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**Communication ACCC/C/2008/31**

Questions with regard to communication ACCC/C/2008/31

Reference: ZG III 6 – 45074/7.2

Berlin, 18.02.2013

Dear Ms. Smagadi,

Thank you for your letter of 22 January 2013 delivering additional questions to Communication ACCC/C/2008/31.

Please find enclosed

- the final version of the Act amending the Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz*) as it has been adopted by the Federal Parliament (*Deutscher Bundestag*) and as it has entered into force, indicating changes to the draft of 10 August 2012 (Annex I),
- the consolidated version of the Environmental Appeals Act indicating changes to the previous version of this Act (Annex II),
- the clean version of the consolidated Environmental Appeals Act as it has entered into force on 29 January 2013 (Annex III).

As regards the adopted amendments of the Environmental Appeals Act I would like to explain the following:





Page 2

The **amendments to section 2 (1) no. 1 and section 2 (5)** reflect the consequences of the judgment of the European Court of Justice (ECJ) in Case C-115/09 *Trianel*. The aim is to ensure an exact transposition, free from any omissions, of Article 10a of the Environmental Impact Assessment Directive (Directive 85/337/EEC, as amended) (now Article 11 of the codified directive: Directive 2011/92/EU) and of article 9, paragraph 2, of the Aarhus Convention.

The ECJ held that the provisions of the German Environmental Appeals Act concerning access to justice are not compatible with Article 10a of the Environmental Impact Assessment Directive (now Article 11 of the codified directive) in as much as non-governmental organizations satisfying the requirements of Article 1(2) of the Directive (hereinafter: ‘recognized environmental associations’) are limited to challenging the impairment of individual public law rights. Although the national legislature may impose a restriction of that kind on the access to justice available to individuals, such a restriction may not be imposed on the access to justice available to recognized environmental associations.

In relation to EU law, to which the ECJ’s findings were restricted, the rights which recognized environmental associations are deemed to hold, in accordance with the third sentence of Article 10a (3) of the Environmental Impact Assessment Directive (now the third sentence of Article 11(3) of the codified directive), are those set out in national legislation implementing EU environmental law and those set out in the provisions of EU environmental law having direct effect. Consequently, an impairment of the rights set out in such environmental provisions resulting from EU law may be challenged by recognized environmental associations before the courts.



### Page 3

The ECJ was explicit in its findings only in relation to provisions resulting from EU law. The focus on provisions of that kind is a reflection of the fact that the ECJ's jurisdiction is limited.

For that reason, the judgment cannot be interpreted as meaning that appeals brought by recognized environmental associations concerning provisions of environmental law not connected to EU law may continue to be restricted to appeals alleging the impairment of a provision conferring individual rights. In implementing the judgment, the German legislature must have regard to the fact that both the European Union and the Federal Republic of Germany are States Parties to the Aarhus Convention and consequently are also subject to the obligations laid down by that convention.

Against that background, the amendment to the Environmental Appeals Act could not be limited to allowing recognized environmental associations access to justice simply in relation to environmental provisions based on EU law. Instead, section 2 (1) no. 1 and section 2 (5) no. 1 and no. 2 of the Environmental Appeals Act have been amended such that recognized environmental associations are entitled also to bring proceedings alleging the impairment of other provisions of environmental law not conferring rights on individuals. In order to do this, the restriction currently in force limiting the challenge to provisions which 'establish individual rights' must be repealed in its entirety.

The rules inserted by **section 4a** provide for the uniform regulation of various procedural issues in relation to all actions brought in the area of environmental law in the scope of the Environmental Appeals Act. They satisfy the requirements for effective individual legal protection in accordance with article 19 (4) of the German Basic Law (*Grundgesetz*) and apply in a uniform manner to actions by individuals and recognized environmental asso-





Page 4

ciations, as EU law and the Aarhus Convention requirements mean that special rules for associations cannot be adopted if these disadvantage associations in comparison to individuals.

In addition, I would like to inform you that the judgement of the regional court (Oberverwaltungsgericht für das Land Nordrhein-Westfalen) of 1 December 2011 on the Trianel power plant has become effective.

Trianel, the energy supply company involved in the case, challenged the regional court's decision to deny leave for further appeal at the Federal Administrative Court (*Bundesverwaltungsgericht*). On 5 September 2012 the Federal Administrative Court dismissed this appeal. Therefore, the judgement of the regional court could become effective.

In particular, the regional court's conclusions on access to justice for environmental organizations became effective: The regional court had ruled that the restriction to a review of provisions which establish personal rights for individuals as it is set out in the Environmental Appeals Act was not a sufficient implementation of the requirements of Article 10a of the EIA Directive. Hence, it applied the Directive directly and granted access to justice for the plaintive environmental organization.

Yours sincerely,

For the Federal Ministry for the Environment,  
Nature Conservation and Nuclear Safety

Susanna Much

**Enclosures**



