Comments by the European Commission, on behalf of the European Union, to the draft findings and recommendations by the Aarhus Convention Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union in connection with access by members of the public to review procedures

(ACCC/C/2008/32)

I. INTRODUCTORY REMARKS – REQUEST FOR A FURTHER HEARING

1. These comments by the European Union (EU) refer to the draft findings and recommendations by the Aarhus Convention Compliance Committee (ACCC) in the above-mentioned compliance case, transmitted to the EU on 27 June 2016.

2. Pursuant to Article 17(1) of the Treaty on European Union (TEU), the European Commission submits these comments on behalf of the EU.

3. Thereby, the EU exercises its procedural right under paragraph 34 of the Annex to Decision I/7 on Review of Compliance, adopted at the first Meeting of the Parties to the Aarhus Convention in 2002 ("Decision I/7"), to submit comments to draft findings.

4. Paragraph 34 of Decision I/7 further provides that the ACCC *"shall take into account any comments made by them* [the Parties] *in the finalization of those findings, measures and recommendations."*

5. The EU would like to stress this latter point in view of the tight time-table set by the ACCC for the adoption of its final findings.[1] Furthermore, the findings on Part I of this case do not seem to take fully into account and reply to the comments the EU provided on the draft findings on Part I. As it is outlined in the Union's written reaction upon notification of the final findings on Part I of this case of 20 July 2011, the ACCC simply mentioned the date on which the EU comments were lodged. However, the Union respectfully submits that the ACCC has a procedural obligation to describe the Party's comments and to set out its reasons for not accepting them, if such were the

[1] In its transmission letter of the draft findings of 27 June 2016, the ACCC asked for comments by the EU by 25 July 2016, in order to finalize its findings at or before its fifty-fourth meeting in Geneva from 26 to 29 September 2016. The deadline for reply by the EU has in the meantime, at the request of the Union, been prolonged to 25 October 2016; the next meeting of the ACCC is scheduled for 6-9 December 2016.

case.[2] This is all the more important in the present case which concerns the very structure of the EU Treaty system of access to litigation.

6. Furthermore, as the EU will explain in more detail under section III.C of its observations relating to the "Aarhus Regulation" 1367/2006[3] which contributes to the implementation of the Aarhus Convention in the Union's legal order, the Union did not yet rebut several of the Communicant's allegations of failing compliance of the Aarhus Regulation. The reason was that it considered those arguments inadmissible and recognised as such by the ACCC who did not contradict the Union's analysis on this point. The ACCC thus based a good part of its draft findings of non-compliance by the Union on allegations by the Communicant to which the Party had not by then replied.

7. The possibility given to Contracting Parties of the Aarhus Convention under the terms of Decision I/7 to comment draft findings is thus all the more to be seen not only as an occasion to correct any factual errors or minor details, but has to be a proper, fully fledged stage within the compliance procedure where the rights of defence of the Party need to be completely respected. Any other interpretation would not be in conformity with the wording and purpose of paragraph 34 of Decision I/7 and, notably in the specific context of this compliance case, would seriously undermine the Union's rights of defence.

8. In the transmission letter of the draft findings of 27 June 2016, the EU was asked whether it agrees with the ACCC making advance recommendations to the Union in this case in accordance with paragraph 36(b) of Decision I/7. This would allow the ACCC to take action already before the Meeting of the Parties of the Aarhus Convention has adopted its findings, with a view to addressing compliance issues without delay. As expressed by the aforementioned note of 20 July 2011, the EU disagreed with the final findings by the ACCC on Part I of the case and did not give its consent to advance action. Given the EU's present comments regarding the draft

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2 This is, by the way, also the standard that the Convention sets for "due account" to be taken of public participation, whereby it is clear that to "take due account" does not mean to "accept". In the 2014 Aarhus Convention Implementation Guide, it is noted that *"the public input should be capable of having a tangible influence on the actual content of the decision. When such influence can be seen in the final decision, it is evident that the public authority has taken due account of public input."* (page 120).

3 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, OJ L 264 of 25.9.2006, p. 13.

findings on Part II, it respectfully submits that the Union still cannot agree to advance recommendations in accordance with paragraph 36(b) of Decision I/7 at this stage of the procedure.

9. Rather, in light of the circumstances of this case and the following comments, the EU would consider it appropriate and kindly requests that the matter be made subject of a further hearing.

II. FACTUAL BACKGROUND AND CONTENT OF THE DRAFT FINDINGS

10. The EU would like to recall briefly the main elements of this case, as far as they are relevant for the current exchange with the ACCC.

11. This compliance case was introduced by the non-governmental organisation (NGO) *ClientEarth* in 2008. It concerns compliance by the EU with Article 9(3) and (4) of the Aarhus Convention. These provisions read as follows:

"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.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. […]"

12. The compliance case was subsequently separated into two parts, to allow the ACCC to proceed with those elements of the case that were not by then *sub iudice*.

i) Part I concerns the allegation that the standing criteria for individuals and non-governmental organisations (NGOs) before the EU Courts, as interpreted by the jurisprudence of these courts, would not fulfil the requirements of Article 9(3) and (4) of the Aarhus Convention.

ii) Part II relates to the allegation that the standing criteria laid down in the Aarhus Regulation would not be compliant with Article 9(3) and (4) of the Convention.

13. On 27 April 2011, the ACCC adopted findings on Part I. The ACCC, though finding the EU *"not in non-compliance with the Convention"* 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 of the Treaty on the Functioning of the European Union (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."*

14. As mentioned above, by letter of 20 July 2011, the EU notified its disagreement with these findings. The Union notably regretted that the ACCC had not taken its comments to the draft findings into account which outlined the vital role of the Courts of the Member States of the Union in its system of judicial remedies.[4] Furthermore, the EU pointed to the discrepancy between the ACCC's findings of non-compliance and its recommendation that *"a new direction of the jurisprudence of the EU Courts should be established"*.

15. In the hearing on this case on 1 July 2015, the Union informed the ACCC about important recent developments regarding the case-law of the Court of Justice of the European Union (CJEU) which demonstrated, in the EU's view, that the obligations stemming from the Convention had been taken into account, in accordance with the tools provided for by the EU legal order as interpreted by the CJEU.

16. In its draft findings on Part II, the ACCC thus also took up its examination of Part I of the case, by considering whether there was in the meantime a new direction of the

[4] See the EU comments to the draft findings on Part I of the case of 12 April 2011, notably paragraphs 2 to 13.

jurisprudence of the EU Courts. The ACCC came to the conclusion that this was not the case and that, therefore, the EU failed to comply with Article 9(3) and (4) of the Aarhus Convention. Thereby, the ACCC changed its previous finding of compliance on this allegation into a draft finding of non-compliance.

17. Concerning specifically the issues examined under Part II of the case relating to the standing criteria of the Aarhus Regulation, the ACCC equally found the EU to be in non-compliance with Article 9(3) and (4) of the Convention.

