

ERA Workshop for Judges:
How to Handle Court Proceedings Invoking
Non-Compliance with EU Environmental Assessment Law



Source: www.uvp-portal.de/

VI. EIA/SEA Procedure and Citizens' Rights Public Participation under the EIA/SEA Directives

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The first slide shows the topic of the training module and speaks for itself.

Foreword

- The following presentation is meant to initiate an exchange of thoughts and experiences about EU environmental assessment law among legal practitioners from different MS (peer discussion).
- It cannot be avoided that it reflects my practical experience as an administrative judge working in the German judiciary.
- I hope the more general and less specific issues I picked up are relevant for your work as well. Feel free to add other topics of concern in the course of the presentation.

Looking forward to our discussion!

Matthias Keller



The foreword sets the scene by mentioning the core of continuous legal training which is the exchange of thoughts and experiences.

List of Topics

- Setting the Scene
- Procedural Steps
- Access to Justice for NGOs („Trianel“)
- CJEU Case Law on the Application of Directives



It is important for the audience to have a good insight in the structure of the upcoming presentation.

Setting the scene



This slide is a title.

Public Participation („P2“) ?

What is your
professional or even private experience
with public participation?



In adult learning it is extremely helpful to utilize existing knowledge and life experiences. During the session the lecturer should encourage the audience to connect their past experiences with the new information on the EIA and SEA Directives.

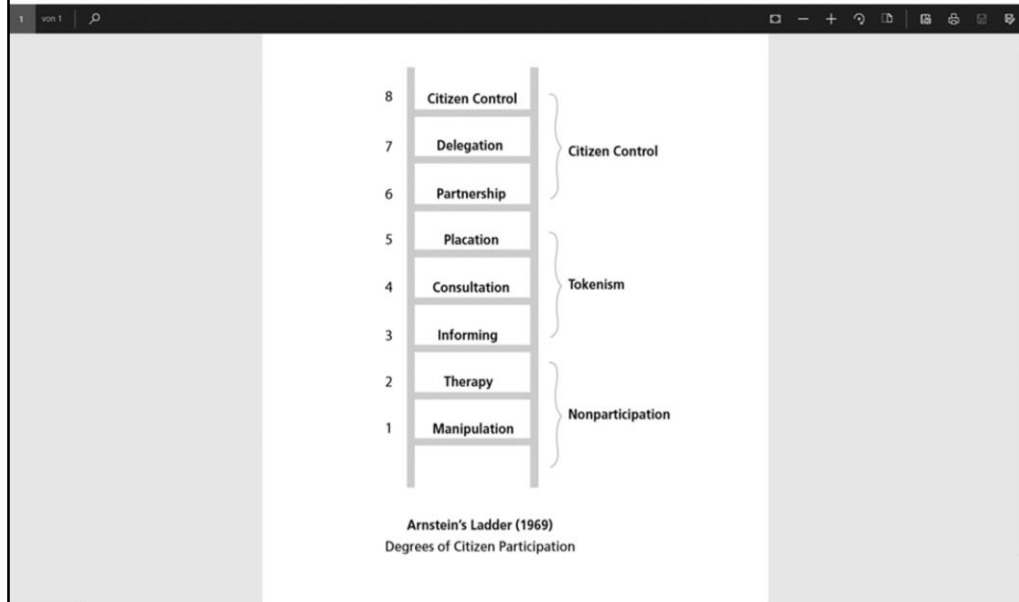
Public consultation event about urban planning in Helsinki



Photo by Kaihsu Tai;
Source: [https://en.wikipedia.org/wiki/Participation_\(decision_making\)/#media/File:Keskustelutilaisuus_Helsingin_yleiskaavasta.jpg](https://en.wikipedia.org/wiki/Participation_(decision_making)/#media/File:Keskustelutilaisuus_Helsingin_yleiskaavasta.jpg)

Here public participation is visualized. The slide is meant to simplify an abstract issue und bring things “down to earth”.

