Study on the implementation of article 9.3 and 9.4 of the Aarhus Convention - Denmark

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A. Environmental legislation, administration and courts

Environmental legislation

Danish environmental law is based upon a number of sectoral laws dealing with specific environmental issues – largely based upon the structure created in the early 70'es. In a 1991 environmental law reform a number of smaller acts were merged into three main pieces of legislation: The Environmental Protection Act, The Nature Protection Act and The Planning Act. These acts, however, continues to be supplemented by a long list of other legislation, e.g. the Watercourse Act, the Water Supply Act, the Soil Pollution Act, the Chemicals Act, the Forest Act, the National Parks Act, the Act on Environmental Damage, the Act on Environmental Assessment and the Act on Environmental Objectives. Environmental legislation in Denmark is thus characterised by a high level of complexity and the lack of a clear and coherent structure.[1]

Polluting activities are in general regulated in the Environmental Protection Act through general prohibitions/restrictions and permit procedures. Environmental impact assessment procedures are, however, incorporated into the Planning Act, whereas strategic environmental assessment procedures are governed by the Act on Environmental Assessment. The Planning Act establishes a decentralised physical or land use planning system together with a general protection of the countryside through the so-called rural zone permit system for different activities. The Nature Protection Act includes a general protection of specific nature types (habitats) and landscape elements, including a 300 m shore protection zone, as well as the possibility of adopting individual nature conservation orders for specific areas. The protection of Natura 2000 areas and Annex IV species of the EU Habitats Directive is embedded in a Statutory Order regarding assessment of permits and plans, in a notification and prohibition scheme under the Nature Protection

[1] In a 2011 Report of an Expert Committee re. the administrative appeal system the complexity of environmental legislation was identified as one of the major obstacles to an efficient and well-functioning administrative appeal system.

Act and the Forest Act, and in a requirement of the Act on Environmental Objectives to draw up so-called Natura 2000-plans for each Natura 2000 site. The Act on Environmental Objectives also forms the basis for the elaboration of river basin management plans in accordance with the EU Water Framework Directive.

There are no provisions in the Danish Constitution regarding protection of the environment or ensuring an appropriate livelihood. As regards access to justice it follows from Sec. 63 of the Constitution that any question about the limits of public authority can be brought to the courts.

System for decision-making and administrative appeal

Environmental decision-making in Denmark mainly rests with the local authorities, i.e. the 98 municipalities (or municipal councils). With effect from 1.1.2007 a local government reform reduced the number of municipalities from 271 to 98. At the same time the 13 regional/county councils were abandoned and replaced by 5 regions. The municipal councils and the new regional councils are independent authorities established by local elections. Thus, there is no subordinate relationship between the national, regional and municipal authorities. The legislation may, however, provide the Minister for the Environment with certain powers to control or call-in decision-making of the municipalities. This is in particular the case in relation to municipal (and regional) planning where the Minister may either call-in decision-making powers or adopt a national planning circular with binding effect on lower level plans. The Minister may use such powers to safeguard national interests. Furthermore, the State Supervisory Authority[2] has certain powers to control or supervise the exercise of local government

While the county councils previously had a number of environmental responsibilities, including regional planning, water resource planning and nature protection, the new regional authorities since 1.1.2007 only have very limited powers in environmental matters related to regional development plans, raw materials planning and mapping of soil pollution. Most environmental decision-making were as a consequence of the local government transferred to the municipalities.

The Ministry for the Environment were assigned certain additional powers as a consequence of the local government reform. The Ministry for the Environment is now responsible for the drawing up of river basin management plans and Natura 2000 plans and it also deals with permits and environmental impact assessment for certain large scale activities. Furthermore, the administration of the 300 m shore protection zone rests with the Ministry for the Environment. The Ministry for the Environment consists of a central administration, including the Danish Nature Agency (Naturstyrelsen) and the Environmental Protection Agency (Miljøstyrelsen) in Copenhagen and a number of local units.

Denmark has a specific system of administrative appeals in environmental matters. In general decisions made by the municipalities and most decisions made by the Ministry

[2] Formed by five regional units (regionale statsforvaltninger), cf. Act no. 542/2005 (lov om regional statsforvaltning).

for the Environment can be appealed to the Nature and Environment Appeals Board (Natur- og Miljøklagenævnet). Which decisions that can be appealed to the Board and by who is determined in the relevant piece of legislation. In a few situations administrative appeal is cut off, this includes decisions regarding waste plans, waste water plans, certain notification schemes and hunting decisions.

In general, there is a broad access to administrative appeal by individuals as well as NGOs. It should, however, be noted that environmental decision-making not embedded in legislation under auspices of the Minister for the Environment in general cannot be appealed to the Nature and Environment Appeals Board. This is particularly relevant for certain offshore activities that are governed by legislation under the Minister for Transport or the Minister for Climate and Energy – such as coastal defence works or offshore energy installations. Decision-making regarding offshore energy installations can in general be appealed to the Energy Appeals Board,[3] whereas no similar appeal board exists regarding other offshore activities not governed by environmental or energy legislation.

