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To:

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From:

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By:

Post and email

Brussels, 6 July 2011

Dear Ms. Smagadi

Communication ACCC/C/2008/31 Judgment of the European Court of the EU in case C-115/09

1. We would like to draw the attention of the Compliance Committee on the judgment of the Court of justice of the EU (CJEU) in case C-115/09 which has crucial implications in relation to communication ACCC/C/2008/31 made against Germany.

Background of the case

2. This judgment has been adopted following the reference for a preliminary ruling under Article 234 EC (now Article 267 TFEU) from the Higher Administrative Court for the Nordrhein-Westfalen Land in Germany ('the referring court') concerning the interpretation of Article 10a of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment¹. Article 10a of Directive 85/337 was inserted by Directive 2003/35² in order to align the former with Article 6, 9(2) and (4) of the Aarhus Convention.
3. The reference has been made in proceedings between the Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV (the Nordrhein-

¹ Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, P.40).

² Directive 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 (OJ L 156, p.17).

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Westfalen branch of Friends of the Earth, Germany; 'Friends of the Earth') and the Bezirksregierung Arnsberg (Arnsberg District Administration), concerning the authorisation granted by the latter to Trianel Kohlekraftwerk GmbH & Co. KG ('Trianel') for the construction and operation of a coal-fired power station in Lünen.

4. Within eight kilometers of the project site, there are five areas designated as special areas of conservation within the meaning of Directive 92/43/EC on the conservation of natural habitats and wild fauna and flora³ ('the Habitats Directive').
5. Yet, the Bezirksregierung Arnsberg– the defendant in the main proceedings – issued Trianel with a preliminary decision and a partial permit for the project. The preliminary decision stated that there were no legal objections to the project.
6. Friends of the Earth initiated proceedings for the annulment of those measures before the referring court. Friends of the Earth relied, in particular, on an infringement of the provisions transposing into German law the Habitats Directive and, in particular, Article 6 thereof.
7. The referring court found that, on the basis of domestic law, an environmental NGO is not entitled to rely on infringement of the law for the protection of water and nature or on the precautionary principle laid down in the German Anti-pollution law ('the BImSchG'), as those provisions do not confer rights on individuals for the purposes of the Law on supplementary provisions governing actions in environmental matters under Directive 2003/35/EC ('the UmwRG').
8. The referring court stated that, accordingly, the right of action accorded to NGOs is comparable with that provided for under the general rules of administrative procedural law governing actions for annulment and, in particular, under the Administrative Court Rules ('the VwGO'), which provide that an action challenging an administrative measure will be admissible only if the administrative measure affects the claimant's rights, that is to say, his individual public law rights.
9. Additionally, the referring court considered that, in the field of anti-pollution law, the BImSchG – in the same way, as the law for the protection of water and nature – primarily concerns the general public and not the protection of individual rights.
10. However, the referring court considered that such a restriction on access to justice could undermine the useful effect of Directive 85/337/EEC and was therefore not sure whether the action brought by Friends of the Earth should not be allowed on the basis of Article 10a of that directive. It therefore decided to refer some questions to the CJEU before taking its decision.
11. The questions asked by the German court are the following:

Does Article 10a of Directive 85/117 require it to be possible, for non-governmental organisations wishing to bring an action before the courts of a Member State in which administrative procedural law requires an applicant to maintain the impairment of a right, to argue that there has been an infringement of any environmental provision relevant to the approval of a project, including provisions which are intended to serve the interests of the general public alone rather than those which, at least in part, protect the legal interests of individuals?

³ Council Directive 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L206, p.7), as amended by Directive 2006/105/EC of 20 November 2006 (OJ 2006 L 363, p.368).

Unless Question 1 is answered unreservedly in the affirmative:

Does Article 10a of Directive 85/337 require it to be possible, for non-governmental organisations wishing to bring an action before the courts of a Member State in which administrative procedural law requires an applicant to maintain the impairment of a right, to base their argument on the infringement of environmental provisions relating to the approval of a project which are derived directly from Community law or which transpose Community environmental legislation into domestic law, including provisions intended to serve the interests of the general public alone, rather than those which at least in part, protect the legal interests of individuals?

(a) If Question 2 calls, in principle, for an affirmative response:

Must provisions of Community environmental legislation satisfy any substantive conditions in order to be capable of forming the legal basis for an action?

(b) If Question 2(a) is answered in the affirmative:

What are the relevant substantive conditions (for example, direct effect, protection objective or aim of the legislation)?

(3) If either Question 1 or Question 2 is answered in the affirmative:

Does the directive directly entitle non-governmental organisations to a right of access to the courts which exceeds that provided for under the rules laid down in national law?

12. We can already conclude from the questions asked by the German court that the provisions of German procedural law do not comply with Article 9(2)(3) and (4) of the Aarhus Convention as they do not provide environmental NGOs with access to the courts.

Decision of the Court of Justice of the EU

13. The CJEU considered that "*with regard to legislation such as that at issue in the main proceedings, although the national legislature is entitled to confine to individual public-law rights the rights whose infringement may be relied on by an individual in legal proceedings contesting one of the decisions, acts or omissions referred to in Article 10a of Directive 85/337, such a limitation cannot be applied as such to environmental protection organisations without disregarding the objectives of the last sentence of the third paragraph of Article 10a of Directive 85/337*".

14. The CJEU further stated that if, "*as is clear from that provision, those organisations must be able to rely on the same rights as individuals, it would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness if such organisations were not also allowed to rely on the impairment of rules of EU environment law solely on the ground that those rules protect the public interest*".

15. As the CJEU rightly observed doing so "*very largely deprives those organisations of the possibility of verifying compliance with the rules of that branch of law, which, for the most part, address the public interest and not merely the protection of the interests of individuals as such*".

16. The answer from the CJEU to Questions 1 and 2 is that:

"Article 10a of Directive 85/337 precludes legislation which does not permit non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of a rule flowing from EU environment law and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals".

17. To the last question, the CJEU replied that:

"Such a non-governmental organisation can derive, from the last sentence of the third paragraph of Article 10a of Directive 85/337, as amended by Directive 2003/35, the right to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, as amended, on the infringement of the rules of national law flowing from Article 6 of Directive 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Directive 2006/105/EC of 20 November 2006, even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals, national procedural law does not permit this."

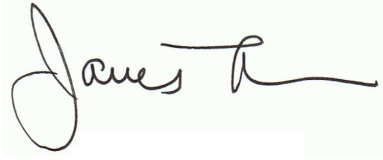
Implications in relation to compliance by Germany with Article 9(2)(3)(4) of the Convention

18. It is noteworthy that the CJEU noted that the third question "*arises in the context that it would not be possible for the referring court to interpret national procedural law in a manner consistent with the requirements of EU law*". This sentence in addition to the replies from the CJEU to the questions referred by the German court clearly mean that German procedural law is not consistent with Article 10a of Directive 85/337. As the latter provision transposes Article 9(2) and (4) of the Aarhus Convention into EU law, it means in turn that the German law does not comply with these provisions of the Convention either.

19. It also follows that the German procedural law does not comply either with Article 9(3) of the Convention as it applies the same way to all the other acts and omissions allegedly infringing environmental law than to the ones falling under the scope of Article 10a of Directive 85/337, preventing NGOs from challenging any of these acts and omissions.

20. We therefore call on the Compliance Committee to adopt the necessary recommendations to ensure the German government amends its law to bring about compliance with Article 9(2)(3) and (4) of the Aarhus Convention.

Yours sincerely



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