COUNCIL OF THE EUROPEAN UNION

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"I" ITEM NOTE

From:	Legal Service
To:	COREPER / COUNCIL
Subject:	**Judgments of the General Court - "Aarhus Convention"** Case T-338/08 Stichting Natuur en Milieu and Pesticide Action Network Europe against European Commission and Case T-396/09 Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht against European Commission

1. On 14 June 2012 the General court handed down its judgments in the abovementioned cases. In both cases, the Council intervened in support of the Commission[1]. In case T-338/08, the Republic of Poland also intervened in support of the Commission, as did the Kingdom of the Netherlands and the European Parliament in Case T-396/09.

[1] For the background, see doc. 5357/10.

2. Case T-338/08 concerned the setting, by the Commission, of maximum residue levels of pesticides on food and feed of plant or animal origin. Case T-396/09 concerned the authorisation, by the Commission, of the postponement of a deadline by which a Member State was to comply with certain air quality standards. In both cases, the applicants had sought an internal review of the Commission acts in question. The basis of those requests for internal review was European Parliament and Council Regulation 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies ("the Aarhus Regulation")[2].

3. The Commission decided that both requests were inadmissible since they related to matters of general scope, whereas Article 10, in conjunction with Article 2(1)(g), of the Aarhus Regulation provides that such a right of internal review is limited to measures of *"... individual scope under environmental law, taken by a Community institution or body and having legally binding and external effects."* In the proceedings brought before the General Court, the applicants argued that the Commission had misinterpreted the Aarhus Regulation, or, alternatively and indirectly, that the Aarhus Regulation itself was invalid on the ground that it failed to conform to the Aarhus Convention.

4. In its judgments, the General Court held that the legality of the Aarhus Regulation could be reviewed in the light of the Aarhus Convention, in particular because of the stated intention of the co-legislators as evidenced in particular by the recitals and by Article 1 of the Regulation. The Court then held that Article 9(3) of the Aarhus Convention, concerning access to justice, could not be construed as referring exclusively to measures of individual scope, and that the limitation of the right of review under the Aarhus Regulation was therefore not compatible with the Aarhus Convention[3]. The General Court concluded that the plea of illegality raised by the applicants must be upheld.

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[2] OJ L264/13 of 25.9.2006

[3] See paragraph 83 of the judgment in Case T-338/08, and paragraph 69 of the judgment in Case T-396/09.

5. The Legal Service is of the view that, in reaching its conclusion, the General Court has expressed its reasoning in a manner which is potentially open to criticism. Such is the case, for example, with regard to the General Court's observations concerning the inadequacy of the preliminary ruling procedure[4]. Moreover, the judgments raise broad questions of principle concerning the extent to which the legality of the Union's acts may be reviewed in the light of international conventions to which the Union is a party.

6. In this regard, it is important to recall that according to the existing case law, the general rule is that the Court of Justice and the General Court will only examine the validity of a legal act of the Union in the light of an international agreement (i) "*where the nature and the broad logic of the latter do not preclude this*" and (ii) "*where, in addition, the provisions of that agreement appear, as regards their content, to be unconditional and sufficiently precise*"[5]. Where those cumulative conditions are not satisfied, provisions of international agreements cannot be invoked in order to dispute the validity of an act of the Union.

7. However, by way of exception, the Court of Justice and the General Court will nonetheless review the legality of a legal act of the Union in the light of an international agreement even if the conditions above are not satisfied, where the Union act in question was intended to implement a "*particular obligation*" assumed in the context of that agreement, or where the Union act "*refers expressly to the precise provisions*" of the agreement concerned. This exception flows from the Court of Justice's case-law in *Fediol*[6] and *Nakajima*[7] in the context of the GATT/WTO.

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4 See paragraphs 74-76 of the judgment in Case T-396/09.

5 See e.g. Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-6513, paragraph 110; and Case C-366/10 *ATAA and Others* [2011] not yet reported, paragraphs 53-54.