The Nature and Environment Appeals Board (Natur- og Miljøklagenævnet) was established by law on 1. January 2011[4] as a result of a merger between the former Nature Protection Appeals Board (Naturklagenævnet) and the Environmental Protection Appeals Board (Miljøklagenævnet). The Nature and Environment Appeals Board is organizationally part of the Ministry for the Environment, but it operates independently from instructions from the minister, cf. § 1(2) Act no. 483/2010. The Board may be considered a court in the sense of TFEU article 267 and as elaborated in C-205/08. There are, however, so far no examples of a preliminary ruling being brought by the Appeals Board (or its predecessors). Whether the Board is also to be considered a court in the sense of the European Human Rights Convention has not been officially confirmed by the Danish authorities.

The Nature and Environment Appeals Board is a so-called 'combination board' in the sense that the composition of the board may differ from one type of case to another. In essence the new board has two distinct configurations: 1) a lay configuration as in the former Nature Protection Appeals Board and 2) an expert configuration almost equal to the former Environment Protection Appeals Board. It is possible that in special cases the two board configurations may join into one combined board. It is also possible that an appeal case in special circumstances may be transferred from the lay board to the expert board and vice versa. The lay board consists of a chairman (permanent staff qualified as judge), two Supreme Court judges and seven members appointed by Parliament. The expert board consists of a chairman and a number of experts - normally two or four. The lay board mainly deals with appeals related to planning and nature protection, while the expert board mainly deals with appeals related to pollution and chemicals. The board has a fairly wide discretion to delegate decision-making to the chairman. The Appeals Board can in most cases make a full review, including both matters of legality (lawfulness) and

[3] The Energy Appeals Board is composed of a chairman and a number of expert members depending upon the type of case. The Board deals with appeals regarding e.g. the Electricity Supply Act, the Act on Renewable Energy and the Act on CO_2 quotas.
[4] Act no. 483/2010 with later amendments (Lov om Natur- og Miljøklagenævnet).

discretion. The powers of the board are reformatory and they can in most cases replace the decision with a new decision. However, the general principle of "two instance review" means that the Board will often remit an unlawful decision back to the first instance authority making a second appeal to the Board possible. With effect from 1. August 2012 a new provision in the Act on the Nature and Environment Appeals Board intends to reduce remittal from the Board making remittal the exception rather than the main rule.

The Parliamentary Ombudsman also provides an opportunity to challenge an administrative decision. The Ombudsman may raise cases on his own initiative or respond to complaints being brought to him, cf. the Ombudsman Act.[5] The Ombudsman determines whether a complaint should lead to further investigations in a case. It is a requirement that the options for administrative appeal have been exhausted before bringing a case to the Ombudsman. The Ombudsman cannot make decisions with legally binding effect. He can raise criticism of and make recommendations to the authorities.

Complaints regarding the supervisory powers of local and regional authorities can be brought to the State Supervisory Authority. The State Supervisory Authority may receive complaints regarding municipal and regional authorities – but only if there are no options for administrative appeal, cf. Act on Municipal Government.[6] The State Supervisory Authority determines whether a complaint should lead to further investigations. The Supervisory Authority may review the legality of acts or omissions. The Supervisory Authority may issue a guiding opinion on the matter – it cannot replace the decision in question. It may, however, annul or suspend clearly illegal decisions. Furthermore, the State Supervisory Authority may report serious breaches of law by the municipal councils to the prosecutor or the prosecutor may himself initiate a case.

The role of the courts

Denmark has a system of general courts that deals with both criminal and civil cases, including cases challenging administrative decisions. There is no constitutional court and there are no general administrative courts although administrative courts can be established according to the Danish Constitution. Consequently there are no specialized environmental courts in Denmark. As mentioned above there are, however, specialized administrative appeal bodies or tribunals that to a large extent are comparable to environmental courts.[7]

The general court system since 1.1.2007 consists of 24 district courts, two high courts (the Eastern and Western High Court) and one Supreme Court. As a consequence of the 2007 court reform all cases will start in the district courts. A district court may, however,

[5] Act no. 473/1996 with later amendments (lov om Folketingets Ombudsmand).
[6] Consolidated Act no. 1440/2010 with later amendments (lovbekendtgørelse om kommunernes styrelse).
[7] See e.g. Anker, H.T. & Nilsson, A.: 2010: *The role of courts in environmental law – Nordic Perspectives*, Journal of Court Innovation, 2010:3(1) p. 110-120 and Anker et.al: 2009: The Role of Courts in Environmental Law – a Nordic Comparative Study, Nordic Environmental Law Journal 2009 pp. 9-33.

refer cases on matters of principle or more complex issues to the Eastern or Western High Court.

The more specific composition or configuration of the courts depends upon the type of the case, e.g. a criminal case or a civil case. The Supreme Court consists of one president and 15 Supreme Court judges. Court rulings are made by a minimum of five judges. The Eastern High Court consists of one president and 56 judges, whereas the Western High Court consists of one president and 36 judges. The high court cases are in general decided by three judges. In criminal cases laymen or juries may supplement the court judges. The district court cases are normally decided by one judge. In more complicated or important civil and administrative cases three judges may participate in the case. In criminal cases two laymen or six jury members may supplement the district court judge(s).

