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Secretary to the Aarhus Convention Compliance Committee  
United Nations Economic Commission for Europe

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**Communication ACCC/C/2008/32 (EU), Part II – Information about the Order of the General Court in case T-19/13**

Submitted by:

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1. By this submission, Frank Bold Society (FBS), a public interest law organization and Justice and Environment, European Network of Environmental Law Organizations (J&E), would like to inform the Committee about the Order of the EU General Court in case T-19/13<sup>1</sup> (FBS v. European Commission) and make comments concerning its possible relevance for the evaluation by the Committee of the communication in case C/32 (EU), Part II.

**Summary of the T-19/13 case and of the Order of the General Court from 29 June 2015<sup>2</sup>**

2. The merits of the T-19/13 case related to the decision of the Czech Republic, according to Article 10c of the revised Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (hereafter 'ETS Directive') to temporarily derogate from the principle of full auctioning and to grant free allowances to electricity generators in exchange for the modernization of the energy portfolio. To be able to use the possibility of derogation, Member States had to present an

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<sup>1</sup> The General Court took similar approach also in the Order in case T-565/14 - EEB v Commission, available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=T-565/14> and the Order in case T-685/14 - EEB v Commission, Available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=T-685/14>.

<sup>2</sup> Available at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d5897c1440adec4679a7aeca921a4ea2db.e34KaxiLc3eQc40LaxqMbN4ObNiKe0?text=&docid=166443&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=350398>

application which part was the national investment plan for approval by the European Commission (hereinafter 'EC').

3. The EC approved the application together with the national investment plan for the Czech Republic by its decision C(2012) 4576 of 6 July 2012 (hereafter referred to as the 'Decision on transitional free allocation'). FBS has submitted a request for internal review of this decision according to Article 10 of Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (hereinafter 'Aarhus Regulation'). FBS alleged that the Decision on transitional free allocation was not in compliance with a number of provisions of the ETS Directive, as well as with the Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ('SEA Directive').
4. By its decision C(2012) 8382 of 12 November 2012 (hereinafter 'Decision on RIR'), the EC declared the FBS request for internal review inadmissible, as according to the EC, the Decision on transitional free allocation did not meet the criteria of "administrative act" according to Article 2(1)(g) of the Aarhus Regulation.
5. By an application of 11 January 2013, FBS requested the General Court to declare both the Decision on RIR and the Decision on transitional free allocation null and void. In the application, FBS i.a. argued that Article 263 of the TFEU shall be interpreted in the light of the EU obligations based on Article 9(3) and 9(4) of the Aarhus Convention. Therefore, the Decision on transitional free allocation, as an act allegedly breaching the provisions of EU law relating to the environment, should be subject to "direct" judicial review, meeting the requirements of Article 9(4) of the Convention (being timely and effective). In case the General Court would find that the Decision on transitional free allocation is not an administrative act in the sense of Article 2(1)(g) of the Aarhus Regulation, FBS further referred to the decisions of the General Court in cases T-396/09 and T-338/08, in which the General Court found that the fact that the Aarhus Regulation limits the access to review procedures only to the "measures of the individual scope" is contrary to Article 9(3) of the Convention.
6. The General Court stayed the case until the decision of the EU Court of Justice in cases C-401/12P to C-401/12P. After the Court of Justice issued its judgments in these cases, the General Court dismissed the FBS application by its order of 13 July 2015.
7. The General Court held in the order that the Decision on transitional free allocation is not addressed to specific subjects (the operators concerned), but only to the Czech Republic. It is therefore, according to the court, a measure of general application, and the Commission was correct when rejecting the RIR for that reason. Concerning the question of compliance of the Aarhus Regulation with Article 9(3) of the Aarhus Convention, the Court referred to the judgments in cases C-401/12P to C-401/12P in which the Court of Justice held that Article 9(3) of the Convention is not sufficiently specific to assess the legality of Article 10 of the Aarhus Regulation.
8. With respect to the request to review directly the Decision on transitional free allocation, the General Court only held that the action has been brought out of time, i.e. after the 2 months deadline according to Article 263 of the TFEU. The Court did not consider at all that the reason for this was that FBS was following the procedure according to Article 12(1) of the Aarhus Regulation, according to which it is necessary to exhaust the RIR procedure.

## Comments on the T-19/13 case's possible relevance for the Compliance Committee case C/32, Part II

9. We are convinced that the T-19/13 case and the General Court's order, as summarized above, support the allegations by the Communicant in the C/32 case, according to which the relevant provisions of the Aarhus Regulation (Articles 2(1)(g), 10(1) and 12(1), as interpreted by the CJEU, as well as the EU legal system in a whole, including the established jurisprudence of the CJEU, are not in compliance with the requirements of Article 9(3) and 9(4) of the Aarhus Convention.
10. With respect to the access to review procedures according to the Aarhus Regulation, including the possibility to institute the court proceedings before the CJEU, the case confirmed that the interpretation of the scope of acts eligible for the RIR procedure, and subsequently for the court review, remains utmost restrictive. It is clear that the scope of the acts subject to the RIR procedure (administrative acts according to Article 2(1)(g) of the Aarhus Regulation), as interpreted by the EC and CJEU, represents only a small part of the acts and omissions by the EU bodies, which can contravene provisions of EU law relating to the environment. Therefore, the Aarhus Regulation, as interpreted by the EC and CJEU, does not implement Article 9(3) of the Aarhus Convention sufficiently and properly.
11. At the same time, Article 9(3) of the Convention is neither transposed and implemented, with respect to the acts and omissions of the EU bodies, by any other provisions of the EU law, nor is it applied by the CJEU when interpreting the conditions for standing of environmental NGOs or other members of the public according to Article 263 of the TFEU. The Communicant and other observers in the C/32 case have already provided the Committee with evidence that since the adoption of the findings concerning Part I of this communication, the practice of the CJEU has not changed. It is still based on the restrictive interpretation of the "direct concern" criteria, known as the "Plaumann test".
12. In the T-19/13 case, the General Court found the action for annulment against the Decision on transitional free allocation manifestly inadmissible as it has been brought more than 2 month after the publication of this Decision in the *Official Journal*. The court has not expressed any opinion on possible standing of FBS and admissibility of the case if it had been brought within this deadline. There is no indication that it would depart from its established practice in this respect, as also the recent case law quoted by the Communicant confirms.
14. Moreover, the General Court has taken no account of the obvious reason why the action for annulment against the Decision on transitional free has been brought more than 2 month after the publication of this Decision in the *Official Journal*: FBS considered it necessary, according to Article 12(1) of the Aarhus Regulation, to exhaust the RIR procedure before application to the Court. Also the complete reluctance of the Court to consider this aspect of the case confirms that the requirements of Article 9(3) and 9(4) of the Aarhus Convention were not applied.
15. In general, it can be concluded that also the T-19/13 case confirms that the Committee's findings on part I of communication C/32 are still valid. The CJEU does not follow the conclusions of its own jurisprudence, asking the national courts of the Member States to interpret the procedural rules in environmental cases applicable in cases where environmental organization challenges acts or omissions which allegedly contravene provisions of the EU law relating to the environment, "to the fullest extent possible" in accordance with the objectives of Article 9(3) of the Aarhus Convention. Therefore, both the Aarhus Regulation and the EU legal system in a whole are not in compliance with this provision.