III. EU COMMENTS TO THE DRAFT FINDINGS

18. The ACCC recommended, in essence, that either the jurisprudence of the CJEU should change to take fuller account of the obligations under Article 9(3) and (4) of the Aarhus Convention when it interprets EU law and assesses the legality of EU implementing measures, or that the Aarhus Regulation is amended or new legislation implementing the Aarhus Convention is adopted.

A. The specific character of the EU framework

19. Both these recommendations ignore, with all due respect, the specific features of a regional economic integration organisation like the EU, with its special institutional framework and unique legal order, being a Party to the Convention, as already highlighted by the EU in its previous submissions.

20. The Aarhus Convention bodies have been made aware by the Declaration that the EU made upon signature and reiterated upon approval of the Convention ("the EU Declaration") that *"[w]ithin the institutional and legal context of the Community […] the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention."*

21. Therefore, when looking at the question whether the Union has properly implemented the Convention with respect to its institutions and bodies in areas that actually fall within the Convention's scope, the ACCC cannot treat it in the same way as a State Party. In most legal orders, the issue of *locus standi* is governed by rules adopted by the legislator, with the consequence that those rules might be altered by that same sovereign legislator. The Union's institutions as "secondary legislator" cannot, however,

depart in secondary legislation from the express provisions of the Treaties which constitute "primary law" - and the Union takes it that the ACCC, when it referred to *"new or amended legislation"* did not suggest any modification of the Founding Treaties.[5] Moreover, the EU Declaration implies that the Union adhered to the Convention in full respect of all sources of international law, including first of all the EU Treaties. Any modification of the Aarhus Regulation or adoption of new implementing legislation can thus only take place within the boundaries and in full compliance with the institutional balance and the specific role conferred by the TFEU and TEU on each EU institution, including the CJEU in its jurisdictional role, and both the Parliament and the Council in their legislative functions.

22. Nor can the jurisprudence of the CJEU somehow be modulated following compliance findings. Certainly, its case-law may evolve and become more comprehensive. It did so and still continues to do so in the Union's view to take full account of the entry into force of the Aarhus Convention for the Union, as the ACCC requested in its findings on Part I of this case. However, any such development is decided by the Union judicature itself. In the Union legal order, the authority to interpret authentically Union law rests with the Union judicature. An international agreement, like the Aarhus Convention, cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Union legal system.[6]

23. This does not mean that the Union does not intend to properly implement the obligations arising from the Aarhus Convention to which it is a Party, or that it somehow requests a lower standard of implementation than State Parties. It rather means, firstly, that it feels that the specific features of the Union legal order should not be ignored, and secondly, that it considers that the Union legal order ensures access to justice in environmental matters to a sufficient degree as to comply with the requirements of Article 9(3) and (4) of the Aarhus Convention. No change of the EU Treaties was requested when the Union adhered to the Convention.

24. Furthermore, the ACCC should acknowledge that, on the basis of settled case-law of the CJEU, within the jurisdictional system of the Union, national judges (as *"juge*

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5 Such a modification of the Treaties would, in particular, need the common accord of all Member States and would need to be ratified by all Member States in accordance with their respective constitutional requirements.

6 See Opinion I/92 [1992], ECLI:EU:C:1992:189, paragraph 32.

communautaire du droit commun") and courts play a central role for implementing Article 9(3) of the Aarhus Convention. This concerns also the jurisdictional control by national judges on EU legal acts. As the CJEU has held on many occasions, *"[…] the possibility for individuals to have their rights protected by means of an action before the national courts, which have the power […] to make a reference for a preliminary ruling […] constitutes the very essence of the Community system of judicial protection."*[7] Implementation of the Convention's Article 9(3) by way of an interaction between national courts and EU courts should thus not be seen as "less justice", but be acknowledged as a unique, complete system of judicial protection within the EU context, as the CJEU stressed in its case-law.

25. The TFEU has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of EU acts, and has entrusted such review to the EU Courts. Accordingly, natural or legal persons who cannot, by reason of the conditions of admissibility stated in the fourth paragraph of Article 263 TFEU, challenge directly EU acts of general application, do have protection against the application to them of those acts. In that context, it must be emphasised that, in proceedings before the national courts, individual parties have the right to challenge before the courts the legality of any decision or other national measure relative to the application to them of a EU act of general application, by pleading the invalidity of such an act. It follows that requests for preliminary rulings which seek to ascertain the validity of a measure constitute, like actions for annulment, means for reviewing the legality of EU acts.[8]

26. The system of jurisdictional protection based on both the European and national jurisdiction, put in place by the EU Treaties, is particularly relevant as regards fields of EU law like environment, characterised by shared competences between the EU institutions and the Member States.[9]

27. In that vein, the European Court of Human Rights has recognised that the protection of fundamental rights by Union law, as regards both the substantive guarantees offered

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7 See e.g. Order of the Court of 1 February 2001 in Case C-301/99 P, *Area Cova SA and others v Council and Commission*, ECLI:EU:C:2001:72, paragraph 46.

8 Cf. Judgment of the CJEU of 3 October 2013 in Case C-583/11P, *Inuit Tapiriit Kanatami a.o. v European Parliament and Council*, EU:C:2013:625, paragraphs 89 to 107.

9 See Article 4(2)(c) TFEU.

and the mechanisms controlling their observance, can be considered to be *"equivalent"* to that of the European Convention of Human Rights system.[10]

B. CJEU case-law

28. In its draft findings, the ACCC equally looked at the jurisprudence of the EU courts in relation to Article 9 (3) and (4) of the Aarhus Convention since 14 April 2011, when the ACCC adopted its findings on Part I of the case.

29. The ACCC examined the above-mentioned "*Stichting Mileu"* case on compliance of the Aarhus Regulation with Article 9 (3) and (4) of the Aarhus Convention, for which it had suspended its deliberations on Part II of the case, *"to determine whether it represents a change in direction in the jurisprudence of the EU, and in particular whether it brings the EU into compliance with the Convention"* (paragraph 43 of the draft findings).

30. The ACCC took note of the CJEU's conclusion that Article 9(3) of the Aarhus Convention is not unconditional and sufficiently precise to be relied on in order to assess the legality of Article 10(1) of the Aarhus Regulation. However, the ACCC deducted that the CJEU's ruling does not bring the EU in compliance with Article 9 (3) of the Convention (paragraph 51 of the draft finding).

31. In this regard, the Union would first like to observe that the development of CJEU jurisprudence relating to the Aarhus Convention is a continuous process. It depends on the number of cases that are brought before the Court and the issues that are raised therein. The ACCC has now somehow fixed a "cut-off" date, implying that the jurisprudence is already settled enough to allow the ACCC, in contrast to its earlier findings on Part I of the case, to conclude on non-compliance. This draft finding, however, disregards the evolving nature of the jurisprudence, as it is also acknowledged by the ACCC's recommendations which give the Union the possibility to further implement Article 9 (3) and (4) of the Convention by way of CJEU jurisprudence.

