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1 Background

Environmental protection has invariably become one of the central challenges facing modern societies and, by extension, their respective states.[1] Constitutionally endowed with judicial powers, states also have a mandate to guarantee the rights and duties arising from legislation on the environment, including, if necessary, their enforcement. In the process, public interest litigation in environmental matters has acquired growing importance as one important means of achieving this objective.[2] Widespread opposition in civil society against large-scale projects with potentially detrimental consequences for the environment, often followed by lengthy judicial action against operators and licensing authorities, are merely one of the more salient examples of public interest litigation on the environment. Indeed, judicial action frequently provides the only means of resolving such disputes, for instance through an action for rescission of an environmental permit; as a result, environmental law, a young area of law lacking the degree of statutory elaboration common to other areas of law and involving many broadly worded principles and discretionary clauses to accommodate complex, rapidly changing factual circumstances, has been influenced more strongly than many other issue areas by judicial decisions, prompting some scholars to describe it as based largely on case law.[3]

As with other states, this has also been true for Germany, where the judiciary has been confronted with a rapidly growing – or, as some critics contend, a downright excessive[4] – docket of environmental cases. Given that environmental goods do not

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1 The German Federal Government, for instance, has afforded environmental protection a central position in its agenda: "*Der Schutz der Umwelt ist nach der Sicherung des Friedens die wichtigste Aufgabe unserer Zeit*" ("following the guarantee of peace, environmental protection is the most important task of our times"), in: Federal Records of Parliament (*BT-Drucks.*) 10/1345, at p. 5. Environmental protection has also been included in Article 20a of the German Constitution, or *Grundgesetz für die Bundesrepublik Deutschland* (*Grundgesetz* – GG), 23 May 1949, Federal Gazette (*BGBl.*) I (1949), pp. 1 *et sqq*., last amended on 26 July 2002, Federal Gazette (*BGBl.*) I (2002), pp. 2862 *et seq*.

2 German lawyers have devoted significant attention to this issue, which already, *inter alia*, formed one of the central themes of the 56th Meeting of German Jurists (Deutscher Juristentag) in Berlin in 1986, see Peter Marburger, *Ausbau des Individualschutzes gegen Umweltbelastungen als Aufgabe des bürgerlichen und des öffentlichen Rechts, Gutachten C zum 56. Deutschen Juristentag* (Munich: Beck, 1986), and of the 8th Scientific Meeting of the German Society of Environmental Law, see Michael Kloepfer, "Rechtsschutz im Umweltschutz", in Gesellschaft für Umweltrecht e.V. (ed.), *Dokumentation zur 8. Wissenschaftlichen Fachtagung der Gesellschaft für Umweltrecht e.V.* (Berlin: Erich Schmidt, 1985), pp. 30 *et sqq.*

3 See Michael Kloepfer, *Umweltrecht*, 3rd ed. (Munich: C.H. Beck, 2004), § 8 Annot. 1: "*Das Umweltrecht ist zu einem beträchtlichen (…) Teil Richterrecht*."

4 Arguing in the context of a debate on the global competitiveness of the German economy and the obstacles arising from procedural requirements, sharp criticism was launched against the perceived proliferation of public litigation in German courts already at an early stage, see Horst

typically fall within the ambit of private property,[5] and access to justice, by contrast, has traditionally been geared towards protection of individual rights in Germany, the role of courts in environmental disputes has necessitated innovative approaches. In the process, public interest litigation in environmental matters, which does not seek the enforcement of individual rights, such as property or health, has acquired growing importance as one important means of achieving this objective (public interest litigation *strictu sensu*). Still, conventional litigation aimed at the protection of individual interests, which clearly dominates in the German judicial system, may also accommodate environmental concerns, in which case it may be considered public interest litigation in a wider sense. Both environmental litigation based on legally vested rights initiated by their holders, and environmental litigation which seeks to guarantee the integrity of the legal system as such, will therefore be considered in this report.

By describing the legal framework for public interest litigation, this report seeks to shed light on an important channel of environmental protection in Germany, whose role in countering environmental pollution and other forms of damage to public goods prior to serious and irreversible deterioration has been consistently on the rise. Against this background, the aim of the report is to provide an introduction to German experiences with public interest litigation in environmental matters, both with a view to its success to date and also to more critical aspects. An introductory section will briefly chart the evolution of public interest litigation in environmental matters as part of German law, with a view to its constitutional implications and a short discussion of comparative aspects. This introduction is then followed by more detailed sections addressing environmental litigation under German civil law and administrative law.

1.1 Environmental Litigation within the German Legal System

Germany is organised as a federal state, resulting in three levels of state authority: the federal level, or *Bund*, the level of the federate states, or *Länder*, and the local level of individual municipalities, known as *Gemeinden*. Legislative powers relating to environmental protection lie both with the federation and the federate states, and are distributed by way of a enumerative catalogue set out in the Constitution. While, as a rule, the federate states have the power to adopt legislation insofar as the

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Sendler, "Zum Instanzenzug in der Verwaltungsgerichtsbarkeit", *Deutsches Verwaltungsblatt* (1982), pp. 157 *et sqq.*, at p. 164; Michael Kloepfer, while not so dismissive, has also expressed concern that excessive legal proceedings may prevent the very operation of the law in Germany ("*Rechtsverhinderung durch Verfahren*"), *idem*, *Umweltrecht*, 3rd ed. (Munich: C.H. Beck, 2004), § 4 Annot. 59.

5 It is no coincidence that environmental goods are often perceived as "environmental commons", whose precarious fate as a consequence of collective over-exploitation has been poignantly described by Garrett Hardin, "The Tragedy of the Commons", 162 *Science* (1968), pp. 1243 *et sqq.*

Constitution does not confer legislative powers on the federation,[6] most environmental issues affect living conditions and legal and economic unity in the federal territory, and are thus assigned to the federal legislator.[7] Administrative implementation and enforcement of environmental law, however, including the creation of suitable authorities, is traditionally left to the federate states, with the federation merely retaining supervisory powers as to the constitutionality and, where federal law applies, the legality – but not the expedience – of implementation measures.[8] In accordance with the federal Constitution, where federal law and the law of a federate state are in conflict with each other, federal law prevails.[9]

German law contains no single standardised rule, either substantive or procedural, for judicial proceedings in environmental matters. Rather, when it comes to environmental damage and the consequences thereof, the law applicable to environmental proceedings may be drawn from both public environmental law, which comprises sectoral provisions on air pollution, water resources management, nature conservation, and waste management, or – particularly in the case of claims for damages – private law, which includes both general civil law and specific liability rules set out in the foregoing sectoral statutes. Pursuant to Section 13 of the Judicial Organisation Act,[10] administrative courts (*Verwaltungsgerichte*)[11] are then responsible for legal disputes in the sphere of public law, whereas civil courts (*ordentliche Gerichte*)[12] retain responsibility for disputes in which civil law claims are asserted.[13]

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6 See Article 70 (1) of the Constitution.

7 See Articles 73 to 75 of the Constitution.

8 See Article 30 of the Constitution.

9 See Article 31 of the Constitution.

10 *Gerichtsverfassungsgesetz* (GVG) of 9 May 1975, Federal Law Gazette (*BGBl.*) (1975) Part I, pp. 1077 *et sqq*., last amended 19 April 2006, Federal Law Gazette (*BGBl.*) (2006) Part I, pp. 866 *et sqq.*

11 In Germany, the jurisdiction of administrative courts extends to all disputes governed by public law, with the exception of constitutional law, see Section 40 (1) of the Code of Administrative Judicial Procedure (*Verwaltungsgerichtsordnung*, or VwGO) of 21 January 1960, Federal Law Gazette (*BGBl.*) (1960) Part I, pp. 17 *et sqq.*, last amended 22 August 2005, Federal Law Gazette (*BGBl.*) (2005) Part I, pp. 2482 *et sqq.* In the first instance, competent jurisdiction generally lies with the basic administrative court, or *Verwaltungsgericht*, found in all larger municipalities and districts. Its decisions may be appealed both on issues of fact and law to a Higher Administrative Court (*Oberverwaltungsgericht* or *Verwaltungsgerichtshof*) in each federate state, or *Land*. The highest instance is the Federal Administrative Court, or *Bundesverwaltungsgericht*, in Leipzig, which only decides on appeals or complaints on points of law.

12 This branch of the judiciary, the ordinary jurisdiction, or *ordentliche Gerichtsbarkeit*, has competence for both civil and criminal matters. At the lowest level, the local courts, or *Amtsgerichte*, hear cases involving minor offences or smaller claims, and the regional courts, or *Landgerichte*, cases involving more substantial claims. The *Landgerichte* are also the first appellate instance against certain decisions of the *Amtsgerichte*. Higher Regional Courts, or *Oberlandesgerichte*, generally serve as the appellate instance on fact and law for decisions of

In an environmental context, different circumstances may prompt judicial action, ranging from protection of the public against environmental threats to safeguarding the rights of operators seeking to rescind constraining measures by an environmental authority;[14] and frequently, these countervailing interests need to be reconciled by way of a cautious balancing process in accordance with the principle of proportionality. Only public interest litigation will be addressed here, however, obviating the need to analyse issues relating to the legal standing of those responsible for environmental impacts.[15] As will be shown in the remainder of this research report, public interest litigation in environmental matters has undergone a prolific development in the German judicial system, although the path to its current level of implementation has not always been without obstacles, meeting with significant political resistance. In order to illustrate this evolution and the lessons it may garner, the following section will briefly outline the development of public interest litigation in Germany within the area of environmental protection.

1.2 Evolution of Public Interest Litigation in Environmental Matters

In the Federal Republic of Germany, as in most other jurisdictions, litigation involving some form of environmental damage has its roots in a long tradition of rules governing the status of private property, the relations between neighbours, and the protection of certain commons.[16] From its earliest stages of development, German law – both the law of the Germanic tribes settling on the territory of modern Germany and the civil law later received and assimilated in successive stages under Roman rule, during the renaissance of Roman law in the Middle Ages at the newly established universities,[17] and as part of the codification movement of the 19th century – has afforded property owners a right to avert nuisances and other unlawful

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lower instances. The Federal Court of Justice, or *Bundesgerichtshof*, in Karlsruhe has jurisdiction only for appeals or complaints on points of law.

13 For an overview, see, generally, *European Commission, The Courts of Law in the Federal Republic of Germany*, available on the internet at: http://ec.europa.eu/civiljustice/org_justice/org_justice_ger_en.pdf (last accessed on 15 June 2006).

14 This latter dimension of environmental litigation, not strictly belonging to public interest litigation, will not be covered here; for further details, see Horst Schlemminger and Claus-Peter Martens, *German Environmental Law for Practitioners*, 2nd ed. (The Hague: Kluwer Law International, 2004), at p. 198.

15 On this issue, see *ibid*.

16 Some of the oldest rules known to man relate to the protection of wells and watercourses against poisoning, see Michael Kloepfer, "Anfänge von Umweltrecht: Umweltrelevantes Recht in den frühen Hochkulturen und in der Antike", *GAIA* (1995), pp. 315 *et sqq.*, at p. 316.

