Statement by the Commission, on behalf of the EU,

in the hearing on 1 July 2015 in Geneva

on Case ACCC/C/2008/32

Honourable Members of the Compliance Committee, Communicant, ladies and gentlemen,

We would like to thank the ACCC for having invited us today to this hearing on Case ACCC/C/2008/32 concerning access by members of the public to review procedures. We appreciate this additional opportunity to present our observations on the Communicant's claims.

As this case originated in 2008 and has subsequently been **separated in two parts** - with the present hearing dedicated mainly to part II - let us briefly resume the main elements of the procedure:

In its communication, the Communicant alleges:

- Firstly, that the **standing criteria for individuals and NGOs before the EU Courts**, as interpreted by the jurisprudence of these courts, do not fulfil the requirements of Article 9 of the Aarhus Convention.

- Secondly, also the **standing criteria laid down in the Aarhus Regulation** 1367/2006 would not be compliant with the Convention.

We leave aside here the third allegation on prohibitive costs of proceedings before the EU courts, as this argument has already been dismissed by the ACCC.

On 27 April 2011, the ACCC has **adopted findings on the first part** of the allegations, as the second part relating to the Aarhus Regulation was then *sub iudice*. To recall, the ACCC – though finding the EU *"**not in non-compliance** with the Convention"* – has stated that:

"if the jurisprudence of the EU Courts, as evidenced by the cases examined, were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraphs 3 and 4, of the Convention."

The ACCC continued to express its *"regret that the EU Courts … did not account for the fact that the Convention had entered into force and whether that should make a difference in its interpretation and application of TEC article 234"* (now Article 267 TFEU).

The ACCC further recommended that:

"while the Committee is not convinced that the Party concerned fails to comply with the Convention, a new direction of the jurisprudence of the EU Courts should be established in order to ensure compliance with the Convention."

These ACCC findings and recommendations on part I of communication ACCC/C/2008/32 form the latest stage with regard to that part of the proceedings; these findings and recommendations on part I have not yet been submitted to the Meeting of the Parties.

Therefore, we would like to take the occasion of this hearing to draw the attention of the Honourable Members of the Compliance Committee to **important recent developments** regarding the CJEU case-law in the application of Article 267 TFUE since the adoption of these findings.

Indeed, we feel that recent case-law clearly shows that the EU courts consistently refer to the Aarhus Convention and **take the obligations stemming from the Convention into account** in their judgments. Express references to interpret EU law in light of the Aarhus Convention can be found in a number of recent judgments.

Given the limited time-frame for our statement, we would like to only briefly recall the main cases, but we are of course available to provide further details in the course of today's hearing or later in written exchange should the ACCC require further information.

Allow us thus to refer to the most important cases in that regard, covering issues like **standing**, **costs** or **scope of review**, in chronological order:

1. Case C-240/09, *Lesoochranárske zoskupenie* or ***"Slovak Bears",*** a judgment that was rendered by the CJEU on 8 March 2011 - thus very shortly before the ACCC adopted its findings on part I of the Communication - in reply to preliminary questions by the SK "Najvyssi sud". The CJEU underlined that it is for the national court to interpret its national law *"to the fullest extent possible"* (paragraph 51) in line with the Aarhus Convention, so as to grant effective judicial protection;

2. Case C-115/09, Bund für Umwelt und Naturschutz, or also known under the name of the intervening Party "***Trianel",*** a judgment by the CJEU of 12 May 2011 in reply to preliminary questions by the DE "Oberverwaltungsgericht Nordrhein-Westfalen". It concerns **standing before the national courts** for NGOs promoting environmental protection. In this case, the CJEU explicitly stated that the provisions of EU law at stake *"must be interpreted in light of, and having regard to, the objectives of the Aarhus Convention"* (paragraph 41);

3. Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09, ***Boxus***, judgment by the CJEU of 18 October 2011 in reply to preliminary questions by the BE "Conseil d'Etat" on the extent of the **right to a review procedure** in light of the Aarhus Convention;

4. Case C-182/10, ***Solvay***, a judgment by the CJEU of 16 February 2012 in reply to preliminary questions by the BE Constitutional Court on the extent of the **right to a review procedure**, in the light of Articles 9(2) to (4) of the Aarhus Convention;

5. Case C-416/10, ***Krizan***, a judgment by the CJEU of 15 January 2013 in reply to preliminary questions by the SK "Najvissi sud" on **effective legal remedies**, where the court equally explicitly read and interpreted EU law in conjunction with the Aarhus Convention;