In administrative matters the role of the courts is to oversee the public authorities. This includes judicial review of the legality or lawfulness of administrative decisions or omissions, i.e. matters regarding legal basis, competence, procedure and compliance with general principles of law. Review of the merits or discretionary elements of administrative decisions is in principle not entirely excluded, but the courts are very reluctant to review the discretionary powers of administrative authorities. This is in accordance with § 63 of the Danish Constitution stipulating that the courts oversee the limits of public authorities. The courts apply the so-called adversarial system relying on the claims and material presented by the parties. The court may, however, ask the parties to elaborate on matters that it finds important to the case.

There is in general no requirement that the possibilities of administrative appeals shall be exhausted before bringing a case to the courts. Most environmental legislation stipulates that claims shall be brought to the courts within six months from the announcement of the decision.

The Milieu study 2007

Milieu-study

The Danish part of the Milieu study 2007 provides a very general introduction to and overview of the rules on access to justice in the administrative appeal system and in the judicial system, including a fairly detailed overview of provisions on legal standing within the administrative appeal system.

As of 1.1.2007 there has, however, been a major court reform reducing the number of district courts significantly and making them the general first instance court also in administrative matters. Before the court reform appeals against the decisions of the administrative appeals boards were submitted to the high courts.

Within the administrative appeal system the two former appeal boards have been merged into one Nature and Environment Appeals Board with effect from 1.1.2011. This merger has not lead to major changes in the administrative appeal system apart from a few

changes regarding procedures and fees. However, a proposal for additional amendments of the legislation was adopted by Parliament in June 2012.[8] The purpose was to make administrative appeal more effective, e.g. by encouraging the first instance authority to reconsider the decision in view of the appeal and to increase digital communication. It has also been stipulated that the appeals board may limit its review to those issues that have been raised in the complaint and also to the most significant issues. This provision makes it clear that the appeal board is not obliged to make a full review of all aspects and conditions of e.g. an environmental permit. The Appeals Board is, however, obliged to review compliance with the requirements of EU law. On the other hand it has been emphasised that the appeals board should only in specific circumstances remit a decision back to the first instance authority and if they do so the board should guide the first instance authority in order to avoid a second appeal to the board. The amendment also included changes regarding the fees, the standard fee of 500 DKK will apply to all appellants and the 3000 DKK fee for NGOs has been abolished. The standard fee will, however, be subject to inflation indexation.

The amendment is based on the recommendations of a so-called Expert Committee on the Administrative Appeal System in Environmental Matters who delivered a report in May 2011.[9] The background for the establishment of the Committee was an increasing dissatisfaction with quite long delays in many appeal cases, in particular within specific areas such as environmental permits for livestock installations. The Expert Committee made a number of recommendations on adaptations of the existing system with the purpose to make administrative appeals more effective – most of which were included in the abovementioned amendment of the legislation in June 2012. The Expert Committee, however, also pointed at a need to reconsider the structure and function of the Nature and Environment Appeals Board, e.g. to ensure a greater legitimacy in the expert composition of the board, and to reconsider the appeal system regarding supervisory decisions. Furthermore, the Expert Committee pointed at the need to consider a new environmental law reform as the increasing number of administrative appeal cases to some extent can be explained by the increasing complexity and incoherence in environmental legislation.

B. Standing

Standing for the public concerned

General questions

[8] L147, FT 2011-12 (Forslag til lov om ændring af lov om Natur- og Miljøklagenævnet og forskellige andre love).
[9] Reform af klagesystemet på natur- og miljøområdet – afrapportering fra de eksterne ekspertudvalg vedrørende klagesystemet på natur- og miljøområdet, 2011.

In Denmark it is necessary to draw a distinction about the rules that apply in the general court system and those that apply in the administrative appeal system although they are to some extent interlinked, e.g. on the question of standing.

The general terminology regarding standing or access to justice in Denmark is the concept of "legal interest." In relation *to court procedures* the concept of legal interest is not defined in legislation, but it is most often interpreted as having a sufficient individual and significant interest. This does not, however, exclude standing for organizations. There is no *actio popularis* in Denmark giving everybody access to courts. Thus, the courts may determine on a case by case basis whether a claimant has a sufficient legal interest. Apart from demonstrating an affected interest (or a certain connection) the claim should also be sufficiently clear and suitable for judicial review. More abstract claims will normally not be admitted. It is to some extent accepted that the group of persons and NGOs that have a right to administrative appeal will also be considered to have a sufficient legal interest to bring the case to the courts. In general the courts do not examine the question of standing ex officio as it relies on the claims brought forward by the parties to the case (the adversarial system). If the question of standing is raised in a court case, the court may make a preliminary ruling regarding standing.

In relation to *administrative appeal* in environmental matters the legislation specifies who has access to appeal to the Nature and Environment Appeals Board. The legislation was amended and to some extent streamlined in 2000 with the purpose to implement the Aarhus Convention.[10] The Appeals Board shall in each case determine whether the criteria are met and dismiss the case if they are not.