In 1968 Sherry R. Arnstein made an influential approach to categorize public participation: „The Ladder“



For a change, this slide is unlike to the one before. It shows an academic approach to public participation from the late 60s. It might be interesting to see and to discuss the very negative way of describing “nonparticipation” by using words like “manipulation” and “therapy”.

Public participation:
a cornerstone of (global) environmental law

Principle 10 of the Rio Declaration:

*“Environmental issues are
best handled with participation
of all concerned citizens (...)”*



The importance of the Rio Declaration and its Principle 10 is to be mentioned in order to highlight the global aspect of the matter.



„ ... best handled with public participation ... “

Paris 2010- Le penseur CC BY-SA 2.0 Credit:
Daniel Stockman-Flickr: Paris 2010 Day 3-9

Why ?

Better decision-making process:

- Complex procedures will be more **open and transparent**
- Citizens and NGOs can provide **informations on the impacts**
- **Informed decision making**
- **Alternatives** can be discussed at an early stage
- **Solutions** may be more tailored to the specific situation
- **Conflicts** may be resolved without court proceedings
- The decision will gain **more acceptance** (legitimacy)
- It may ensure a **better implementation**



The slide is meant to make people aware that public participation is a tool for improving the decision-making process.



„ ... best handled with public participation ... “

Why ?

Paris 2010- Le penseur CC BY-SA 2.0 Credit:
Daniel Stockman-Flickr: Paris 2010 Day 3-9

Meeting the challenges of our time:

- Climate change
- Biodiversity protection
- Sustainability
- Resource efficiency
- Risks of accidents and disasters
- Protection of cultural heritage /diversity



Without public participation, there is a risk that major environmental issues will not be addressed at all.



By the way :
From 23 April - 23 July 2018 the SEA-Directive itself
is subject to a public consultation (REFIT)
where you can submit (online) your opinion on issues like:

SEA-Directive:

▪ Effectiveness	Have the objectives been met?
▪ Efficiency	Were the costs involved reasonable?
▪ Coherence	Does the policy complement other actions or are there contradictions?
▪ Relevance	Is EU action still necessary?
▪ EU added value	Can or could similar changes have been achieved at national/regional level, or did EU action provide clear added value?



„It is not easy to answer, is it?“

The slide shows the importance of public participation in modern decision-making, even when it comes to the SEA Directive itself.



What does the EU do to achieve better decision making in environmental law?

EU law (providing SEA and EIA) sets

minimum requirements

for the environmental assessment



Here, the idea of “minimum standards” is introduced.



Programmes, plans, projects that ...

**„are likely to have significant effects
on the environment“**

should as rule be subject to
environmental assessment.

Environmental assesement under the SEA/EIA-Directives
has different steps which comprise
public participation.



The slide puts the focus on the keywords of the SEA/EIA Directives.

... „are likely“ ... to have such effects

means - as a consequence - :

**„in dubio pro“
environmental (impact) assessment!**

Footnote:

It would be interesting to know how „likely“ in this context is translated into your language and see the (legal) connotations.

However, at the end of the day the meaning should be the same in the light of the CJEU case law.



The slide makes a reference to “in dubio pro reo” which is known by every practitioner. Therefore, in dubio pro “EIA” will be understood easily.

Procedural Steps



The slide is a title.

Let's follow the
procedural steps of an Environmental Impact Assessment (EIA)
by reading the text of the law ...

The current EIA-Directive (amended by 2014/52/EU)
defines in Art. 1 (2) g:

**“environmental impact assessment”
means a process consisting of:”**

- (i) ...
- (ii) ...
- (iii) ...
- (iv) ...
- (v) ...



People are invited to read the relevant definition of the EIA Directive.

(1st step)

environmental impact assessment

means a process consisting of:

(i)

the preparation of

an environmental impact assessment **report**

by the developer as referred to
in Art 5(1) and (2) EIA Directive;



The legal meaning of “report” is clarified.

(2nd step)
environmental impact assessment
means a process consisting of:

(ii)

the carrying out of

consultations

as referred to in Art 6 / 7 EIA Directive;



The legal meaning of “consultations” is clarified.

