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**FRIENDS OF THE EARTH**

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Our Reference: JW/State Aid

6<sup>th</sup> August 2014

Dear Madam,

**REQUEST FOR INTERNAL REVIEW: GUIDELINES ON STATE AID FOR ENVIRONMENTAL PROTECTION AND ENERGY – 2014 – 2020 (2014/C 200/01)**

1. We write to request an internal review of the decision by the Commission to publish the above guidelines (the “Guidelines”) on 28 June 2014. We make this request in accordance with Article 10 of Regulation 1367/2006 of 6 September 2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies (the “Aarhus Regulation”). We consider certain provisions of the guidelines to be unlawful for the reasons set out below.
2. This request is made on behalf of Friends of the Earth England, Wales and Northern Ireland. As will be evident from the documents submitted alongside the request, this organisation is incorporated as “Friends of the Earth Limited” in the UK. However it is also a member of Friends of the Earth International, an environmental network with 74 member groups, including Friends of the Earth Europe. As a result, in order to avoid confusion with other Friends of the Earth groups, the term Friends of the Earth England, Wales and Northern Ireland (“Friends of the Earth EWNI”) will be used for the rest of this document.<sup>1</sup>
3. Friends of the Earth EWNI meets all of the requirements set out in Article 11(1) of the Aarhus Regulation. As laid out in its Memorandum of Association, Friends of the Earth is a company limited by guarantee (ie. has not-for-profit status under law) and was incorporated in 1972. It is an independent organisation and its objectives are:

*“3.1 Understanding and appreciation of the need for the conservation protection and restoration of nature both in the United Kingdom and in the rest of the world.”*

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<sup>1</sup> This is the name by which the group is known within the FOEI international network, see <http://www.foei.org/member-groups/europe/england-wales-and-northern-ireland/>



3.2 *The enhancement and rational use of all aspects of the environment.*

3.3 *Socially just sustainable development.*”

4. Environmental Protection is therefore a primary objective of Friends of the Earth EWNI. As part of its work on combatting climate change, it has a key interest in decarbonisation of the United Kingdom and Europe’s energy supply. The Guidelines forming the subject matter of this request are of direct and far-reaching relevance to its work.
5. In accordance with Article 3 of Commission Decision 2008/50 of 13 December 2007 (the “Aarhus Regulation”) I enclose the following documents:
  - (a) Articles of association of Friends of the Earth Limited;
  - (b) annual accounts for the last two years in respect of which accounts have been audited;
  - (c) certificate of incorporation.
6. Friends of the Earth EWNI’s request for internal review concerns section 3.3.2.1 of the Guidelines. The grounds on which this request for internal review is made is that certain of the provisions in that section of the Guidelines are:
  - (a) contrary to the Renewable Energy Directive<sup>2</sup>;
  - (b) contrary to the EU law principle of equal treatment;
  - (c) disproportionate in view of the burdens on certain businesses which they are likely to impose;
7. I am the contact point for the purposes of Article 1(4) of the Commission Decision 2008/50 and my contact details are set out above.

#### Background

8. Paragraph 126 of the Guidelines provides (*inter alia*) that competitive bidding applies to operating aid granted to energy from renewable sources from 1 January 2017 subject to certain exceptions. Paragraph 127 sets out certain exemptions from the competitive bidding requirements for

“installations with an installed electricity capacity of less than 1 MW, or demonstration projects, except for electricity from wind energy, for installations with an installation capacity of up to 6 MW or 6 generations units”.
9. Paragraph 128 provides that where no competitive bidding process applies (eg: because Article 126 applies), the conditions of paragraphs 124 and 125 and the conditions set out in paragraph 131 are applicable.
10. It is clear that paragraphs 125 and 127 set different levels of support for wind (on the one hand) and for as against all other forms of renewable energy (on the other). No evidence or rationale for the different levels of exemption is set out in the Guidelines or the Impact Assessment.

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<sup>2</sup> Directive 2009/28 of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

## Timing

11. For the avoidance of doubt, this request is made in good time in accordance with Article 10(1) of the Aarhus Regulation. This is because this request is made within 6 weeks of 28 June, being the date on which the Guidelines were published<sup>3</sup>.

