Ref. Ares(2011)405472 - 12/04/2011

Submissions of the European Commission, on behalf of the European Union, on the Draft Findings of the Aarhus Convention Compliance Committee of 14 March 2011 in ACCC/C/2008/32

1. The Commission welcomes the Committee's preliminary finding that the communicant's allegation with respect to costs should be dismissed. The Commission fully agrees that the communicant has failed to substantiate this claim. Indeed, this claim is manifestly unfounded.

   Furthermore, the Commission would express a cautious welcome for the fact that the Committee has decided not to make a determination as to whether the Union has infringed Article 9(2) (draft findings, paragraph 74). For the reasons which the Commission has already advanced, notably at the Committee's session of 23 September 2009, the Commission submits that the communicant's allegation of a breach of that provision is based on an exorbitant reading of both Article 6 and Article 9(2).

   For the rest, while the Commission naturally regrets that the Committee has not been swayed by its arguments, it does not propose to repeat those arguments now. Instead, it will concentrate on one important point: the role of the national courts.

2. The role played by the courts of the Member States of the Union in its system of judicial remedies, and especially the possibility for those courts to make references for preliminary rulings pursuant to what is now Article 267 of the Treaty on the Functioning of the European Union (TFEU), was a central plank in the Commission's written submissions of 11 June 2009 (see in particular paragraphs 52ff.) The Commission respectfully submits that the Committee has failed to give sufficient weight to this crucial point, particularly in paragraphs 89 and 90 of its draft findings.

3. Long before the seminal judgment in Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, it was plain that in many circumstances actions challenging the validity of Community acts had to be brought in the national courts. That judgment established that national courts could not themselves rule such acts to be invalid, but must refer that issue to the Court of Justice under what is now Article 267 TFEU. Indeed, national courts against which no appeal lies are expressly required by the third paragraph of Article 267 TFEU to make a reference for a preliminary ruling if they are required to decide an issue of Union law to which the answer is not absolutely clear. Moreover, the ruling in *Foto-Frost* was qualified in Case C-143/88 *Zuckerfabrik Süderdithmarschen* [1991] I-415, where the Court of Justice held that it was open to national courts to grant interim relief suspending the enforcement of such a measure, as long as they also made a reference for a preliminary ruling, a possibility which can render such actions significantly more effective.

4. In its recent Opinion 1/09 on the European Community and Patents Court, the Full Court made two pronouncements which are highly significant in the present context. First, it described the courts of the Member States as "'ordinary courts' within the European Union legal order", whose task is to "implement European Union law" (paragraph 80). Second, it stated that:

> "… the national courts have the most extensive powers, or even the obligation, to make a reference to the Court if they consider that a case pending before them raises issues involving an … assessment of the validity of the provisions of European Union law and requiring a decision by them …" (paragraph 83).

5. That the national courts are frequently the proper fora for litigants other than Member States and Union institutions ("private parties") to challenge acts of the Union is now made even more evident by the fourth paragraph of Article 263 TFEU. As is well known, the Treaty of Lisbon added the final limb to that paragraph (previously in Article 230 EC) which enables such litigants to bring actions for annulment before the General Court against "a regulatory act which is of direct concern to them and does not entail implementing measures". Plainly, the term "implementing measures" refers to measures taken by the Member States as well as those taken by the Union itself. This was confirmed by the General Court in Case T-16/04 *Arcelor v European Parliament and Council* (judgment of 2 March 2010), paragraph 123. It is very hard to see how an action for the annulment of a Directive could ever be admissible under the final limb of the fourth paragraph, given that by their very nature Directives entail implementing measures.

6. The principle referred to in the previous paragraphs is complemented by the principle of effectiveness whereby the Member States are bound to make available effective remedies and procedure for enforcing Union law before their courts (see e.g. Cases 33/76 *Rewe*, [1976] ECR 1989, 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 and 22; Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19; and Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12.

7. The principle of effectiveness, a creation of the case law, is now enshrined in the second paragraph of Article 19(1) of the Treaty on the European Union (TEU), which provides: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". Appearing as it does in the initial article of the Treaties relating to the Court of Justice, this provision could scarcely be more prominent.

8. Beyond any doubt, the principle of effectiveness and Article 19(1) TEU apply to actions before national courts in which private parties seek to challenge Union acts or national measures implementing them. Thus Member States are required to ensure that such actions can be brought effectively before their courts.

