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European Commission
Legal Service
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Brussels, 29 August 2012

Dear Sirs,

Internal review request of Commission Decisions of 18 July 2012 on the submission of appeals before the Court of Justice in cases T-338/08 and T-396/09.

We write on behalf of ClientEarth and Justice & Environment to request an internal review pursuant to Article 10 of Regulation 1367/2006[1] of the decisions of the European Commission[2] to appeal decisions of the General Court in cases T-338/08 and T-396/09 (the Decisions).

Background

1. On 14 June 2012, the General Court decided to annul two decisions of the European Commission that rejected as inadmissible the requests for internal review made pursuant to Article 10 of Regulation 1367/2006 by environmental NGOs. In case T-338/08, the NGO applicants requested the review of Regulation 149/2008 setting maximum residue levels for certain products[3]. In case T-396/09, the review request concerned the Decision

[1] 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.
[2] Commission Decisions C(2012)5070 final and C(2012)5069 final of 18.7.2012 on the submission of an appeal before the Court of Justice.
[3] Regulation (EC) No 149/2008 of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and of the Council by establishing Annexes UU, III and IV setting maximum residue levels for products covered by Annex I thereto (OJ 2008 L 58, p.1).

granting the Kingdom of the Netherlands a temporary exemption from the obligations laid down by Directive 2008/50/EC on ambient air quality and cleaner air for Europe[4].

2. In both cases, the Court expressly considered that because Article 10(1) of Regulation 1367/2006 limits the concept of "acts" that can be challenged by NGOs to "administrative acts" as defined in Article 2(1)(g) of Regulation 1367/2006 as "measures of individual scope", it is not compatible with Article 9(3) of the Aarhus Convention[5]. The Court held that "… *Article 9(3) of the Aarhus Convention cannot be construed as referring only to measures of individual scope*".[6]

On 18 July 2012, the Commission decided to appeal those decisions for the following reasons:

First, the Court erred in extending the so-called Nakajima case-law to the Aarhus Convention and in examining the validity of Regulation 1367/2006. Second, the Commission considers that the review mechanism provided by Article 10 of Regulation 1367/2006 does not need to cover all acts of EU institutions and should only allow NGOs to contest acts of individual scope.

Against this background, the applicants seek an internal review of the Decisions.

Admissibility of the request

3. Article 10 of Regulation 1367/2006 allows NGOs to make a request for an internal review to an EU institution that has adopted an administrative act as defined in Article 2(1)(g) of the Regulation.

4. Article 2(1)(g) of the Regulation defines these acts as "*any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects*;".

5. We will demonstrate in this section that the contested decisions (the Decisions) are administrative acts as defined by Article 2(1)(g) of Regulation 1367/2006 and can therefore form the object of a review under Article 10.

Of individual scope

6. The General Court decided in both cases T-338/08 and T-396/09 that ".. *Article 9(3) of the Aarhus Convention cannot be construed as referring only to measures of individual*

[4] Decision C(2009) 2560 final of 9 April 2009 granting the Kingdom of the Netherlands a temporary exemption from the obligations laid down by Directive 2008/50/EC on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p.1).
[5] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998.
[6] Case T-338/08, paras 71-79, case T-396/09, paras 58-59

scope".[7] Actions brought before the Court of Justice of the European Union do not have suspensory effect.[8]

7. Therefore, the Commission should no longer consider the individual scope condition as applicable and should not reject requests for review as inadmissible because the acts concerned are considered not to be of individual scope.

8. However, as a subsidiary argument, even if this condition had still to be fulfilled, which is not the case, the Decisions should be considered as being of individual scope for the purpose of Article 10(1) of Regulation 1367/2006.

9. The appeals are not addressed to Member States but to one EU institution, the Court of Justice, which is required to take a decision upon them. The decisions relate to and contest specific other identified decisions, the decisions of the General Court.

10. They do not constitute measures of general application. They do not apply to "*objectively determined situations or entails legal effects for categories of persons envisaged generally and in the abstract*". Nor do they "*establish, in abstract and objective terms, a body of general rules*".

11. On the contrary, they contest decisions of the General Court in a specific context and provide the Commission's own interpretation of the case-law and provisions of specific pieces of legislation to the Court. The Decisions are therefore of individual scope.