The rules on who has access to administrative appeal differ from one area to another. In general, the Appeals Board makes a full review of the case including both the substantive and procedural legality of the decision as well as more discretionary matters. In a few matters, e.g. regarding spatial planning, the review is limited to legality issues only – excluding more discretionary elements regarding the merits of the case. In 2011 administrative appeals regarding river basin management plans and Natura 2000 plans were restricted to issues of procedural legality – apparently in an attempt to avoid additional delays in the river basin planning process.[11]

The standing criteria used in the legislation are not dependent upon the type of remedy available. There are no specific standing criteria for environmental cases that concern EU law as opposed to those that do not. However, the Appeals Board as well as the courts should interpret the standing requirements in accordance with EU law and the Aarhus Convention. There are no examples of appeal board cases or court cases in which a direct reference is made to the standing requirements of EU law and the Aarhus Convention.

Within the administrative appeal system it is the decisions of the authorities that can be appealed to the Appeals Board. The Appeals Board has in some cases taken a restrictive

[10] Act no. 447/2007.
[11] Act no. 553/2011. In February 2012 a draft proposal to entirely remove access to administrative appeal of river basin plans was sent out for consultation but withdrawn immediately afterwards.

view on what could be considered to be a decision and have introduced a concept of "non-decisions" that cannot be subject to appeals. An example is notification schemes according to which an activity shall be reported to the authorities and can be carried out if the authority does not react within a specified time limit, e.g. four weeks. The Appeals Board has in such cases rejected appeals even though the "acceptance" of the authority has been formulated as a formal decision.[12] In other cases it is possible to appeal more indirect decisions as well as the failure (or omission) of an authority to enforce the legislation, e.g. by accepting a building project that contravenes a local plan. In general, however, supervisory decisions of the authorities cannot be appealed to the Nature and Environment Appeals Board.

The following sections focus on the specific rules regarding access to administrative appeal to the Nature and Environment Appeals Board. It is as mentioned above likely that the courts will accept that those having access to administrative appeal will also have legal standing before the courts.

Third party intervention is not subject to specific rules within the *administrative appeal system*. The Appeals Board will normally deal with all timely submitted complaints regarding the same administrative decision in one appeal case. As mentioned above the Appeals Board also has the option to combine complaints regarding different decisions on the same matter into one appeal case. Furthermore, the Appeals Board may ask e.g. relevant authorities or institutions to provide information relevant to a case and the board may also invite other interested parties to participate in on-site inspections. Such on-site inspections or meetings are open to the public unless the board decides otherwise – on private land, however, only with the acceptance of the landowner.[13]

The *court system* allows for third party interventions, cf. Act on Administration of Justice §§ 251-252. A third party may intervene in a first instance case by submitting a claim to the court if this will not cause significant inconvenience to the parties. A third party, including a public authority with a significant interest, may also intervene to support one of the parties in the case. The court determines whether the intervention can be accepted.

Standing for individuals

Legal standing for individuals is generally interest-based in the sense that persons representing an interest protected by the relevant piece of legislation will have access *to administrative appeal*. The interest-based approach is reflected in the different rules on administrative appeal and in their application in practice. Thus, legal standing for individuals may vary from one piece of legislation to another. A quite broad understanding of the concept of "legal interest" is to be found in matters regarding physical planning in the Planning Act. As the planning process is based on broad public participation requirements individuals do not need to demonstrate a particular interest in administrative appeals and there is no requirement that they should have raised their voice in consultation

[12] This has been criticized both in view of administrative law and in view of EU law and the Aarhus Convention, see Pagh, P., 2011: Er en stiltiende tilladelse en ikke-afgørelse?, Juristen 2011/5 pp. 166-172.
[13] Cf. Statutory Order 773/2012 (Bekendtgørelse om forretningsorden for Natur- og Miljøklagenævnet).

procedures. They should, however, be able to document some kind of connection to the local area. An almost equally broad understanding is applied in relation administrative appeals in EIA matters. However, the same criterion of "legal interest" in the Planning Act is understood more narrowly in relation to e.g. rural zone permits as being affected in a different way than a broader group of citizens. The Environmental Protection Act stipulates an even narrower criterion of having "an individual, significant interest," whereas the Nature Protection Act only grants access to administrative appeal to the addressees (or others pertaining to a status as a party to the case). The reasoning for not granting access to administrative appeals for neighbours is that the Nature Protection Act does not safeguard the interests of neighbours and other individuals. On the other hand local (and national) organizations or groups have access to administrative appeal under the Nature Protection Act.

Actions for damages or other private law suits can be brought to the courts by the plaintiffs (or organizations representing the plaintiffs). Private action against activities that contravene public law requirements is generally not possible. One exception is the possibility for private action against activities that contravene provisions in a local plan, cf. Planning Act § 62 – there are, however, no reported cases. It is possible for individuals to report unlawful activities to the authorities and to the prosecutor. The lack of opportunity for private individuals to take private action against unlawful activities was discussed by the Compliance Committee in ACC/C/2006/18 in a case brought by an individual citizen regarding the culling of wild birds by the authorities.[14] The Committee was "not convinced that the lack of opportunity for the communicant to initiate criminal procedure in itself amounts to non-compliance by Denmark." The Committee, however, relied upon the limited case law ensuring standing for NGOs in such situations and stressed the importance of applying such an approach as a "minimum standard of access to justice in cases relating to the protection of wildlife."

