para. 73(4) 3 Code of Administrative Procedure.

65 The general principle of "material preclusion" can be found in para. 73(4) 3 of the Code of Administrative Procedure.

eNGOs frequently have to deal with.[66] However, the underlying reason for the "material preclusion" is that it provides for legal certainty for affected parties and the competent authority and it enhances the speed and efficiency in environmental impact assessment procedures.[67]

In its 2006 version, para. 2(3) of the EEA entailed the material preclusion rule. In 2014, however, in the *Präklusion* case, the CJEU ruled that this generalized preclusion was in breach of EU law.[68] Consequently, the "material preclusion" was abandoned mainly within the scope of obligations flowing from Art. 9(2) AC.[69] However, in cases falling under the scope of Art. 9(3) AC, the "material preclusion" rule is generally still applicable.[70]

4 Critical Issues Concerning Germany's Compliance with Art. 9(3) AC

4.1 *The Complaints with the ACCC*

The problematic compliance by Germany with Art. 9(3) AC already became evident on 20 December 2013, when the ACCC found that Germany was in breach of its obligations, and the country was "invited" to revise any existing criteria for NGO standing.[71] Then, in 2017, after the entry into force of the most recent amendments to the EAA, the ACCC concluded that Germany is no longer in a state of non-compliance with respect to the identified in the Committee's prior decision.[72] However, these ACCC findings need to be read attentively. Firstly, the committee states numerous times that its positive assessment does not prevent it from examining any future allegations of Germany's non-compliance.

66 *L. Jachmann*, Das Ende der materiellen Präklusion: Die Entscheidung des EuGH vom 15. Oktober 2015 (C-137/14) und die Reaktion des Deutschen Gesetzgebers, Beiträge zum Europa-und Völkerrecht 2019 (17), p. 5.

67 *T. Siegel*, Die Präklusion im europäisierten Verwaltungsrecht, NVwZ 2016 (6), p. 338.

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

69 Relevant articles are para. 1(1-2b) EAA and para. 7(4) EAA.

70 Para. 7(3) 2 EAA; *C. Franzius*, Genügt die Novelle des Umwelt-Rechtsbehelfsgesetzes den unionsrechtlichen Vorgaben? NVwZ 2019 (4), p. 219; *P. Zentgraf*, Die Entwicklung des Umwelt-Rechtsbehelfsgesetzes unter dem Einfluss des Europarechts, WOSE 2019 (8), p. 38.

71 ACCC, Findings and recommendations with regard to communication ACCC/C/2008/31 concerning compliance by Germany 2014, ECE/M P. PP/C.1/2014/8, para. 100, " (…) the Committee finds that, by not ensuring standing of environmental NGOs in many of its sectoral laws to challenge acts or omissions of public authorities or private persons which contravene provisions of national law relating to the environment, the Party concerned fails to comply with article 9, paragraph 3, of the Convention".

72 ACCC, Compliance by Germany with its obligations under the Convention 2017, ECE/ M P. PP/2/Add.8., p. 15.

Secondly, it seems that the main reason for its positive assessment results from the fact that the new EAA had by that time barely been applied in practice. Therefore, the committee notes repeatedly that "some uncertainties remain" or "the information provided does not provide full clarity."[73] Yet, as long as there was no "concrete example" demonstrating a violation of Art. 9(3) AC, it would not make a contrary finding "in the abstract."[74] The ACCC appears to have most doubts regarding the EAA's scope of application, which entails the above mentioned enumerative list of potential areas of application.