6. Case C-260/11, ***Edwards***, a judgment by the CJEU of 11 April 2013 in reply to preliminary questions by the UK Supreme Court, on the **principle of "non-prohibitive" access to environmental justice**, having regard to the requirements of Article 9(4) of the Aarhus Convention and explaining the criteria to be taken into account for this purpose;

7. Case C-72/12, ***Altrip***, a judgment by the CJEU of 7 November 2013 in reply to preliminary questions by the DE "Bundesverwaltungsgericht", where the court stressed that *"the conditions fixed by Member States ... may not make it in practice impossible or excessively difficult to exercise the rights ... to give the public concerned wide access to justice"* (paragraph 46) and that *"that public must be able to invoke any procedural defect in support of an action"* (paragraph 48);

8. Another case, that the Communicants will know very well as it was brought by them, C-404/13, ***ClientEarth***, a judgment by the CJEU of 19 November 2014 in reply to preliminary questions by the UK Supreme Court. This is an important judgment in

our present context as the CJEU reaffirmed the requirement by Member States to provide **remedies sufficient to ensure effective legal protection** in the fields covered by EU law, and the applicant was in that case the same as the Communicant in the present case;

9. Let us indicate a final and very recent case, C-570/13, ***Gruber***, a judgment by the CJEU of 16 April 2015 in reply to preliminary questions by the AT "Verwaltungsgerichtshof". It relates to the conditions for the **admissibility of actions** by members of the public against environmental administrative decisions. The CJEU explicitly underlined that, in order to align the EU law in question (directive 2011/92) "properly" with the Aarhus Convention, the EU law must be interpreted in the light of the Convention (paragraph 34).

All the above-mentioned cases show that the a "new direction" of case-law of the CJEU as recommended in part I of the ACCC findings did actually take place, as the Aarhus Convention was taken into account in its recent judgments.

We would thus **respectfully request the ACCC to reconsider the findings under points 94 and 95 so to amend them** in light of these judgments.

From a procedural perspective, we esteem that this would **still be possible,** given that the previous findings cover only a part of the communication and have not yet been submitted to the MOP.

Regarding the substance of the partial findings, the EU maintains that as the ACCC has explicitly pointed to the evolution of the jurisprudence of the EU courts, it should consider **these recent important developments** in the overall evaluation of the present Communication.

Honourable Members of the Compliance Committee, Communicant, ladies and gentlemen,

Let us now come to part II of our case and to the Communicant's allegation vis-à-vis the Aarhus Regulation, which also coincides with the first question that the ACCC has asked the EU in view of today's hearing:

- **Does the Aarhus Regulation meet the Convention's requirements on access to justice?**

First, let us tackle the question, raised in the communication (notably p. 19), of **who** is given standing under the Aarhus Regulation 1367/2006.

As a preliminary consideration regarding this point, let us recall that Article 9(3) of the Aarhus Convention on access to justice to challenge acts and omissions which contravene environmental legislation **does allow that national law** – in the context of the EU as Party to the Convention this has to be understood as EU law – **sets criteria for access**. It also provides contracting Parties with a choice between administrative and judicial review.

In that regard, the Commission notes that the Regulation provides for an administrative review procedure and a **specific *locus standi* for NGOs** and sets criteria for entitlement.

The Aarhus Implementation Guide 2014, which provides non-binding interpretative guidance of the Convention, confirms (at page 198) that Parties are not obliged to establish a system of *actio popularis* in their national laws. However, Parties should not use the reference to national law as an excuse for introducing so strict criteria that they effectively bar all or almost all NGOs from challenging acts or omissions that contravene national law relating to the environment.

An NGO, in order to be able to introduce a request for internal review, must, for instance, have environmental protection as its primary stated objective and have existed for more than two years.

It is thus true, as the Communicant pointed out, that the Aarhus Regulation sets criteria for entitlement to make a request for internal review.

However, the Communicant has already lodged several requests for review and has always been found eligible for that purpose. The Communicant's argument, apparently on behalf of other NGOs, should thus not be deemed admissible.

In practice, in the 28 requests for internal review that the Commission has already answered to date, it only 4 times found NGOs not fulfilling the Regulation's eligibility criteria. One case, where the NGO was barred from review as it had not existed for more than two years, was appealed to the General Court (Case T-192/12, PAN Europe). However, the NGO only questioned the application of the 2-year-criterion by the institution (which was confirmed by the General Court), but not the criterion as such.

No NGO has so far raised the issue of an alleged incompatibility of any of the criteria set in the Aarhus Regulation for NGOs to lodge a request for review **before the EU courts**.