Standing for groups

Legal standing for groups representing individuals is generally accepted both within the administrative appeal system and in within the court system. Within the administrative appeal system, however, the rules differ from one piece of legislation to another. Under the Planning Act local groups representing individuals are accepted as having a "legal interest" and the Nature Protection Act refers to "local organisations having a significant interest."

The courts apply a fairly liberal approach to groups or organizations representing individuals and generally accept such groups as having a sufficient legal interests depending upon the individual interests being represented. Group or class actions on behalf of the interests of a group of persons have since 1.1.2008 been possible according to the Act on Administration of Justice Chap. 23a.

[14] About the case see Pagh, P., 2008: Kan grønne organisationer håndhæve miljøkrav, Tidsskrift for Miljø 2008/280 pp. 496-500.

Standing for environmental NGOs (e-NGOs)

The implementation of the Aarhus Convention in 2000 included amendments to most environmental legislation stipulating the right of administrative appeal for NGOs. In general, nationwide NGOs having protection of nature and environment or recreational interests as their main purpose have access to administrative appeal. It is a requirement that the organization can present bylaws that document such a purpose. According to the Planning Act a nationwide organization shall represent at least 100 members. A similar requirement does not apply according to the Environmental Protection Act or the Nature Protection Act.

Local organizations or groups generally also have access to administrative appeal, however, with some variations from one area to another. According to the Environmental Protection Act local organizations shall have requested to be notified about decisions in order to have access to administrative appeal. This is not a requirement according to the Nature Protection Act and the Planning Act.

Apart from environmental NGOs certain specified interest or business organizations may have access to administrative appeal as specified in the relevant piece of legislation.[15] Foreign NGOs are not explicitly referred to in the legislation as having access to administrative appeal. The Nordic Environmental Protection Convention from 1974 explicitly recognizes the principle of non-discrimination and grants persons from the Nordic countries affected by a decision under the Danish Environmental Protection Act access to administrative appeal on equal terms. Whether foreign NGOs can raise a claim in the courts will most likely depend upon whether the NGO is affected or represents a sufficient legal interest in the case.

Case law of the Danish courts regarding NGO access is somewhat limited. The courts appear to have a fairly liberal attitude regarding standing of NGOs and as mentioned above they do not consider standing ex officio. A few cases have, however, been dismissed on the basis that the claim presented by the NGO was not suitable for admission to the court, e.g. being too abstract or hypothetical. The most known court cases dealing with NGO standing includes:

V.L. B-2938-10 (Østerild): An ad-hoc organization (National Organisation for a Better Environment) was (together with individually affected individuals) accepted as having right of appeal against an Act on a national wind turbine test center (647/2010). The court made reference to the number of members (more than 200), to objections raised during the parliamentary process, and to the fact that the organization would have had right to administrative appeal if the test center had been established by an administrative decision. The court rejected the granting of suspensive effect. The rejection of suspensive effect was appealed to the Supreme Court (U2012.2572H) that in May 2012 also rejected the granting of injunctive relief.

[15] The Milieu Study on Denmark provides a detailed table regarding standing in administrative appeal of organizations and others.

U2009.2706H/MAD2009.1612H (Kyndby Huse): The right of appeal of an ad-hoc citizen group (Citizens for Offshore Turbines in Marine Areas in its own and as representative of individual citizens) against the Nature Protection Appeals Board regarding EIA-decisions for two test turbines on land was not disputed, but their claim was unsuccessful (costs: 250.000 DKK). In U2009.1785H the claim of the organization against the project developer was dismissed as the project was abandoned.

U2005.2143H/MAD2005.537H: The Supreme Court dismissed the claims raised by a citizen group against the Metro Company as not being sufficiently precise.

MAD2004.1360Ø: A local citizen group claim against the Nature Protection Appeals Board regarding EIA of the Metro project was not granted suspensive effect

U2001.1594V/MAD2001.539V: The Western High Court acknowledged the right of appeal of the Danish Anglers Association regarding a decision to reintroduce beavers in Denmark.

MAD2003.602Ø: Standing of an ad-hoc local citizens group (Amager against Superfluous Malls) was not disputed, but they were unsuccessful in their claim against the Nature Protection Appeals Board regarding plans for a new shopping centre (costs: 50.000 DKK)

U2000.1103H./MAD2000.83H: A claim raised by the Danish Cyclist Association regarding lack of EIA of a road project was successful in the Supreme Court. The standing of the association was not disputed in the case and accordingly not discussed by the courts.

U1994.780Ø: Greenpeace Denmark was accepted as having a sufficient legal interest in a claim against the Ministry of Transport regarding EIA of the Øresund-bridge project.