32. For instance, the pending Case C-43/15, *Lesoochranárske zoskupenie,* a request by the Slovak *Najvyssí súd* (Supreme Court) for a preliminary ruling by the CJEU in the

[10] See *Bosphorus Hava Yollari Turizim Ve Ticaret Anonim Sirketi v* Ireland [GC], no. 45036/98, § 155, ECHR 2005-VI.

context of the Habitats Directive 92/43/EEC, might further strengthen standing for environmental NGOs in view also of the requirements of the Aarhus Convention. In her Opinion of 30 June 2016 on this case, the Advocate General outlined that, in case public participation is refused, the NGO should be entitled to challenge that refusal before a court (see paragraph 85 of the Opinion). This further demonstrates that the degree of access to justice in the field of EU environmental law cannot be exhaustively assessed without considering the role of the national judge, under the control of the CJEU in the context of the preliminary reference procedure under Article 267 TFEU.

33. The Union would thus maintain that the present draft findings with regard to the CJEU case-law are not exhaustive and do not take into account the specific nature of the EU jurisdictional system. In the EU's opinion, the ACCC does not have sufficient ground to depart from its earlier findings on Part I of the case according to which the EU was not in non-compliance. These earlier findings are also coherent with the ACCC's recommendation in the present draft findings (paragraph 118) to implement the obligations under Article 9(3) of the Convention by way of the jurisprudence of the CJEU.

34. Before it came to its conclusion that the jurisprudence of the CJEU does not comply with the requirements of Article 9 (3) and (4) of the Aarhus Convention, the ACCC stated, in paragraph 40 of its draft findings, that it did not assess in detail *"each decision by the EU Court that has been referred to in the course of this case"* but just looked at the *"most important trends"*.

35. However, the Union considers and submits that the ACCC should carefully analyse all Court decisions that the Union indicated in that regard in the hearing on this case on 1 July 2015 in Geneva, all the more as the number of cases to be examined is limited. The ACCC already covered the case-law that was rendered until early 2011 in its findings on Part I of the case. That leaves only those cases that post-date the earlier findings for closer examination. The Union indicated 9 cases that showed, in its opinion, a *"new direction"* of case-law of the CJEU. The EU outlined these cases and their importance from the point of view of the Convention in its statement in the hearing, transmitted to the ACCC also in writing (see pages 3 to 5).

36. The ACCC globally dismissed these cases as they were submitted to the CJEU by way of preliminary rulings and concerned enforcement of the Convention in national courts (paragraph 52 of the draft findings), without therefore considering the role of the national judge as complementary to the one of the European jurisdiction in ensuring access to justice and full jurisdictional control in the field of EU environmental law.

37. This position ignores the vital role that the courts of Member States play as "ordinary courts" within the EU legal order, whose task is to implement EU law.[11] As the EU already outlined in more detail in its comment to the draft findings on Part I of the case to which reference is made in this context (see notably pages 2 and 3), 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. It is essentially through the national courts that the Union system provides a remedy to individuals against a Member State or another individual for a breach of Union law. This principle is a cornerstone of the Union's judicial architecture and deeply embedded in the Treaty.

38. Furthermore, the ACCC referred to the Communicant's allegation which seems to imply that the wording of the Treaty or its interpretation by case-law would discriminate between potential applicants according to their status, and that companies and Member States would be entitled to better access to justice than NGOs (paragraph 24 of the ACCC's draft findings).

39. The Union would like to stress that the distinction introduced by Article 263 TFEU between "privileged" or "institutional" applicants (Member States and EU institutions) and "natural or legal persons" does not operate any discrimination but, again, reflects simply the specific nature of the EU legal order. There is a distinction between institutional applicants and natural and legal persons, which fully justifies a different treatment with regard to their *locus standi* before the European jurisdictions. This is also the case with regard to access to high constitutional jurisdictions within the Member States. However, neither the Treaty nor the case-law operates any such discrimination between natural or legal persons. Rather, the same tests developed by the Union judicature, for instance as to the possibility to challenge acts of direct concern which do not entail implementing measures, apply irrespectively of the applicant.

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[11] See Opinion I/92 [1992], ECLI:EU:C:1992:189, paragraph 80.

40. Therefore, as far as the CJEU case-law is concerned, the Union would ask the ACCC to recognise the specific legal nature of the EU legal order and the evolving nature of CJEU jurisprudence relating to the Aarhus Convention and to revert to its earlier findings which did not establish any non-compliance on this issue.

C. The Aarhus Regulation

41. With regard to the Aarhus Regulation, the ACCC in its draft findings looked at the criteria under which the Regulation provides for internal review and access to the EU courts. This covers the questions of the scope *ratione personae* (who can ask for review) and *ratione materiae* (what can be reviewed) of the Aarhus Regulation. The ACCC assessed whether these criteria comply with the requirements of Article 9(3) and (4) of the Aarhus Convention.

42. However, a number of allegations which the ACCC took up in its draft findings result from new arguments that the Communicant only introduced in its comment to the "Aarhus appeal judgments"[12] of 23 February 2015 and which were not contained in its original communication. To only introduce these arguments at this late stage made them, in the Union's view, inadmissible for the purpose of the present compliance case.

43. The EU was supported in this opinion by the wording of the invitation to reply to the Communicant's comment. On 2 March 2015, the EU was invited to comment either the Aarhus appeal judgments of 13 January 2015 and/or the Communicant's commentary on those rulings (emphasis added). The invitation for comment did not, in the Union's understanding, extend to the Communicant's allegations of failing compliance of the Aarhus Regulation with the Aarhus Convention beyond the aspects covered by these judgments.[13] To recall, the Aarhus appeal judgments concerned the notion contained in the Aarhus Regulation of an *"administrative act"* and whether it can, in view of

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12 Judgments of 13 January 2015 in Joined Cases C-401/12 P to C-403/12 P, *Council a.o. v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, ECLI:EU:C:2015:4, and Joined Cases C-404/12 P and C-405/12 P, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, ECLI:EU:2015:5.

13 As the EU already detailed in its observations of 11 June 2015, these allegations covered the application of the criterion of individual scope in all requests for internal review addressed to the European Commission (also beyond those requests lodged by *ClientEarth*; see paragraphs 42 to 49 of the Communicant's commentary to the Aarhus appeal judgments), "Acts not adopted under environmental law" (paragraphs 50 to 60), "Acts not having legally binding and external effects" (paragraphs 61 to 71) and "Arbitrary exemptions to the administrative acts definition" (paragraphs 72 to 81 of the Communicant's commentary to the Aarhus appeal judgments).

Article 9(3) of the Aarhus Convention, be limited to acts *"of individual scope"* rather than general scope that are open for review.

44. As the EU outlined in its observations of 11 June 2015, the Union thought that the ACCC had thus considered that these arguments, which could be deemed to enlarge the scope of the case, were not pertinent at hand and inadmissible for the purpose of the present Communication.

45. The EU noted that, for this reason, it replied at that time only to the specific ACCC request, namely to comment on the CJEU's rulings and the Communicant's interpretation thereof. The EU thus only elaborated on the Regulation's criterion *"of individual scope"*.

46. If the ACCC disagreed with that evaluation and did not consider those arguments as inadmissible, it should have explicitly said so upon receipt of the Union's comments of 11 June 2015 and invited the EU to reply also to those grievances.