Adopted under environmental law

12. Article 2(1)(f) of Regulation 1367/2006 defines 'environmental law' as meaning "*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*;"

13. It therefore provides for a very broad definition.

14. The legal basis of the contested decision being irrelevant, the only criteria is whether the decision contributes to the pursuit of the objectives of the Community policy on the environment as set out in the Treaty. The contested decisions appeal judgments in which the General Court holds that Regulation 1367/2006 does not comply with the Aarhus Convention with regards to the types of acts that may be contested under the internal review request procedure. The matter is thus an environmental one: which decisions adopted by EU institutions under environmental law may be contested.

15. In both cases, the Court expressly considered that because Article 10(1) of Regulation 1367/2006 limits the concept of "acts" that can be challenged by NGOs to "administrative acts" defined in Article 2(1)(g) of the Regulation as "measures of individual scope", it is not compatible with Article 9(3) of the Convention. The Court held that ".. *Article 9(3) of*

[7] Case T-338/08, paras 71-79, case T-396/09, paras 58-59.
[8] Article 278 TFEU and Article 60 of the Statute of the Court of Justice of the EU.

the Aarhus Convention cannot be construed as referring only to measures of individual scope"[9].

16. The Court rulings therefore broaden the range of acts that can be contested under Articles 10 and 12 of Regulation 1367/2006. As a consequence, the scope of the right of access to justice for NGOs to contest decisions on environmental matters and likely to impact the environment is broadened.

17. It follows that in appealing these judgments, the Commission aims at restricting the scope of the NGOs' right to contest its own decisions in environmental matters in limiting the types of acts that could be challenged.

18. Preventing civil society from challenging certain decisions impacting the environment inevitably prevents pursuing the objectives of EU policy on the environment as set out in the Treaty whether it is to preserve, protect and improve the quality of the environment or protect human health.

19. In appealing, the Commission is also clearly doing the contrary than "*promoting measures at international level to deal with regional or worldwide environmental problems*". It is rather undermining the measures that have been adopted at international level by the EU in ratifying the Aarhus Convention to advance environmental democracy and enhance environmental procedural rights to ensure the right level of environmental protection. Still even in doing the contrary than what the Commission is required to do, its decisions are nevertheless "*adopted under environmental law*" in the broad sense of the regulation.

20. The Decisions have therefore been adopted under environmental law for the purpose of Article 2(1)(g) of Regulation 1367/2006.

Taken by an EU institution and having legally binding and external effect

21. The decisions were adopted by the Commission, are legally binding and have external effect. They have the effect to institute proceedings before the Court of Justice and require it to adopt a decision on the matter which is very far reaching. The Decisions also entail actions to be taken by the NGO applicants, to prepare their defence accordingly which imply costs related to the hiring of lawyers as well as additional costs in case they lose. The decisions can, provided the Commission wins the cases, result in preventing NGOs from challenging acts that are not of individual scope and from bringing Regulation 1367/2006 into compliance with the Aarhus Convention. Additionally, provided the Commission did not appeal, the review of Regulation 1367/2006 would have taken place without having to wonder what the decision of the Court of Justice will be. The process would have maybe been faster than it is going to be.

22. The Decisions are legally binding. Decisions of the Commission are binding. They are not mere recommendations, opinions or advice. They are binding in this case on the Legal Service of the Commission which is required to implement them as stated in Articles 2 of the Decisions.

[9] Case T-338/08, paras 71-79, case T-396/09, paras 58-59.

23. It follows that the Decisions constitute administrative acts for the purpose of Article 10(1) of Regulation 1367/2006; the request for a review is therefore admissible.

Eligibility of the NGO applicants

24. The NGO applicants fulfil the criteria laid down in Article 11 of Regulation 1367/2006. Please see the attached Annex containing the by-laws of each NGO Applicant.

25. They are all independent non-profit-making legal persons in accordance with a Member State's national law.

26. They have the primary stated objective of promoting environmental protection in the context of environmental law; they have existed for more than two years and are actively pursing this objective.

27. The Decisions to appeal have clearly a direct impact on the promotion of environmental protection as they seek to restrict the scope of the right of access to justice provided to NGOs in environmental matters. The subject matter in respect of which the request for internal review is made is thus covered by their objectives and activities for the purpose of Article 11 of Regulation 1367/2006.

Grounds of the request

The extension of the "Nakajima" case-law

28. The Commission contests the use of the so-called "Nakajima" case-law by the General Court and argues that they "*should seek to avoid its extension to provisions of international agreements*" such as the Aarhus Convention which "*have no direct effect because they are not unconditional and sufficiently precise and, therefore cannot be invoked by individuals before the courts*". The Commission considers that "*If the General Court's ruling on this point is allowed to stand, it will create an unfortunate precedent for many other agreements concluded by the Union*"[10].