Meanwhile, two new communications provide the ACCC with a new opportunity to scrutinize Germany's compliance with the ACCC. First, there is the WWF complaint already discussed in section 3 concerning the "anyone principle." Second, a communication contesting Germany's implementation of Art. 9(2) and (3) AC has been issued by Mrs. Artmann on behalf of the "Aarhus Konvention Initiative."[75] This group presents itself as a "German civil society movement" pursuing Germany's compliance with the Aarhus Convention. In essence, the complaint claims that the scope of the EAA is still too narrow, particularly due to the numerous exceptions and specialized procedures contained in the act, leading to legal uncertainty and inconsistency. The German system's alleged shortcomings are illustrated by using the concrete example of the proposed physical measure of grid extension in the north of Germany.[76] Remarkably, the communicant leaves it to the ACCC to determine to what extent the issue concerns Art. 9(2) or (3) respectively,[77] which illustrates the difficulty to differentiate between the two subsections. The complaint criticizes the lack of any direct review possibilities – both for individuals and for eNGOs – regarding certain plans and programs requiring an environmental impact assessment. Applying the example of the network extension plans, the claimant illustrates that certain so-called "demand assessments plans" (*Bedarfsplanungen*)[78] of environmentally relevant projects can *per se* not be

73 ACCC, Compliance by Germany with its obligations under the Convention 2017, ECE/ M P. PP/2/Add.8, p. 14.

74 ACCC, Compliance by Germany with its obligations under the Convention 2017, ECE/ M P. PP/2/Add.8., pp. 11, 13–15.

75 ACCC, Preliminary determination of admissibility of communication to the Aarhus Convention Compliance Committee concerning compliance by Germany regarding access to justice in the context of tiered decision and plans, ACCC/C/2020/178, p. 2.

76 Aarhus Konvention Initiative, Communication to the Aarhus Convention Compliance Committee 2020/178, p. 1.

77 *Id.* at p. 10.

78 The purpose of a demand assessment plan is to evaluate whether a project is actually necessary considering the objectives of the sectoral law that prescribes the assessment. It assesses i.e. compliance with environmental standards or public budgets. See further

judicially reviewed following para. 1 EAA and further specialized provisions.[79] The issue is that para. 1 only entails a limited – and possibly too restrictive – list of possible acts that can be challenged.

A specific concern is, in particular, that whenever a "demand assessment plan" is adopted in the form of a legislative act in the last step of the procedure (which has become common practice for certain large infrastructure projects),[80] the measure no longer qualifies as an administrative act and is, therefore, no longer reviewable by any administrative court.[81] In such cases, only the option of incidental judicial review is available, which could, as a last remedy, lead to an assessment by the federal constitutional court, which is the only court competent to review parliamentary legislative acts. However, according to the Aarhus Konvention Initiative, incidental judicial review is neither effective nor timely. Since the legislator has a wide margin of discretion, the court can merely check whether the act was decided upon in an "obviously non-objectively" manner (*Evidenzkontrolle*), meaning whether the legislator fully disregarded the public interest in the *Bedarfsplanung*. Moreover, the complaint reminds its reader that the constitutional court only assesses constitutionality, meaning compliance with basic rights, not compliance with *environmental law* – which is what matters in the context of Art. 9(3) AC.[82]

In its response to these allegations, the German government points out that the claimant is not a recognized eNGO and that Mrs Artmann, representing the Aarhus Konvention Initiative, needs to demonstrate a subjective right infringement.[83] The response states further that a potential breach of Art. 9(2)

W. Köck et al., Das Instrument der Bedarfsplanung – Rechtliche Möglichkeiten für und verfahrensrechtliche Anforderungen an ein Instrument für mehr Umweltschutz, Abschlussbericht Forschungsauftrag für das Umweltbundesamt 2017 (55), p. 4.

79 Specifically, in this case para. 12 c and paras. 4(2), (66), (75) Law on the energy industry (EnWG) see further Aarhus Konvention Initiative, Communication to the Aarhus Convention Compliance Committee 2020/178, p. 7.

80 See further *B. Wegener*, Verkehrsinfrastrukturgenehmigungen durch Gesetz und ohne fachgerichtlichen Rechtsschutz? ZUR 2020 (4).