## Ground 1: Renewable Energy Directive

12. Friends of the Earth EWNI is concerned that paragraph 127 of the Guidelines conflicts with the Renewable Energy Directive on the grounds that it:

- (a) undermines the promotion of renewable energy in the EU;
- (b) conflicts with Member States' competence to achieve the renewable energy target set out in the Directive in such manner as suits their particular circumstances;
- (c) undermines the capacity of small and medium-sized businesses and local and community energy projects to generate renewable energy as envisaged by the Directive.

- (a) Promotion of renewable energy

13. Article 194 of the Treaty on the Functioning of the European Union recognises that developing new and renewable forms of energy is one of the aims of EU energy policy<sup>4</sup>. The European Parliament has also noted the importance of local generation and microgeneration<sup>5</sup>.
14. Article 1 of the Directive provides that its purpose is to “establish a common framework for the promotion of energy from renewable sources” (our emphasis). We are concerned that the exemption from competitive bidding for renewables projects (other than wind) of less than 1 MW conflicts with the purpose of the Directive, since it is liable to deter small and medium sized renewable energy projects from being deployed, including community and local energy projects. Competitive bidding is widely believed to be a significant disincentive for small and medium sized projects, particularly for small and medium sized enterprises and community organisations, because of the disproportionate cost of participating in them and the lack of skills and experience to enable them to do so.
15. There is substantial evidence that small and medium-sized enterprises are very active in developing renewable energy projects with less than 5MW capacity - that is within the area directly affected by paragraph 127 of the Guidelines. Evidence from the UK Renewable Energy Association indicates that most of the organisations involved in development of this scale of projects in the UK are SMEs<sup>6</sup>. Industry bodies have made clear that bidding requirements are particularly onerous for SMEs<sup>7</sup>. While we have not had an opportunity to obtain evidence on the impacts in the rest of Europe within the time limit for lodging this request, it is our understanding that the impacts are the same. There is also strong evidence that competitive, market-based

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<sup>3</sup> C 200/1 – 28 June 2014

<sup>4</sup> We note that the recital referring to this Article of the Treaty in the XXX 2013 draft was deleted from the draft published in the Official Journal.

<sup>5</sup> European Parliament resolution of 12 September 2013 on microgeneration – small-scale electricity and heat generation (2012/2930(RSP) – para 8.

<sup>6</sup> REA response to DECC Consultation on changes to financial support for solar PV – 20 July 2014.

<sup>7</sup> See for example press release from UK Solar Trade Association and the Renewable Energy Association “Contracts for Difference: Concerns persist for SMEs and new entrants in power sector” – 23 July, 2014.

mechanisms are unsuitable for small and medium sized community electricity projects<sup>8</sup>, which are not operated by profit-making companies. It therefore seems reasonable to infer that this condition, if implemented by Member States, will deter SMEs and community energy projects from seeking support and reduce the scale of generation by such energy projects. In their submissions to the Consultation on the Draft State Aid Guidelines for Environmental Protection and Energy several Member States expressed concerns about the negative impact that competitive bidding could have on the deployment of renewable energy more generally<sup>9</sup>.

16. We believe it is reasonable to assume that Member States will design their support schemes for small and medium sized renewables projects so as to comply with the Guidelines including as regards competitive bidding for smaller projects. In law, it is well established that guidelines adopted and published by the Commission have legal effects, in particular by limiting the Commission's discretion to act contrary to such guidelines<sup>10</sup>. In practical terms, there is evidence that Member States are already taking steps to design support schemes in precisely this manner. Thus whilst the UK government has consulted on a proposal to raise its Feed-in Tariff limit from 5MW to 10MW for community energy projects, it acknowledges that "it may be necessary to apply competitive bidding processes to all or most generators with a capacity of more than 1MW" in order to bring the scheme into line with the Guidelines<sup>11</sup>.
17. The Directive recognises that State intervention to support renewable energy generation is integral to the promotion of renewables and achieving the purpose of the Directive. Thus Article 3(3) explicitly recognises Member States power to introduce "support schemes" for the purpose of achieving the targets laid down in the Directive<sup>12</sup> (see further below).
18. We consider that paragraph 127 of the Guidelines breaches Article 1 of the Directive because it is liable to substantively interfere with the promotion of renewable energy in the EU. In particular, it unduly limits Member States' capacity to support small and medium sized renewable energy projects (other than wind), which is itself potentially contrary to Article 3(3) of the Directive, thereby jeopardising the deployment of this type of renewable energy project across the European Union.
19. So far as the second set of exemptions is concerned, we are concerned that these conditions are relatively uncertain in terms of their legal meaning (see for example "the need to achieve diversification") and in the case of subparagraph (e) narrowly applicable.

