

The Aftermath of the Trianel Case

Germany

Case Study

Justice and Environment 2011

The Aftermath of the Trianel Case

Germany

Case Study

BUND/Trianel judgment - Outcomes by February 2012

I. The case at EU level

Case C-115/09 before the Court of Justice of the European Union

The case was referred to the CJEU by the Higher Administrative Court of North Rhine-Westphalia. The referring court asked the CJEU for a preliminary ruling on the interpretation of Article 10a of Council Directive 85/333/EEC, i.e. the EIA-Directive as amended by Directive 2003/35/EC, i.e. the Directive on Public Participation.

The CJEU had to examine whether the Environmental Appeals Act which Germany had enacted in order to implement the Directive on Public Participation would grant environmental organisations access to justice in accordance with the Directive.

In its judgment, the CJEU found that the German legislation, by setting up an additional requirement, interfered with adequate access to justice as guaranteed by EU law and the Aarhus Convention.

In its current version, the German Environmental Appeals Act determines that environmental organisations can only bring actions on grounds of the violation of legislation which confers individual rights. The concept that a case can only be brought to court if individual rights explicitly granted by legislation are at stake is a major principle of German procedural law. However, in the field of environmental conservation, legislation often does not confer rights to individuals but provides for nature protection as such or for the public interest e.g.

As a consequence, if a project violates legislation on nature conservation providing for the public interest only, according to the Environmental Appeals act, nobody has standing to ask for a remedy in court.

The CJEU ruled that, at least if legislation derived from EU law is concerned, Germany cannot keep up the requirement that standing of environmental organisations depends on the individual rights concept.

As a consequence of the judgment, Germany has to change its Environmental Appeals Act accordingly. Until this is done, the CJEU declared the Directive on Public Participation directly applicable. For the underlying case this meant that the applicant, BUND/Friends of the Earth, has standing and the referring court could decide upon the material questions of the case.

II. The case at the national level

Case 8 D 58/08.AK before the Higher Administrative Court of North Rhine-Westphalia

Applicants to the main proceedings in the national court case are BUND/Friends of the Earth as applicant and registered environmental organisation. Defendant is the district authority of Arnsberg. Intervening party is the Trianel Company which wants to construct and operate a coal-fired power plant.

BUND/Friends of the Earth challenged the permissions issued by the district authority of Arnsberg for the construction and operation of the Trianel power plant and pleaded the violation of several laws protecting the environment. One major argument was that the project would have a significant negative impact at a Natura 2000 site close by and thus not be in accordance with legislation derived from the Habitats Directive.

After the CJEU's judgment, the Higher Administrative Court of North Rhine-Westphalia took up the main proceedings. On December 1st, 2011, after a three-day court hearing the court lifted the permissions issued by the district authority of Arnsberg. The court held that the impact assessment provided by the Trianel Company could not show that the project would not significantly harm the Natura 2000 site close to the project.

III. Outcomes by February 2012

- Implications of the CJEU's BUND/Trianel judgment

Germany is still in the process to change its Environmental Appeals Act. Until the changed act comes into force, registered environmental organisations can rely on their right to access to justice directly on grounds of the Directive on Public Participation. There is a discussion on how Germany should implement the necessary amendment to the Environmental Appeals Act. A simple solution in favor of a wide access to justice would be simply to omit the phrase which introduces the additional requirement "individual rights". As a consequence, environmental organisations would have standing when they can bring forward the violation of environmental legislation, regardless whether this legislation derives from European law or is founded in national protection regimes. A more restrictive approach would be to lift the "individual rights" requirement only regarding legislation deriving from EU law, and keep it up for national legislation. In this case, access to justice would be less wide and at least the question whether the standards of the Aarhus Convention are met would arise.

- Implications of the main proceeding's outcomes

The decision to lift the permissions issued for the construction is final in terms of the permissions already issued. However, according to German administrative law, new permits on the same issues can be issued any time if the conditions for the permission are met subsequently. This means, if Trianel can prove by a new impact assessment that the Natura 2000 site close to the project was not harmed significantly by new evidence or because of additional measures to avoid such harm, the authority in charge is free to issue a new permit if Natura 2000 legislation is met according to their judgment. If the district authority of Arnsberg would issue new permissions for the project, BUND would have to challenge these again.

Contact information:

name: Alexandra Tryjanowski
organization: J&E
address: Greifswalder Str. 4, D-10405 Berlin
tel/fax: 49 30 4284 99 333/49 30 42 8004 85
e-mail: info@justiceandenvironment.org
web: www.justiceandenvironment.org

The Work Plan of J&E has received funding from the European Union through its LIFE+ funding scheme. The sole responsibility for the present document lies with the author and the European Commission is not responsible for any use that may be made of the information contained therein.