81 Usually, the demand assessment plan is executed through an administrative act. However, the issue is that this administrative act is also not challengeable because of certain legal exceptions (In the example of the complaint: Section 75(2) (EnWG), which states that only parties who have been involved in the prior planning procedure are allowed to appeal.) See further Aarhus Konvention Initiative, Communication to the Aarhus Convention Compliance Committee 2020/178, p. 6.

82 BVerwG 9 A 16/12 German Constitutional Court (BverwG) Karlsruhe (03/05/2013) para. 21. See further Aarhus Konvention Initiative, Communication to the Aarhus Convention Compliance Committee 2020/178, pp. 7–9.

83 Bundesrepublik Deutschland, Stellungnahme der Bundesrepublik Deutschland zur Mitteilung von Frau Brigitte Artmann an das Compliance Committee der Aarhus-Konvention vom 27. Januar 2020, Aktenzeichen ACCC/C/2020/178, p. 15.

and (3) AC would only be given if there were *no* options for judicial review *at all,* and that providing the possibility of incidental review is sufficient.[84] To support this statement, the government brings forward a recent judgment by the German Constitutional court,[85] in which the court went beyond its usual superficial review and also assessed whether a new highway construction was in line with certain environmental laws.[86]

In addition to these two complaints directed to the ACCC, there are several further concerns regarding Germany's compliance with Art. 9(3) AC and EU law, which will be discussed in the next sections.

4.2 *Over-complication and Incoherence*

One of the most reccurring criticisms regarding the EAA and its effects is that its complicated structure makes its application difficult for all concerned parties. This issue brought forward i.a. by the German Lawyers Association,[87] contributes to limited legal certainty and leads to many unanswered questions of interpretation regarding the EAA.[88] It is unusually hard to make sense of the act, especially due to the numerous referrals to other pieces of legislation, countless exceptions, and enumerative lists. The need to understand the relation between the specific rules in the EAA and the general rules in the Code of Administrative Court Procedure and the Administrative Procedure Act further complicates matters.[89] Some legal scholars go so far as to say that the EAA constitutes "the opposite of good legislation because it is characterized by confusion and technical legal language".[90]

However, it is questionable whether a mere literal translation of Art. 9(3) AC in the German system would even be possible since the historical context and the importance of norms such as the *Schutznormtheorie* within the overall

84 *Id* at. p. 16 and 19.

85 BVerwG 9 A 2.18 German Consititutional Court (BVerwG) (12/06/2019) para. 22.

86 Aarhus Konvention Initiative, Communication to the Aarhus Convention Compliance Committee 2020/178, p. 21.

87 Deutscher Anwaltverein, Stellungnahme zum Referentenentwurf eines Gesetzes zur Anpassung des Umwelt-Rechtsbehelfsgesetzes und andere Vorschriften an europa-und völkerrechtliche Vorgaben, 2016, p. 6.

88 *A. Brigola & F. Heß*, Die Fallstricke der unions- und völkerrechtlichen Metamorphose des Umwelt-Rechtsbehelfsgesetzes (UmwRG) im Jahr 2017, Natur und Recht 2017 (39), p. 731; *M. Seibert*, Die Fehlerbehebung durch ergänzendes Verfahren nach dem UmwRG, NVwZ 2018 (3), p. 104; *P. Zentgraf*, Die Entwicklung des Umwelt-Rechtsbehelfsgesetzes unter dem Einfluss des Europarechts, WOSE 2019 (8), p. 43.

89 *S. Schlacke*, Die Novelle des UmwRG 2017, NVwZ 2017 (13), p. 912.