6 Case 70/87 *Fediol v Commission* [1989] ECR 1825, paragraphs 19-22.

7 Case C-69/89 *Nakajima v Council* [1991] ECR I-2069, paragraph 31.

8. In the present case, it is clear that Article 9(3) of the Aarhus Convention does not fulfil the cumulative conditions referred to in paragraph 17 above. This was established by the Court of Justice in the so-called "*Slovakian Bears*" case.[8] The General Court therefore relied on the *Fediol* and *Nakajima* case law in order to review the validity of the Aarhus Regulation, pointing to the fact that Regulation No 1367/2006 was adopted, in part, to meet the European Union's international obligations under Article 9(3) of the Aarhus Convention, as evidenced by the recitals and by Article 1(1)(d) of the Aarhus Regulation[9].

9. However, in doing so, the General Court did not discuss whether and for what reasons the reference to Article 9(3) of the Convention in the preamble to the Aarhus Regulation was comparable to the reference to GATT 1947 examined by the Court of Justice in *Fediol*. Likewise, the General Court did not discuss whether and for what reasons Article 9(3) had to be construed as imposing a "*particular obligation*" on the Union within the meaning of the Court of Justice's case-law in *Nakajima*.

10. In this regard it should be noted, firstly, that in *Fediol* the Court of Justice found that the Union act at issue (Council Regulation No 2641/84[10]) "*entitles economic agents to rely on the GATT provisions in the complaints which they lodge with the Commission*". This appears to the Legal Service to be a material difference from the Aarhus Regulation.

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8 Case C-240/09 *Lesoochranárske zoskupenie* [2011] not yet reported, at paragraph 44-45.

9 See paragraph 58 of the judgment in Case T-396/09. As to the legislative intent concerning Aarhus, this has been reconfirmed as regards the Council in its conclusions of 11.6.2012, paragraph 6 of which refers to *"...improving access to justice in line with the Aarhus Convention."* See doc. 11186/12.

10 Council Regulation (EEC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to the protection against illicit commercial practices (OJ L 252, 20.9.1984, p. 1).

11. Secondly, while Article 9(3) of the Aarhus Convention creates obligations for the Union (as does any other provision of an international agreement to which the Union is party), the Court of Justice's case-law in *Nakajima* requires that a "*particular*" obligation for the Union must be present. In essence, this refers to situations where the Union is required specifically to transpose prescriptions, laid down at the international level, in the Union legal system, which also implies that the Union enjoys little or no discretion as regards the measures to be taken to that effect. None of those features is addressed in the judgment at hand, where the General Court simply found that "*obligations arise under Article 9(3) of the Aarhus Convention*".

12. The General Court thus appears to have adopted a very broad interpretation of the *Fediol/Nakajima* conditions. Such a broad interpretation may be contrasted with the usual approach of the Union's judicature, which is to apply the *Fediol/Nakajima* conditions restrictively, as an exception to the principle that individuals may not directly rely on international law provisions which have no direct effect. The General Court's broad interpretation of *Fediol/Nakajima* may turn out to have significant repercussions, well beyond the case at issue. It might indeed pave the way to challenges by individuals and economic operators against Union legislation (not only in the field of environmental policy but also in other policy spheres) wherever such legislation specifically refers to international commitments of the Union.

13. It is understood that the Commission (as regards both cases) and the European Parliament (as regards Case T-396/09 only) will lodge appeals. The Legal Service therefore recommends that appeals be lodged against the judgments in both cases. As the time-limit for doing so expires on **24 August 2012**, and subject to any contrary decision Coreper might make regarding the bringing of the appeals, the Director-General of the Legal Service has appointed Kristien MICHOEL and Matthew MOORE as agents to represent the Council.

14. In the light of the above, Coreper is invited:

- to recommend to the Council that is approve the lodging of an appeal by the Council to the Court of Justice against the judgements of the General Court in Cases T-338/08 and T-396/09;
- to decide to use the written procedure for adopting that decision.