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Mr Jeremy WATES
Secretary to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters
United Nations - Economic Commission for Europe (UN-ECE)
Office 332 – Palais des Nations
CH-1211 Genève 10

Subject: Communication to the Aarhus Convention Compliance Committee concerning compliance by the European Community with provisions of the Convention in connection with access to members of the public to review procedures (ACCC/C/2008/32)

Dear Mr Wates,

By letter of 21 January 2010, addressed to the European Community Focal Point, Mr Daniele Franzone, you invited to submit our written explanations clarifying on how the changes introduced by the Lisbon Treaty may impact the merits of the communication referred to above.

According to Article 1, first and third subparagraphs of the Treaty on the European Union (TEU) ' *[b]y this Treaty, the High Contracting Parties establish among themselves a European Union [...]'* and *'[t]he Union shall replace and succeed the European Community'*. Article 47 TEU provides that *'[t]he Union shall have legal personality'*. Therefore, the explanations are presented on behalf of the European Union, successor to the European Community.

I am pleased to send you herewith these submissions.

Yours sincerely,

Pia Bucella

Enclosures: Written submissions of the EU in ACCC/C/2008/32

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In the letter of 21 January 2010 the Commission's observations were sought on the impact of the Treaty of Lisbon on the merits of the above-mentioned Communication. The letter refers in particular to Article 263 of the Treaty on the Functioning of the European Union (TFEU), which has replaced Article 230 of the EC Treaty, and to the Charter of Fundamental Rights of the European Union, which has been given binding force with the same legal value as the Treaties by Article 6(1) of the Treaty on European Union as amended.

Article 263 TFEU widens significantly the rules on standing in actions for annulment brought by private parties (i.e. applicants other than Member States or EU institutions and bodies) by adding a final limb to the fourth paragraph ("... and against a regulatory act which is of direct concern to them and does not entail implementing measures"). Where these conditions apply, there is no need for the Applicant to show that he is individually concerned by the contested act. This limb first appeared in Article III.365(4) of the Treaty establishing a Constitution for Europe (2004 OJ C310/1). As is well known, the purpose of this reform was to resolve the controversy surrounding Cases C-50/00P Unión de Pequeños Agricultores v Commission [2002] ECR I-66777 and C-263/02P Commission v Jégo-Quéré [2004] ECR I-3425. This also emerges clearly from the *travaux préparatoires*. [1]

Naturally, at this early stage, the European Courts have not yet had the opportunity to rule on the meaning of the new provision, but the General Court (formerly the Court of First Instance) may well do so shortly. That Court has addressed written questions to the parties in Cases T-16/04 Arcelor v European Parliament and Council, T-532/08 Norilsk Nickel and Umicore v Commission and T-539/08 Etimine and Ab Etiproducts v Commission, asking what consequences they infer from the entry into force of the new Treaty and Article 263 TFEU in particular. In Norilsk and Etimine, the matter has been referred to the Grand Chamber of the General Court.

In their answers to these questions, the European Parliament, the Council and the Commission have all taken the view that Article 263 TFEU only applies to actions brought on or after 1 December 2009 when the Treaty of Lisbon entered into force. All three institutions consider that the admissibility of an action can only be judged according to the rules in force on the date on which that action is lodged.

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1 Point 4 of the speech delivered on 17 February 2003 by President Rodríguez Iglesias of the Court of Justice to the "Discussion Circle" of the European Convention on the Court of Justice CONV 572/03 CERCLE I 6 http://register.consilium.europa.eu/pdf/en/03/cv00/cv00572.en03.pdf ; point 4 of the speech delivered on 24 February 2003 by the President Vesterdorf of the Court of First Instance to the same group CONV 575/03 CERCLE I 8 http://register.consilium.europa.eu/pdf/en/03/cv00/cv00575.en03.pdf ; para. 22 of the final report of this "Discussion Circle" dated 25 March 2003 CONV 636/03, CERCLE I 13 http://register.consilium.europa.eu/pdf/en/03/cv00/cv00636.en03.pdf ; note of the Praesidium of 12 May 2003 CONV 734/03, page 20 http://register.consilium.europa.eu/pdf/en/03/cv00/cv00734.en03.pdf

At the same time, the Parliament and the Commission have submitted to the General Court their interpretation of the term "regulatory act" in Article 263 TFEU, a concept which is not defined anywhere in the Treaties. According to these two institutions, "regulatory acts" are acts of general application which are not legislative acts within the meaning of Article 289(3). On any other view, they submit, the word "regulatory" would be redundant. In addition, they rely on the *travaux préparatoires*.[2] The TFEU provides for three types of non-legislative act of general application: (i) those adopted on specific legal bases such as Articles 43(3), 109 and 215(1); (ii) delegated acts (Article 290); and (iii) implementing acts (Article 291). The Council has not taken a position on the meaning of the term "regulatory act".

Another difficult question of interpretation is what is meant by "implementing measures" at the end of the fourth paragraph of Article 263 TFEU, although it is plain that such measures may be taken either by the Union or by the Member States. In their submissions to the General Court, the Council and the Commission have pointed out that, since Directives must be implemented by the Member States to which they are addressed, it is extremely unlikely, or even impossible, that actions for the annulment of Directives could ever be admissible under the final limb of the fourth paragraph of Article 263 TFEU. In addition, it seems clear that criminal proceedings cannot be regarded as "implementing measures" for these purposes, since the very aim of the reform was to ensure that private parties should not be driven to infringe the act in question before having access to a court.

At all events, if the contested measure is a "regulatory act which ... does not entail any implementing measures", the Applicant will still need to show that it is of direct concern to him or her. The concept of "direct concern" appears to bear the same meaning in Article 263 TFEU as it bore in Article 230 EC.

As to the Charter, Article 47 guarantees the right to an effective remedy. This right, which derives from Articles 6 and 13 of the European Convention on Human Rights, has long been recognised as a fundamental right by the Court: Cases 222/84 Johnston [1986] ECR 1651 and 222/86 Heylens [1987] ECR 4097. What is more, since its judgment in Case C-540/03 European Parliament v Council (Directive on family reunification) [2006] ECR I-5769, the Court has had regard to the Charter, albeit only as a non-binding source of law (see also Cases C-303/05 Advocaten voor de Wereld v Leden van de Ministerraad [2007] ECR I-3633 and C-450/06 Varec v Belgian State [2008] ECR I-581). In these circumstances, it is not certain that the fact that the Charter now has binding force will necessarily have any impact on the merits of the Communication.

Finally, the Commission is not aware at this stage of any other amendment effected by the Treaty of Lisbon which is likely to have any bearing on the merits of this Communication.

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2 See note 1 above.