For these reasons, the EU considers that the Aarhus Regulation is **compliant** with the Convention **on who is given standing, when it sets out criteria for certain qualified NGOs.**

The second point raised by the Communicant is **which acts** are challengeable.

Article 9(3) of the Aarhus Convention does not prescribe the challengeable acts but leaves it to the **discretion of Parties** to address the question which acts can be challenged.

The Aarhus Regulation circumscribes under that definition (Article 2(1)(g) of the Regulation):

- all administrative measures of individual scope under environmental law (as defined broadly under Article 2(1)(f) of the Regulation,

- taken by an EU institution or body, and

- having legally binding and external effects.

We would first like to elaborate on the **notion of an administrative measure**.

This is an important point because, as we know, the Convention excludes from its application acts of bodies when they are acting in a legislative or judicial capacity.

The TFEU differentiates **regulatory acts** (see Article 290 TFEU) from **legislative acts** (as mentioned in Article 289 TFEU and adopted through a legislative procedure).

Regulatory acts are acts of general application which can *"supplement or amend certain non-essential elements of the legislative act"* and they have to respect the *"objectives, content, scope and duration of the delegation of power"* defined in the legislative acts (Article 290(1) and (2) TFEU). The fact that these acts are not "legislative" acts in the sense of Article 289 TFEU is not relevant per se.

Why?

The Commission, when it adopts these acts, still acts in a legislative capacity. What counts is the **"substance" of these acts**. They also have the same character as "legislation": they are of general scope in that they apply to objectively determined situations and they entail legal

effects for categories of persons envisaged generally and in the abstract (see point 38 of case T-338/08, as confirmed by the CJEU in Case C-404/12P) .

Regulatory acts as just defined can thus be deemed to be adopted by the Commission in a legislative capacity in the sense of the Convention. **Such acts can thus legitimately be excluded from the scope of the Convention,** and by excluding acts of general scope from the Aarhus Regulation, the Union fully complied with the Convention.

In addition, implementing acts under Article 291 TFUE also present similar characteristics. As legislative acts are usually adopted by a Parliament which ensures the legitimate democratic process, it is to be recalled that the EP has a proper right of scrutiny (c.f. Article 11 of Regulation (EU) 182/2011). This mechanism ensures that the "executive" body does not exceed its powers set out in the basic act. On substance, like regulatory acts under Article 290 TFUE, they apply to objectively determined situations and they entail legal effects for categories of persons envisaged generally and in the abstract.

As we know, certain NGOs regarded the criterion "of individual scope" as too stringent and submitted the issue to the General Court of the EU. The judgments of the General Court which acknowledged the NGO's plea have then been subject to appeals.

In its **appeal judgments** of 13 January 2015, the CJEU held that *"Article 9(3) of the Aarhus Convention lacks the clarity and precision required for that provision to be properly relied on before the EU judicature for the purposes of assessing the legality of [..] Regulation No 1367/2006."*

This implies that, as such, Article 9(3) of the Aarhus Convention cannot be invoked directly to assess the legality of the Aarhus Regulation. However, for the reasons explained above, the

exclusion of acts of general scope is in line with Article 2(2), last sentence, of the Convention which excludes bodies or institutions acting in legislative or judicial capacity.

How can then private parties exercise their right to review in respect of measures of environmental law that are not of individual scope?

The CJEU judgment cannot be interpreted as being exhaustive on this issue, because the subject-matter of those cases was confined to the application of the Aarhus Regulation.

As the CJEU held in its appeal judgments (paragraph 60), the right to internal review under the Aarhus Regulation is *"only one of the remedies available to individuals for ensuring compliance with EU environmental law."*

Let us repeat this particular finding of the CJEU, as this is a crucial point for understanding the role of the Aarhus Regulation in the EU system of access to justice in environmental matters:

The **Aarhus Regulation is ONLY ONE of the remedies** that private individuals and NGOs have at their disposal for exercising their rights to access to justice in environmental matters, as guaranteed under the Aarhus Convention.

We need thus to explore the **full EU system of remedies**, as laid down in the Treaty on Functioning of the European Union, on the one hand, and in derived EU legislation – we have already mentioned sector-specific legislation in our written observations to which we would like to refer on this point - on the other hand.

Litigants may bring a **direct action** before the General Court for annulment of an act of general scope - please note that implementing acts are only one category ex-Article 291 TFUE -, under the conditions set out in **Article 263, fourth paragraph, TFEU.**

In support of that action, they may invoke, pursuant to **Article 277 TFEU**, the illegality of the basic act at issue by challenging the implementing acts adopted in application of the basic act, even after the deadline of two months of the publication of the measure, provided in Article 263 TFEU.