47. Given the content of the new draft findings, the discussion at the hearing on part II of the Communication on 1 July 2015 cannot be seen to remedy this oversight. With regard to the Aarhus Regulation, the discussion focused on the question whether the exclusion from the Regulation of acts of general scope is in compliance with Article 9(3) of the Convention. The questions, contained in the ACCC's draft findings, whether acts not adopted under environmental law should be eligible for review or whether acts not having legally binding and external effects may be excluded from review were not dealt with. Only the issue of the exclusion of certain sectors from the Regulation's scope was touched upon in the hearing and the EU replied briefly in general terms. However, also on this latter point no detailed arguments were exchanged and, most notably, not in writing.

48. Apart from the fact that certain grievances were thus only presented in the course of the procedure, some of which were not yet discussed at all, another element raises admissibility questions. Indeed, the Communicant just generally criticised standing criteria in the Aarhus Regulation without demonstrating that those criteria would ever have been applied to the NGO and hindered it to bring a request for review in a given case. For instance, the Communicant was never barred from review because the challenged act was not adopted under environmental law. The compliance procedure

under the Aarhus Convention should be considered as a remedy to find an effective and sufficient means of redress to the advantage of the Communicant, and not be used for an abstract discussion.[14]

49. In the same vein, the Communicant should first exhaust internal legal remedies available at the level of the European Union before addressing the ACCC. If the NGO considers to be unduly hindered in its right to review under the Aarhus Convention by the application of criteria in the Aarhus Regulation, it could address the EU Courts on these matters, pursuant to Article 12 of the Aarhus Regulation.

50. In its observations of 11 June 2015, mentioned above, the EU continued to point out that the absence of comments on the allegations it considered as inadmissible and recognised as such by the ACCC did not imply that the EU accepted them as founded, and that the EU reserved its right to make observations on those arguments. In so far as the draft findings on Part II of the Communication do not fully take into account and assess those observations, the EU respectfully asks the ACCC to organise a further hearing in order to make sure that the general principle that both Parties should be heard on their arguments and the right of defence would be fully taken into consideration. More particularly, the Union would then be able to receive a specific reasoning on how the ACCC considered its current reply, following below, on the points concerning *"acts not adopted under environmental law"*, *"acts not having legally binding and external effects"*, and *"the exemption of administrative review"*. This is important also in view of the ACCC's remark in the draft findings that, in its evaluation, the Committee looked at the combined effect of the standing criteria in the Aarhus Regulation (paragraph 90 of the draft findings), so that it is evident that each and every criterion played a role for the ACCC's draft findings.

i) Access to justice under the Aarhus Regulation

51. As a preliminary remark, the Union would like to recall that one of the fundamental principles of the Aarhus Convention is the rule laid down in its Articles 2(5) and 9 whereby environmental NGOs are deemed to have a legal interest of their own to bring certain judicial proceedings on behalf of the environment. No such rule was recognised in Union law prior to the adoption of the Aarhus Regulation.

[14] See in this respect also paragraph 21 of Decision I/7.

52. As is plain from the preamble to the Aarhus Regulation (especially recitals 18 to 21), the purpose of that enactment is to give wider access to justice. This is achieved by the Regulation's Title IV on *"Internal review and access to justice"*, comprising Articles 10 to 12, which grant to NGOs the possibility of requesting internal review of environmental acts of individual scope. Where the NGOs do not agree with the response from the EU institution concerned, they may seek the annulment of the latter's refusal decision.

53. The basic rules for administrative review ("*internal review")* under the Aarhus Regulation are as follows:

54. Article 10(1) of the Aarhus Regulation provides that *"[a]ny non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act."*

55. Article 2(1)(g) of the Aarhus Regulation defines an *"administrative act"* as *"any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects"*.

56. The following arguments reply to those grievances by the Communicant with regard to the Aarhus Regulation that the ACCC upheld in its draft findings. For the record, the ACCC did not uphold any criticism with regard to the criteria that NGOs must meet according to Article 11 of the Aarhus Regulation to be eligible to ask for review. For ease of reference, the Union keeps the titles as used by the ACCC.

ii) Entities other than NGOs

57. The ACCC considered, firstly (paragraphs 85 and 86 of the draft findings), that the Aarhus Regulation is not compliant with Article 9 (3) of the Convention in that it limits applicants for internal review to environmental NGOs and excludes members of the public in general. Indeed, Articles 10 to 12 of the Aarhus Regulation refer to NGOs that meet the criteria outlined in Article 11.

58. As a preliminary remark under this point, the EU would like to note that the Communicant already lodged several requests for review and was always found eligible for that purpose under Article 11. Therefore, as mentioned before, it does not seem that the Communicant is lacking an effective and sufficient means of redress to its advantage. The Communicant's argument of failing standing for other private parties, made apparently on their behalf, should not be deemed admissible for the present communication.

59. Furthermore, on the merits, Article 9 (3) of the Convention expressly allows Parties to provide for *"criteria"* which *"members of the public"* must meet to be able to avail themselves of the review procedure referred to in that provision.

60. The EU considers that Article 9 (3) of the Convention does not require Parties to ensure that any member of the public has unconditional access to a review procedure. This implies that, when a Party puts in place a review mechanism, it still has a margin of discretion as to the category of applicants, to find the right balance between the need of complying with procedural requirements and the objective of an effective access to justice.

61. The Union understands that Article 9(3) of the Aarhus Convention is aiming to enhance the enforcement of measures relating to the environment. This objective can be more than sufficiently achieved by means of a scheme whereby environmental NGOs are entitled to review.

62. Besides, Article 9(3) of the Convention seeks to ensure access to administrative or judicial review, implying a choice between the two options. Natural persons have already access to the EU Courts, in accordance with the relevant provisions of the Treaty.

63. If Article 9 (3) of the Convention were considered as requiring access to justice across the board, such a broad interpretation would be tantamount to imposing on Parties the

establishment of an *"actio popularis"*, which the ACCC itself has expressly declared in previous cases[15] as not being what the Convention requires.

64. This latter element is all the more important in the context of measures taken by the EU institutions where the potential pool of litigants and the potential consequences for decision-making and administration have quite another dimension than in State Parties. The ACCC cannot limit itself in this regard to simply state as it did in three short sentences (paragraphs 85 and 86 of the draft findings) that Article 9(3) of the Aarhus Convention requires *"members of the public"* to be given access (*quod non* in the EU's view, given that Article 9(3) *expressis verbis* allows Parties to establish criteria for the eligibility of members of the public). The importance of this question requires due consideration, also of what the practical implications of the ACCC's (legally incorrect, in the Union's view) interpretation would be.

65. Furthermore, to enlarge the scope of potential litigants to every natural and legal person would imply an amendment to the Treaty (Article 263 TFEU on actions for annulment and Article 265 regarding actions for failure to act) and hence could not in any event be introduced by EU secondary legislation.