C. The effectiveness of the judicial review

Suspensive effect of administrative appeals is determined in the relevant legislation and the rules differ from one area to another. In general, appeals regarding a prohibition or an order will automatically have suspensive effect, whereas appeals against permits etc. will normally not have suspensive effect – with permits under the Nature Protection Act as an important exemption. The Appeals Board may, however, determine otherwise in the individual case. The legislation does not specify the criteria for granting or lifting suspensive effect.

According to the Danish Constitution § 63 an appeal to *the courts* does not suspend an administrative decision. It has, however, been accepted that the courts in very special circumstances may grant suspensive effect, in particular with reference to EU law. Court practice regarding suspensive effect is very restrictive also in cases involving EU law.

In a case regarding the Act on a national wind turbine test center (Østerild) the Supreme Court in May 2012 (U2012.2572H) confirmed the ruling of the Western High Court refusing to grant suspensive effect stating that on the basis of a preliminary assessment there were not sufficient grounds for assuming that the entire Act was unlawful even though it could not be excluded that the requirements of the EU Habitats Directive art. 6(3) had not been complied with. The Supreme Court as the High Court explained that a decision on suspensive effect was to be based on a balancing of the public interests of not suspending the decision on the one hand and the nature and scope of harm suffered by the appellants on the other hand. On a preliminary basis considering the comprehensive environmental assessments carried out prior to the adoption of the Act, the Supreme Court did not find that there was reasonable ground to assume that the Act would be annulled. The Supreme Court also found that the public authorities had a significant interest in not postponing the implementation of the Act that was greater than the interest of the applicants in having the Act suspended.

Regarding the timeliness of administrative decisions or appeals there are no time limits specified in law for dealing with the appeal – apart from decisions on access to environmental information. In general, a decision shall be made within reasonable time by the administrative authorities and the Appeals Board. The Nature and Environment Appeals Board has introduced new procedures with the purpose to ensure more effective handling of appeals. The overall aim is that cases should be decided within 12 months as a maximum. The average time consumption in the Appeals Board varies within the different types of cases – in 2010 from about six months and up to almost two years. Some cases have, however, been pending in the board for even longer.

In court cases certain time limits are specified for the parties in delivering replies. A ruling of the court shall be given as shortly as possible after the end of the court negotiations – in district courts and high court appeals normally within four weeks, cf. Act on Administration of Justice § 219. There is no formal requirement in Danish legislation that administrative/judicial procedures should be effective.

There are no formal mechanisms to prevent frivolous applications in court cases. In relation to administrative appeal a recommendation from the Expert Committee to include a provision allowing the Appeals Board to reject appeals that are insignificant to the protection of nature and environment was not included in the pending proposal for amending the legislation.

Alternative dispute resolution is not common in environmental matters in Denmark. In civil cases first instance courts are normally obliged to seek a settlement between the parties in case, cf. Act on Administration of Justice § 268. The parties to a case may, however, also ask the court to appoint a mediator with the purpose of seeking an out of court agreement, cf. Act on Administration of Justice § 272. The parties shall pay the expenses. If an agreement is reached the court case can be lifted. Other types of alternative dispute resolution in environmental matters are not formalized.

D. Costs in the environmental procedure

Loser pays principle, court fees, costs for expert witnesses, etc.

Appeals to the Nature and Environmental Appeals Board are subject to a standard fee of 500 DKK (67 EUR). The fee will be reimbursed if the appellant is wholly or partly successful in the appeal. A 3.000 DKK (400 EUR) fee for organisations and other legal entities that was introduced by 1. January 2011 has been abolished by the new Government that came into power in November 2011. The 3.000 DKK fee was subject to a complaint to the Compliance Committee of the Aarhus Convention which in March 2012 found that the 3.000 DKK fee was in breach of Article 9(4) considering the intended purpose of the fee to reduce the number of NGO appeals and that the fee was considerably higher than fees for other quasi-judicial appeal bodies in Denmark.[16]

In court cases the court fees include a standard fee of 500 DKK (67 EUR) for bringing a case to the first instance court. If a case has a value of more than 50.000 DKK (6.700 EUR) an additional fee of 1,2 % of the value above 50.000 DKK shall be paid with a maximum fee of 75.000 DKK (10.000 EUR)for bringing the case to the courts. If the case proceeds to court negotiations an additional fee will be paid for cases with a value of more than 50.000 DKK: 750 DKK + 1,2 % of the value above 50.000 DKK. If a case is appealed a new fee will be calculated on the basis of the value of the case at that point including a standard fee of 750 DKK (100 EUR) in the high courts and 1.500 DKK (200 EUR) in the Supreme Court. Most court cases that challenge administrative decisions will not have a value that exceeds 50.000 DKK and the court fee will accordingly be low. However, apart from the court fees the parties to the case must pay the costs of e.g. expert opinions as well as lawyer fees. Both may be expensive.