17 As a consequence of the assimilation of Roman law, the Germanic tribal rules set out in highly fragmented local and regional codes, municipal rules, and customary law increasingly converged under a common German law (*gemeines Recht*), albeit without really becoming unified until a much later stage under the second German empire created in 1871.

interferences originating in other properties, including environmental impacts.[18] New approaches to agriculture, commerce, and manufacturing, along with the rise of urbanisation in the Middle Ages, all prompted a wave of rules specifically addressed at emerging environmental problems, such as the disposal of sewage and other waste, and culminated in a far more sophisticated regulatory framework designed to contend with the environmental consequences of industrialisation.[19]

While this marked a crucial stage in the early development of environmental law, public interest litigation found little or no consideration, with legal standing still largely confined to the protection of individual rights, such as property and personal health. This situation remained unchanged for a considerable period of time. It was only with the proliferation of environmental law and a growing public awareness of local and global environmental challenges in the second half of the 20th century[20] that calls for enhanced access to justice in environmental matters arose. In Germany, the systematic deployment of comprehensive statutes on all main environmental issue areas, including water resources management, waste management, air and noise pollution, and nature conservation, introduced – among other things – a fairly advanced licensing scheme for all activities with significant environmental impacts, but it did not automatically widen the prospects for environmental litigation, in particular for public interest litigation. Under the prevailing rules on administrative procedure, access to the courts continued to be strictly limited to individuals able to claim a violation of rules specifically aimed at the protection of their subjective rights, while civil law retained its traditional focus on individual rights and duties between private subjects.[21]

A notable development in civil law occurred with the adoption of the Environmental Liability Act[22] in 1990, which introduced strict liability for certain polluting installations,[23] albeit without widening the scope of admissible plaintiffs. Instead, any attempts to extend access to interest groups or introduce an environmental class

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18 Michael Kloepfer, *Zur Geschichte des deutschen Umweltrechts* (Berlin: Duncker & Humblot, 1994), at pp. 10 *et seq.*

19 See generally Klaus-Georg Wey, *Umweltpolitik in Deutschland: Kurze Geschichte des Umweltschutzes in Deutschland seit 1900* (Opladen: Leske & Budrich, 1982), pp. 27 *et sqq*.

20 Significant events in this regard include the United Nations Conference on the Human Environment, held in Stockholm from 5 to 16 June 1972, UN Doc. A/CONF.48/14/Rev.1, and the publication of the Club of Rome report on *The Limits to Growth* in the same year, Donella H. Meadows *et al.*, *The Limits to Growth* (New York: University Books, 1972).

21 See *infra*, Section 2.1.

22 *Umwelthaftungsgesetz* (UmweltHG) of 10 December 1990, Federal Law Gazette (*BGBl.*) (1990) Part I, pp. 2634 *et sqq*.

23 Sec. 1 UmweltHG; see also Jürgen Klass, "Stand der Umwelthaftung in Deutschland", in *Umwelt- und Planungsrecht* (1997), 134.

action[24] met with strong resistance from industry representatives, who blamed excessive environmental regulation for imposing an administrative burden which was stifling the competitiveness of German companies and compromising the legal certainty traditionally surrounding economic activity and investment.[25] If anything, in the wake of this debate on the German economy, a number of procedural rights providing for public participation and access to justice were curtailed in favour of more streamlined, less bureaucratic decision making by administrative authorities.[26]

A shift in the German debate on environmental litigation and the admissibility of public interest proceedings became apparent against the backdrop of international initiatives on improved access to justice in environmental matters, reflected, *inter alia*, in the adoption of a regional convention in 1998.[27] After nearly two decades of academic debate on the admissibility of class actions by environmental interest groups,[28] a clause was finally introduced into the Federal Nature Protection Act[29] allowing recognised non-governmental organisations (NGOs) to initiate legal proceedings against certain violations of its provisions. Pursuant to this clause, such interest groups may file an action within the scope of their substantive mandate even if they are unable to claim a violation of their own rights,[30] marking a clear departure from the earlier limitation of legal standing to violations of subjective rights. At the federal level, this has remained the most important inclusion of public interest groups in environmental litigation to date.[31] Arguing with the need to close remaining gaps in

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24 See, for instance, the recommendations submitted by the 52nd Meeting of German Jurists, Ständige Deputation des Deutschen Juristentages (ed.), *Verhandlungen des Zweiundfünfzigsten Deutschen Juristentages*, Vol. 2 (Munich: C.H. Beck, 1978), at pp. K32 *et sqq*.

25 This so-called debate on economic location ("*Standortdebatte*") reached its apex in the mid-1990s, see, for an overview, the 1996 Advisory Report of the German Advisory Council on the Environment, Sachverständigenrat für Umweltfragen, *Umweltgutachten 1996: Zur Umsetzung einer dauerhaft-umweltgerechten Entwicklung*, Federal Records of Parliament (BT-Drs.) 4108 of 14 March 1996, pp. 68 *et sqq.*

26 See, for instance, Henning Jäde, "Beschleunigung von Genehmigungsverfahren nach dem Genehmigungsverfahrensbeschleunigungsgesetz", *Umwelt- und Planungsrecht* (1996), pp. 361 *et sqq*.

27 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Århus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999) 515; see also Jonas Ebbesson, "The Notion of Public Participation in International Environmental Law", *Yearbook of International Environmental Law* (1997), pp. 51 *et sqq*.

28 See, *e.g.*, Eckard Rehbinder, "Argumente für die Verbandsklage im Umweltrecht", *Zeitschrift für Rechtspolitik* (1976), pp. 157 *et sqq.*

29 See Section 61 of the *Gesetz über Naturschutz und Landschaftspflege* (*Bundesnaturschutzgesetz*, or BNatSchG) of 25 March 2002, Federal Law Gazette (*BGBl*.) (2002) Part I, pp. 1193 *et sqq*., last amended 21 June 2005, Federal Law Gazette (*BGBl*.) (2005) Part I, pp. 1818 *et sqq.*

30 See *infra*, Section 3.2.

31 With nature conservation falling within the scope of a legislative framework competence of the

the legal enforcement of environmental concerns and mobilising civil society to promote environmental governance, however, several elaborate proposals, including a parliamentary bill,[32] have already been submitted with the purpose of expanding access to justice for public interest groups. Given the trend in recent years at the regional and international level, this discussion is likely to continue into the foreseeable future in Germany.

1.3 Constitutional Aspects of Public Interest Litigation in Environmental Matters

The German approach to legal standing in environmental matters can only be properly understood against the background of constitutional law. Standing in a strong tradition of legal positivism, and committed to central tenets of liberal democracy and the rule of law following the tragic lessons of the 2nd World War, German jurisprudence has evolved in close correlation with constitutional doctrines and, in particular, the guarantee of fundamental rights. For public interest litigation in environmental matters, this translates into strict observance of the division of powers, guaranteed recourse to the judicial system, and a general objective of environmental protection for state organs.

Article 19 (4) of the German Constitution sets out a general guarantee of recourse to the courts in the event of a violation of individual rights:

> "Should any person's rights be violated by a public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts."

In essence, this provision affords legal standing for any claims relating to a violation of subjective rights by state entities. It is not limited to the formal right to initiate action before the judiciary, but also guarantees effective legal protection, which includes a comprehensive judicial review of the public act at issue, both as a matter of law and of fact.[33] For environmental litigation, this guarantee does not, as such, afford legal

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federal legislator under Article 75 (1) (3) of the Constitution, several federate states, or *Länder*, had exercised their right to introduce class action prior to the introduction of this clause in the federal Nature Conservation Act, see for a detailed overview Miriam Dross, "Germany Country Report", in Nicolas de Sadeleer, Gerhard Roller and Miriam Dross (eds.), Access to Justice in Environmental Matters: Country Reports and Case Studies, Part II: Germany – Italy – The Netherlands, p. 1 *et sqq.*, at p. 1, available on the internet at http://ec.europa.eu/environment/aarhus/pdf/accesstojustice_ii.pdf (last accessed 15 June 2006).

[32] See the draft of an act to amend the administrative process and introduce a general class action for environmental interest groups, which was submitted by the parliamentary caucus of the PDS, "*Entwurf eines Gesetzes zur Neuordnung des Naturschutzes und der Landschaftspflege*", Federal Records of Parliament (*BT-Drs.*) 14/5766, at p. 25.

[33] Thus the standing case law of the Federal Constitutional Court (*Bundesverfassungsgericht*), see Federal Constitutional Court Reports (*BVerfGE*) Vol. 35, pp. 263 *et sqq.*, at p. 274; Vol. 15, pp. 275 *et sqq*., at p. 282.

standing, let alone support specific claims. Instead, it merely ensures that rights afforded under other laws may be enforced by way of recourse to the judiciary. Still, the importance of this guarantee may not be underestimated in an area as contentious as environmental protection, where the boundaries between public and private interests are not always clearly outlined, and effective judicial control of state measures therefore acquires critical importance.

As for the division of powers, Article 20 of the German Constitution establishes that, *inter alia*, the Federal Republic of Germany is committed to the rule of law:

> "(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.
>
> (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice."

For the judiciary, this is further elaborated in Article 97 of the Constitution, which provides for the independence of judges:

> (1) Judges shall be independent and subject only to the law.
>
> (2) Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred, or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

The formal division of powers thereby stipulated ensures that measures taken by the executive can be reviewed by an independent judiciary, without bias or coercion guiding the outcome of the judicial decision. In areas such as environmental law, however, where general and vaguely phrased provisions abound, and legal interpretation frequently involves scientific or technical determinations as well as contingent value judgments, the judiciary has occasionally been accused of crossing the boundaries set out by this division of powers, instead assuming powers assigned to the executive and legislative branches of the state.[34] More than other areas of law, therefore, environmental litigation calls for cautious observance of the foregoing principles.

Environmental protection as such is not mentioned in the German Constitution, which only makes reference to specific environmental sectors such as waste management,

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[34] On this enduring debate, see, for instance, Winfried Brohm, "Zum Funktionswandel der Verwaltungsgerichtsbarkeit", in *Neue Juristische Wochenschrift* (1984), pp. 8 *et sqq*., at pp. 10 *et seq*.

air pollution control and water resources management. In October 1994, however, a new Article 20a was introduced, setting out a state objective requiring protection of the "natural bases of life" (*natürliche Lebensgrundlagen*).[35] Specifically, Article 20a declares:

> "Mindful also of its responsibility toward future generations, the state shall protect the natural bases of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."

From a legal point of view, the text of this provision is largely superfluous. As seen above, the legislature is already bound to the constitutional order in all matters, including environmental protection, by virtue of Article 20 (3) of the Constitution. Likewise, under the same provision, the executive and judiciary powers have to adhere to law and justice.

What remains is a general state objective (*Staatszielbestimmung*)[36] to protect the natural bases of life and animals with a view to present and future generations.[37] In essence, this state objective holds all state organs to protect the integrity of the natural environment. While its wording and thus its substantive content are characterised by a large degree of indeterminacy, this responsibility calls, *inter alia*, for an assessment of the environmental impacts of state action, in particular with a view to long-term risks, as well as sparing use of exhaustible resources. Within the ambit of its constitutional powers, however, the legislator can exercise discretion and adopt a more concrete interpretation of the state objective by way of binding legislation; the executive and judiciary powers, which are required to adhere to such an interpretation, are only secondarily affected by the state objective, although they may also be subject to its mandate in cases which have not yet been addressed through legislation, or cases involving discretionary powers or indeterminate legal concepts and thus leaving room for interpretation.

From the perspective of environmental litigation, a state objective can be distinguished from fundamental rights by the fact that it confers no individual subjective right.[38] Therefore, individuals may neither file an action against the

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35 See the constitutional amendment act of 27 October 1994, Federal Law Gazette (*BGBl.*) (1994) Part I, pp. 3146 *et sqq*., amended 26 July 2002, Federal Law Gazette (*BGBl.*) (2002) Part I, pp. 2862 *et sqq*.

36 State objectives may be defined as legally binding provisions in the constitution setting out an objective mandate for state organs, primarily for the legislature, to pursue or give consideration to the general objectives they set out in a specific context, see Winfried Brohm, "Soziale Grundrechte und Staatszielbestimmungen in der Verfassung", *Juristenzeitung* (1994), pp. 213 *et sqq*., at p. 215.

37 Generally on Article 20a of the German Constitution and its legal implications: Alexander Schink, "Umweltschutz als Staatsziel", *Die Öffentliche Verwaltung* (1997), pp. 221 *et sqq*.