66. The Aarhus Convention bodies have been made aware by the EU Declaration that *"[w]ithin the institutional and legal context of the Community […] the Community also declares that the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention."* This implies that the Convention is implemented by EU secondary legislation, but within the boundaries of the Founding Treaties, i.e. within the institutional and legal context of the Union.

67. Finally, the ACCC referred to its earlier findings in Case ACCC/C/2006/18 against Denmark to underpin its conclusion that the term *"members of the public"* in the Convention could not be limited to NGOs. However, in this case, Denmark was not found to be non-compliant. The ACCC rather held that it was *"not able to conclude that Danish law effectively bars all or almost all members of the public, in particular all or almost all non-governmental organisations devoted to wildlife and nature conservation,*

[15] See paragraph 35 of the findings in Case ACCC/C/2005/11 against Belgium or paragraph 29 of the findings in Case ACCC/C/2006/18 against Denmark, also repeated in paragraph 77 of the findings on Part I of the present Communication.

from challenging the culling of wild birds, as covered by article 9, paragraph 3". Paragraphs 30 and 31 of the findings to which the ACCC refers do not specifically deal with the question whether or not *"members of the public"* can be limited to qualified NGOs. Rather, they specify that the ACCC, when evaluating whether a Party complies with Article 9 (3) of the Convention, *"pays attention to the general picture"* and whether the application of the criteria set by the Party do *"not lead to effectively barring all or almost all members of the public from challenging acts and omissions"* which contravene environmental law. The Union does not therefore think that the case indicated by the ACCC constitutes a precedent for the question at hand.

68. In view of these arguments, the Union is of the opinion that it can validly limit entitlement to review to qualified NGOs and that this is not in breach of Article 9(3) of the Aarhus Convention.

69. This is particularly so as the Aarhus Regulation is not the only means whereby the EU gives effect to the Aarhus Convention, as was recognized by the CJEU in the Aarhus appeal judgments.[16] It is not valid to criticise the Union based on the content of one Regulation where the EU legal order covers the remedies available to individuals also through other means, notably in interaction with the courts of the Member States.

iii) Acts of individual scope

70. The ACCC further looked at the acts that are open to internal review under the terms of the Aarhus Regulation (its scope *ratione materiae*). The ACCC found that Article 10(1) of the Aarhus Regulation fails to correctly implement Article 9 (3) of the Convention because it is limited to challenging acts *"of individual scope"*.

71. As we know, Article 9(3) of the Aarhus Convention leaves a broad margin of discretion to the Contracting Parties with regard to the concrete procedures for review.[17]

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16 See the judgments in Joined Cases C-401/12 P to C-403/12 P, cited above, paragraph 60, and Joined Cases C-404/12 P and C-405/12 P, paragraph 52.

17 The Aarhus Convention Implementation Guide 2014, for instance, refers to previous compliance findings where the ACCC *"acknowledged the rather broad range of possibilities for the Parties to ensure procedures to challenge acts and omissions contravening provisions of national law relating to the environment."* (page 197).

72. In this logic, the CJEU, the highest judicial body of the Union, ruled that Article 9(3) of the Aarhus Convention is not unconditional and sufficiently precise to be relied on in order to assess the legality of Article 10(1) of the Aarhus Regulation.[18]

73. The ACCC concluded that it *"follows that Article 10(1) of the Aarhus Regulation fails to correctly implement Article 9, paragraph 3 of the Convention in so far as the former covers only acts of individual scope."* (paragraph 47 of the draft findings).

74. However, the CJEU judgment limits itself to stating that Article 9(3) of the Convention cannot be relied upon to assess the legality of Article 10(1) of the Aarhus Regulation. This does not mean that Article 10(1) would be flawed. The General Court's earlier judgment finding that Article 10(1) of the Aarhus Regulation was not compatible with Article 9(3) of the Aarhus Convention was overruled by the CJEU as the higher instance. This has to be accepted. Any evaluation of the compliance of the Aarhus Regulation with the Convention cannot be based on the judgment that has been set aside by the higher court, but has to be done afresh, by taking into account the wording of the Aarhus Convention and the broad margin of discretion left by its Article 9(3) to the Contracting Parties.

75. When evaluating whether the Aarhus Regulation might validly refer to acts *"of individual scope"*, it has equally to be borne in mind that the last sub-paragraph of Article 2(2) of the Aarhus Convention excludes from the definition of *"public authorities"* to which the Convention applies those bodies or institutions *"acting in a judicial or legislative capacity"*.

76. According to the express wording of Article 2(2) of the Convention, this exclusion is functional in nature. This means that it is not the classification of the authority under national (internal) law that counts, but in which function it acts when it adopts the measure. In the hearing on 1 July 2015, the ACCC seemed to share the view that the definition of an act has to be made on the basis of its substance rather than its terminology in the national legal order.

[18] Judgments in Joined Cases C-401/12 P to C-403/12 P, cited above, paragraphs 55 to 61, and Joined Cases C-404/12 P and C-405/12 P, paragraphs 47 to 53.

77. There can be no doubt that normative acts of general scope by the Council and/or the European Parliament, acting directly on the basis of a conferral of powers laid down in the TFEU, constitute measures adopted *"in a legislative capacity"*.

78. The distinction which is known in certain legal orders between legislative acts adopted by parliament and executive regulations adopted by the government cannot be transposed to accurately describe the Union legal order. In the specific institutional framework of the Union, a normative act of general scope adopted by its institutions is to be considered as adopted in a legislative capacity within the meaning of Article 2(2) of the Convention. This is also relevant with regards to acts of general scope adopted by the Commission on the basis of the powers conferred on it by the Treaty and/or delegated to it by the EU legislator.[19]

79. In case of doubt, an act has to be considered on a case-by-case basis, so that the vital distinction between legislation which is outside the scope of the Convention (a normative act of general scope) and administrative measures in the environmental area which are up to review can be safeguarded in the institutional context of the EU.

80. The criterion *"of individual scope"* in Article 10(1) of the Aarhus Regulation thus reflects the specific decision-making procedure within the Union and within its *"institutional and legal context"* as indicated in the EU Declaration. This does not mean that acts by the Commission would be globally excluded from review as is alleged. Rather, the Commission has already reviewed earlier Implementing Decisions in the context of the internal review procedure under the Aarhus Regulation.[20] Furthermore, avenues of judicial review are available under the terms of the TFEU.

81. Therefore, the EU is of the opinion that it cannot be requested to provide in the Aarhus Regulation for review procedures in respect of acts other than administrative acts or omissions of individual scope.

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19 See Articles 290 and 291 TFEU.

20 E.g. the Commission Implementing Decision of 28 June 2012 authorising the placing on the market of products containing, consisting of, or produced from genetically modified soybean MON 87701 x MON 89788 (MON-97701-2 x MON-89788-1) pursuant to Regulation (EC) No 1829/2003 of the European Parliament and of the Council, OJ L 171, 30.6.2012, p. 13. Another example is the Commission Decision of 30 January 2015, C(2015)363 final, recognising Le Commerce du Bois as a monitoring organisation under Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market.

iv) Acts not adopted under environmental law

82. Article 10(1) of the Aarhus Regulation provides that an administrative act *"under"* environmental law may be challenged by way of a request for internal review. Likewise, in Article 2(1)(g) of the Aarhus Regulation, an administrative act open for review is described, among other criteria, as a measure of individual scope *"under"* environmental law.