In general the "loser pays principle" apply in court cases, cf. Act on Administration of Justice § 312. The court will in each case determine the costs to be paid by the losing party based on an estimate of costs for expert opinions and lawyers. The court may, however, in special circumstances decide that the losing party shall not pay the costs of the opponent. This could be the case if the opponent is a public authority or a big company or the case deals with a matter of principle. But, it very much depends on the specific circumstances and there are examples of private claimants being ordered to pay the costs of public authorities, e.g. U2009.2706H (250.000 DKK) and U2009.509Ø (200.000 DKK + 300.000 DKK in the district court). This has been criticized for not being in accordance with the Aarhus Convention in particular in cases where there is no option for administrative appeal.[17] It is likely that the risk of having to pay (parts of) the costs of the opponent may have a chilling effect on litigation – perhaps in particular litigation by NGOs.

Legal aid and other methods of public and private funding

It is possible to apply for "free process" (or legal aid), cf. Act on Administration of Justice. Normally, you have to fulfill certain criteria regarding maximum income (as of 1.1.2012: 289.000 DKK for a single income and 368.000 for a couple). In addition your

[16] Findings and recommendation with regard to communication ACCC/C/2011/57 concerning compliance by Denmark, 30 March 2012.

[17] Pagh, P., 2011: Behov for ændring af reglerne om sagsomkostninger i miljøsager, U.2011B.11.

case needs to be reasonably justified. More importantly in environmental matters it is possible that “free process” can be granted on the basis of special circumstances alone. This may be fulfilled in cases dealing with matters of principle or matters of general public importance. Individuals as well as groups or organizations may apply for “free process” on the basis of special circumstances. In April 2012 the appellants in the case on the national test center for wind turbines (Østerild) were granted “free process” in the court case(s) against the Ministry for the Environment.

Pro bono legal assistance can be provided by “legal clinics” or by law firms. However, this does normally not extend to environmental matters. There are no public interest environmental law organizations or law clinics in Denmark that offer legal advice to the public in environmental matters.

E. Examples

1. A permit decision concerning an industrial activity not covered by the Industrial Emissions Directive.

The permit decision is normally taken by the municipal council according to the Environmental Protection Act. There is no prior public participation for non IE-installations. A permit shall be made publicly available and appeals to the Nature and Environment Appeals Board can be submitted within four weeks together with payment of the fee of 500 DKK. Anybody with a significant, individual interest in the case can submit an appeal. Furthermore, local organisations safeguarding the environment or significant recreational interests may submit appeals if they have requested to be notified about permit decisions. Nationwide organisations safeguarding the environment or significant recreational interests may also appeal the decision. An appeal does not suspend the permit, unless the Appeals Board so decides. The Appeals Board makes a full review, including both procedural and substantive matters. It may replace the permit with a new permit or new conditions. The permit can also be appealed to the general courts within six months. The courts will review the legality (lawfulness) of the decision, but will normally not go into technical matters.

2. Complaints concerning an on-going waste deposit (landfill) in breach of national legislation.

Complaints concerning an on-going polluting activity shall be submitted to the municipal council as the supervisory authority. If the landfill has a permit the municipal council shall order the permit holder to bring the activity into compliance with the permit conditions. If the landfill is in breach with general requirements in national legislation the municipal council shall enforce the legal requirements by a direct order. Such supervisory decisions cannot be appealed to the Nature and Environmental Appeals Board, cf. § 69(4) of the Environmental Protection Act. If the municipal council decides not to intervene it is not quite clear whether such a decision can be appealed to the Appeals Board. The Appeals Board has in some cases accepted such appeals in relation to polluting activities that

do not have a permit, cf. §§ 41-42 of the Environmental Protection Act.[18] If an appeal cannot be made to the Appeals Board a complaint regarding non-intervention can be submitted to the State Supervisory Authorities or to the Ombudsman. Furthermore, a court case can be initiated by those having a sufficient legal interest. Environmental organisations are likely to be accepted as having a sufficient legal interest. Court fees shall be paid and there is a risk that the loser will have to pay (part of) the costs of the opponent.

3. A decision to undertake an infrastructural construction project which might have an effect on a Natura 2000 area.

A land-based infrastructure project will normally require an EIA-screening and/or EIA-permit, a local plan and/or a rural zone permit issued by the municipal council according to the Planning Act. Certain public infrastructure works are subject to a permit procedure according to the Nature Protection Act. Plans or permits under the Planning Act can be appealed to the Nature and Environment Appeals Board by a broad group of individuals and organisations, whereas permits under the Nature Protection Act can be appealed by organisations (and not by individuals). A sectoral permit may be required under the Roads Act – such decisions are subject to appeals to the Ministry of Transport. Major road projects are, however, decided by the ministerial agency or even by an Act of Parliament. Offshore infrastructure projects need a State permit from ministerial agencies and can only be appealed to the relevant Minister. However, permits regarding offshore energy installations can be appealed to the Energy Appeals Board by individuals having a significant, individual interest and by environmental NGOs on matters relating to EIA, habitat assessment etc. All permits can be appealed to the general courts.

