

**English translation of the reply to the request for internal review of Commission
Decision C(2009)2560**

Only the reply in Dutch is authentic

By letter dated 18 May 2009 (registered on 19 May 2009 under reference Ares (2009)204069), you requested, on behalf of Vereniging Milieudefensie and Stop Luchtverontreiniging Utrecht, the Commission to review its Decision C(2009) 2560 final of 7 April 2009 on the notification by the Netherlands of a postponement of the deadline for attaining the limit values for NO₂ and an exemption from the obligation to apply the limit values for PM₁₀. This Decision has been adopted on the basis of Article 22 of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ L 152, 11.6.2008, p. 1). Article 22 of Directive 2008/50/EC allows Member States, under certain conditions, to postpone the deadlines for attaining certain limit values and be exempted from the obligation to apply certain limit values, unless the Commission raises objections against the postponement and exemption. By the above-mentioned Decision addressed to the Netherlands, the Commission has decided not to raise objections against the postponement until 2015 for attaining the deadline for the limit values for NO₂ in all air quality zones except one where the postponement will expire in 2012, and an exemption until June 2011 from the obligation to apply the limit values for PM₁₀ in the zones specified in the Annex to the Decision.

Your request for internal review has been lodged on the basis of Title IV of 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, 25.9.2006, p. 13). Its purpose is to request the Commission to review its above-mentioned decision of 7 April 2009 as the Netherlands would not satisfy the conditions laid down in Article 22 of Directive 2008/50/EC, with the resulting consequence that the Commission should have raised objections against postponing the attainment of the limit values for NO₂ and against the exemption from the obligation to apply the limit values for PM₁₀.

The Commission has carefully considered your request in the light of the provisions of Title IV of Regulation No 1367/2006, and its Articles 10 and 11 in particular, in conjunction with the relevant provisions of Article 2 of that Regulation.

It follows from a combined reading of Article 10 and the definition of "administrative act" set out in Article 2(1)(g) of the Regulation that a request for internal review may only be lodged against a measure of individual scope taken under environmental law by a Community institution or body and having legally binding and external effects.

Without prejudice to any comments it might have with respect to any other of the criteria provided for in Title IV of Regulation No 1367/2006 concerning the admissibility of your request for internal review, the Commission considers that its Decision of 7 April 2009 is not a measure of individual scope.

The Commission understands that you contend that the Decision is an administrative act insofar as it is, *inter alia*, a measure of individual scope, it being a decision ("beschikking") addressed to a specified Member State (see para. 9 of the Request).

A decision addressed to a specific Member State may, however, be of general scope by reason of the fact that it is designed to approve a scheme which applies to one or several categories of persons defined in a general and abstract manner.

There is specific case-law to the effect that derogations from a given general regime which are constituted by confirmatory decisions adopted by the Commission under a given directive partake of the general nature of that directive, insofar as they are addressed in abstract terms to undefined classes of persons and apply to objectively defined situations; in such cases, the said decisions (even though they are "beschikkingen") must be regarded as acts of general application. Reference can be made in this respect to Case T-142/03 (*Fost Plus VZW v Commission* [2005] ECR p. II-589, paragraph 47 and case-law cited therein).

In view of the scope and conditions for the implementation of the derogatory regime laid down in Article 22 of Directive 2008/50/EC, the Commission considers that this regime applies to objectively determined situations and provides legal consequences for categories of persons viewed generally and in the abstract, so that decisions adopted pursuant to that provision constitute "derogations to a general regime" within the meaning of the above-mentioned case-law and partake therefore the general nature of Directive 2008/50/EC.

Reference can, *inter alia*, be made in this respect to the circumstance that the derogatory regime laid down in Article 22 of Directive 2008/50/EC can only be relied on by Member States provided they establish air quality plans for the zones and agglomerations to which the postponement and exemptions would apply. Such plans provide for the adoption and implementation of measures applicable to undefined classes of persons in objectively defined situations. The decision whereby the Commission raises no objections against the notification from the Netherlands under Article 22 of Directive 2008/50/EC takes into account the air quality plans submitted by that Member State.

On the basis of the aforementioned observations, the Commission considers that your request for internal review concerns a measure which is not an administrative act as defined in Article 2(1)(g) of Regulation No 1367/2006. The Commission therefore considers your request to be inadmissible.

Should you not agree with the present reply, you may bring the matter before the European Ombudsman or before the Court of First Instance if you have a complaint which falls within the conditions laid down in Articles 195 and 230 respectively of the Treaty.

Complimentary close.