83. The ACCC sees this as too narrow (paragraphs 88 to 92 of the ACCC's draft findings), given that Article 9(3) of the Convention refers to acts and omissions which *"contravene"* provisions of its national law relating to the environment. According to the ACCC, an act without an environmental legal base in EU law, like in the field of energy or fisheries, may contravene a law relating to the environment and should thus be equally subject to review.

84. In this regard, it suffices to refer to the definition of *"environmental law"* in Article 2(1)(f) of the Aarhus Regulation which reads as follows:

"(f) 'environmental law' means Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems" (emphasis added).

85. This definition clarifies that it is the substance of an act, not the legal basis upon which it was adopted, that is decisive for the determination as to whether it falls within the scope of Article 10(1) of the Aarhus Regulation and is open for review. Recital 10 of the Aarhus Regulation further indicates that, "*[i]n view of the fact that environmental law is constantly evolving, the definition of environmental law should refer to the objectives of Community policy on the environment as set out in the Treaty."*

86. The Explanatory Memorandum to the Proposal for the Aarhus Regulation[21] equally confirms the wide notion of *"environmental law"* for the purposes of the Regulation. To quote from the Explanatory Memorandum (page 6):

"The definition of "environmental law" is relevant for the access to justice part of the proposal. "Environmental law" is defined in general terms to make it possible to include relevant legislation on the environment. As environmental law is constantly developing, drawing up an exhaustive list would be problematic, as a procedure for regular updating would have to be provided. Thus, the proposal takes account of the following aspects:

- The legislative objective must be one of the objectives taken up in Article 174 of the EC Treaty [now Article 191 TFEU].

- The definition must be consistent with the Åarhus Convention, taking up the main aspects of the environment. It seems inappropriate to draft an exhaustive list of what must be understood as "environmental law", as this concept is not defined in the Åarhus Convention. The constant evolution of environmental law requires an indicative list."

87. Contrary to what is alleged by the ACCC, the Union has therefore a broad definition of *"environmental law"* for the purposes of applying the Aarhus Regulation that does not look at the legal basis of the act, but at its substance.

88. The EU would therefore submit that the ACCC has erred in finding the criterion of acts *"under environmental law"* as laid down in the Aarhus Regulation incompatible with Article 9(3) of the Aarhus Convention.

v) Acts not having legally binding and external effects

89. The ACCC considers (paragraphs 93 to 97 of the draft findings) that the concept of *"acts"* pursuant to Article 9(3) of the Aarhus Convention must not be construed as covering only acts that have legally binding and external effects, as Article 2(1)(g) of the Aarhus Regulation does. According to the ACCC, the discretion left to Parties under the terms of Article 9(3) of the Aarhus Convention stretches only to the criteria

[21] COM(2003)622.

that must be met by members of the public to have access to justice (who can ask for review or scope *ratione personae*), but would not allow Parties any discretion as to the acts that may be excluded from review (what can be reviewed or scope *ratione materiae*).

90. However, Article 9(3) of the Convention does not prescribe in any way the challengeable acts. Why should a Party be barred from giving the general, imprecise term of *"acts"* a meaningful interpretation by way of its implementing legislation? The wording of Article 9(3) of the Convention does not imply this conclusion that has been drawn by the ACCC in the present case.

91. The earlier compliance Case ACCC/C/2005/11, Belgium, and notably its paragraph 35 to which the ACCC refers in that context (paragraph 97 in combination with paragraph 48 of the draft findings) cannot serve as a precedent for a case where this issue – whether the flexibility given to Parties in implementing Article 9(3) of the Convention stretches only to its scope *ratione personae*, but not to its scope *ratione materiae* - would already have been clarified.

92. Paragraph 35 of Case ACCC/C/2005/11 only explains how a Party has to exercise its margin of discretion when it comes to defining the scope *ratione personae* of Article 9(3) of the Convention. Notably, the ACCC held that *"[w]hile referring to "the criteria, if any, laid down in national law", the Convention neither defines these criteria nor sets out the criteria to be avoided. Rather, the Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice."*

93. However, to lay out the margin of discretion that Parties have when defining who has access to review procedures does not mean that there would be no margin when it comes to defining what can be reviewed. These are two different questions. Case ACCC/C/2005/11 is therefore, in the Union's opinion, not pertinent at hand.

94. The ACCC further notes that the Commission declared some requests for internal review as inadmissible based on the criterion of "*legally binding and external effects"*. This is correct. However, it does not signify as such that the Aarhus Convention would require a review possibility for such kinds of acts, notably in view of the purpose or *"effet utile"* of Article 9(3) of the Convention.

95. Indeed, to submit internal acts of the EU institutions and acts which do not have legally binding effects to review would not serve the purpose, as stated also in Article 1 of the Aarhus Convention, of protecting the environment.

96. This can be demonstrated by looking at previous cases that have been barred on that ground.

97. For instance, the request for review of the Commission Decision on the candidate list for the Director of its Chemicals Agency was refused on the ground that this decision does not have external effects. It is evident that this is an internal decision of the institution unrelated to environmental matters. The scope *ratione materiae* of the Aarhus Regulation is already broad as explained under letter iv) by its wide definition of environmental law. However, the scope cannot be enlarged beyond environmental issues; this is also not requested by the Aarhus Convention.

98. The Commission Communication on renewable energy (COM(2012)271) can serve as an example of a measure that was deemed not to have legally binding effects in the sense of Article 2(1)(g) of the Aarhus Regulation and was thus considered unsuitable for internal review.

99. The very idea that non-binding acts of public authorities should be subject to public law remedies (first internal review, then actions for annulment or failure to act under the terms of the TFEU) is extremely far-fetched. This idea is wholly alien to EU law, as even the Member States and the EU institutions cannot bring such actions under the relevant Treaty rules (Article 263 TFEU). Furthermore, the Communicant does not claim that such actions are available before the administrations or courts of any other Parties to the Aarhus Convention. In any case, it is difficult to imagine how a non-binding act could ever be subject of an action for annulment: If the act has no binding effects, how could it be annulled?

100. This argument is also supported by the wording of Article 9(3) of the Aarhus Convention, which refers to the possibility of challenging acts and omissions by private persons and public authorities which "contravene" provisions of national law relating to the environment. Acts and omissions can only contravene national environmental law if they have legal effects.

101. Therefore, in the Union's view, Article 9(3) of the Aarhus Convention clearly cannot be interpreted as to request review of non-binding acts without external effects.

vi) The exemption of administrative review

102. Under Article 2(2) of the Aarhus Regulation, administrative acts and omissions taken by an EU institution in its capacity as an administrative review body are excluded from internal review.