38 Karl-Peter Sommermann, Annot. 10 to "Art. 20a", in Ingo von Münch and Phillip Kunig (eds.), *Grundgesetz-Kommentar*, Vol. 2, 5th ed. (Munich: C.H. Beck, 2001).

administration nor against the legislator solely on the grounds of a violation of Article 20a of the Constitution. If anything, this state objective may affect the interpretation of existing subjective rights, for instant if a plaintiff claims an infringement of fundamental rights or another subjective right by environmentally detrimental state action or an absence of protective measures.[39] As such, then, Article 20a is largely confined to providing guidance in the legislative process and the interpretation of indeterminate rules, and does not establish a general priority of environmental protection over other state objectives. By being expressly included in the Constitution, however, environmental protection has thereby been afforded the status of a constitutional principle, underlining the enormous significance of environmental protection in the modern state.

1.4 Public Interest Litigation in Germany and Abroad: A Brief Comparison

The restrictive concept of legal protection and its reliance on a violation of subjective rights has prompted influential observers to describe Germany as a laggard when it comes to environmental litigation in Europe.[40] According to a comparative study commissioned by the European Commission, only four Member States of the European Community had not granted unlimited access to justice to environmental interest groups by 1998: Germany, Austria, Denmark, and Sweden.[41] Compared to Germany, however, even Sweden and Denmark afford environmental interest groups more ample litigation opportunities, with Sweden allowing for an extensive right to sue of environmental non-governmental organisations, and Denmark offering a right to challenge environmental planning and licensing decisions before independent administrative entities with semi-judicial powers to both individual stakeholders and certain recognised interest groups.[42] What is more, Scandinavian countries have traditionally provided for a powerful independent control venue, the *Ombudsman*, which is open to any complaints by citizens, including environmental complaints, without further requirements.[43]

Likewise, several legal systems within Europe and abroad impose less stringent requirements on the legal standing of individuals. A majority of Member States in the

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39 Bruno Schmidt-Bleibtreu and Franz Klein, *Kommentar zum Grundgesetz*, 10th ed. (Neuwied: Luchterhand, 2004), Annot. 3 to Art. 20a.

40 Rat von Sachverständigen für Umweltfragen (SRU), *Umweltgutachten 2002: Für eine neue Vorreiterrolle*, Federal Records of Parliament (BT-Drs.) 14/8792 of 15 April 2002, Annot. 155.

41 See Michel Prieur, *Complaints and Appeals in the Area of Environment in the Member States of the European Union: Study for the Commission of the European Community* (Brussels: Directorate General XI, 1998), p. 92.

42 Jonathan Verschuuren, Kees Bastmejer and Judit van Lanen, *Complaint Procedures and Access to Justice for Citizens and NGOs in the Field of the Environment within the European Union* (The Hague: VROM, 2000), p. 80.

43 *Ibid.*, pp. 13 *et seq.*, 70 *et seq.*

European Community provide for wider access to justice, either generally or in the area of environmental protection. Legal standing is not conditional on a claimed violation of subjective rights, but merely a generously interpreted "legitimate interest", whereas the Netherlands and Portugal have even introduced a popular action requiring no affected interests of the plaintiff whatsoever.[44] Such ample access to justice has not, apparently, resulted in an excessive burden for the judicial system of affected states.[45] Given recent developments at the international and the European level, it is likely that the German legislator will also be compelled to abandon its strong adherence to a restrictive approach in public interest litigation; the introduction of a class action for environmental interest groups under nature protection law is representative of this trend and may be seen as a first step.[46]

1.5 Recent Developments in the European Union

Current differences in the domestic approach to environmental litigation within the European Union are likely to diminish as the political and legal systems of its Member States continue to converge. As the culmination of a lengthy political development dating back to the Treaty of Paris, signed in 1951, and the Treaty of Rome, signed in 1957, the European Union has become a driving force in the elaboration of the legal framework in its Member States, including the dynamic field of environmental law. As such, the European Union is an intergovernmental and supranational union of 25 Member States, with separate institutions, including the Council of the European Union, the European Commission, the European Court of Justice, the European Central Bank and the European Parliament, separate policies, and – through the European Community, one of its central pillars – its own legislative powers. In issue areas which fall within its competence, the Community legislator may exercise the derived powers conferred to it by the Member States and adopt secondary legislation, including regulations, which are directly binding on the Member States, directives, which merely bind the Member States as to the result to be achieved, but leave to the national authorities the choice of form and methods, and decisions, which are binding upon those to whom they are addressed.[47] In either case, legislation adopted at the Community level is of a higher hierarchical order than the

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44 See Bernhard W. Wegener, *Rechte des Einzelnen: Die Interessentenklage im europäischen Umweltrecht* (Baden-Baden: Nomos, 1998), pp. 148 *et sqq*.

45 Ludwig Krämer, "The Citizen in the Environment: Access to Justice", *Resource Management Journal* (1999), pp. 1 *et sqq.*, at p. 11.

46 See *infra*, Section 3.2.

47 See Article 249 of the Treaty Establishing the European Economic Community (EEC Treaty), 298 *United Nations Treaty Series* 3 (1957), as amended by the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 37 *International Legal Materials* 56 (1997), and now known as the Treaty Establishing the European Community (hereinafter EC Treaty).

domestic law of the Member States, and failure to implement it may result in proceedings before the European Court of Justice, with the possible consequence of substantial sanctions against the Member State in question.

The influence of Community legislation on the development of German law cannot be overstated. In many areas, including environmental law, regulatory innovation is increasingly originating with the European legislator, which, committed to the objective of a harmonised internal market and possibly compelled by its own institutional dynamics, has been highly prolific in adopting new legislation for each policy area within its purview. The same applies to the subject of access to justice in environmental matters, where the European Community has proven willing to embrace ambitious and innovative measures. Already an influential actor in the elaboration of the United Nations Economic Commission for Europe (UNECE) Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,[48] the European Community, which ratified the Convention with a decision of 17 February 2005,[49] has already adopted two implementing measures, a directive on public access to environmental information repealing an earlier, less stringent directive on the same subject matter,[50] and a directive providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.[51]

On 24 October 2003, the Commission adopted further legislative proposals to align Community legislation with the requirements of the Aarhus Convention, including a proposal for a directive on access to justice in environmental matters,[52] and a proposal for a regulation on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to EC institutions and bodies.[53] The

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48 See *supra*, note 27; the Aarhus Convention entered into force on 30 October 2001, in accordance with its Article 20 (1), and currently has 40 signatories and 39 parties.

49 Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, Official Journal L 124 of 17 May 2005, pp. 1 *et sqq.*

50 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, Official Journal L 41 of 14 February 2003, pp. 26 *et sqq*.

51 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, Official Journal L 156 of 25 June 2003, pp. 17 *et sqq*.

52 Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM(2003) 624 of 24 October 2003.

53 Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies, COM(2003) 622 of 24 October 2003.

proposed directive establishes a set of minimum requirements on access to administrative and judicial procedures in environmental matters, requiring that Member States afford all members of the public, including natural or legal persons and their associations, organisations or groups, the right to initiate administrative or judicial procedures against acts or omissions of private persons that do not respect environmental law.[54] Such administrative and judicial procedures must be objective, effective, adequate, equitable, timely and not prohibitively expensive.[55] A similar right is also provided for action against administrative decisions or omissions which infringe environmental law, albeit with the qualification that the claimants need to demonstrate a sufficient interest or show that their rights have been affected.[56] The proposal also calls on Member States to guarantee that qualified entities, such as associations, groups or organisations whose objective is protecting the environment and who have been recognised by a Member State, may initiate administrative or judicial proceedings against violations of environmental law, without showing a sufficient interest or impairment of a right if the subject of the procedure is within the scope of their statutory and geographically relevant activities.[57]

The Member States are also required to lay down a procedure for recognising qualified entities, for which they may choose between a preliminary procedure and a case-by-case *ad hoc* procedure. Under the proposal, a qualified entity must meet a set of criteria to be eligible; to this end, it must:

a.) operate on a non-profit basis and pursue the objective of protecting the environment;

b.) have an organisational structure enabling it to achieve its objectives;

c.) be legally constituted and have experience in environmental protection; and

d.) have its annual accounts certified by a registered auditor.[58]

The proposal for a directive on access to justice in environmental matters has entered the legislative process, where it is subject to the co-decision process, requiring approval by both the Council of the European Union and the European Parliament. It has been transmitted to both bodies by the Commission, but has not yet passed the second reading by the Council and the Parliament. At this point, it cannot be stated with certainty if and when it will be approved by the Community legislator, a precondition for its entrance into force. As for the proposal for a

[54] See Article 3 of the proposal, *supra*, note 52.
[55] See Article 10 of the proposal, *supra*, note 52.
[56] See Article 4 of the proposal, *supra*, note 52.
[57] See Article 5 of the proposal, *supra*, note 52.
[58] See Articles 8 and 9 of the proposal, *supra*, note 52.

regulation, an agreement was reached in conciliation between the European Parliament and the Council on 2 May 2006. The regulation will still need to be formally adopted by both institutions; following its publication, the regulation will enter into force after nine months.

2 Civil Law and Environmental Litigation

Historically preceding public law in its relevance for environmental litigation,[59] civil law has retained its significance as a vehicle for individuals to seek compensation for damages and injunctive relief. Generally speaking, civil law governs the legal relations between private subjects, as opposed to public law, which specifies the legal relations of citizens *vis-à-vis* the state or public entities.

As such, the German legal system does not contain a specific set of rules on environmental protection, but rather provides for numerous rights and duties which may *also* find application in an environmental context. Both the Civil Code,[60] which is the central act of private legislation, and numerous specific norms may provide a legal basis for environmental litigation before the ordinary courts.[61] Although not specifically geared towards environmental damage, conventional property and liability rules, for instance, may afford protection against environmental impacts. Property rules and rules on neighbour relations will generally provide legal standing only to property owners seeking to redress impacts originating in other properties, without requiring demonstration of fault. Tort law, in turn, protects the legal interests – such as property, life and health – of any person, although upon condition of a demonstration of fault and causation.

Complex causal pathways, multiple sources, and the occurrence of summation and long-distance impacts have prevented effective application of civil law to a wide range of environmental damages, prompting the German legislator to adopt the Environmental Liability Act, which introduces strict liability for certain polluting installations. Still, barring individual attributability, the largest number of environmental impacts, notably the gradual, cumulative impairment of ecosystems, fails to be adequately covered by the rules of civil law.[62] Accordingly, private law is

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59 See *supra*, Section 1.2.

60 *Bürgerliches Gesetzbuch* (BGB) of 18 August 1896, Imperial Gazette (*RGBl.*) (1896), pp. 195 *et sqq.*, last amended 7 July 2005, Federal Gazette (*BGBl.*) I (2005), pp. 1970 *et sqq.*

61 For a brief overview of the German judicial system, see the source cited *supra*, in note 13, and notes 11 and 12.

62 Peter Marburger, *Ausbau des Individualschutzes gegen Umweltbelastungen als Aufgabe des bürgerlichen und des öffentlichen Rechts, Gutachten C zum 56. Deutschen Juristentag* (Munich: Beck, 1986), at p. C 9.

unlikely to ever assume the importance in environmental litigation currently held by public law.[63]

Judicial proceedings before the civil courts poses numerous legal challenges and involves a sophisticated, historically grown system of rules. The following sections highlight the legal framework and some of the salient features of public interest litigation under civil law, starting with basic aspects of the civil process and central requirements under different substantive rules applicable to environmental damage.

2.1 Civil Litigation Procedure and Procedural Requirements

Without the prospect of judicial enforcement, the rights and duties conferred by civil law lose much of their purpose. Because observance of the rights and duties set out by substantive law is unlikely to occur on a purely voluntary basis, and self help by afflicted parties is limited to a limited number of cases, civil litigation and its procedural framework are essential elements of a functioning legal system. In Germany, the procedural aspects of civil litigation are governed by the Civil Procedure Code,[64] which distinguishes between contentious proceedings (*Erkenntnisverfahren*) – the process resulting in determination of whether a claim is legally justified or not – and compulsory execution (*Zwangsvollstreckung*),[65] which provides means to enforce a judicial decision affirming the existence of a claim. It also specifies who has the capacity to sue and be sued,[66] the procedural rights and duties of the plaintiff and defendant, and the central principles of civil litigation, including, notably, that only parties dispose of the matter of controversy and decide whether and about what to sue (*Dispositionsmaxime*), and only parties have the right and duty to demonstrate the facts of the case (*Verhandlungsmaxime*).[67] Civil courts, in other words, neither initiate legal proceedings, nor are they responsible for the collection of evidence and determination of the facts of the case; the burden of proof for all claims and counter-claims raised before the court lies with the party making said claim.[68] On principle, only the presentation of parties during the oral proceedings may serve as the basis of a judicial decision (*Mündlichkeitsgrundsatz*),[69] and only

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63 Werner Hoppe, Martin Beckmann and Petra Kauch, *Umweltrecht*, 2nd ed. (Munich: C.H. Beck, 2000), Chapter 13 Annot. 1.

