



EUROPEAN COMMISSION

Brussels, 18.7.2012  
C(2012) 5069 final

**COMMISSION DECISION**

**of 18.7.2012**

**on the submission of an appeal before the Court of Justice**

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Whereas:

- (1) Article 10 of Regulation 1367/2006 of the European Parliament and the Council 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 lays down a procedure whereby environmental non-government organisations ("NGOs") can request the EU institution or body concerned to carry out an administrative review of an environmental act of individual scope which it has adopted.
- (2) In April 2008, two NGOs, relying on this Regulation, asked the Commission to review Commission Regulation 149/2008 amending 396/2005 of the European Parliament and the Council by establishing Annexes II, III and IV setting maximum residue levels for products covered by Annex I thereto. The Commission declined to carry out such a review on the grounds that the Commission Regulation was not of individual scope.
- (3) The two NGOs challenged the latter Commission Decision (Case T-338/08 *Stichting Natuur en Milieu and Pesticides Action Network Europe v European Commission*). In its judgment of 14 June 2012, the General Court annulled the Commission Decision on the grounds that Regulation 1367/2006 was contrary to Article 9(3) of the Aarhus Convention in so far as it restricted the administrative review procedure to acts of individual scope.
- (4) This judgment is flawed in several respects and should therefore be appealed.
- (5) First, the Court erred in applying the so-called "Nakajima exception" so as to hold the above-described restriction in the Aarhus Regulation to be incompatible with Article 9(3) Convention (paragraphs 54ff. of the judgment). The Nakajima exception allows EU measures to be held invalid as being incompatible with provisions of international agreements even if those agreements lack direct effect. (In Case C-240/09 LZ, the Court of Justice had held that Article 9(3) does not have direct effect.) The Commission should insist that the Nakajima exception can only be applied where the relevant provision of the international agreement is sufficiently precise. Article 9(3) does not fulfil that condition, since it is very vague. 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.

- (6) Second, the Court erred in finding that the Contracting Parties to the Aarhus Convention enjoy limited discretion in identifying the acts which are to be subject to an administrative review pursuant to Article 9(3) of the Convention (paragraph 77 of the judgment). There is no basis for such a statement. On the contrary, the administrative review mechanism in the Aarhus Regulation complements the remedies available before the national courts and therefore need not cover all categories of act. It is important that the Union's discretion in this matter should not be fettered more than is required by the Aarhus Convention itself.
- (7) Third, the Court erred in finding that, insofar 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 therefore it is invalid (paragraph 83 of the judgment). While it is true that the scope of the former provision is more limited than the scope of the latter provision, this cannot allow concluding to the existence of an incompatibility leading to the invalidity of the provision of EU law. Such a finding 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.
- (8) Fourth, the Court was wrong to find that Commission Regulation 149/2008 had not been adopted by the latter in its legislative capacity. Acts adopted by public authorities in that capacity are excluded from the scope of the Convention by virtue of Article 2(2) of the Aarhus Convention. The Commission argued before the General Court that, because Commission Regulation 149/2008 amended various annexes to a Regulation of the Parliament and the Council, the latter Regulation was so closely bound up with the basic act as to be regarded as legislation itself. The General Court rejected the Commission's argument (paragraphs 65ff.), but its reasoning on this point is not convincing. Failure to challenge the General Court's ruling on this point would lead to the administrative review procedure being applied to many acts which fall outside the scope of the Aarhus Convention.

HAS DECIDED AS FOLLOWS:

*Article 1*

The Commission shall submit an appeal before the Court of Justice seeking the annulment of the judgment of 14 June 2012 in Case T-338/08 Stichting Natuur en Milieu and Pesticides Action Network Europe v European Commission.

*Article 2*

The Legal Service for the Commission shall implement this Decision.

Done at Brussels, 18.7.2012

*For the Commission*  
*José Manuel BARROSO*  
*The President*