

# Price of Justice

## Germany

Comparative Analysis on Costs of  
Administrative and Judicial Remedies

Legal Analysis

*Justice and Environment 2011*

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**I. Country information**

Currency: *Euro (EUR)*

EUR exchange rate: -

GDP per capita: EUR 28.970 (2010)

Human Development Index: 0,885 (2010, 10th position in the list of countries)

**II. Administrative and judicial procedural costs**

**A) Administrative procedural costs**

Only in some environmental matters administrative procedures apply, e.g. when residents try to make municipal authorities take measures against excessive noise caused by traffic or industrial sites etc. In the vast majority of environmental matters, e.g. when an EIA or similar is in question, the law provides that remedies cannot be addressed in an administrative procedure but only by directly taking the responsible authority to court. So when it comes to the price of justice, the relatively low costs of administrative procedures cannot be seen as a relevant parameter.

**B) Judicial procedural costs**

**a) Administrative<sup>1</sup> judicial procedure**

When environmental organizations go to court in environmental matters the general rules for administrative proceedings apply. I.e., according to § 154 VwGO (Verwaltungsgerichtsordnung/ Code of Administrative Procedure) the loser pays principle applies.

The procedural costs are to be calculated according to the GKG (Gerichtskostengesetz/Court Fees Act) in relation to the amount in dispute. This means: the higher the amount in dispute, the higher the court fees and also other costs related (like lawyers' fees) which, to a certain extent, are calculated accordingly.

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<sup>1</sup> Administrative judicial procedures are court procedures where the procedural or substantive legality of an administrative decision is decided by a court of law, based on the motion of a plaintiff against the administrative body as a defendant.

According to § 63 GKG (Gerichtskostengesetz/Court Fees Act) the amount in dispute is to be set by the court, if there is no amount prescribed by law. Concerning environmental matters, no such fixed amount in dispute applies. Thus, even if there are certain standards set by judicial practice and also by explicit recommendations by the BVerwG (Bundesverwaltungsgericht/Federal Administrative Court), the decision on the amount in dispute is at the discretion of the court in charge.

Between 2002 and 2006, in environmental matters the amount in dispute was set between 2000 EUR and 260.000 (!) EUR in the extremes<sup>2</sup>. Statistically, the amount ranges between 20.000 and 25.000 EUR, but there is a significant dispersion. About 8% of nature protection related claims had amounts in dispute of up to 2000 EUR, 24% between 2000 and 10.000 EUR and another 21% between 10.000 and 15.000 EUR. This means that in the majority of these cases, an amount of maximum 15.000 EUR was the basis of the calculation of costs. However, in about 32% of the cases during this period the amount in dispute was set between 15.000 and 40.000 EUR and in about 15% over 75.000 EUR.<sup>3</sup>

Thus the costs of law suits in environmental matters vary considerably. It is very difficult, if not impossible to have a sound estimation of costs in advance.

### **What is the amount of procedural duty or fee to be paid for the start of a procedure (in EUR)?**

Concerning the court of first instance, an amount of about 5000 EUR applies, if an amount of interest of 25.000 EUR is taken into consideration. This amount consists of 933 EUR of procedural fees plus about 1700 EUR lawyer's fees for each of the two parties' lawyers according to reimbursement rates prescribed by law, plus VAT, i.e.  $933 + (2 \times 1700) + \text{VAT}$ . Costs for the own lawyer can be considerably higher as most experts do not work on the lawyers' fee scheme set by law, but on individual contracts and charge five figure amounts. This amount does not include any costs for evidence/expert opinions, which may exceed this sum by far.

As seen above, the amount in dispute can be lower, but also considerably higher than 25.000 EUR, which lowers and heightens the costs accordingly: For an amount in dispute of 2000 EUR procedural costs and lawyers' costs without costs for evidence would be about 1000 EUR, for an amount in dispute set at 15.000 EUR about 4000 EUR have to be calculated. This rises to 6.800 if the amount in dispute is set at 40.000, and to 9.500 EUR, if the amount in dispute is set at 75.000 EUR.

### **What is the amount of procedural duty or fee to be paid for an appeal (in EUR)?**

For the second instance (Berufung), if applicable, procedural costs and lawyers' costs without costs for evidence would be about 5.800 EUR, but may also rise up to 7700 EUR.<sup>4</sup> For the third instance (Revision), if applicable about the same amount applies.

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2 UfU research. For the following period, 2007 to date, no in-depth-research is available yet.  
3 as before.

4 Measures on access to justice in environmental matters (Article 9(3)), Country report for Germany, prepared for the European Commission, 2007, section 2.2.4.

Again these numbers relate to an estimated amount in dispute of 25.000 EUR, the actual costs can be lower or considerably lower or higher if another amount in dispute is set by the court in charge.

### **Who pays the aforementioned procedural duty or fee?**

As the loser-pays-principle applies, the defeated party has to bear these costs and also to reimburse the winning party's costs for legal representation by a lawyer. The amount for reimbursement of cost of legal representation is capped by limits set by law, and varies in relation to the amount in dispute (see above). Estimations name an amount between 700 EUR and 2500 EUR for the first instance, 900 EUR up to 3000 EUR for the second and between 900 EUR and 2000 EUR for the third instance, if applicable, all figures related to an amount in dispute of 25.000.<sup>5</sup>

### **Is there a waiver or an allowance, based either on the nature of the case or on personal characteristics of the appellant?**

No waivers or allowances apply in terms of environmental issues or environmental organizations.

