

ACCC/M/2017/3 (EU): Examples requested by the Committee during the open session on 25 November 2020

The following are examples of provisions of acts that an applicant may wish to challenge by way of an internal review request for contravening EU law related to the environment, which could potentially be seen to amount to “provisions for which Union law explicitly requires implementing measures” at national level.

Approval of a herbicide, such as glyphosate

Regulation 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (Annex 1), introduced a system in which approval procedures for active substances (Articles 7 to 13 of Regulation No 1107/2009), such as glyphosate, are separated from authorisation procedures for the formulated plant protection product. The final product, consisting of the active substance and other elements, which is then used by operators, is regulated by Articles 33 to 39 of Regulation No 1109/2009.

The process for the approval of the active substance (e.g. glyphosate) takes place at EU level, culminating in the adoption of a non-legislative Commission regulation. This process is intended to ensure that the active substances contained in plant protection products present a clear benefit for plant production and are not expected to have harmful effects on human or animal health or any unacceptable effects on the environment (recital 10).

If an NGO would consider that the approval of a specific substance contravenes EU law related to the environment, the provisions it would challenge would be contained in the Implementing Regulation. As an example, “the provision” challenged by an applicant could be Article 1 (and thereby the Annex) of Commission Implementing Regulation 540/2011 (see Annex 2).¹

However, an active substance cannot be placed on the market until the final product has been approved by the Member State in whose territory it will be marketed. Article 33(1) Regulation 1107/2009 requires an applicant that wishes to put a plant protection product on the market to apply for an authorisation to the Member States authorities.

It is therefore unclear if an NGO could challenge Art. 1 of Regulation 540/2011 by way of an internal review or whether it would be considered a provision for which Art. 33(1) of Regulation 1107/2009 requires national implementing measures.

Should the NGO be barred from submitting an internal review request, it would be required to seek to challenge the authorization of the plant protection product in the Member States and seek to obtain a preliminary reference. Next to the practical challenges that this would entail, an NGO would also not have standing to bring such a challenge in many EU Member States leaving it without a legal remedy.

¹ Of course, such a challenge would be out of date. This is just to illustrate what kind of acts may be relevant.

Type approval of motor vehicles

Regulation 2018/858 sets the framework for the approval of motor vehicles in the European Union, the so-called “type approval system” (Annex 3). Based on Art. 5(1) Regulation 2018/858, vehicles need to comply with the requirements of the regulatory acts listed in Annex II.

One of those regulatory acts is Regulation 715/2007 (Annex 4) which regulates pollutant emissions. Art. 10 and the Annex to Regulation 715/2007 define the Euro 5 and 6 emission standards, including the limits of emissions of nitrogen oxides, for instance, for a specific type of a diesel passenger vehicle.

Based on Art. 5 and 15(3) of Regulation 715/2007, the specific test procedure to ensure compliance with this requirement is to be regulated by way of an Implementing Regulation. In the past, these tests have been insufficient, permitting car manufacturers to utilize so-called defeat devices, which led to serious underreporting of real driving emissions.

An example for such an Implementing Regulation is Commission Regulation 2016/646 (Annex 5) which supplemented the requirements for real driving emissions (RDE) tests. Art. 1(6) of that Regulation replaces Annex IIIA of Regulation 715/2007, thus introducing a new “conformity factor”. This means in practice that for instance certain diesel passenger vehicles would need to comply with a less stringent emission limits of nitrogen oxides in order to obtain a type approval. The same Regulation also inserts new testing requirements.

Based Art. 6(4) of Regulation 2018/858 the Member States are to grant “type approval” thereby certifying that the vehicle satisfies the relevant requirements, including the Euro standards explained above.

It is therefore unclear if an applicant could challenge Art. 1(6) Commission Regulation 2016/646 by way of an internal review request or whether it would be considered a provision for which Art. 6(4) Regulation 2018/858 requires national implementing measures.

It is important to note that it will be difficult for NGOs to challenge this type approval by the national approval authorities in many, if not all, Member States.

List of Projects of Common Interest

Based on Art. 3(4) Regulation 347/2013 (Annex 6): “*The Commission shall be empowered to adopt delegated acts in accordance with Article 16 that establish the Union list of projects of common interest ('Union list'), subject to the second paragraph of Article 172 of the TFEU. The Union list shall take the form of an annex to this Regulation.*” Projects of common interests benefit for a special permitting regime and possibilities to obtain funding.

An example of such a delegated act is Commission Delegated Regulation 2020/389 (Annex 7). An NGO may for instance seek to challenge Art. 1 of the Regulation which amends the Annex to Regulation 347/2013 by inserting certain projects, alleging that this inclusion contravened of EU law related to the environment.

Art. 5(1) Regulation 347/2013 requires project promoters to draw up an “Implementation plan” for PCIs including a timetable (such as certain studies, approval by national authorities, constructions and the permit granting schedule). Moreover, Arts 7-10 explicitly regulate the national permitting process for PCIs.

It is unclear if this Implementation Plan or a national permit would be considered as an explicitly required national implementing measure of Art. 1 Commission Regulation 2020/389.

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List of Annexes

Annex 1: Regulation 1107/2009

Annex 2: Commission Implementing Regulation 540/2011

Annex 3: Regulation 2018/858

Annex 4: Regulation 715/2007

Annex 5: Commission Regulation 2016/646

Annex 6: Regulation 347/2013

Annex 7: Commission Delegated Regulation 2020/389