103. Article 2(2) of the Aarhus Regulation provides:

"2. Administrative acts and administrative omissions shall not include measures taken or omissions by a Community institution or body in its capacity as an administrative review body, such as under:

(a) Articles 81, 82, 86 and 87 of the Treaty [now Articles 101, 102, 106 and 107 TFEU] *(competition rules)*;

(b) Articles 226 and 228 of the Treaty [now Articles 258 and 260 TFEU] *(infringement proceedings);*

(c) Article 195 of the Treaty [now Article 228 TFEU] *(Ombudsman proceedings);*

(d) Article 280 of the Treaty [now Article 325 TFEU] *(OLAF proceedings)."*

104. The ACCC considered that Article 2(2) of the Aarhus Regulation would not be consistent with the requirements of the Aarhus Convention. The Convention would only allow to exclude bodies acting in a judicial or legislative capacity, but not bodies acting as an administrative review body.

105. The ACCC also criticised (paragraph 99 of the draft findings) that Article 2(2) of the Aarhus Regulation does not contain an exhaustive list of measures taken in the capacity of an administrative review body. With regard to this latter argument, it suffices to say that, so far, no request for review has ever been denied based on the argument that the institution would have acted as an administrative review body other than in one of the capacities mentioned in Article 2(2). This argument is thus purely hypothetic without being underpinned by any element on substance and thus cannot be held against the Union.

106. As to the exemption of **competition rules**, it is to be noted that, as a general rule, norms applying to undertakings and state aid are outside the scope of the Aarhus Convention. Their subject-matter is to avoid any distortion of competition within the internal market that is harmful to citizens and companies in the EU. The Commission's decision-making role here generally relates to competition matters rather than environmental issues.

107. The ACCC further questioned the exemption of **infringement procedures** from administrative review under the Aarhus Regulation (paragraphs 98 to 104 of the ACCC's draft findings).

108. However, infringement procedures are based on a bilateral relationship between the Commission and the respective Member State. Their subject-matter is to ensure that Member States comply with EU law. The initiation of infringement procedures is at the discretion of the Commission; it is not a "traditional" procedure where other parties would have a say. As long as the infringement procedure is not terminated, third parties have no role in this bilateral process which is confidential.

109. The EU Courts confirmed this principle many times in the context of requests for access to documents – and the ACCC does not suggest that confidentiality of infringement procedures would be an issue also in view of the Convention's second pillar on access to environmental information.

110. As the CJEU has ruled, for instance, on 16 July 2015 in Case C-612/13 P, *ClientEarth v Commission, "neither the reference in Article 4(4)(c) of the Aarhus Convention, to enquiries 'of a criminal or disciplinary nature', nor the obligation, laid down in the second paragraph of Article 4(4) of that convention, to interpret in a restrictive way the grounds for refusal of access mentioned in Article 4(4)(c), can be understood as imposing a precise obligation on the EU legislature. A fortiori, a prohibition on giving the concept of 'enquiry' [enquete] a meaning which takes account of the specific features of the Union, and in particular the task of the Commission to investigate [enqueter] any failures of Member States to fulfil their obligations which might adversely affect the correct application of the Treaties and the EU rules adopted pursuant to the Treaties, cannot be inferred from those provisions"* (paragraph 42).

111. The ACCC limits itself to stating, in paragraph 101 of the draft findings, that there is *"no express exemption from the Convention of measures taken in the capacity of an administrative review body from a provision of a measure implementing article 9, paragraph 3 of the Convention"*.

112. This is not surprising given that the Aarhus Convention was not designed to take account of the specific features of a regional economic integration organisation like the EU. Rather, it had the national legal orders and their concepts in mind. It is for this reason that, by way of the EU Declaration, the Union has notified the Convention bodies that it accedes to the Convention *"[w]ithin the institutional and legal context of the Community"*, as set out in the EU Treaties.[22]

113. Article 9(3) of the Aarhus Convention cannot therefore be interpreted as barring the Commission to exercise its vital role as *"guardian of the Treaties"* in infringement proceedings in accordance with the conditions of Articles 258 and 260 TFEU.

114. The ACCC also considered that **OLAF proceedings** must not be excluded from review under the terms of the Aarhus Regulation, failing an *"express exemption"* from Article 9(3) of the Convention of measures taken in the capacity of an administrative review body (see notably paragraph 101 of the ACCC's draft findings).

115. The European Anti-Fraud Office (OLAF) conducts inquiries into alleged fraud affecting the financial interests of the Union and into any other alleged serious facts linked to the performance of professional activities which may constitute a breach of obligations by staff of the Union institutions, bodies, offices and agencies.

116. OLAF investigations can be seen as *"proceedings of public authorities"* for which Article 4(4)(a) of the Aarhus Convention provides an express exemption from the principle of transparency under the second Aarhus pillar on access to environmental information.

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[22] Cf. the above-mentioned judgment in Case C-612/13 P, *ClientEarth*, where the CJEU noted that the *"convention was manifestly designed with the national legal orders in mind, and not the specific legal features of institutions of regional economic integration, such as the European Union, even where those institutions can sign and accede to the Aarhus Convention, under Articles 17 and 19 thereof. It is for that reason that […] the Community, when approving the Aarhus Convention, reiterated, in a declaration lodged in accordance with Article 19 of that convention, the declaration which it had made upon signing that convention and which it annexed to Decision 2005/370, namely that 'the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the filed covered by the Convention'."* (paragraphs 40 and 41).

117. OLAF reports, moreover, are adopted at the end of an autonomous administrative procedure by a service having functional independence. They have no binding legal effects. While they may recommend to the competent authorities of the Member States and the EU institutions that measures be adopted having binding legal effects adversely affecting the persons concerned, their conclusions and recommendations impose no obligation, even of a procedural nature, on those authorities. These are free to decide what action to take following a final OLAF report, and are accordingly the only authorities having the power to adopt decisions capable of affecting the legal position of those persons in relation to which the OLAF report recommended that legal or disciplinary proceedings be instigated.

118. The Commission's decision-making role in relation to competition, infringement and OLAF proceedings largely relates to law enforcement. These proceedings typically involve a law enforcement discretion which is not intended to be open to general challenge by complainants seeking particular interventions.

119. The inherent characteristics of competition, infringement and OLAF proceedings should lead to the conclusion that they were not intended to be governed by review procedures such as those contained in Article 9(3) of the Aarhus Convention.

120. This argument also corroborates the point made previously under letter v) on *"acts not having legally binding and external effects"* that, in the Union's view, it is erroneous to interpret Article 9(3) of the Convention as not to leave any discretion as to what amounts to an *"act"* or an *"omission"* (the scope *ratione materiae*).

121. In light of these considerations, the Union would thus maintain that it can validly exclude competition matters, infringement procedures and OLAF proceedings from the scope of application of the Aarhus Regulation.

122. Finally, the ACCC found that **Ombudsman proceedings** must not be excluded from review, as the Convention would not provide any basis for such an exemption (see in particular paragraph 103 of the ACCC's draft findings).