29. The fact that the Court is able to examine the validity of a provision of a regulation in the light of an international Treaty is perceived by the Commission as "unfortunate". This clearly shows that the Commission strongly and unequivocally refuses to have individuals, NGOs, or the Courts examining the lawfulness of its decisions. Yet, having courts of law checking the validity of public authorities' decisions is not an option but the duty of the Courts in a democratic system and a State of law. Article 263(1) TFEU provides that the Court of Justice of the EU shall review the legality of acts of EU institutions and bodies. Institutions may thus not choose which acts the Court should be able to review, in distinguishing acts the institutions adopted on their own initiative from acts that implement a norm higher in the hierarchy of norms such as international Treaties.

[10] Commission decision(2012)5070 final and (2012)5069 final, paragraphs 5.

30. It is also unclear why the Court could examine the legality of secondary laws that implement the WTO agreements and not the ones that transpose other international conventions. The Commission seems to want to impose an artificial dichotomy between commercial matters on the one hand, which it accepts would be important enough to allow the Courts to examine the legality of the EU institutions' decisions implementing the relevant agreements, and other matters such as environmental, health, social, which it appears to consider should be entirely and utterly governed by the institutions without the checks and balances of judicial review.

31. However, the Commission does not have any legal arguments countering the reasoning of the Court. It simply considers that it "*should seek to avoid its [the] extension [of the Nakajima case-law] to*"11 other international agreements such as the Aarhus Convention for the political reasons mentioned above.

32. However, nothing prevents the Court from extending the Nakajima case-law to other international agreements. On the contrary, secondary EU legislation implementing WTO agreements and legislation implementing environmental agreements should be treated on an equal footing. There is no legal justification to distinguish between different types of international agreements depending on their subject matters and scopes. Commercial matters do not prevail over environmental ones.

33. The Court held in the Nakajima case that "*the new basic regulation, which the applicant has called in question, was adopted in order to comply with the international obligations of the Community, which, as the Court has consistently held, is therefore under an obligation to ensure compliance with the General Agreement and its implementing measures*"12. However, exactly the same could be said (as the General Court held in cases T-338/08 and T-396/09) about any other international agreement as this obligation imposed on the EU, to ensure compliance with international agreements, stems from the Treaty itself (Article 216 TFEU). The contrary would be utterly unlawful, unfair and undemocratic.

34. Indeed, if there are conditions to invoke provisions of international agreements before Courts and for them to apply them directly, still Article 216(2) TFEU provides that the international treaties are binding on the institutions. Both of these requirements, allowing applicants to invoke only directly applicable provisions and complying with international agreements, must therefore be applied concordantly. If the agreements are binding, it is only logical that Courts should be able to examine the validity of regulations that transpose them into EU law once they are adopted, no matter what field of the Treaty.

35. Also, the fact that a provision is devoid of direct effect does not imply its non-existence. This provision is also an integral part of EU law binding on the institutions. It does not either imply unlimited discretion of the institutions in the way to transpose and implement this provision, as the Commission seems to believe. Yet, the way Article 9(3) of the Aarhus Convention has been implemented by Regulation 1367/2006 is clearly far too restrictive as it only allows NGOs to contest a very limited category of acts. This is not what the Aarhus Convention requires.

[11] Commission Decisions, paragraphs 5.
[12] Paragraph 31.

36. The Court therefore did not err in extending the Nakajima case-law to the Aarhus Convention.

The misinterpretation of the Aarhus Convention

37. In paragraphs 6 of the Decisions, the Commission states that "*the administrative review mechanism in the Aarhus Regulation complements the remedies available before the national courts and therefore need not cover all categories of acts*". This is simply not correct.

38. Acts and omissions of the EU institutions can only be challenged at EU level through the mechanism established in Article 10 of Regulation 1367/2006 and in theory, according to the Convention and the Treaty, before the EU courts. By no means, may these decisions be challenged before national courts. The only means available at national level would be the referral for a preliminary ruling procedure provided in Article 267 TFEU. However, the Aarhus Convention Compliance Committee has already considered that this mechanism does not provide access to justice for the purpose of Article 9(3) of the Aarhus Convention13.

39. The internal review mechanism is therefore clearly set up not to complement remedies available before national courts but to create one at EU level to challenge acts and omissions that would otherwise be exempt from any scrutiny from the public and could not be contested in any legal forum.