4. A clear cutting operation (forestry) which threatens a protected nature reserve or a protected species.

Clear cutting of a forest which is to be maintained for forest purposes within a Natura 2000 area shall be notified to the State Forest Service/Nature Agency (if "fredskov") or to the municipal council. The authorities shall assess whether the clear-cutting may affect the protected habitats and species negatively and if so either make an agreement with the landowner not to cut the forest or issue an order with monetary compensation. Such decisions or assessments can be subject to appeals by organisations (not by individuals). If the authority decides that an assessment is not needed the Nature and Environment Appeals Board has ruled that this is a non-decision that cannot be appealed.

If the land is to be used for other purposes than forest land a number of permits may be required under the Forest Act and the Planning Act – and an EIA-screening and/or EIA-permit is required. Such permits can be appealed to the Nature and Environment Appeals Board.

[18] On the somewhat inconsistent practice of the Appeals Board see Pagh, P, 2012: Støjkrav – undersøgelsespligt og klageret, TfM 2012/32 pp. 69-77.

5. The competent authority has failed to establish an air quality action plan for a municipality in breach of EU air quality norms, or an action plan has been adopted but will not sufficiently reduce the risk of exceeding air quality limits.

The elaboration of air quality action plans rests with the Environmental Protection Agency (Ministry for the Environment), cf. Statutory Order 1326/2011. There is a public consultation procedure. But, there are no provisions for administrative appeal to the Nature and Environment Appeals Board regarding such plans. Claims regarding failure to establish a plan or include sufficient measures in an air quality plan can be submitted to the courts on the basis of an individual, significant interest, e.g. local residents. Claims submitted by environmental organisations are likely to be accepted by the courts. Court fees shall be paid and there is a risk that the loser will have to pay (part of) the costs of the opponent.

6. In an area with highly permeable soil, the competent authority has issued building permits for a number of holiday homes, all of which rely on individual systems to dispose of their waste-water. Following the discovery of E-coli or cryptosporidium in a local groundwater, some citizens/NGOs are concerned that the competent authority (1) has not attached sufficiently strict conditions with regard to individual waste-water systems to comply with EU water and/or waste legislation; (2) is not ensuring that individual systems are maintained so as to avoid contamination of the drinking water source; (3) has either no or no adequate remedial action plan or (4) has failed to recognise the vulnerability of the drinking water catchment.

The individual disposal of waste-water requires a permit under the Environmental Protection Act. Such permits can normally be appealed to the Nature and Environmental Appeals Board by individuals having a significant, individual interest in the case as well as by local and nationwide organizations. Small-scale permits for percolation of waste-water can, however, not be appealed to the Appeals Board, cf. Statutory Order 1447/2008 § 33.

7. The competent authority makes a derogation allowing the killing of individuals of a species of wild bird protected under the Wild Birds Directive (EC Directive 79/409/EEC) or of a species of large carnivore protected by the Habitats Directive (EC Directive 92/43/EC). There are allegations that the derogations in the Nature Directives are unlawful in the light of the case law of the CJEU.

The killing of wild birds and carnivores is regulated under the Hunting and Game Management Act. Permit procedures for certain very specific derogations allowing the killing of wild birds or carnivores are laid down in Statutory Order 259/2011. In addition the Nature Agency (Ministry for the Environment) may in other circumstances allow the killing of individuals of a species in accordance with the criteria of the Habitats Directive and the Wild Birds Directive. The Hunting and Game Management Act, however, does not stipulate that decisions under the Act can be appealed to the Nature and Environment Appeals Board – and this has not been specified in relation to derogation decisions either.

Decisions by the Nature Agency can only be appealed to the Minister. Alternatively, a decision can be appealed to the general courts.

F. Concluding remarks

The main problems in the Danish legal system regarding implementation of Article 9(3) and 9(4) are associated with administrative decisions or omissions that cannot be appealed to the Nature and Environment Appeals Board. In general, the Nature and Environment Appeals Board can be considered to fulfil the requirements of the Aarhus Convention providing an independent and in most cases full review of both procedural and substantive legality. The administrative appeal procedures are in general easily accessible and the costs are low. However, there may be some problems in relation to suspensive effect of appeals in some cases.

A few types of decisions adopted within environmental legislation cannot be appealed to the Nature and Environmental Appeals Board, e.g. derogations to kill species of wild birds or carnivores. Furthermore, there is some uncertainty as regards the possibility to appeal so-called non-decisions and omissions, e.g. related to the supervisory powers of the authorities, to the Appeals Board.

If administrative appeal to the Appeals Board is not possible an appeal can be made to the general courts. The courts in general have a liberal and pragmatic approach in relation to standing. A key problem regarding court procedures is, however, the potentially high costs – in particular the application of the "loser pays principle." This issue should be addressed preferably by an amendment of the Act on Administration of Justice or through the practice of the courts. Furthermore, the very restrictive practice regarding suspensive effect appears to be problematic in view of the Aarhus Convention.

Also in relation to the acts or omissions of private parties there are certain issues that have not been properly addressed in the present system. Even though anybody can report unlawful activities to the relevant authority or to the prosecutor, there are limited options for follow-up if the authorities or the prosecutor decides not to intervene. In general supervisory decisions cannot be appealed within the administrative appeal system and bringing a court case would require a sufficient legal interest in the case, e.g. suffering a damage.

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