64 *Zivilprozeßordnung* (ZPO) of 12 September 1950, Federal Law Gazette (*BGBl.*) (1950) Part I, pp. 455 *et sqq*., 512 *et sqq*., and 533 *et sqq*., last amended 19 April 2006, Federal Law Gazette (*BGBl.*) (2006) Part I, pp. 866 *et sqq*.

65 See Sections 704-945 of the Civil Procedure Code.

66 See Section 50 of the Civil Procedure Code.

67 See, notably, Section 308 (1) of the Civil Procedure Code.

68 Michael Kloepfer, *Umweltrecht*, 3rd ed. (Munich: C.H. Beck, 2004), § 8 Annot. 1

69 See Section 128 (1) of the Civil Procedure Code; in the interest of streamlined proceedings, however, numerous exceptions apply, allowing for written proceedings without an oral hearing.

facts established before the deciding judge may be considered (*Unmittelbarkeitsgrundsatz*),[70] although here, too, exceptions apply.

Admissible classes of action are specified by legislation or recognised under customary law, and include the following: actions for performance (*Leistungsklage*), actions for a modification of rights (*Gestaltungsklage*), and actions for a declaratory judgment (*Feststellungsklage*). By far the most common category of action is the action for performance, such as actions geared toward payment of damages or action for restraint against the commission of an unlawful act (*Unterlassungsklage*), both of which are also of central importance in environmental litigation.[71] Once proceedings are instituted before a court, the court will ascertain whether the action is admissible and sufficiently substantiated. The conditions of admissibility are set out in various provisions of the Civil Procedure Code, and are grouped into procedural requirements (*echte Prozeßvoraussetzungen*), whose absence already precludes the action from being instituted, and qualified requirements (*Sachurteilsvoraussetzungen*), whose absence prevents the adoption of a judicial decision. Both requirements are assessed by the court *ex officio*,[72] and if they are not met, they result in dismissal of the action. More specifically, these procedural requirements include, *inter alia*, substantive and local jurisdiction of the court,[73] the absence of *lis pendens*,[74] and the submission of a signed statement of claim naming the parties to the lawsuit, the court it is addressed to, and a sufficiently determinate specification of the cause and subject matter of action, followed by a clearly stated application for relief.[75]

A number of requirements also concern the parties to the lawsuit. In particular, parties need to have the capacity to hold rights (*Parteifähigkeit*)[76] and the capacity to perform legal acts, including suing and being sued (*Prozeßfähigkeit*).[77] Essentially, all natural and legal persons able to hold and exercise rights, including incorporated firms[78] and associations with independent juridical personality,[79] meet this

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70 See Sections 128 (1), 278 (2) of the Civil Procedure Code.

71 On this issue, see *infra* in this section.

72 See Section 56 of the Civil Procedure Code; Othmar Jauernig, *Zivilprozeßrecht*, 28th ed. (Munich: C.H. Beck, 2003), § 33 Sec. III.

73 See Sections 13, 23 *et sqq*., and 71 *et sqq*. of the Judicial Organisation Act, and Sections 12 *et sqq.* of the Civil Procedure Code.

74 Section 261 (3) (1) of the Civil Procedure Code.

75 See Section 253 (1) of the Civil Procedure Code.

76 See Section 50 of the Civil Procedure Code.

77 See Section 50 of the Civil Procedure Code.

78 These include, for instance, limited liability companies (*Gesellschaft mit begrenzter Haftung*, or GmbH), public limited companies (*Aktiengesellschaft*, or AG), and even civil-law associations, that is, companies constituted under Section 705 of the Civil Code (*Gesellschaft des bürgerlichen Rechts*, or GbR).

requirement. Plaintiffs must also be entitled to institute proceedings in their own name (*Prozeßführungsbefugnis*), which is the case if they are entitled to the claim filed before the court. And finally, as a means of averting frivolous lawsuits, plaintiffs must be in need of legal protection (*Rechtsschutzbedürfnis*), which is regularly the case when the existence of the claim cannot be entirely ruled out.

As stated earlier, civil litigation in environmental matters will commonly occur through an action for performance. This might, for instance, be an action for restraining the defendant from committing an unlawful act with environmental consequences, such as engaging in an environmentally detrimental activity, or launching the operation of an environmentally harmful installation. Likewise, the performance might consist in the restoration of a previous, lawful state, for instance the decontamination of a polluted property of the plaintiff, or, especially when that is no longer possible, compensation for injury or damage sustained as a result of environmentally harmful activities. In all these cases, however, success of the action will depend on the substantive requirements set out by the legal basis of the claim. As a rule, a successful claim will presuppose a violation of individual legal positions, such as immediate injury to human body or property. Given its strong focus on individual rights and duties, civil law is not, generally, a suitable vehicle for altruistic claims and pre-emptive environmental protection; instead, it assumes a largely reactive function, able to avert environmental damage only when such damage has already occurred or is particularly imminent.

2.2 Claims Based on General Civil Law

Prior to the evolution of subjective rights under German public law (*subjektives öffentliches Recht*), judicial enforcement of environmentally pertinent claims was largely a prerogative of civil law.[80] From the viewpoint of modern environmental policy, however, the provisions of the Civil Code acquire relevance only to the extent that they afford individuals a right to avert environmental damage or, once such damage has occurred, claim compensation. As stated earlier, however, the precepts of civil law provide few means to actively exert environmental control.[81]

In civil law, claims to protection against abridgment of legal rights and compensation for damages will commonly be based on the private law governing the relations of

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79 See, notably, Sections 21 and 22 of the Civil Code, specifying the legal personality of incorporated associations (*eingetragene Vereine*, or e.V.), the common form of organisation of non-profit environmental interest groups.

80 Helmut Müller and Reiner Schmidt*, Einführung in das Umweltrecht*, 6th ed. (Munich: C.H. Beck, 2001), § 1 Annot. 38.

81 For instance through purchase of strategically located real estate to prevent large-scale projects or installations, or for instance by implementing a real servitude so as to contain an element of environmental protection, *e.g.* with a view to the permissible construction projects.

neighbours in property law[82] and the provisions of tort law.[83] Generally speaking, only property owners and – to a very limited extent – holders of a right *in rem* enjoying a similar legal status will benefit from the foregoing provisions on neighbourly relations, which afford protection against nuisances originating in other properties. The relevant provision in this regard, Section 1004 of the Civil Code, reads as follows:

> "(1) If property is restricted by any other means than withdrawal or withholding of possession, the owner may demand removal of the restriction from its originator. If a risk of further restriction exists, the owner may institute an action of restraint.
>
> (2) The claim is precluded if the owner is required to endure the restriction"

As Section 906 of the Civil Code specifies, however:

> "(1) The owner of a property may not prohibit the introduction of gases, fumes, odours, smoke, soot, heat, vibrations and other similar impacts originating in another property, insofar as it does not, or does not significantly, compromise the ability to use the property. A disturbance will commonly be insignificant if it does not exceed the threshold values and guidelines set out in statutory law and ordinances, provided the disturbance is assessed and evaluated in accordance with such rules. The same applies to general administrative standards adopted pursuant to Section 48 of the Federal Ambient Pollution Control Act with a view to reflecting the best available technology.
>
> (2) The same applies if a significant disturbance is caused by locally common uses of the other property, and the disturbance may not be averted by economically reasonable measures. If, under this provision, the owner is required to tolerate a disturbance, he may claim an appropriate financial compensation from the user of the other property if the disturbance impedes the locally common use of his property or its yield to an extent which is no longer reasonable.
>
> (3) Introduction by a special pipeline is forbidden."

In other words, claims based on Section 1004 (1) of the Civil Code are curtailed by the duty of toleration set out in Section 906 of the Civil Code, which distinguishes insignificant and significant, but locally common disturbances. Additionally, the neighbourhood rules of different federate states may support a claim.[84] As stated earlier, these claims do not presuppose demonstration of fault or of unlawful action. Both the scope of protected rights and the notion of significant disturbances have been interpreted increasingly amply,[85] but the corresponding claims are still limited to

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82 Strictly speaking, the law of real and personal property (*Sachenrecht*) set out in the third book of the Civil Code in Sections 854 to 1296; these provisions must be read in conjunction with the first book of the Civil Code dealing with things, see Sections 90 *et sqq*.

83 See the title on torts (*Deliktsrecht*) set out in the second book of the Civil Code in Sections 823 to 853.

84 See Werner Hoppe, Martin Beckmann and Petra Kauch, *Umweltrecht*, 2nd ed. (Munich: C.H. Beck, 2000), Chapter 11, Annot. 4.

85 For instance, the judiciary has applied Section 1004 (1) of the Civil Code through analogy to the violation of other absolute rights, including danger for life and health, see *ibid.*, § 11, Annots. 5

a the rather limited group of affected property owners, ruling out public interest proceedings by plaintiffs whose property is not directly impaired.

By contrast, tort law affords everyone general protection of individual rights, but only subject to the establishment of fault and the unlawfulness of the respective action or omission. The central provision in German tort law, Section 823 of the Civil Code, reads as follows:

> "(1) Whoever, intentionally or through negligence, causes wrongful injury to the life, body, health, freedom, property or other right of another, shall compensate the resulting damage.
>
> (2) The same obligation applies to whoever violates a statutory law providing for the protection of another. If the statutory law, by virtue of its substance, allows for a violation in the absence of fault, the duty to compensate shall only arise in the event of fault."

Whereas the rules on neighbourly relations may support a preventive claim to protection against abridgment of legal rights, tort law merely applies once the damage has occurred.[86] Claims may also be based on violations of other norms, including environmental norms, pursuant to Section 823 (2) of the Civil Code.[87] Moreover, several provisions of sectoral environmental law contain similar liability rules, for instance Section 25 of the Atomic Energy Act (Atomgesetz – AtG), Section 14 (1) of the Federal Immission Protection Act (*Bundesimmissionsschutzgesetz* – BImSchG), and Section 22 of the Water Resources Management Act (*Wasserhaushaltsgesetz* – WHG).

In the local context of neighbourly relations, the legal protection afforded by these rules may allow for speedy and effective resolution of environmental conflicts, ultimately arriving at a balanced outcome.[88] Frequently, however, the complexity of environmental deterioration, characterised by the interaction of a vast range of independent impacts, will not allow for attribution of the environmental damage to a single neighbour or tortfeasor.[89] And environmental impacts accumulating over time and long distances altogether defy the demonstration of causality and fault required under tort law.[90] Still, the magnitude of environmental damage accruing on an annual basis can hardly be ignored, necessitating improved approaches to civil litigation.[91]

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and 8 *et sqq*.

86 Michael Kloepfer, *Umweltrecht*, 3rd ed. (Munich: C.H. Beck, 2004), § 4 Rdnr. 299.

87 See Helmut Müller and Reiner Schmidt*, Einführung in das Umweltrecht*, 6th ed. (Munich: C.H. Beck, 2001), Ch. 1 Annot. 40.

88 *Ibid.*, § 1 Annot. 38.

89 See Werner Hoppe, Martin Beckmann and Petra Kauch, *Umweltrecht*, 2nd ed. (Munich: C.H. Beck, 2000), Chapter 11, Annot. 28.