40. Additionally, contrary to what the Commission states, the Aarhus Convention provides that all acts should be subject to challenge. The Aarhus Convention Compliance Committee specified that:

> "*The Convention obliges the Parties to ensure access to justice for three generic categories of acts and omissions by public authorities. Leaving aside decisions concerning access to information, the distinction is made between, on the one hand, acts and omissions related to permits for specific activities by a public authority for which public participation is required under article 6 (article 9, paragraph 2) and, on the other hand, all other acts and omissions by private persons and public authorities which contravene national law relating to the environment (article 9, paragraph 3).*[14]"

41. The Committee further added that:

> "*Article 9, paragraph 3, is applicable to all acts and omissions by private persons and public authorities contravening national law relating to the environment. For all these acts and omissions, each Party must ensure that members of the public "where they meet the criteria, if any, laid down in its national law" have access to administrative or judicial procedures to challenge the acts and omissions concerned.*[15]"

[13] ACCC/C/2008/32 findings and recommandations of the Compliance Committee
[14] Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 26.
[15] Ibid, ACCC/2005/11; para 28.

42. All acts should therefore be covered by the Regulation as well. There are numerous examples of acts and omissions of EU institutions and bodies in the environmental field that should be open to judicial review but which are not open to challenge under Regulation 1367/2006.

43. Acts such as Regulation 149/2008 setting maximum residue levels for certain products[16] and the Decision granting the Kingdom of the Netherlands a temporary exemption from the obligations laid down by Directive 2008/50/EC on ambient air quality and cleaner air for Europe[17] should therefore be subject to the public scrutiny and possible legal challenges. This is also amply justified by the fact that they impact the life of every person living in the EU and in some cases, beyond.

44. Because of the restrictive definition of administrative acts under Regulation 1367/2006, a whole range of acts are not opened to challenge.

45. Moreover, it would appear that the improper conduct of a public consultation by an EU institution would not fall either within the definition of an "administrative act". Similarly, it would appear that an omission to organise a public consultation could not be interpreted as an "omission to adopt an administrative act" further to the definition in article 2(1)(h) of the Regulation, unless the organisation of a public consultation could be construed as a "measure of individual scope under environmental law".

46. Narrowing the types of challengeable acts and omissions this way prevents the review of acts and omissions in relation to the conduct of public consultation on plans and programmes relating to the environment and in the lack of transposition of article 9(2) of the Aarhus Convention into the community legal order and in the incorrect transposition of article 9(3).

47. Moreover, Article 263(4) TFEU provides the right to any natural or legal persons to institute proceedings "*against a regulatory act which is of direct concern to them and does not entail implementing measures*". However, a regulatory act is not necessarily of individual scope and does not need to be of individual concern to the applicant[18]. So there is no reason why the acts opened to challenge in environmental matters should be of individual scope, nor to adopt a more restrictive approach under environmental law. It is therefore difficult to see the logic in the Commission's approach to insist in limiting the types of acts to ones of individual scope, except of course the classic "floodgates" argument of having hundreds of requests and legal proceedings against its own decisions or perhaps to protect political decisions or vested interests. This is not the logic (or law) of the Aarhus Convention nor of the Treaties (see below as the Commission's role as the guardian of the Treaty).

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[16] Regulation (EC) No 149/2008 of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and of the Council by establishing Annexes UU, III and IV setting maximum residue levels for products covered by Annex I thereto (OJ 2008 L 58, p.1).

[17] Decision C(2009) 2560 final of 9 April 2009 granting the Kingdom of the Netherlands a temporary exemption from the obligations laid down by Directive 2008/50/EC on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p.1).

[18] Case T-18/10, *Inuit Tapiriit Kanatami and others v Parliament and Council*, para 71, (pending appeal C-583/11) and Case T-262/10, *Microban International Ltd v Commission,* judgment of 25 October 2011, para 27.

48. The question remains as how these three provisions, Article 263(4) TFEU and Articles 10 and 12 of Regulation 1367/2006 will be applied. Article 12 provides that the NGO applicant may institute proceedings against the reply of the institution to the internal request before the Court of Justice "*in accordance with the relevant provisions of the Treaty*" and therefore implicitly refers to Article 263(4) TFEU. The requirement is thus to challenge an act of individual scope and a regulatory act at the same time which will not be always possible. Article 10 therefore, in addition to being incompatible with Article 9(3) of the Convention, is also breaching the Treaty by requiring the equivalent of the individual concern criteria for NGO applicants through the individual scope condition, when the Treaty abandoned this criteria with regards to regulatory acts.

