AMICUS BRIEF IN SUPPORT OF COMMUNICATION ACCC/C/2008/32 ON THE NON-COMPLIANCE OF THE EUROPEAN UNION WITH ARTICLE 9(3) AARHUS CONVENTION

1. Contact details

1. This Amicus Brief is submitted by Onno W. Brouwer and Joep J. Wolfhagen (attorneys at law, Amsterdam).

2. We are concerned that access to justice and effective judicial protection at EU level risks becoming increasingly restrictive and difficult, despite the changes in the Lisbon Treaty intended to improve access to justice and judicial protection.

2. Party concerned by the Amicus Brief: European Union

3. The Amicus Brief concerns the non-compliance of the European Union (***EU***) with Article 9(3) of the Aarhus Convention (the ***Convention***).

3. Non-compliance of the European Union with Article 9(3) Aarhus Convention

4. We have advised various NGOs on environmental law and transparency related matters, as well as represented NGOs before the General Court and the Court of Justice of the European Union (***CJEU***).

5. One important element of the limited access to justice at EU level concerns the limitation that according to the settled *Plaumann* case-law of the CJEU, NGOs (and other legal persons and individuals) can only directly challenge EU legal acts to the extent that these legal acts are of individual concern them. This has been interpreted by the CJEU to mean that the contested act must affect one in such a manner as to individually distinguish it from others. This test is for NGOs and other legal entities or persons almost impossible to meet. A similar high threshold – applicants must meet the criterion of "direct concern" – applies to NGOs and individuals that wish to challenge a regulatory act that does not entail implementing measures, in accordance with Article 263(4) of the Treaty on the Functioning of the European Union (***TFEU***).

6. The limited access to justice is illustrated by the fact that NGOs are hardly ever granted standing before the EU courts. With regard to environmental law this means that although various NGOs are deeply involved in environmental (regulatory) matters, they are under the established case-law (in practice) never individually concerned and are therewith precluded from effectively

challenging EU legal acts related to inter alia the environment, an area which is covered by the Convention.

7. It seems important that the Committee is also provided with a practitioner's perspective on whether Article 263(4) TFEU ensures compliance with Article 9(3) of the Convention. We are of the view that:

   (i) the Commission is not correct in holding that Case C-456/13 P leads to the conclusion that the EU has fulfilled its obligations under the Convention;

   (ii) it is very questionable in fact and law that the challenging of EU legal acts before a Member State court (which can lead to preliminary questions to the CJEU) can be considered an effective substitute for direct action and as such fulfils the EU's obligations under Article 9(3) of the Convention;

8. This Amicus Brief is not exhaustive and intends to provide the Committee with *additional* reasons from a practitioner's perspective why the EU may be held to have failed to correctly implement the Convention.

3.1 Judgment C-456/13: T&L Sugars Ltd et al / Commission

9. The Commission submits that the EU has fulfilled its obligations under Article 9 of the Convention, for the following reason.

> *"It results that a Member State will be in breach of Union law if no effective action is available before its courts for challenging an EU act – or a national measure implementing it – where the conditions of the fourth paragraph of Article 263 TFEU are not met (see the judgment by the CJEU of 28 April 2015 in case C-456/13 P, T & L Sugars and Sidul Acucares, paragraphs 49 and 50)."*[1]

10. The Commission considers that the judgment in C-456/13 evidences that Article 263(4) TFEU must be interpreted in light of the right to access to justice and that access to justice is ensured by the national courts of the Member States.[2]

11. However, in our view, Judgment C-456/13 does not result in the EU acting in compliance with Article 9 of the Convention.

Case C-456/13 does not ensure that applicants have direct access to judicial procedures regarding EU law related to the environment

12. The European Union is a party to the Aarhus Convention. As such it is according to Article 9(3) of the Convention obligated to:

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1 Statement by the Commission, on behalf of the EU, in the hearing on 1 July 2015 in Geneva on Case ACCC/C/2008/32, p. 12.

2 Observations by the European Union to the Communicant's commentary on the judgments by the Court of Justice of the European Union of 13 January 2015 in Joined Cases C-401/12 P, C-402/12 and C-403/12 P and Joined Cases C-404/12 and C-405/12 P (ACCC/C/2008/32), respectively, par. 45, 6.

> "*3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*" (emphasis added)

13. Accordingly, the EU as a party to the Convention must ensure that "members of the public" have access to (administrative or) judicial procedures to challenge acts and omissions by, in this case, EU institutions. As a party, the EU has committed itself to provide for access to judicial procedures to challenge acts that contravene provisions of EU law ("national law") relating to the environment.