90 Jürgen Klass*,* "Stand der Umwelthaftung in Deutschland", in *Umwelt- und Planungsrecht* (1997), pp. 134 *et sqq*., at p. 137 with further references.

91 See, *inter alia*, Michael Kloepfer, *Umweltrecht*, 3rd ed. (Munich: C.H. Beck, 2004), § 4 Rdnr. 301.

The response to this demand, the Environmental Liability Act, is outlined in the following section.

2.3 Claims based on the Environmental Liability Act

With a view to closing the remaining liability gaps in traditional tort law, which originate in the challenging or even impossible task of providing evidence for the necessary facts supporting a claim, a lengthy debate on the extension of environmental liability culminated in the adoption of an independent act of legislation, the Environmental Liability Act. So as to offset the risks posed by certain environmentally hazardous activities tolerated under the existing legal framework, the Environmental Liability Act introduces strict liability for certain polluting installations.[92] Section 1 of the Environmental Liability Act reads as follows:

> "If the environmental impacts originating in one of the installations listed in Annex 1 result in the wrongful death of someone or damage to their body, health or possessions, the operator of that installation has a duty to compensate the resulting damage to the injured party."

This provision shifts the burden of evidence to the benefit of claimants, and imposes information duties on installations to strengthen the position of stakeholders.[93] In particular, damage resulting both from accidents and from regular operations are largely covered.[94]

While this attempt to improve the enforcement of environmental liability rules needs to be generally welcomed, it suffers from several weaknesses. Installation owners may avert liability, for instance, by identifying other potential sources of pollution[95] or affirming normal operation of their installation.[96] Although the presumption of causality may provide an additional incentive to comply with the pertinent rules of public environmental law, this prerogative of operators reintroduces the main weaknesses of the earlier system, at least for the duration of normal camera operation.[97]. Moreover, even the Environmental Liability Act is unable to contend with long-term summation damage, as it also presupposes the attributability of such damage to a specific operator.[98] Still, despite these drawbacks, the Environmental

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92 See Section 1 of the Environmental Liability Act; see also Jürgen Klass, "Stand der Umwelthaftung in Deutschland", in *Umwelt- und Planungsrecht* (1997), 134.

93 Section 6 (1) and 8 *et sqq.* of the Environmental Liability Act.

94 Helmut Müller and Reiner Schmidt, *Einführung in das Umweltrecht*, 6th ed. (Munich: C.H. Beck, 2001), Ch. 1, Annot. 41.

95 Section 7 (1) and (2) of the Environmental Liability Act.

96 See Section 6 (2) of the Environmental Liability Act.

97 Jürgen Klass, "Stand der Umwelthaftung in Deutschland", in *Umwelt- und Planungsrecht* (1997), pp. 134 *et sqq*., at p. 139.

98 Helmut Müller and Reiner Schmidt, *Einführung in das Umweltrecht*, 6th ed. (Munich: C.H. Beck,

Liability Act is unique in Europe, both with a view to its substantive scope and the stringency of its liability rules.

3 Public Law and Environmental Litigation

The enforcement of public environmental law generally follows the same rules as the enforcement of norms in other areas of law.

Competent courts for the enforcement of public law are the administrative courts when it comes to the enforcement of statutory provisions, constitutional provisions and provisions in the law of the European Union, the constitutional courts for the enforcement of constitutional provisions, and the European Court of Justice for the enforcement of the law of the European Union.[99] This report will concentrate on the most common type of proceedings, which is action brought before the German administrative courts.

There are two types of proceedings related to the enforcement of provisions for the protection of the environment, which have a basis in German law. These are “egoist proceedings” on the one hand, and public interest proceedings on the other hand. Egoists proceedings are proceedings which are initiated to protect the claimant’s own individual rights. They are not specific to environmental law, but rather generally found in all areas of law. Public interest proceedings, by contrast, are initiated for the enforcement of provisions which do not serve the protection of individual rights of the claimant, but rather for the pursuit of a public good. Public interest proceedings are only admissible in specific fields of law, including environmental law.

While egoist proceedings are guaranteed by the Constitution - In this regard, Article 19 (4) of the German Constitution stipulates that, if the rights held by any individual are violated by a public authority, this individual may initiate judicial proceedings. As a consequence, egoist proceedings traditionally have a much stronger standing in German law than public interest proceedings. While the former cannot be abolished by the statutory legislator without violating the Constitution, the latter are entirely subject to statutory law. Recently, however, public interest proceedings in the area of environmental law seem to have acquired a stronger position, given that they are also anchored in the law of the European Union. Still, there is significant debate on the legal status of public interest litigation, and resistance to an ample interpretation

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2001), Ch. 1, Annot. 42.

99 For a brief overview of the German judicial system, see the source cited *supra*, in note 13, and notes 11 and 12.

of European Union law is strong among German scholars and politicians in view of the constitutional doctrine of individual rights proceedings.[100]

The following sections will set out the characteristic features of egoist and public interest proceedings in public environmental law.

3.1 Individual Rights Proceedings in Public Environmental Law

As demonstrated, egoist proceedings are proceedings which are initiated to protect the individual rights of claimants. In the environmental field, such rights are those conferred by environmental law provisions. Environmental interests, in other words, are only indirectly protected through such proceedings. And while such egoist proceedings are based on the pursuit of individual rights, in an environmental context, even they have been criticised for being construed too restrictively as to allow for a comprehensive enforcement of such individual rights.[101] This evidences a tendency among German courts to safeguard the constitutional doctrine of individual rights proceedings.

For the sake of better comprehensibility, the following remarks will be limited in two ways. First, they focus on administrative decisions (*Verwaltungsakte*). Unlike ordinances adopted by the executive branch, their scope is confined to a specific case; and, unlike physical measures adopted by enforcement bodies, such decisions have a regulatory rather than a merely factual effect. Secondly, the following section concentrates on claims against, not for, administrative decisions. In this regard, a claimant may, for example, seek to obtain the revocation of an administrative decision allowing the construction and use of an industrial facility or the implementation of a large-scale infrastructural project.

The characteristic requirements for individual rights proceedings are set out in Articles 42 (2) and 113 (1) of the Code of Administrative Judicial Procedure (*Verwaltungsgerichtsordnung*), which govern the action for rescission (*Anfechtungsklage*). They regulate to what extent claimants may obtain a judicial review of an administrative decision. Mirroring Article 19 (4) of the Constitution, Article 42 (2) of the Code of Administrative Judicial Procedure stipulates that judicial proceedings are only admissible where the claimant asserts an impairment of his or her rights. Pursuant to Article 113 (1), accordingly, the court revokes the

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100 Differing in opinion: Thomas von Danwitz, legal expert opinion for the VDEW e.V.: *Zur Ausgestaltungsfreiheit der Mitgliedstaaten bei Einführung der Verbandsklage anerkannter Umweltschutzvereine nach den Vorgaben der Richtlinie 2003/35/EG und der sog. Aarhus-Konvention*, October 2005; draft law approved by the German federal government: *Entwurf eines Gesetzes über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Umwelt-Rechtsbehelfsgesetz)*.

101 Felix Eckardt, *Information, Paritzipation, Rechtsschutz – Prozeduralisierung von Gerechtigkeit und Steuerung in der Europäischen Union*, (Münster: LIT, 2004), p. 89.

administrative decision to the extent to which it is illegal and therefore violates the rights of the claimant. It follows that addressees of a detrimental administrative decision may invoke the violation of any provision on which the administrative decision was based.[102] Claimants who are not themselves addressees of the administrative decision, however, may only base their claim on the violation of a provision which does not aim to merely protect the public interest, but – at least also – seeks to protect individual rights, and this only on the condition that the claimant belongs to the group of persons benefiting from said protection.[103] This excludes, first, any provisions which do not aim at protecting individual rights, and secondly, all provisions which aim at protecting individual rights, but not those of the claimant. As to the first condition, the Federal Administrative Court has developed specific criteria for its assessment.

Pursuant to its case law, a provision only envisages the protection of individual rights if it seeks to protect a specific and distinguishable group of beneficiaries, *i.e.* a group of beneficiaries that can be individualised and is not excessively broad.[104] The protection of individual rights is also sought by rules aimed at the protection against dangers which, if unchecked, would under normal circumstances and with a sufficient probability lead to the violation of protected individual rights. By contrast, legal provisions merely consisting of precautionary elements do not aim at the protection of individual rights.[105]

Regarding the regulatory framework on ambient air pollution control, a violation of requirements on the protection of neighbours from dangers resulting from an adjacent industrial facility pursuant to Article 5 (1) (1) of the Federal Ambient Pollution Control Act (*Bundesimmissionsschutzgesetz*)[106] can thus be invoked in proceedings against an administrative decision authorising the construction and operation of the facility,[107] while the precautionary requirements contained in Article 5 (1) (2) of that Act cannot be invoked in the same proceedings.[108] This does not rule out that it is sometimes unclear whether a provision is only precautionary or already aims at averting an actual threat. The classification of emission limit values or

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102 Compare Michael Kloepfer, *Umweltrecht*, 3rd ed. (Munich: C.H. Beck, 2004), § 8 Annot. 55.

103 Exemplary, Federal Administrative Court Reports (*BVerwGE*), Vol. 1, pp. 83 *et sqq.*

104 Federal Administrative Court Reports (*BVerwGE*), Vol. 52, 122 (129). Less strict: Federal Administrative Court, *Deutsches Verwaltungsblatt* (1987), pp. 276 *et sqq.*

105 Federal Administrative Court Reports (*BVerwGE*), Vol. 65, pp. 313 *et sqq.*, at p. 320.

106 *Bundes-Immissionsschutzgesetz* (BImSchG) of 26 September 2002, Federal Law Gazette (*BGBl.*) (2002) Part I, pp. 3830 *et sqq.*, last amended on 25 June 2005, Federal Law Gazette (*BGBl.*) (2005) Part I, pp. 1865 *et sqq*.

107 *Ibid*.

108 *Ibid*.

standards, in particular, has proven difficult in this regard. In nuclear safety law, the case law distinguishes between provisions protecting the general population against the risks, and provisions protecting against a specific individual risk. Only a violation of the latter can serve as the basis for judicial proceedings.[109]

Where a decision involves discretion and requires the balancing of interests, only a misappraisal of the importance or relevance of individual rights may be invoked, not an error in the overall balancing process. The violation of fundamental rights contained in the Constitution, such as the right to property[110] and the right to health,[111] may be invoked unless the statutory legislator has adopted statutory law substantiating the requirements of the Constitution in a conclusive manner, in which case recourse to constitutional provisions is barred. Substantive nature protection law does not fulfil the requirements of the jurisprudence set out above and can, consequently, not be invoked.

The violation of participatory rights can, generally, not be invoked independently of the violation of a substantive right. Because participatory guarantees are seen to have an auxiliary function only, *i.e.* of contributing to the observance of the substantive right, their violation can only be invoked if it might have implications for the observance of the substantive right. This is reflected in Article 46 of the Administrative Process Act (*Verwaltungsverfahrensgesetz*),[112] according to which the revocation of an administrative decision cannot be claimed when its illegality derives solely from a violation of procedural provisions, from a violation of provisions requiring the use of a particular form, or from a violation of provisions on the local competence of an authority, if that violation evidently had no effect on the substance of the administrative decision taken. According to case law, violation of the right of an association to participate in the procedure preceding the adoption of an administrative decision on the basis of Articles 58 and 60 of the Federal Nature Protection Act and corresponding provisions of the nature protection acts of the federal states does not fall within the ambit of Article 46 of the Administrative Process Act.[113] Contrary to preceding national jurisprudence, but in line with the jurisprudence of the European Court of Justice, an individual can also, on certain conditions, invoke the violation of provisions on participation contained in the Environmental Impact

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109 Federal Administrative Court Reports (*BVerwGE*), Vol. 61, pp. 256 *et sqq.*, at pp. 264 *et sqq.*

110 Article 14 of the Constitution.

111 Article 2 paragraph 2 of the Constitution.

112 Administrative Process Act (*Verwaltungsverfahrensgesetz* – VwVfG) of 25 May 1976, Federal Law Gazette (*BGBl.*) (1976) Part I, pp. 1253 *et sqq.*, last amended on 5 May 2004, Federal Law Gazette (*BGBl.*) (2004) Part I, pp. 716 *et sqq*.