### **Who bears the costs of evidence in the procedure?**

The party bringing an expert report or other evidence must bear the cost and is not automatically reimbursed even if their claim is successful finally, here the loser pays principle does not apply. However, the court can decide that the defeated party must bear the costs of evidence of the other party completely or in part.

### **How much is approximately the total cost of evidence in a typical environmental administrative judicial procedure (in EUR)?**

No reliable data available. According to our own estimations, cost of evidence in form of expert opinion is hardly available under 5.000 EUR and likely to range up to 25.000 EUR on average. In extensive cases, when several experts are needed for different matters the amounts may be significantly higher.

### **To what extent does the "loser pays principle" prevail in such procedures?**

This principle applies for the procedural duties and fees and, up to the limits set by law, which vary in relation to the amount in dispute, for the costs of legal representation. It does not apply for the costs of evidence which – in general - have to be borne by the party bringing the evidence without reimbursement. However, the court can decide that the defeated party must bear the costs of evidence of the other party which may cause costs which exceed the fees and duties and representation's costs by far.

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5 as before.

## b) Civil<sup>6</sup> judicial procedure

For civil procedures, a similar system applies, resulting in similar costs which are difficult to estimate in advance due to the discretion of the courts in charge to set the amount of dispute. There are several possibilities to sue e.g. polluters or other stakeholders in the frame of civil judicial procedures. However, the most powerful tool of environmental organizations under German legislation up to now remains suits before administrative courts. Civil procedures, if any, don't play a significant role so far.

## c) Legal aid

### Is there a state supported scheme in your country for providing legal assistance in administrative or judicial procedures? Who can use such legal aid?

According to § 116 ZPO (Zivilprozessordnung/Code of Civil Procedure) and § 166 VwGO (Verwaltungsgerichtsordnung/Code of Administrative Procedure)

- individuals
- as well as legal personalities (i.e. also environmental organizations)
- when they are based or resident in Germany or in a Member State of the EU or EEA.

**Individuals** must show that they lack the financial resources to participate in a law suit without legal aid and that the suit or defence they intend to pursue has sufficient prospects of being successful and is also not abusive.

Additionally to that, legal personalities like **environmental organizations** must also show that failing to pursue the action would be contrary to the public interest.

However, **in practice** the possibility that environmental organizations may claim legal aid in environmental matters has no relevance so far, as up to now there seems to be no example where legal aid has ever been granted in a case brought by an environmental organization. One reason for that may be that the courts in charge to define whether a person or association meets the criterion "lack of resources" set up overly strict standards.

In 2008<sup>7</sup>, the OVG Muenster (Higher Administrative Court of North Rhine-Westphalia) ruled for example that an application for legal aid launched by an environmental organization was undue because the organization had lacked to build up a financial reserve for legal purposes in the past and could also try to raise funds especially for the case it wanted to bring to court.

The organization was declared as not lacking funds unless it spent the whole of its present funds on the court case. Moreover, according to the court also the personal wealth of the organization's members should be taken into consideration before legal aid was to be considered.

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6 Civil judicial procedures are court procedures where the legality of a natural or legal person's conduct is decided by a court of law, based on the motion of a plaintiff against the natural or legal person as a defendant.

7 OVG Muenster, decision of april 30, 2008 – 8 D 20/08.AK.

## **NEW**

### **Who can provide legal aid (e.g. can NGOs be legal aid providers)?**

Before end of June 2008, the provision of legal aid was the exclusive privilege of lawyers formally exercising this profession with expressive permission of the authorities in charge. Anyone else, even active legal professionals such as judges, risked prosecution when providing legal aid outside of this narrow legal framework which was introduced to the German law system in the 1930s.

However, with the reform of 2007/2008, this situation has changed completely and for the better. Since then, the new law provides the possibility to provide professional and non-professional legal aid in a variety of cases that do correspond with today's practice and needs. There even is a clear privilege given to forms of charitable legal aid, as provided by human-rights organizations and similar or Law Clinics. NGOs can be legal aid providers.

### **Is legal aid frequently used in environmental cases?**

No. Unlike in other fields like migration law, ad hoc or institutionalized charitable legal aid or pro bono actions by lawyers have no tradition in the field of environmental matters, and even if some experts in the field do agree on reduced rates in some cases, lawyers specialized on environmental law are rare and therefore expensive.

## **III. Country evaluation**

### **Which are the most significant [a) administrative, b) administrative judicial, c) civil judicial] procedures in your country in the protection of the environment?**

In Germany, administrative judicial procedures are the most significant procedures in the protection of the environment. In some cases, also an administrative procedure may be relevant to start a procedure, e.g. when residents seek measures against harmful noise. Civil judicial procedures so far are not relevant in the protection of the environment.

### **According to your evaluation, does your country meet the requirements of the Aarhus Convention regarding expenses of seeking administrative and/or judicial remedies? What arguments support your above position? What recommendations can you formulate in this matter?**

According to our evaluation, Germany could do far better in meeting the requirements of the Aarhus Convention regarding expenses of seeking remedies. In practice, it is very difficult to foresee the cost of an action, and already average costs force individuals as well as environmental organizations to spend an amount of resources on a single court case which is enormous compared to their regular income. For environmental organizations this situation means that going to court is no option but for the most intolerable breaches of environmental law - the vast majority of relevant cases cannot be reinforced, even if this would be more than justified. Apart from this, the resources bound by a single case often paralyze a good deal of the rest of the work of an organization.

We recommend changing this situation for the better by abolishing judicial costs in environmental cases altogether or introducing fixed rates at a low level so that costs can be estimated reliably. Costs of evidence should also be considered as a factor inhibiting the reinforcement of environmental regulations and legal aid schemes should be provided.

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