(3rd step)

environmental impact assessment

means a process consisting of:

(iii)

the examination by the competent authority

of the **information** presented in the environmental impact assessment **report** and any **supplementary information** provided, where necessary, by the developer in accordance with Article 5(3),

and any **relevant information**
received through the consultations
under Articles 6 and 7;



The “examination” is shown as a part of the environmental impact assessment.

(4th step)

environmental impact assessment

means a process consisting of:

(iv)

the reasoned conclusion by the competent authority on the significant effects of the project on the environment,
taking into account the results of the examination referred to in point (iii) and,
where appropriate, its own supplementary examination;



The “reasoned conclusion” is shown as a part of the environmental impact assessment.

(5th step)

environmental impact assessment means a process consisting of:

(v)

the integration of the competent authority's reasoned conclusion into any

of the decisions

referred to in Article 8a.



The “integration” is shown as a part of the environmental impact assessment.

All five steps:

The current EIA-Directive (amended by 2014/52/EU) defines in Art. 1 (2) g:

“environmental impact assessment”

means a process consisting of:”

- (i) report
- (ii) consultations
- (iii) examination
- (iv) reasoned conclusion
- (v) integration into decision



The slide is an overview on the definition of the environmental impact assessment under the EIA Directive.

The procedural steps of the Strategic Environmental Assessment (SEA) are similar:

Art 2 (b) SEA Directive:

"environmental assessment" shall mean

- the preparation of an environmental **report**,
- the carrying out of **consultations**,
- the **taking into account** of the environmental report and the results of the consultations **in decision-making** and
- the provision of information on the decision in accordance with Articles 4 to 9;



Under the SEA Directive the definition is similar.

Who shall participate?

„the public concerned“!

(key notion from Aarhus Convention)

Under Art 6 EIA Directive the „public concerned“ has a right:

**to get environmental information.
to participate actively in the permitting procedure.**

Under Art 11 EIA Directive (Art 9 Aarhus Convention)

access to justice for those rights is guaranteed.



“The public concerned“ is presented as a key notion when it comes to the question to determine the persons who should be able to participate in a public consultation.

Definition of „the public concerned“

Art. 1 (2) e EIA Directive states:

"public concerned" means

the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2).

For the purposes of this definition, **non-governmental organisations** promoting environmental protection and meeting any requirements under national law **shall be deemed to have an interest**;



The slide presents the legal definition of “public concerned”.

Access to justice for NGOs („Trianel“)



The slide is a title introducing a case.

The Parties (typical triangle of public construction law):

Bund für Umwelt und Naturschutz Deutschland,
Landesverband Nordrhein-Westfalen e.V.
(BUND = environmental **NGO**)

vs.

Land Nordrhein-Westfalen (= **State**)

Intervening party:

Trianel Kohlekraftwerk Lünen GmbH & Co. KG (**Company**)



The parties of the case are introduced here.

The Land NRW (State) issued a permit to Trianel (Company) allowing the building of a coal-fired power station.



A picture makes it easier to get an understanding of the case.

The NGO (BUND/ Friends of the Earth)

- initiated **proceedings for the annulment of the permit**
- relied on an **infringement of the provisions of the Habitats Directive.**



The claim is explained without any details.

Firstly, no doubt about this:

The „NGO“ has a right to participate in the administrative procedure evaluating the environmental impact of the coal fired power station with a heat output to a maximum of 1 705 megawatts and 750 megawatts of electricity output, cf. Annex I 2 (a) of the EIA Directive.

because



Here, the EU law context is a little more specified.

At the time (2010) the question was all about the „locus standi“ or standing of the NGO:



Art 42 (1) of the Administrative Court Rules
Verwaltungsgerichtsordnung - VwGO -:

...an action for annulment is admissible
only if the claimant asserts that
his rights have been impaired
by the administrative measure (...)



The German problem: Do NGOs have a standing?