113 Federal Administrative Court Reports (*BVerwGE*), Vol. 87, pp. 62 *et sqq.*, at pp. 70 *et sqq.*

Assessment Act (*Umweltverträglichkeitsprüfungsgesetz*),[114] which calls for public participation in every procedure whose outcome might have significant detrimental effects on the environment.[115]

As for the condition that the claimant must belong to the group of persons protected by a law that, principally, aims at protecting individual rights, the courts have acknowledged that such is the case, for instance, when the claimant is a "neighbour" to the activity or installation approved by the challenged decision. Being a "neighbour" in the juridical sense means that one is affected in a qualified manner which is clearly distinct from the effects for the general public. A qualified relationship of this sort may exist, for example, when the claimant lives in close vicinity to an industrial facility, that is, in geographical and temporal proximity.[116] In this regard, the Federal Administrative Court has also admitted proceedings instituted by environmental interest groups which owned real estate in the vicinity of an industrial facility based of the violation of their property rights,[117] unless such real estate had been acquired solely for the purpose of instituting the action, given that such behaviour would constitute an abuse of the rights guaranteed by procedural law.[118]

3.2 Public Interest Proceedings in Public Environmental Law

3.2.1 Development and Legal Basis

The objective of public interest proceedings is to ensure the protection of public goods, including, *inter alia,* the environment. In environmental law, the ability of initiating public interest proceedings is conferred upon officially recognised associations. As already demonstrated above, the admissibility of altruistic proceedings – in contrast to egoist proceedings – is not anchored in constitutional law. For this reason, the introduction of public interest proceedings in environmental matters at the federal level did not occur until 2002, and the scope of such proceedings is confined to the enforcement of nature conservation law, as opposed to environmental law in general, and to specific administrative decisions, as opposed to all decisions which are apt to have significant detrimental effects on the environment. The existence of such proceedings has, time and again, been

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114 Environmental Impact Assement Act (*Gesetz über die Umweltverträglichkeitsprüfung* – UVPG) of 12 February 1990, Federal Law Gazette (*BGBl.*) (1990) Part I, pp. 205 *et sqq.*, last amended on 24 June 2005, Federal Law Gazette (*BGBl.*) (2005) Part I, pp. 1794 *et sqq*.

115 Federal Administrative Court Reports (*BVerwGE*), Vol. 100, pp. 238 *et sqq.*, at pp. 251 *et sqq.*; European Court of Justice, case C-201/02, *Delenna Wells against United Kingdom*, European Court Reports 2004, p. I-723 et sqq.

116 Federal Administrative Court, *Neue Zeitschrift für Verwaltungsrecht* (1997), pp. 276 *et sqq.*, at p. 277.

117 Federal Administrative Court Reports (*BVerwGE*), Vol. 72, pp. 15 *et sqq.*

118 Federal Administrative Court Reports (*BVerwGE*), Vol. 112, pp. 135 *et sqq.*, at p. 137.

challenged from both a political as well as a doctrinal point of view. Not even recent developments in European and regional international law have prompted serious reconsideration of the traditional German position.

From a historical perspective, the first to introduce public interest proceedings in environmental law were the federate states, starting with Bremen in 1979. By the time the amended federal Nature Protection Act entered into force in 2002,[119] thirteen federate states had already stipulated the admissibility of altruistic proceedings. The federate state of Mecklenburg-Vorpommern introduced provisions to this effect after 2002, whereas the states of Hesse and Sachsen-Anhalt revoked their respective national provisions after the federal law entered into force. To date, Baden-Württemberg and Bavaria have not adopted any specific provisions on public interest litigation in environmental matters.

Nowadays, the Federal Nature Protection Act (*Bundesnaturschutzgesetz,* hereinafter BNatSchG)[120] and fourteen out of sixteen regional nature conservation statutes of the federate states[121] contain a legal basis for public interest proceedings in environmental matters. The federal statute applies to proceedings concerning administrative decisions of federal as well as of federal state authorities. The provisions contained in the nature conservation act of a federate state, in turn, only apply to proceedings against administrative decisions of the authority of that federal state. Where the provisions of a federate state are narrower in scope than the BNatSchG, the BNatSchG takes precedence.[122] Where the provisions of a federal state are broader, they are applicable to the extent to which they go beyond the federal law. Some provisions adopted by the federate states reiterate what is already regulated by the BNatSchG. In this case, where the law of a federate state is silent on the issue of public interest litigation by associations, only the BNatSchG applies. To the extent that no specific provisions are contained in nature conservation law, the

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119 The pertinent Article 61 of the BNatSchG entered into force on 4 April 2002. It also applies to administrative decisions that were adopted before the entry into force of the federal law, if they were adopted after 1 July 2000 and the deadlines for proceedings against such decisions have not yet expired (Article 69 (5) (2) of the BNatSchG).

120 Article 61 of the BNatSchG.

121 Article 39b of the Nature Protection Act of Berlin, Article 65 of the Nature Protection Act of Brandenburg, Article 44 of the Nature Protection Act of Bremen, Article 41 of the Nature Protection Act of Hamburg, Article 65a of the Nature Protection Act of Mecklenburg-Vorpommern, Article 60c of the Nature Protection Act of Lower Saxony, Article 12b of the Nature Protection Act of Northrhine-Westphalia, Article 37b of the Nature Protection Act of Rheinland-Pfalz, Article 33 of the Nature Protection Act of the Saarland, Article 58 of the Nature Protection Act of Saxony, Article 51c of the Nature Protection Act of Schleswig-Holstein, Article 46 of the Nature Protection Act of Thuringia.

122 Article 31 of the Constitution.

general provisions of the Code of Administrative Judicial Procedure relating to the admissibility of public law proceedings apply.

The legal basis in federal law is Article 61 of the BNatSchG. The following passage focuses on Article 61 of the BNatSchG.

Article 61 of the BNatSchG reads:

> "Proceedings Initiated by Associations
>
> (1) An association recognised in accordance with Article 59 or on the basis of respective provisions of the federal states adopted within the framework of Article 60, can without a violation of its rights, initiate proceedings pursuant to the Administrative Courts Code against
>
> 1. exemptions from prohibitions and orders for the protection of nature reserves, national parks, and other areas of conservation referred to in Article 33 paragraph 2[123] as well as against
>
> 2. plan establishment decisions on projects involving an interference with nature and landscape as well as plan approval decisions to the extend to which their adoption requires public participation.
>
> The first sentence shall not apply where an administrative decision referred to therein was issued on the basis of administrative judicial proceedings.
>
> (2) Proceedings pursuant to paragraph 1 are only admissible, if the association
>
> 1. asserts that the issuance of an administrative decision referred to in the first sentence of paragraph 1 is conflicting with provisions of this Act, provisions which are adopted or continue to be applicable on the basis of or within the framework of this Act, or other provisions that must be respected when issuing the administrative decision and are at least also intended to serve the interests of nature protection and landscape conservation,
>
> 2. is affected within the field of activities set out in its articles of association, to the extent to which it is covered by the recognition decision, and
>
> 3. was entitled to participation in accordance with Article 58 paragraph 1 numbers 2 and 3 or the provisions of the federal states within the framework of Article 60 paragraph 2 numbers 5 to 6 and has, in that context, expressed an opinion on the matter, or, contrary to Article 58 paragraph 1 or to the provisions of the federate states adopted in the framework of Article 60 paragraph 2 was given no opportunity to express its opinion.
>
> (3) If the association had the opportunity to express its opinion during the administrative procedure, the association is precluded with all objections, which it failed to raise in the administrative procedure despite the fact that it would have been able to do so on the grounds of the documentation transmitted to it or inspected by it.

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[123] The areas of conservation mentioned in Article 33 paragraph 2 of the BNatSchG are areas designated for the protection of habitats and wild fauna and flora that are registered at the European Community level as well as European areas of conservation for the protection of birds.

(4) If the administrative decision was not notified to the association administrative and judicial proceedings must be initiated within one year from the date on which the association had knowledge or could have had knowledge of the administrative decision.

(5) The federal states may admit proceedings initiated by associations also in other cases, in which Article 60 paragraph 2 prescribes the participation of the associations. The federate states may adopt further provisions on the procedure."

3.2.2 Admissible Subject Matters and Claims

Article 61 (1) 1st sentence, lit. 1 and 2 of the BNatSchG contains an exhaustive list of admissible subject matters. These do not include all activities which can potentially have significant detrimental effects on the environment. In particular, not all projects that require an environmental impact assessment may be challenged, even though environmental impact assessments are only required for projects which may have significant detrimental impacts on the environment. Rather, an association may only initiate public interest proceedings against exemptions from prohibitions and orders for the protection of nature conservation areas, national parks and designated areas for the protection of habitats and wild fauna and flora that are registered at the European Community level, as well as for European conservation areas for the protection of birds. Finally, associations may also challenge plan establishment decisions (*Planfeststellungsbeschlüsse*) regarding projects with an impact on nature and landscape, and plan approval decisions (*Plangenehmigungen*), where participation of the general public in their elaboration is stipulated by law.

Exemptions from prohibitions and orders for the protection of nature conservation areas, national parks and designated areas for the protection of habitats and wild fauna and flora that are registered at European Community level, and European conservation areas for the protection of birds[124] are issued on the basis and pursuant to the conditions of Article 62 (1) of the BNatSchG or corresponding provisions of the federate states.[125] According to Article 62 (1) of the BNatSchG, an exemption can be granted upon request, provided that the implementation of the nature protection provisions would either entail an unintended hardship, although the exemption would be compatible with the interests of nature protection and landscape conservation, or upon condition that the implementation of the nature protection provisions would have unintended adverse impacts on nature and landscape, or, finally, if imperative reasons related to overriding public interests necessitate the exemption. Exemptions can, for example, be a necessary prerequisite for the approval of the construction of buildings, roads, or wind power plants, when these are located in a protected area. In

124 In the meaning of Article 61 (1), 1st sentence, lit. 1 of the BNatSchG.

125 Article 62 (1) of the BNatSchG.

such cases, associations can only attack the decision on the exemption, not the administrative approval of the project itself.[126] For the construction of industrial facilities, no separate exemption is provided for by law. Here, the interests otherwise taken into account when adopting the decision on the exemption are taken into account when deciding on the approval of the industrial facility. Nevertheless, the decision approving the industrial facility cannot be challenged.[127]

Plan determination decisions are generally required by law for large-scale infrastructural projects, which justify a particularly elaborate procedure set out in Article 73 of the Administrative Process Act. Examples of plan determination decisions in the purview of Article 61 (1), 1st sentence, lit. 2 of the BNatSchG, that is: decisions which involve an impact on nature and landscape, include the approval of the radioactive waste disposal,[128] the construction of federal railways,[129] the extension and construction of federal water straits,[130] as well as, under certain conditions, the construction and modification of the installation of a magnetic levitation trains. Other examples are the construction of landfills according to Article 31 of the Waste Management Act (*Kreislaufwirtschafts- und Abfallgesetz*),[131] the extension of water bodies according to Article 31 of the Water Resources Management Act (*Wasserhaushaltsgesetz*),[132] and the construction or extension of federal highways according to Article 17 of the Federal Highways Act (*Bundesfernstrassengesetz*).[133]

Plan approval decisions are normally adopted according to a less elaborate procedure than plan determination decisions and, thus, do not normally require public

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126 Upper Administrative Court Berlin, OVG 2 SN 30.98.

127 Upper Administrative Court Frankfurt/Oder, 3 A 37/96.

128 Article 23 paragraph 2a of the Act on Peaceful Utilisation of Nuclear Energy and the Protection against its Risks (*Gesetz über die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren* – AtG) of 23 December 1959, Federal Law Gazette (*BGBl.*) (1959) Part I, pp. 814 *et sqq.*, last amended on 12 August 2005, Federal Law Gazette (*BGBl.*) (2005) Part I, pp. 2365 *et sqq*.