14. However, the fulfilment of the legal obligation that is set out by the CJEU in C-456/13 relies to a great extent on the review by the Member State/national courts of, in principle, *national* law, i.e. law of the Member States. In C-456/13, the CJEU considers that there is always an opportunity for individuals to have legal acts reviewed because to the extent Article 263(4) TFEU denies applicants legal standing, Member States must ensure that legal remedies are nonetheless available:

> "*As regards persons who do not fulfil the requirements of the fourth paragraph of Article 263 TFEU for bringing an action before the Courts of the European Union, it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection (Inuit Tapiriit Kanatami and Others v Parliament and Council, C-583/11 P, EU:C:2013:625, paragraph 100 and the case-law cited).*"[3]

15. In accordance with this system, the availability of a legal remedy is often fully dependent on the extent to which a Member State does in fact provide for such legal remedy to challenge environmental law related acts. Regardless of the fact that such remedy at the Member State level is often ineffective and no substitute for direct action at the EU level (see section 3.2 below), the Commission fails to explain why the EU has fulfilled its own obligation under Article 9(3) of the Convention, as the Commission considers evidenced by the judgment in C-456/13.

16. Judgment C-456/13 makes clear that the CJEU considers that the Member States must provide for a legal remedy to challenge legal acts, but does not address the EU's individual and independent legal obligation under Article 9(3) Convention to provide for access as well to the EU judicature. As such, the Commission has failed to explain why the jurisprudence by the EU Courts would be in compliance with Article 9(3) of the Convention and/or why the EU has fulfilled its respective obligations.

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[3] Case C-456/13 P, para. 49.

3.2 The ineffectiveness of the 'national route'

17. The Commission contends that the EU has fulfilled its obligations under Article 9(3) Convention because the case law of the CJEU, in particular Case C-456/13, recognizes that NGOs in challenging the *implementation measures* before the national courts may also plead the invalidity of EU acts underlying the implementing measures. These national proceedings could *potentially* lead to a national court asking preliminary questions pursuant to Article 267 TFEU.[4] In other words, the Commission posits that the challenging of *implementation measures* before the *national* courts – instead of challenging directly the EU legal act before the EU courts – constitutes access to justice in the sense of Article 9(3) Convention.

18. This view of the Commission is problematic on at least two accounts. First, it does not seem to be based on a correct interpretation of Article 9(3) Convention. Second, it seems to wrongfully consider the 'national route' to be a sufficient access to justice and judicial protection against illegal Community Acts, including those concerning environmental matters covered by the Convention. The challenging of the implementation measures – to the extent NGOs are granted standing before national courts to do so – does not however automatically result in the national court asking preliminary questions which would allow the CJEU to review the validity of an EU legislative act. National courts enjoy a wide margin of discretion in referring questions to the CJEU. Only in case the ruling by a national court is not subject to appeal, the court is in principle obliged to refer questions to the CJEU.

19. This means that one needs to pursue a case up until the respective highest national court in order to have the possibility that the highest court will ask questions to the CJEU. This renders the 'national route' very costly and moreover very time consuming; by the time that the highest court has referred questions to the CJEU – to the extent it does – effectively challenging the act in question may have become almost without interest because of irreversible consequences, may have become purposeless for other reasons or outdated by changes to the legal act in question.

20. Second, even if the court which judgment is not subject to appeal in fact refers questions to the CJEU, the party in question has in many jurisdictions no control over the questions which are asked. In practice, it may thus be very difficult for a party to achieve that the CJEU considers those issues which were the reasons to initiate legal proceedings in the first place. Furthermore, in formulating the preliminary questions, it remains in practice to a large extent uncertain (and in the court's discretion) whether a court decides whether it will refer to the CJEU the question of the *validity* of the EU legal act; the court may decide that it considers it unnecessary to refer that question to the CJEU.

21. Third, contrary to a direct action, the parties cannot in a preliminary ruling procedure present in full their arguments in law and fact as they would be able

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[4] Observations by the European Union to the Communicant's commentary on the judgments by the Court of Justice of the European Union of 13 January 2015 in Joined Cases C-401/12 P, C-402/12 and C-403/12 P and Joined Cases C-404/12 and C-405/12 P (ACCC/C/2008/32), par. 42, 44.

to do in a direct action. Preliminary ruling procedures do only concern questions of law without there being any scope for review of evidence or facts.

22. The 'national route' can therefore not be considered an effective substitute for a direct action at the EU level in order to ensure that the EU acts in compliance with Article 9(3) of the Convention.

4. Conclusion

23. The Communicant therefore respectfully requests the Committee to adopt the finding that the European Union has not fulfilled its obligations under Article 9(3) of the Aarhus Convention due to the restrictive interpretation by the CJEU of the criteria for legal standing.

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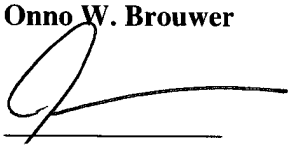

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