The (first) German legislative approach was to confer standing to ENGOs as if they were a neighbour with property rights (!).

However, the environmental provisions in question do not confer rights to individuals or neighbors.

They do protect a **general interest**
(public interest litigation)
but not an individual interest.



A violation or an impairment of an individual right cannot occur.



The former German system of administrative justice in environmental matters turned out to be – at least for NGOs – “like a Ferrari with its doors locked shut” (AG Sharpston).



Art 11 EIA Directive (= Art 9 Aarhus Conv.)
provides :

Member States shall ensure that (...) 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.**



Art. 11 EIA Directive guarantees access to justice.



Art 11 (3) EIA Directive states:

“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 that end, **the interest of any non-governmental organisation** meeting the requirements referred to in Article 1(2) **shall be deemed sufficient** for the purpose of point (a) of paragraph 1 of this Article.

Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.



NGO standing is provided under Art. 11 (3) EIA Directive.

CJEU, C-115/09, 12 May 2011: “Trianel”

*Article 10a of Directive 85/337/EEC
(now Article 11 of the amended EIA Directive)*

*precludes legislation which does not permit NGOs promoting environmental protection to rely before the courts on the ground that **that rule protects only the interests of the general public and not the interests of individuals.***



The slide shows the outcome of the “Trianel-judgment”.

CJEU Case Law on the Application of Directives



The slide is title.

Directives and the Domestic Judge



Paris 2010 - La pensée CC BY-SA 2.0 Credit
Daniel Stokman Photo: Paris 2010 Day 2-9

What are the conditions of a direct application of Directives?

Direct effect? What does it mean in a nutshell?

Generally, an individual can invoke any EU provision in a national court room which is **"sufficiently precise + unconditional"** (e.g. fundamental freedoms)

Direct effect :
"Van Gend&Loos"

Vertical direct effect:
"Van Duyn"

Directives: Against a MS or its "emanation" (vertical)
an individual can invoke those provisions of a directive that are **not timely transposed + "sufficiently precise + unconditional"**.

Horizontal direct effect:
"Faccini Dori"

Directives: Against another private party (horizontal)
an individual cannot use direct effect of a directive.

However, interpretation of domestic law in the light of EU law ("consistent interpretation") is always possible and even required ("as far as possible") from the national courts to reach the result to be achieved by an EU directives, cf. Art. 288 TFEU.

Good guidance by the CJEU in "Pfeiffer, C-397/01 , 116": "National methods of interpretation".



The attention is drawn to "direct effect". This slide recalls the core features of direct effect in a simplified way. Among other things it is important for the national judge to have a solid knowledge about these basic features of EU law.

Do's and Don'ts

(Direct Effect of Directives)

Do consider that an „unconditional and sufficiently precise“ provision of any EU Directive is to be applied directly.

(CJEU C-431/92 - Großkrotzenburg -)

Don't allow national authorities to apply such a provision when they want to impose an obligation on the citizen.

(CJEU C-91/92 - Faccini Dori -, para. 20)

Do consider that national authorities have to apply such provisions in triangular situations: If a building permit is quashed on behalf of a neighbour, the builder affected by the decision is not confronted „with an obligation“. It is only a negative effect.

(CJEU C-201/02 - Delena Wells -)



A clear overview of “Do's and Don'ts” may serve didactical purposes.

Toolbox of the National Judge in line with the SEA/EIA Directives:

- **Preliminary reference (Article 267 TFEU):**

„Is the X-Directive / Y-Regulation / Z-Decision of the EU valid ?”

„Has the EU act to be interpreted in this or that way ?”

- **Supremacy of EU law:**

„The EU legal act takes precedence over the XY-national act.“

„Directives (sufficiently precise + unconditional) direct effect v. public entities

- **Consistent interpretation:**

„In the light of EU law the domestic law is to be interpreted in this or that way“.



It may be reiterated that “direct effect” can also be understood as a one way among others to secure the application of EU law by the national judge.

Thank you
for your kind attention!



The last slide speaks for itself.