129 Article 18 of the General Railway Act (*Allgemeines Eisenbahngesetz* – AEG) of 27 December 1993, Federal Law Gazette (*BGBl.*) (1993) Part I, pp. 2378 *et sqq.*, last amended on 3 August 2005, Federal Law Gazette (*BGBl.*) (2005) Part I, pp. 2270 *et sqq*.

130 Article 14 of the Federal Water Straits Act (*Bundeswasserstraßengesetz* – WaStrG) of 2 April 1968, Federal Law Gazette (*BGBl.*) (1968) Part II, pp. 173 *et sqq.*, last amended on 25 November 2003, Federal Law Gazette (*BGBl.*) (2003) Part I, pp. 2304 *et sqq*.

131 Closed Cycle and Waste Management Act (*Gesetz zur Förderung der Kreislaufwirtschaft und Sicherung der umweltverträgli-chen Beseitigung von Abfällen* – KrW/AbfG) of 27 September 1994, Federal Law Gazette (*BGBl.*) (1994) Part I, pp. 2705*et sqq.*, last amended on 1 September 2005, Federal Law Gazette (*BGBl.*) (2005) Part I, pp. 2618 *et sqq.*

132 Water Resources Management Act (*Gesetz zur Ordnung des Wasserhaushalts* – WHG) of 19 August 2002, Federal Law Gazette (*BGBl.*) (2002) Part I, pp. 3245 *et sqq.*, last amended on 1 June 2005, Federal Law Gazette (*BGBl.*) (2005) Part I, pp. 1746 *et sqq*.

133 Federal Highways Act (*Bundesfernstraßengesetz* – BFernStrG) of 20 February 2003, Federal Law Gazette (*BGBl.*) (2003) Part I, pp. 286 *et sqq.*, last amended on 22 April 2005, Federal Law Gazette (*BGBl.*) (2005) Part I, pp. 1238 *et sqq*.

participation in the meaning of Article 61 (1), 1st sentence, number 2 of the BNatSchG.[134] A plan approval decision that does require public participation is Article 17 (1b) of the Federal Highway Act, which governs the construction of highways in the East German Länder.[135] Only the latter can be challenged.

In addition, contrary to the wording of Article 61 of the BNatSchG, administrative decisions which do not take the form of one of the foregoing administrative decisions may also be challenged so as to prevent authorities from circumventing judicial control by deliberately using an illegal instrument that is not attackable under Article 61 of the BNatSchG.

According to Article 61 of the BNatSchG, only the – preliminary or definitive – *rescission* of one of the administrative decisions set out above can be demanded. On the basis of Article 61 (1), 1st sentence of the BNatSchG, it is not possible to demand that a new administrative decision – let alone a decision with a particular outcome – be adopted. Neither is it admissible to bring an action for restraint against an administrative decision, *i.e.* to initiate proceedings with the aim of preventing a public authority from issuing an administrative decision.

3.2.3 Admissible Grounds for Action and Substantiation of the Claim

The mere fact that one of the foregoing administrative decision is potentially illegal does not suffice as justification to rescind that act. Only the violation of specific provisions can lead to its judicial revocation. Specifically, Article 61 (2) lit. 1 of the BNatSchG limits the ambit of possible grounds for substantiation of a claim to violations of

a.) the provisions of the BNatSchG itself;

b.) provisions which are adopted or continue to be applicable on the basis of or within the framework of the BNatSchG, or

c.) other provisions that must be respected when issuing the administrative decision and which are at least also intended to serve the interests of nature protection and landscape conservation.

The admissible grounds for action are, thus, limited to nature protection law, albeit in a wider sense, and do not extend to environmental law in general. Relevant provisions are thus the federal BNatSchG and the nature conservation acts of the federate states. As yet, there has been no comprehensive or uniform case law on which provisions may fulfil the requirement of being “at least also intended to serve

134 Article 74 paragraph 6 of the Administrative Process Act.

135 The applicability of this provision is restricted until 31 December 2006.

the interests of nature protection and landscape conservation." Examples are set out in the following section.

The Federal Administrative Court has decided that such provisions of the European Community directive on the conservation of natural habitats and of wild fauna and flora[136] which have direct effect may be invoked.[137]

Likewise, the Federal Administrative Court has decided that a violation of the obligation of the administration to balance all interests concerned – *inter alia* the interest of nature protection – amongst and against each other, when adopting a plan determination or a plan approval decision, can be challenged to the extent that such violation consists in the insufficient appreciation of nature protection interests.[138] Affirming its general jurisprudence on the scope of judicial review of decisions involving a balancing process, the Federal Administrative Court has held that judicial review may assess whether:

a.) a balancing of interests with regard to nature protection interests has taken place at all;

b.) whether all relevant nature protection interests were considered in the weighing process;

c.) whether the relevance of the nature protection interests was not misjudged, as well as whether

d.) the balancing of interests was not disproportionate to the relevance of nature protection interests.

Consequently, the insufficient appreciation of interests other than nature protection may not be invoked. An exception applies in the case of manifestly frivolous arguments or an abuse of legal powers when balancing interests. In such cases, a comprehensive review extending to interests other than nature protection will be carried out.[139]

Other provisions which are "at least also intended to serve the interests of nature protection and landscape conservation" could include certain provisions in the law on

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136 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, Official Journal L 206 of 22 July 1992, pp. 7 *et sqq*..

137 Federal Administrative Court Reports (*BVerwGE*), Vol. 110, pp. 302 *et sqq*., at p. 306; Federal Administrative Court, 4 A 28.01.

138 Federal Administrative Court Reports (*BVerwGE*), Vol. 107, pp. 1 *et sqq*.; Alexander Schmidt, Michael Zschiesche, and Marion Rosenbaum, *Die naturschutzrechtliche Verbandsklage in Deutschland – Praxis und Perspektiven* (Berlin: Springer, 2004), p. 89, criticises the jurisprudence of the Federal Administrative Court for excluding certain aspects relevant to nature protection.

139 Federal Administrative Court Reports (*BVerwGE*), Vol. 107, pp. 1 *et sqq*.

ambient air pollution control and water resources management, provisions requiring consideration of the public interest, or the law on environmental impact assessment.[140] By contrast, lacking competence of the public authority that issued the administrative decision[141] cannot be invoked. It is subject to dispute, however, whether lacking need for action, *i.e.* a situation where no public interest whatsoever exists that can justify taking action, can provide sufficient grounds for action.

An association does not, in turn, have to assert that its individual rights (e.g. property rights or procedural rights) have been violated by nature protection provisions.[142] This is the element that distinguishes public interest proceedings from egoist proceedings, which require assertion of a violation of individual rights. Thus, the provisions of Article 61 of the BNatSchG and corresponding provisions of the federate states abrogate the requirement contained in Article 42 (2) of the Code of Administrative Judicial Procedure that stipulates that, where the revocation of an administrative decision is claimed, the violation of an individual right has to be invoked unless otherwise provided for by law. Similarly, Article 113 (1) of the Code of Administrative Judicial Procedure, which regulates the substantiation of the claim, is modified in that only the 1st part of its 1st sentence is applies, according to which the court revokes an administrative decision to the extent to which its adoption was illegal. Article 113 (1), 2nd part of the 1st sentence of the Code of Administrative Judicial Procedure does not apply, which makes the revocation of an administrative decision conditional on the whether the illegality of the act affects the individual rights of the claimant.

However, an association is free to invoke those provisions which it could also invoke in individual rights proceedings, i.e. provisions that confer an individual right upon the association. Separate proceeding are not necessary.

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140 Likewise for water resources management and ambient air pollution control law, Sabine Schacke, Verbandsklagerechte in Umwelt- und Verbraucherschutzangelegenheiten in Deutschland, in: Falke/Schlacke (editors), *Information, Beteiligung, Rechtsschutz: Neue Entwicklungen im Umwelt- und Verbraucherrecht*, 2004, p. 131-167 (139); Alexander Schmidt, Michael Zschiesche, and Marion Rosenbaum, *Die naturschutzrechtliche Verbandsklage in Deutschland – Praxis und Perspektiven* (Berlin et al.: Springer, 2004), at p. 17 - also including provisions on public interest, and Martin Gellermann, Europäisierte Klagerechte anerkannter Umweltverbände, *Neue Zeitschrift für Verwaltungsrecht*, 2006, 7 et seq., p. 11 – also including provisions on public interest and environmental impact assessment; inconclusive Michael Kloepfer, *Umweltrecht*, 3rd ed. (Munich: C.H. Beck, 2004), § 11 Annot. 261; restrictively with regard to ambient air pollution control law apparently Federal Administrative Court, judgment of 19 May 1998, 4 A 9.97, Federal Administrative Court Reports (*BVerwGE*), Vol. 107, 1 (pp. 7 *et seq*), on a comparable wording in the Nature Protection Act of Schleswig-Holstein.

141 Administrative Court of Oldenburg, decision of 26 October 1999, 1 B 3391/99.

142 Article 61 paragraph 1 1st sentence of the Code of Administrative Judicial Procedure and corresponding provisions of the federate states.

3.2.4 Capacity to Act

One reason for which public interest proceedings are disputed is the legitimacy of eligible claimants. Eligibility accrues to associations which have been officially recognised either by the Federal Ministry of the Environment, Nature Conservation and Nuclear Safety, or by a competent federal state authority.[143] An association can choose whether to register at federal level or at the level of a Land. The conditions for official recognition laid down in Article 59 of the BNatSchG apply to the recognition on federal level as well as on the level of a federate state, unless a federate state has adopted land-specific provisions. To be eligible for official recognition at the national level, an association must carry out activities that go beyond the territory of a single federate state. The main purpose of the association, as defined in its Articles of Association, must be to promote, for non-pecuniary purposes and for a longer period of time, the interests of nature protection and landscape conservation. At the time of such recognition, the association must have existed and been actively pursuing nature protection and landscape management goals for at least three years. It must warrant the capacity to carry out its tasks appropriately, in particular, on the basis of the type and scope of its former activities as well as the composition of its members and its capacity to act. The association must be exempt from corporate income tax on the basis of its non-profit character. Finally, membership associated with full voting rights in the general meeting must be open to anyone who supports the objectives of the association, with the exception of associations that are composed of legal persons only. The federate states can provide for different requirements with regard to the territorial extension and the time of official recognition.[144] Provisions of the federate states have been interpreted extensively by the competent authorities.[145]

In addition, Article 61 (2) lit. 2 of the BNatSchG stipulates that the association must be affected within the scope of activities set forth in its Articles of Association to the extent to which these are covered by the recognition granted.

Beyond that, Article 61 (2) lit. 3, 1st half of the sentence of the BNatSchG requires associations to have been entitled to participation in the procedure preceding the adoption of the disputed administrative decision. Such entitlements can flow from Article 58 (1) litt. 2 and 3 or Article 60 (2) litt. 5 and 6 of the BNatSchG or relevant provisions of the federate states adopted in line with Article 60 (2), 2nd and 3rd

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143 Article 61 (1), 1st part of the 1st sentence of the BNatSchG and corresponding provisions of the federate states.

144 Article 60 (1) and (3) of the BNatSchG.

145 For judicial interpretations, see Federal Administrative Court, *Deutsche Verwaltungsblatt* (1986), pp. 415 *et sqq.* (judgement rendered on the basis of provisions of a Land).

sentences of the BNatSchG. An entitlement to participation in an administrative procedure does not necessarily correspond to a right to initiate proceedings. Not all cases in which an association is entitled to participation in an administrative procedure also allow for the association to initiate proceedings.

Moreover, an association must have put forward an opinion during the procedure preceding the adoption of the administrative decision challenged on the subject matter of the procedure.[146] Failing this, proceedings are inadmissible. An exception applies where the association was not given an opportunity to express its opinion contrary to Article 58 (1) of the BNatSchG or to provisions of the affected federate state adopted in conformity with Article 60 (2) of the BNatSchG.