9. Accordingly, a Member State will be in breach of the TEU and TFEU if no effective action is available before its courts for challenging a Union act where the conditions of the fourth paragraph of Article 263 TFEU are not met. Precisely the same will apply if

the courts of a Member State refuse to make references for preliminary rulings pursuant to Article 267 TFEU on the validity of acts of the Union, where there are good grounds for believing that they may be invalid – at the very least if this is a frequent practice not disowned by that Member State's highest court (see by analogy Case C-129/00 *Commission v Italy* [2003] ECR I-14637, paragraph 32).

10. In the light of the principles set out in the previous paragraphs, it is scarcely surprising that, in *Bosphorus v Ireland*, the European Court of Human Rights also recognised the crucial role played by the national courts in the Union's legal system (GC] n° 45036/98, judgment of 30 June 2005). That Court asserted that "it is essentially through the national courts that the Community system provides a remedy to individuals against a Member State or another individual for a breach of Community law" (paragraph 164 of the judgment). The Court added that what is now Article 267 TFEU is amongst the provisions which "envisaged a complementary role for the national courts in the Community control mechanisms from the outset" (*ibid*.).

11. Article 5(2) TEU provides:

> "… the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

Consequently, the Court of Justice may not overstep the limits of its jurisdiction by treating as admissible actions for annulment which fall outside the terms of Article 263 TFEU (e.g. actions against regulatory acts which entail implementing measures at national level). Such a course would be especially unacceptable given that Member States are required to make effective actions available before their courts.

12. In addition, all the Member States except Ireland – which represents less than 1% of the population of the European Union – are themselves Parties to the Aarhus Convention. Needless to say, one of the 26 other Member States would be in breach of the Convention if it failed to provide the effective remedies required by the Convention or if its courts declined to make references pursuant to Article 267 TFEU in the circumstances described in paragraph 9 above.

13. Manifestly, the principles discussed in the previous paragraphs are deeply embedded in the TEU and TFEU. Consequently, these principles cannot be changed without amendments to those Treaties. Given that these principles are a cornerstone of the Union's judicial architecture, such amendments are extremely unlikely to be forthcoming in the foreseeable future.

14. A number of statements in paragraphs 89 and 90 of the Committee's draft findings fail to take account of the fundamental principles set out above.

15. This applies to the statement that enforcement of review procedures through the medium of the national courts "requires that the NGO is granted standing in the EU Member State concerned" (paragraph 89). The reality is that all the Member States except Ireland are bound by the Aarhus Convention itself to admit actions by recognised NGOs.

16. Similarly, in the following sentence of paragraph 89, the Committee objects that the review of Union acts cannot be left to national courts because litigants challenging such acts can only achieve success if those courts make a reference pursuant to Article 267 TFEU. That statement overlooks the fact that national courts of final appeal are bound to make a reference, as are lower courts if they believe that the impugned Union act is or might be invalid.

17. As to paragraph 90 of the draft findings, the Commission would respectfully take issue with the statement in the first sentence that "the system of judicial review in the national courts … cannot be a basis for generally denying members of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies". This statement is based on the misguided premise that, where a reference is made for a preliminary ruling on the validity of a Union act, the plaintiff is not granted "access" to the EU Courts to challenge that act. In other words, according to the Committee, this means of challenge is less effective than direct actions for annulment. This idea is repeated in the second sentence of paragraph 90 of the draft findings. The Committee has not given any reasons for this preliminary view; nor, in the Commission's respectful submission, is there any basis for any such suggestion.

18. Precisely because only the EU Courts can declare a Union act invalid the Court of Justice is required to consider the reference for a preliminary ruling with the utmost care, just as it does with direct actions. This necessarily follows from the general duty on the Court under the first sentence of Article 19(1) TEU to "ensure that in the interpretation and application of the Treaties the law is observed".

19. The culmination of this line of reasoning is to be found in the sweeping statement in the third sentence of paragraph 90 of the draft findings. In particular, the bold assertion that "the system of preliminary ruling does [not] in itself meet the requirements of access to justice in article 9 of the Convention" fails to take account of the key principles discussed above. The same applies to the statement that this system does not "compensate for the strict jurisprudence of the EU Courts" (*ibid*.).

20. In the light of the points set out above, the Commission respectfully requests that paragraphs 89 and 90 of the Committee's draft findings be substantially redrafted, and that the Committee's conclusions and recommendations be amended accordingly.