123. However, in the Union's view, enquiries by the European Ombudsman are clearly outside the Convention's scope. To avoid any misunderstanding of the European Ombudsman's role within the EU legal order, the Union would first like to refer to

Article 228 TFEU which defines the Ombudsman's tasks. Pursuant to this Article, the European Ombudsman is empowered to examine complaints by Union citizens or any natural or legal person residing or having its registered office in a Member State of the Union concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, except where the alleged facts are or have been the subject of legal proceedings.

124. The decisions by the European Ombudsman are not legally binding. The concerned EU institution, body, office or agency informs the European Ombudsman of its views on an Ombudsman decision.

125. The European Ombudsman is elected by the European Parliament. The Ombudsman submits special reports and an annual report to the European Parliament which are then analysed by the latter. The European Parliament exercises democratic control over the activities of the European Ombudsman.

126. The European Ombudsman has wide discretion as regards the merits of complaints and is completely independent in the performance of his or her duties. Ombudsman enquiries cannot thus by definition be subject to any sort of internal administrative review.

127. Given the European Ombudsman's wide discretion in his or her tasks, review by the EU Courts is consequently equally limited. However, in case of an alleged mishandling of a complaint, an action for damages may be brought against the European Ombudsman before the EU Courts. In order to determine whether there is non-contractual liability, the EU Courts review the manner in which the European Ombudsman dealt with a complaint.[23] The Union has already outlined this legal remedy – which is however not related to any application of Article 9(3) of the Convention – in the context of an earlier compliance case, Case ACCC/C/2013/96 against the EU (see notably the Union's observations of 12 December 2014, page 5).

128. It results from these explanations that enquiries by the European Ombudsman are EU internal proceedings complimentary to the role of courts with no environmental objective and clearly outside the scope of Article 9(3) of the Aarhus Convention.

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23 Case C-234/02 P, *Lamberts v European Ombudsman*, ECLI:EU:C:2004:174.

vii) Effectiveness of the internal review procedure

129. In paragraph 107 of the draft findings, the ACCC stated: *"Had the internal review procedure been the only available remedy, the Committee would have questioned whether the procedure met the requirements of the Convention; there would be doubts about whether the procedure was adequate, effective, fair, and equitable as required by the Convention."*

130. The EU notes that the ACCC only has doubts about the effectiveness of the internal review procedure under the Aarhus Regulation and does not conclude on any actual breach of Article 9(4) in that regard. However, the Union would maintain that even these doubts are not justified under the terms of the Convention.

131. The ACCC seems to base its doubts with regard to the effectiveness of the internal review procedure on the allegation by the Communicant that the review institution, being the same body that adopted the challenged act, might not be sufficiently objective in its review *("[…] this leads the Communicant to observe that it is only natural that the institution will be biased and consider that all the legal and due diligence checks have been made when adopting the decision"*, see paragraph 106 of the draft findings).

132. This allegation is pure speculation and not substantiated by any concrete example of a case where the EU institution acting as review body would not have acted in full compliance with the legal requirements.

133. Furthermore, this allegation ignores the very wording of Article 9 (3) of the Aarhus Convention *("[…] each Party shall ensure that, […] members of the public have access to administrative or judicial procedures […]"*) which implies a choice between administrative or judicial review and does not regulate the level of administrative review.

134. Thus, the Aarhus Convention does not at all bar a Party from ensuring administrative review by the same body that took the contested decision. Rather, the Contracting Parties have a broad margin of discretion when defining the rules for the implementation of the administrative procedures. The fact as such that the administrative decision-making and reviewing body are identical cannot therefore lead to criticism with regard to the obligations of the Aarhus Convention, nor with regard to

the general requirement to ensure the availability of an effective remedy. This argument is all the more valid when judicial review is available on top of administrative review[24], as the ACCC also seems to recognise.

135. The Union would thus respectfully ask the ACCC to discard those elements from its findings where no breach of Convention requirements is established.

viii) Scope of judicial review

136. The ACCC went on to examine the effectiveness of the judicial review procedure which the Aarhus Regulation opens up on top of administrative review (notably paragraphs 110 to 112 of the ACCC's draft findings).

137. The ACCC doubts whether the scope of judicial review is broad enough to comply with the obligations under Article 9(3) of the Aarhus Convention, given, as the Communicant argues (paragraph 112 of the draft findings) that the Court might only look at the reply by the institution to the request for administrative review and not at the challenged act.

138. The ACCC noted in this regard, in paragraph 108 of the draft findings, that the internal review procedure of the Aarhus Regulation is supplemented by its Article 12 on *"Proceedings before the Court of Justice"* which provides:

"1. The non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.

2. Where the Community institution or body fails to act in accordance with Article 10(2) or (3) the non-governmental organisation may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty."

[24] This principle is also supported by the case-law of the European Court of Human Rights, where the Court has consistently reiterated that demands of flexibility and efficiency may justify the prior intervention of administrative or professional bodies even where they do not satisfy the requirements of Article 6 of the European Convention on Human Rights in every respect. In such cases, no violation of the right to an effective remedy and to a fair trial under the Convention can be found if the proceedings before those bodies and the decisions of such administrative authorities are subject to subsequent control by a judicial body (see *Zumtobel v Austria*, no. 12235/86, §§ 29-32; *Bryan v the United Kingdom*, no. 19178/91, § 40; *Ortenberg v. Austria*, no. 12884/87, § 31).

139. The ACCC concludes from reading these provisions that *"it is possible for the European Courts to interpret Article 12 in a way that would allow them to […] consider [….] the substance of an act […]. If the European Courts fail to interpret Article 12 in that way, that Article will not be in compliance with the Convention."* (paragraph 112 of the draft findings).

140. As the Union already indicated under letter vii) with regard to the effectiveness of the internal review procedure, it considers that hypothetical remarks and situations where no breach is effectively established should be discarded from the ACCC's findings. It is recalled in this context that the Meeting of the Parties (MOP) to the Aarhus Convention in Chisinau in 2011 clarified that only findings of non-compliance - but not hypothetical findings - can be endorsed by the MOP.[25]

IV. CONCLUSION

141. In the light of the above-mentioned considerations as well as the previous submissions lodged, the EU would respectfully ask the ACCC:

- to further assess and fully take into account all the comments provided by the EU along the procedure, in compliance with paragraph 34 of Decision I/7, before finalising its findings and recommendations, and for this purpose, organise a further hearing.

In this context, the ACCC is asked to take account in particular of the Union's arguments on the standing criteria laid down in the Aarhus Regulation, of the Union's unique institutional and legal framework as well as to provide an exhaustive assessment of recent and further evolving CJEU case-law related to the Aarhus Convention.

On the merits, the EU would contend that it is not to be considered in breach of Article 9(3) and (4) of the Aarhus Convention.

[25] See the list of decisions and major outcomes (ECE/MP.PP/2011/CRP.11), where it says that *"[w]hen adopting decision IV/9f, the Parties agreed that the second sentence of paragraph 117 of Addendum 1 to the report of the 26th meeting of the Compliance Committee (ECE/MP.PP/C.1/2009/8/Add.1), regarding communication ACCC/C/2008/24 concerning Spain, is not a finding, and that therefore it was not endorsed as such by the MOP."*