49. Paragraph 7 of the Decisions states that "*Such a finding [of the incompatibility of the Regulation with the Convention] would have required an assessment of the entire system of remedies in the EU legal order, including the judicial remedies provided for by the TFEU. The Court refrained to make such an assessment*." It is unclear to what system of remedies the Commission refers to. Indeed, to date, no environmental NGOs nor any individual have had access to the EU courts. Article 263(4) TFEU provides that natural and legal persons may have access to the courts under certain conditions. However, the Courts have interpreted these criteria in such a restrictive way that no NGO or individual could ever have legal standing to challenge any acts adopted in environmental matters at EU level. This is the object of the communication made by ClientEarth to the Compliance Committee in which the Committee advised the EU Courts to alter their jurisprudence and the other institutions to take the relevant steps to enable environmental NGOs to have access to justice[19].

50. In view of the complete blocking of the access to EU courts, the administrative review mechanism is therefore the only alternative mechanism provided to NGOs to contest decisions of EU institutions. Yet, it is this one that the Commission seeks to restrict and empty of its substance with its decisions to appeal.

51. The Court therefore did not err in finding that, insofar as Article 10(1) of Regulation 1367/2006 limits the administrative review to acts of individual scope, it is incompatible with Article 9(3) of the Aarhus Convention and that therefore it is invalid. It did not have to make any assessment of the other remedies available as first, there is none (except in theory); Second, the Convention is clear about the fact that it is all acts and omissions that can be challenged.

The Commission Guardian of the Treaty and of the lawfulness of EU law

52. In the minutes of the meeting during which the Commission decided to lodge the appeals20, President Barroso considers that these judgments "*could give rise to a drastic reduction in the discretionary powers of the legislator when transposing international obligations into EU law, to a considerable increase in requests for internal review of*

[19] ACCC/C/2008/32.
[20] Minutes of the 2011th meeting of the Commission held in Brussels on 18 July 2012, PV2012(2011)final, page 11.

measures of general application in many areas, and to an increase in the number of appeals against review decisions taken by the Commission".

53. This statement clearly demonstrates the hostility from the Commission to provide civil society with access to administrative review mechanisms and to justice for political reasons. No attention is given to the actual compliance of the Aarhus Regulation with the Convention or to the effective need to make the EU a genuine democratic one.

54. The policy underlying the appeal is to stop any change to the status quo position that prevents NGOs from challenging decisions adopted by the Commission in environmental matters. The Commission clearly wishes to continue adopting the decisions behind closed doors without being accountable to citizens undergoing the measures it adopts and governing the Union without anyone from civil society being able to contest these before EU courts of law. We can see no solid legal grounds for this position, only political ones. Yet, as guardian of the Treaty, Article 17 TEU states that the Commission "*shall oversee the application of Union law under the control of the Court of Justice*" of the EU. The Commission therefore bears a special responsibility for ensuring that international and EU law is complied with. International agreements are binding upon the EU institutions and form an integral part of EU law. And the Commission is responsible for ensuring that the EU secondary legislation which is adopted is lawful.

55. However, first, failing to ensure the compliance of EU law with an international agreement and then subsequently appealing without sound legal arguments the Court rulings holding that such an international agreement is being breached goes against the provisions of the Treaty itself.

56. Article 2 TEU provides that "*The Union is founded on the values of respect for human dignity, ..., democracy, ..., the rule of law and respect for human rights, including rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*"

57. Article 10(3) TEU provides that "*Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen*". Participating in the life of the Union is not limited to voting or submitting contributions to the public consultations the Commission organises but of course also implies bringing legal proceedings against decisions that citizens consider unlawful.

58. By appealing the rulings, the Commission does not carry the values of the EU enshrined in the Treaties which are democracy, justice, public participation, openness, and accountability. It does not carry out either its role to ensure the lawfulness of EU law.

Conclusion

59. In light of the above analysis and arguments the Applicants respectfully ask the Commission to:

    - Withdraw its appeals lodged before the Court of Justice.

- Given that actions brought before the Court of Justice of the European Union do not have suspensory effect[21], start the process to amend Regulation 1367/2006 now to bring it in line with Article 9(3) of the Aarhus Convention in accordance with the Court's rulings and with Article 263(4)TFEU with regards to regulatory acts. This would also provide the Commission with the opportunity to bring the access to information and public participation provisions of the Regulation in line with the ones of the Convention.

Yours sincerely,

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[21] Article 278 TFEU and Article 60 of the Statute of the Court of Justice of the EU.