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## **EUROPEAN UNION**

the European Commission presents herewith on behalf of the European Union, a contribution on its practice regarding lawsuits in third countries.

It should be recalled that as a result of the entry into force of the Lisbon Treaty, the European Community has been replaced and succeeded by the European Union.

The European Commission is regularly informed of lawsuits brought before foreign local jurisdictions in non- EU countries ('third countries' in EU parlance), including of summonses for its staff to appear in local judicial or administration proceedings or to provide testimony in such proceedings. The addressees of these judicial documents can vary: some are directed against the European Community as an organisation (now: the European Union) and/or against the European Commission as an institution, and/or the Delegation of the European Commission in the third country (now: the EU Delegation), or even against named Commission staff working in such delegations.

In many instances the lawsuits relate to claims of private parties concerning the execution of programmes of financial and technical assistance which the EU provides to non- EU countries. In such cases the EU can often rely on express provisions regarding jurisdictional immunity laid down in agreements with the host state regarding the establishment of the EU delegation and in the relevant framework agreement concluded by the EU with the beneficiary non-EU state regarding the provision of financial and technical assistance. Immunity from jurisdiction is also explicitly provided for in cases where, on the basis of the EU's Common Foreign and Security Policy (CFSP), an EU mission deployed in a third country is covered by a Status of Forces Agreement (SOFA) or Status of Mission Agreement (SOMA).

Insofar as such lawsuits are deemed to concern the European Union itself, immunity of jurisdiction will be invoked on the grounds that the Union is an international organisation benefiting in non-EU countries from the general rule of international law regarding the jurisdictional immunity of international organisations. This means that unless the Union has expressly waived its immunity, it should be exempted from the local jurisdiction of municipal, judicial or administrative authorities and therefore should not be subject to suits, claims or enforcement proceedings in these domestic forums.

In any event, the European Union's claim of jurisdictional immunity is based on the rule of general (customary) international law which recognises that like States, international organisations are exempted from the local jurisdiction of municipal judicial or administrative authorities and therefore are not subject to suits, claims or enforcement proceedings in such domestic forums. The immunity invoked is based on the principle of functionality: i.e., immunity that encompasses all acts needed for the execution of the official functions and activities of the organisation. Therefore, the foregoing applies, in the view of the European Commission, even in the absence of express provisions laid down in international treaties and even when not expressly provided for in municipal law.

In cases where such jurisdictional immunity will need to be invoked in foreign local courts or administrative tribunals, the European Commission will via the EU delegation respond by way of *Note Verbale*, informing the Ministry of Foreign Affairs of the non-EU country concerned that it invokes immunity from jurisdiction. In such a *Note Verbale* the delegation will also usually ask the Department of Foreign Affairs to take the appropriate steps to confirm with local courts that immunity is invoked. Where considered necessary or useful

local counsel will be appointed to follow the proceedings and/or for to invoke jurisdictional immunity on behalf of the EU and/or its staff.

The European Commission knows of no case in which non-EU courts have pronounced expressly on questions relating to the jurisdictional immunity of the EU. Put differently, there is no indication that there is a single instance in which a non-EU court has denied the jurisdictional immunity of European Union (or its predecessor, the European Community) from legal process.

For the sake of completeness, it should be noted that the European Union's legal system provides alternative remedies to which parties that have claims against it, can have recourse. These alternative remedies are available irrespective of the nationality of the party concerned and irrespective of where the challenged Union activity took place.

With regard to disputes based on contractual claims, article 340, first paragraph of the Treaty on the Functioning of the European Union provides that the contractual liability of the Union shall be governed by the law applicable to the contract in question. The underlying contract will normally determine the applicable dispute settlement procedure. One should distinguish between cases where the implementation of EU external aid projects or programmes is executed on a centralised basis, with the European Commission acting as contracting authority, and cases where it is executed on a decentralised basis, with the administration of the beneficiary third state acting as contracting authority. The clauses of the external aid contracts in which the European Commission is the contracting authority either designate a court in the EU (usually the Belgian courts in Brussels) as competent court for any contractual dispute or provide for arbitration. The contract, as a rule, encourages the parties to the contract to previously resolve the dispute amicably.

With regard to disputes based on non-contractual claims, article 340, second paragraph of the Treaty on the Functioning of the European Union provides in the case of non-contractual liability, that the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. According to Article 268 of the Treaty on the Functioning of the European Union, the Court of Justice of the European Union has exclusive jurisdiction in disputes relating to compensation for damages in the case of non-contractual liability.<sup>1</sup> In accordance with Article 46 of the Statute of the Court of Justice, proceedings in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto.

This system of judicial protection of citizens and companies according to Union law is completed with the exclusive jurisdiction of the Court of Justice of the European Union, in accordance with Articles 263 and 265 of the Treaty on the Functioning of the European Union to decide on the legality of acts of the European institutions ( the jurisdiction of the Court is however excluded with respect to acts adopted under the CFSP provisions, with certain limited exceptions) that produce legal effects (or for failure to act). Any natural or legal person (whatever his nationality or residence) may institute proceedings against a decision addressed to him or which is of direct and individual concern.

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<sup>1</sup> In accordance with Article 256 (1) of the TFEU, this jurisdiction is exercised by the General Court (new name for the Court of First Instance).