90 *Lutz & Grandjot*, Forum Umweltschutz 2017: Die erneute Novelle des Umwelt-Rechtsbehelfsgesetzes (UmwRG) in der Praxis, ZUR 2018 (3), p. 188. It is to be noted that the AC requires parties *to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention* (Art. 3 (1) AC).

framework of administrative judicial review should not be disregarded. Such national peculiarities cannot easily be overcome or abandoned. Instead, they seem to continue to play a crucial role and challenge the process of the implementation of international law – both politically and legally.[91]

Furthermore, although the system may be complex, what matters is its effect, meaning that the legal system of administrative review overall needs to be considered. It is, in other words, not only important in *how many* cases eNGOs are awarded legal standing but also *how successful* they are in the outcome. Interestingly, eNGOS were – at least partly – successful in their claims in almost 50 % of the cases that have made it to court in Germany.[92]

4.3 *The Ambiguities of Para. 1 EAA: The Scope of Application*

While the Aarhus Konvention Initiative already contests the limited scope of application of the EAA, some additional issues in this context can be put forward. For instance, it is yet unclear what effects the *Protect* case will bring.[93] In this preliminary ruling involving an Austrian eNGO and the district authority Gmünd as opposing parties, it was stated that – also in light of Article 47 of the Charter of Fundamental Rights of the European Union providing a right to an effective remedy – Member States have *an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law* regardless of the provisions of national law.[94] However, such a general wide access for eNGOs causes issues in the context of para. 1(1) 5 EAA, which can be used to illustrate the limitations that the EAA's scope of application entails in practice. Firstly, the provision is restricted to any administrative act or public contract relating to the "approval of projects" (*Vorhaben*). More specifically, it became clear through recent judgments that only projects related to an installation (*Anlage*) or other activity related to land, fall under the definition,[95] so e.g. a motor vehicle type approval falls outside the scope of

91 *A. Mangold*, The Persistence of National Peculiarities: Translating Representative Environmental Action from Transnational into German Law, Indiana Journal of Global Legal Studies 2014 (21), p. 261.

92 *M Führ et al.*, Evaluation von Gebrauch und Wirkung der Verbandsklagemöglichkeiten nach dem Umwelt-Rechtsbehelfsgesetz, Sonderforschungsgruppe Institutionenanalyse e.V. & Öko-Institut e.V Darmstadt (2014/14), pp. 10 & 51–56.

93 Case C- 664/15, *Protect Natur; Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* [2017] ECLI:EU:C:2017:987.

94 Case C- 664/15, paras. 58, 81, 102.

95 *S. Schlacke*, Aktuelles zum Umwelt-Rechtsbehelfsgesetz, NVwZ 2019 (19), p. 1399. OVG 11 S 40. 19 Higher Regional Administrative Court (OVG) Berlin-Brandenburg (17/05/2019).

the EAA. According to the Administrative Court of Schleswig, interpreting the term "project" to include also product-related issues would require an amendment of the EAA.[96] These restrictions come with substantial practical impact. For instance, an *extension* of an emission control permit would also not fall under the definition of the EEA because it cannot be seen as a "new" approval. Furthermore, any denial or exception brought by an administrative act will likely not be considered an "approval of a project." Moreover, the approval needs to be based on environmental legislation promulgated by the EU, the national legislator, or the federal states. This has, in practice, led to the fact that an approval that complied with all the other requirements but was made based on a *communal* level decree was also not challengeable.[97]

These exemplary illustrations show that it is obvious that the enumerative list is still very restrictive and that it is questionable whether para. 1 EAA complies with both the requirements imposed by the Aarhus Convention and EU law.[98] The general requirement that "acts and omissions related to the environment" need to be challengeable, makes none of the above illustrated distinctions. Therefore, it seems almost certain that Germany will have to make further amendments to the scope of para. 1 EAA. A solution would be to extend the eNGOs' possibility to have legal standing to contest *all* acts by public authorities in the context of environmental law,[99] but such a wide and generous approach stands clearly at odds with the conservative approach taken thus far by Germany.

4.4 *The Persisting "Material Preclusion"*

Another indication brought by the CJEU's *Protect* ruling is that the maintenance of the "material preclusion" for matters falling under para. 1(1) 4 – 6 EEA[100] (the EAA's new areas of application) may not be compatible with EU law. More specifically, although a "material preclusion" in itself is not necessarily in breach of EU law, applying it automatically constitutes an infringement

96 VG 3 A 30/17 Administrative Court (VG) Schleswig (13/12/2017). S. Schlacke, Aktuelles zum Umwelt-Rechtsbehelfsgesetz, NVwZ 2019 (19), p. 1399.