Article 263(4) TFEU broadened the *locus standi* for individuals to challenge acts of general scope. It now enables litigants to bring actions for annulment before the General Court not only *"against an act addressed to that person or which is of direct and individual concern to them"*, but also against *"a regulatory act which is of direct concern to them and does not entail implementing measures"*.

And this, Honourable Members of the Compliance Committee, Communicant, ladies and gentlemen, brings us to the 2nd question asked by the ACCC to the EU in view of this hearing:

- **Is Article 263(4) TFEU a means for ensuring compliance with Article 9 of the Convention?**

We would respectfully submit that Article 263(4) TFEU, is, indeed, a valid means for ensuring compliance with the Aarhus Convention.

In its findings on part I of the communication, which refer to the status before the entry into force of the Lisbon Treaty, the **ACCC already seems to accept** that even the predecessor of this provision - Article 230(4) TEC - met **the standard of the Convention**.

To recall, the ACCC held *"that TEC article 230, paragraph 4, on which the ECJ has based its strict position on standing, is drafted in a way that could be interpreted so as to provide*

standing for qualified individuals and civil society organisations in a way that would meet the standard of article 9, paragraph 3, of the Convention."

So the current conditions of *locus standi* of Article 263(4) TFEU should *a fortiori* be considered compliant with the Convention.

In addition, if the litigants do not fulfil the criteria to address themselves directly at the EU courts, it is the **national courts** of the Member States that come in. They are "ordinary courts" within the EU legal order, whose task is to implement EU law (as outlined in previous jurisprudence of the CJEU, opinion I/09 on the Patents Court).

Under Article 19(1) TEU - which was also introduced in the modification of the Treaties - which enshrines the so-called **"principle of effectiveness",** Member States are bound to **provide sufficient remedies to ensure effective legal protection in the fields covered by EU law**. The CJEU has reiterated this principle various times in the cases that were mentioned earlier, it is deeply embedded in the EU legal order.

The Member States' obligation to provide effective remedies also follows from Article 47 of the EU Charter of Fundamental Rights as regards measures taken by the Member States to implement Union law (see Case C-583/11 P, *Inuit*, paragraph 101).

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).

The **national courts constitute the other side of the coin of access to justice before the EU courts under Article 263(4) TFEU, to ensure** that members of the public can challenge

Union acts of general application environmental law or national measures implementing them. The Member States are required to ensure that such actions can be brought effectively before their courts.

This is an expression of the complementary role that the national courts have in the Union's control mechanism.

And it is to be recalled in this context: The Member States are not only bound by EU law to admit actions by qualified NGOs. They are also bound by the Aarhus Convention itself, to which they are Parties in their own right.

We would also like to refer in this context to the order by the General Court of 6 November 2012 in Case T-57/11, *Castenou Energía*, which shows that it is possible for NGOs to be heard by way of intervention in the General Court on the basis of the statute of the Court.

When a case has thus been brought before a national court, where the validity of an act taken by an EU institution or body is at stake, the national court has another means to ensure that the validity of acts of general scope is properly scrutinized by the EU courts: it is the **reference to the CJEU for a preliminary question** of the act's validity.

A court whose decisions cannot be appealed under national law is **obliged** to address a preliminary ruling to the CJEU, under the terms of Article 267 TFEU.

We have seen in the earlier quoted list of cases that the national courts make **frequent use** of preliminary references to the CJEU in areas touching upon the Aarhus Convention.

It is open to the national court to **grant interim relief** suspending the enforcement of such an act taken by an EU institution or body, as long as it also makes a reference for a preliminary ruling (as confirmed in Case C-143/88, *Zuckerfabrik Süderdithmarschen*).

If the national court of final appeal does not make a reference for a preliminary ruling pursuant to Article 267 TFEU on the validity of EU acts, where there are grounds for believing that they may be invalid, the Member State will equally be in breach of Union law and can be asked to pay damages (well-established case-law *Kobler*, C-224/01, and *Traghetti*, C-173/03, paragraphs 42 and 43).

This system – and let us repeat it:

- national courts as ordinary courts within the EU legal order, accompanied by the obligation for the national highest courts to submit preliminary questions to the CJEU

is thus the framework in which the Union can be deemed to comply with Article 9(3) of the Aarhus Convention in respect to general administrative measures of environmental law.

The European Union is convinced that this framework remains within the margin of implementation that is given to Parties by Article 9 of the Aarhus Convention.

We would thus respectfully ask the Honourable Members of the Compliance Committee to declare the Communicant's pleas as unfounded.