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FRIENDS OF THE EARTH

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Our Reference: GP/ACCC/EU
Your Reference: ACCC/C/2008/32

23rd February 2015

Communication ACCC/C/2008/32 (Part II) - Update on Court of Justice rulings in cases C-401/12 P to C- 405/12 P

Dear Madam,

I write on behalf of Friends of the Earth England, Wales & Northern Ireland (FoE). We understand that the Aarhus Convention Compliance Committee (ACCC) will be reviewing Communication ACCC/2008/32 in the near future and are writing to provide some brief information about our experience of using the Aarhus Regulation, as we believe this will be of assistance to the ACCC in its determination. In doing so we wish to make clear that we do not waive our rights of legal privilege in relation to the matter described below.

FoE is one of the leading environmental campaigning organisations in the UK and part of Friends of the Earth International, the world's largest grassroots environmental network. We campaign for solutions to the biggest environmental problems of our time, such as climate change. One of our campaigning aims is to promote decarbonisation of the United Kingdom and Europe's energy supply.

In August 2014, FoE made an internal review request concerning the Guidelines on State Aid for Environmental Protection and Energy 2014-2020 (2014/C 200/01) (the Guidelines). Section 3.3.2.1 of the Guidelines sets different levels of support for wind energy as compared to other kinds of renewable energy. Our legal concerns were that this section was contrary to both the Renewable Energy Directive and the EU law principle of equal treatment as well as being potentially disproportionate in view of the burden likely to be imposed on certain businesses. In our opinion the complex bidding process proposed was liable in practice to deter small and medium sized renewable energy projects, including community and local energy projects of the kind that we seek to promote through our campaigning. We were concerned that the provisions had the potential to jeopardise the deployment of small and medium-sized (non-wind) renewables projects across the European Union.

In our request (annexed to this letter, alongside the EU's response) we set out our legal concerns on the substantive point. While we believe that there could be no dispute that our request fell within the provisions of the Aarhus Convention, it was necessary for us to show that it met the requirements of the Aarhus Regulation (the Regulation). For this purpose, we referred to the findings of the General Court in the joined *Stichting* case[1] on the question of individual scope, as well as explaining why the guidelines related to matters of environmental law and had legally binding and external effects.

[1] Joined cases C-401/12 P to C-403/12 P, *Council, European Parliament, Commission v Vereniging Milieudefensie, Stichting Stop Luchtverontreiniging Utrecht*, ECLI:EU:C:2015:4.

We found the reasoning in the response from the EU to be both convoluted and contradictory. Our understanding was that the Commission was arguing firstly that the Guidelines fell within the exception in Article 2 (2) of the Regulation relating to measures taken in the capacity of a body as an administrative review body and that in the alternative (though in the drafting it appeared as an additional and therefore contradictory point), the guidelines were not an "administrative act" because they were a measure of individual scope and as a result had no legally binding and external effects.

Being familiar, with the Commission's responses to such requests, we expected that the "individual scope" point would be raised, nothwithstanding the judgment of the General Court in *Stichting.* Pending the appeal decision, we did not know whether that point would remain in our favour. However, it was clear from the response there were further mountains we would need to climb to demonstrate standing in this case.

First of all we would need to counter the Commission's argument that the publication of the Guidelines was caught by Article 2 (2) of the Regulation. It appeared to us that this was not an act undertaken in the capacity of an administrative review body and that this was borne out by Recital 11 of the Regulation which referred to inquiry or other administrative review procedures. There was a further argument that the exceptions in Article 2 (2) of the Regulation were drafted more widely than the corresponding provision in the Aarhus Convention (last sentence of Article 2(2)), which excludes institutions acting in a judicial or legislative capacity. In our view the publication of guidelines was an administrative act well within the provisions of Aarhus Convention. However, making this argument would require us to raise a further point about the compatibility of the Regulation with the Convention. We would also need to prepare arguments about the meaning of "legally binding" and "external effects" in the Regulation.

As set out at the beginning of this letter, our key reason for making the internal review request was to ask the Commission to reconsider the legality of a particular provision of the Guidelines, because of its potential to have a serious detrimental impact on community renewables in particular. With our limited legal capacity (we have a two lawyer team advising on all our campaigns from domestic to international level), a key factor in our decision not to proceed with a case was that we were highly unlikely to be able to argue the legal point of substance but would instead become embroiled in protracted litigation about the meaning of the Aarhus Regulation and/or its compatibility with the Aarhus Convention. We did not know whether the "individual scope" point would be resolved favourably in the *Stichting* appeal, but even if it was, we felt we would not be able to avoid detailed legal argument on the other points outlined above and that these, rather than the decarbonisation of Europe, would become the focus of the case. As a result we reluctantly decided not to proceed.

We are providing this information to the ACCC to highlight not only the level of complexity and the height of the procedural hurdles faced by NGOs in bringing claims, but also their "real world" consequences for environmental matters. We understand that in this particular case a renewable energy trade federation may be bringing a legal challenge to the Guidelines. However, because of the current approach to standing by EU institutions, there is very limited (if any) possibility for organisations with public interest motives to seek legal scrutiny of decision-making. This has serious and continuing consequences for justice and the democratic process at EU level, as well as for environmental protection itself.

Yours faithfully

Gita Parihar
Head of Legal, Friends of the Earth England, Wales & Northern Ireland