97 VGH 2 CS 18.198 Higher Administrative Court (VGH) München (11/04/2018). *S. Schlacke*, Aktuelles zum Umwelt-Rechtsbehelfsgesetz, NVwZ 2019 (19), p. 1399.

98 Specifically, i.e. Article 47 EU Charter.

99 As has been brought forward by the left and green party during the preparatory phase for the amendments to the EAA in 2017 see i.e. Deutscher Bundestag, Entschließungsantrag (…) der Fraktion BÜNDNIS 90/DIE GRÜNEN zu der dritten Beratung des Gesetzentwurfs der Bundesregierung zur Anpassung des Umweltrechtsbehelfsgesetztes (…), (2017) 18/1216, p. 2.

100 As explained above, para. 1(1) 1–3 EAA can be seen as the transposition of requirements flowing from Article 9 (2) AC, whilst para. 1(1) 4 – 6 EAA can be seen as the implementation of new areas to comply with Article 9(3) AC. The rule that the "material preclusion" is kept for the newly added areas of application can be found deducted from paras. 2(3) & 7(3) EAA.

of Article 47 EU Charter. The CJEU has stated that, although in certain circumstances the "material preclusion" may be justified, this outcome needs to be assessed on a case-by-case basis. An assessment of proportionality in accordance with Article 52(1) EU Charter is thus necessary.[101] The rule Austria was condemned for in this case is similar to the German "material preclusion." Since, as explained above, Germany has still not fully abandoned the "material preclusion" for Art. 9(3) AC matters, legal scholars perceive a new condemnation in this regard by the CJEU as likely.[102]

5 Conclusion

This article has illustrated that Germany's compliance with Art. 9(3) of the Aarhus Convention is still subject to contestation. Striking a balance between Germany's traditional legal system and the need to comply with Art. 9(3) AC has proven to be problematic. So far, Germany has used the same method with every new issue of compliance that has arisen, namely adding fragmented amendments which often generated more complexity and legal uncertainty. This approach has led to the existence of a complicated and possibly incoherent legal situation for access to court of eNGOs. An idea for simplification could be to allow straightforwardly all environmentally relevant acts to be challenged by eNGOs in court. Such a wide approach is currently, however, neither clearly required by international or EU law, nor politically wanted. Nonetheless, the debate on how to adapt the German system to the requirements of Art. 9(3) AC has certainly not ended. The ACCC – who signaled to have doubts in its earlier decision from 2013 – now has a new opportunity to scrutinize Germany's implementation. Since the ACCC found that the specific requirement in Germany that anyone should be able to become a member to an eNGO is in breach of Art. 9(2) – and possibly 9(3) – of the AC, further amendments to the EAA are inevitable. Furthermore, the debate around other long-lasting issues of the EAA continues. Especially the enumerative list of the areas of its scope of application and the retention of the "material preclusion" when it comes to Art. 9(3) AC matters may still not be in line with both EU law and the Aarhus Convention. While the further decisions by the ACCC

101 Case C-664/15, *Protect Natur – Arten und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* [2017] ECLI:EU:C:2017:760, para. 99; *S. Schlacke*, Aktuelles zum Umwelt-Rechtsbehelfsgesetz, NVwZ 2019 (19), p. 1397.

102 *C. Franzius*, Genügt die Novelle des Umwelt-Rechtsbehelfsgesetzes den unionsrechtlichen Vorgaben? NVwZ 2019 (4), p. 221.

and the CJEU are certainly essential, it is clear that future developments will also depend on the political will in Germany regarding empowering eNGOs. Federal elections in September 2021 will be a new chance for ending Germany's struggle to generously implement the Aarhus Convention for the sake of giving a voice in court to the silent environment – so that environmental law will be effectively enforced in practice.