Article 61 (3) of the BNatSchG stipulates that, if the association was given the opportunity to express its views during the administrative procedure preceding the adoption of the challenged administrative decision, but has failed to put forward a specific objection despite the fact that it would have been able to do so on the grounds of the documentation transmitted to it or inspected by it, it is precluded from invoking this particular objection in judicial proceedings. Without prejudice to the principle that an administrative court inquires the facts of the case *ex officio*, but in line with the obligation of the association to cooperate, it is for the association to put forward the elements which establish that the association was incapable of putting forward objections during the administrative procedure preceding the adoption of the challenged administrative decision.

These procedural restrictions aim at maintaining the division of powers between the administrative and judicial branches without encroaching on the powers of the administration, while also protecting the person(s) benefiting from the act questioned from unexpected objections and, thus, promoting legal certainty.[147]

3.2.5 Other Requirements

Usually, the general provisions of the Code of Administrative Judicial Procedure apply according to which administrative or judicial proceedings have to be introduced one month after the notification of the administrative decision.[148] Exceptionally, administrative or judicial proceedings must be initiated within one year from the date on which the association had knowledge or could have had knowledge of the

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146 Article 61 (2) lit. 3, 2nd half of the sentence.

147 Compare Federal Records of Parliament (*BT-Drs.*) 14/6378, at p. 62.

148 Articles 70 (administrative proceedings) and 74 (judicial proceedings) of the Code of Administrative Judicial Procedure.

administrative decision, if the administrative decision was not notified to the association.[149]

According to Article 61 (1), 2nd sentence of the BNatSchG, an administrative decision may not be challenged whenever it was issued in the course of judicial proceedings as opposed to adoption by the administration. This is necessary to prevent that conflicting judgments are rendered and provide legal security.

Other admissibility requirements flow from Article 61 paragraph 1, 1st sentence of the BNatSchG in connection with the provisions of the Code of Administrative Judicial Procedure. They differ depending on the type of proceedings. In particular, the prior termination of administrative proceedings may be required as a prerequisite for initiating judicial proceedings.[150]

3.3 General Rules Applicable to Both Individual Rights and Public Interest Proceedings

The court considers all possible grounds for action *ex officio*, regardless of whether the association has invoked that ground for action or not. The decisive point in time is the time of adoption of the decision, not the time of the judicial decision. This protects the powers of the administration.

In principle, the court proceeds to carry out a comprehensive review of the claim and its substantiation.[151] Exceptions apply where the legislator has afforded a margin of appreciation to the administration, notably when the administration is required to balance all interests involved against and amongst each other. According to the case law, judicial review, in this case, may touch upon whether

a.) a balancing of interests took place at all;

b.) all relevant interests were considered in the weighing process;

c.) whether the relevance of the interests was falsely considered;

d.) the balancing of interests was disproportionate.[152]

The extent to which decisions involving a prognostic component, which are of particular relevance in the implementation of environmental law, are subject to judicial control, has not yet been exhaustively clarified. The Federal Administrative Court has held that the judiciary may not review the appraisal of scientifically

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149 Article 61 (4) of the BNatSchG.

150 Article 68 (1) of the Code of Administrative Judicial Procedure.

151 Federal Constitutional Court Reports (*BVerfGE*) Vol. 61, pp. 82 *et sqq*.

152 Federal Administrative Court, judgement of 19 May 1998, 4 A 9.97, Federal Administrative Court Reports (*BVerwGE*), Vol. 107, pp. 1 *et sqq*.

contested questions by the administration, including the assessment of risk based on that appraisal.[153] The case at issue concerned the interpretation of a provision in nuclear safety law concerning the necessary precaution against damage based on the scientific and technical state of art. In a later decision, the Federal Constitutional Court held that the legality of appraisals based on the scientific and technical state of the art had to be reviewed by the judiciary, while the courts were not allowed to replace their own appraisals with those of the administration.[154] According to the jurisprudence of the highest courts, the accuracy of administrative prognoses and appreciations shall not be subject to judicial taking of evidence. Evidentiary proceedings are only necessary if the court cannot determine whether a compulsory procedure was respected or whether the prognosis or appreciation is comprehensible. In particular, the court can review whether all pertinent technical and scientific conclusions were considered, whether the general norms on appraisals and limits set by law were respected, and whether the appraisal did not run counter to the norm attributing the administration powers of appraisal.

3.4 Practical Examples

The Administrative Court of Potsdam revoked an exemption that had been granted by the Ministry for Environment, Nature Protection and Regional Planning to a private investor in 1995 for the construction of a wind power plant in a nature reserve. The proceedings were admissible on the basis of the Nature Conservation Act of Berlin.[155] When granting the exemption, the Ministry did not follow an opinion of a lower environmental authority, but mirrored the assertions of an expert opinion provided by the investor. The Federal Administrative Court found that the Ministry had not sufficiently taken into account the effects of the project on the resting and feeding areas of certain breeds of birds as required by the provision on exemptions of the Berlin Nature Conservation Act,[156] because it followed the – evidently flawed – expert opinion without scrutinising it beforehand.[157] In this case, egoist proceedings would not have been admissible.

The first judgement of the Federal Administrative Court concerning the legality of a plan determination decision approving the construction of Federal Highway A 20 became a lead decision on public interest litigation by associations much reiterated by lower administrative courts.[158] In this case, the Federal Administrative Court

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153 Federal Administrative Court Reports (*BVerwGE*), Vol. 72, pp. 300 *et sqq.*

154 Federal Constitutional Court Reports (*BVerfGE*) Vol. 61, pp. 82 et *sqq.*, at p. 115.

155 Now Article 39b of the Nature Protection Act of Berlin.

156 Now Article 50 of the Berlin Nature Conservation Act.

157 Administrative Court Potsdam, 1 K 3417/95.

158 Federal Administrative Court Reports (*BVerwGE*), Vol. 107, 1 et seq.

upheld the plan determination decision on the construction of highway A 20. After holding, that on the basis of the provision on public interest proceedings of the Nature Conservation Act of Schleswig-Holstein,[159] which is comparable to Article 61 of the BNatSchG, the obligation to weigh all affected interests amongst and against each other when adopting a plan determination decision falls within the scope of provisions the violation of which could be invoked, but only to the extent to which nature protection interests were concerned, and after repeating its general jurisprudence on the extent to which flaws in the balancing of interests are subject to judicial review, it rejected, *inter alia*, the argument that the obligation to weigh all affected interest amongst and against each other had not been respected. To justify its decision, the court drew attention to the fact that alternative traffic routing would have had less harmful consequences for the environment, as reasons of transport planning outweighed nature protection interests in this case.

4 Outlook: The Future of Public Interest Litigation in German Environmental Law

Pending adoption of the directive on access to justice in environmental matters proposed by the European Commission,[160] civil law litigation, where the relevant legal basis – the Environmental Liability Act – has remained largely unaltered for several years, is unlikely to change dramatically in Germany. At this point, the greatest potential for a marked shift in the German approach to environmental litigation lies with two European directives on public participation in environmental procedures, whose legal status, however, is currently unclear. Article 10a of the directive on the assessment of the effects of certain public and private projects on the environment (hereinafter EIA-Directive)[161] and Article 15a of the directive concerning integrated pollution prevention and control (hereinafter IPPC-Directive)[162] both contain public law standards for access to justice in environmental matters applicable throughout the European Union. They were introduced into Community law in order to implement the Aarhus Convention following its accession by the European Community. Their purpose is twofold, as they seek to promote better enforcement of both European Community law relating to environmental protection and European Community law in general. The identically worded Articles 10a of the EIA-Directive

159 Now Article 51c of the Nature Protection Act of Schleswig-Holstein.

160 On this issue, see *supra*, Section 1.5.

161 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, Official Journal No. L 175 of 5 July 1985, pp. 40 *et sqq*.

162 Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, Official Journal L 257 of 10 October 1996, pp. 26 *et sqq.*

and 15a of the IPPC Directive, which reflect the corresponding provisions of the Aarhus Convention, stipulate that

> "Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
>
> (a) having a sufficient interest, or alternatively,
>
> (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,
>
> have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.
>
> Member States shall determine at what stage the decisions, acts or omissions may be challenged.
>
> What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any [non-governmental organisation promoting environmental protection and meeting any requirements under national law], shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.
>
> The provisions of this Article 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.
>
> Any such procedure shall be fair, equitable, timely and not prohibitively expensive.
>
> In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures."

Currently, however, it remains unclear whether Article 10a of the EIA-Directive and Article 15a of the IPPC Directive may be relied upon to initiate proceedings for the enforcement of environmental law in a manner which goes beyond the possibilities currently afforded by German law on individual rights and public interest proceedings. Whether they can be relied upon in judicial proceedings depends, first, on whether they can be invoked in spite of the fact that they have not yet been transposed into national law and, secondly, on how the procedural guarantees they contain have to be interpreted. As a rule, provisions contained in European Community Directives cannot be invoked in judicial proceedings before the courts of a Member State of the European Union, but have to be transposed into domestic law first. In exceptional cases, however, they may be invoked when they have direct effect. According to the jurisprudence of the European Court of Justice (hereinafter ECJ), which developed the concept of direct effect and whose decisions are binding on the Member States of

the European Union in line with Articles 226 *et sqq*. of the EC Treaty, the prerequisites for direct effect are that:

a.) the time limit for implementing the Directive into national law has passed without adequate implementation;

b.) the provision concerned is sufficiently clear and precise, unconditional, and leaves no discretion to Member States in their implementation; and

c.) the provision concerned is intended to create individual rights which national courts must respect.[163]

The time limit for implementing Articles 10a of the EIA Directive and 15a of the IPPC Directive was 25 June 2005. Whether the other conditions for direct effect are met is disputed[164] has not yet been authoritatively decided.

If one subscribes to the opinion that these conditions are currently met,[165] however, the question remains as to how the procedural guarantees set out in Articles 10a of the EIA Directive and 15a of the IPPC Directive should be interpreted. In academic literature, several divergent interpretations have been promulgated. They diverge, in particular, on whether and to which extent Articles 10a of the EIA Directive and 15a of the IPPC Directive regulate public interest proceedings by associations.[166]

Independently from the question of direct effect under Articles 10a of the EIA Directive and 15a of the IPPC Directive, the European Commission initiated proceedings before the ECJ against Germany in June 2006 according to Article 226 of the EC Treaty for failure to comprehensively implement Articles 10a of the EIA Directive and 15a of the IPPC Directive. On 13 July 2006, the German government adopted a draft law for the implementation of Articles 10a of the EIA Directive and 15a of the IPPC Directive, which, however, takes a very restrictive stance on the admissibility of public interest proceedings by associations. The approach to interpretation that will be chosen by the ECJ in the proceedings against Germany has the potential to essentially influence the further development of German law on public interest proceedings in environmental law.

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163 European Court of Justice, Case 26/62, *Van Gend en Loos* v. *Administratie der Belastingen*, European Court Reports 1963, p. 3.

164 Supporting their direct effect, Martin Gellermann, "Europäisierte Klagerechte anerkannter Umweltverbände“, *Neue Zeitschrift für Verwaltungsrecht* (2006), pp. 7 *et sqq*.

165 Thus Martin Gellermann, "Europäisierte Klagerechte anerkannter Umweltverbände“, *Neue Zeitschrift für Verwaltungsrecht* (2006), pp. 7 *et sqq*.

166 For a more extensive interpretation: Martin Gellermann, *Neue Zeitschrift für Verwaltungsrecht* (2006), pp. 7 *et sqq*.; for a more restrictive interpretation: Thomas von Danwitz, expert opinion for the VDEW e.V., *Zur Ausgestaltungsfreiheit der Mitgliedstaaten bei Einführung der Verbandsklage anerkannter Umweltschutzvereine nach den Vorgaben der Richtlinie 2003/35/EG und der sog. Aarhus-Konvention*, October 2005.

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