(b) Member States' competence to achieve targets

20. We believe that paragraph 127 of the Guidelines conflicts with the Directive by restricting

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<sup>8</sup> See for example evidence gathered by the UK Department of Energy & Climate Change in its "Community Energy Strategy Call for Evidence" (June 2013).

<sup>9</sup> See for example consultation submissions on the Draft Guidelines for State Aid to Environmental Protection and Energy by Finland, Denmark and Poland.

<sup>10</sup> T-59/02 Archer Daniels Midland Co – para 43: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1406727286093&uri=CELEX:62002TJ0059>.

<sup>11</sup> Consultation on support for community energy projects under the Feed-in Tariffs Scheme – Part B – Increasing the maximum specified capacity ceiling for community projects from 5MW to 10MW (May 2014): para 2.4.

<sup>12</sup> The definition of this term in Article 2(k) makes clear that it includes "direct price support schemes including feed-in-tariffs and premium payments".

Member States' competence to achieve the targets in such manner as they consider is best suited to their particular circumstances. Recital 25 of the Directive recognises that:

“For the proper functioning of national support schemes it is vital that Member States can control the effect and costs of their national support schemes according to their different potentials”.

Whilst Article 3 imposes binding targets on Member States, the Directive envisages considerable flexibility for Member States as to how the targets are to be achieved<sup>13</sup>. As previously stated, the Directive explicitly recognises the right of Member States to introduce support schemes to promote the deployment of renewable energy and contains relatively high level provisions concerning “national renewable energy action plans” which must contain “adequate measures to be taken to achieve those overall national targets”<sup>14</sup>.

21. In case C-573/12 Ålands Vindkraft AB v Energimyndigheten the EUCJ found that the Directive permits a Member State to create support structures “solely in respect of green electricity produced in that Member State”<sup>15</sup>. The decision underlines the competence of Member States to determine such support structures as are required to suit their particular circumstances and which enable them to achieve the targets set out in the Directive. Despite acknowledging the importance of the targets laid down by the Directive for the purposes of the Guidelines<sup>16</sup>, the Guidelines appear to conflict with the Directive by imposing potentially harmful restrictions on support structures which Member States are entitled to introduce for small and medium scale renewable (non-wind) projects.
22. We are not aware of any provision in the Directive which supports the favouring of wind over other forms of renewable energy – on the contrary it conceives of “energy from renewable sources” as embracing all the major sources of renewable energy equally<sup>17</sup>. The Directive states that its purpose is to create a “common framework” for the promotion of renewable energy. It is far from clear that the Commission is entitled to add to and potentially undermine this framework through guidance issued regarding the State aid rules in the Treaty. Restrictions on Member States' flexibility to deliver low carbon policy is also at odds with the draft EU 2030 Framework in its current form<sup>18</sup>.

(c) Undermines role of SMEs and community energy projects

23. As set out above, we are concerned that the provision complained of will undermine the capacity of SMEs and community energy projects to generate renewable electricity (other than wind) going forward. We believe this is contrary to the Directive because it explicitly recognises the important

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<sup>13</sup> Article 3(1) makes high level reference to “promoting and encouraging energy efficiency and energy saving”.

<sup>14</sup> Article 4(1).

<sup>15</sup> Para 54 – decided 1 July 2014.

<sup>16</sup> See paragraph 5 “The headline targets mentioned in recital (3) are particularly important for these Guidelines”. Although recital 3 refers to the Europe 2020 Strategy, limb (ii) of the Strategy is the 20% renewable target set out in the Renewable Energy Directive.

<sup>17</sup> We recognise that the Directive also contains bespoke provisions concerning biofuels and bioliquids, but these do not contradict the basic position which is equal treatment.

<sup>18</sup> See paragraph 9 of the Framework: “Delivery of this objective should follow a cost-efficient approach, providing flexibility to member States to define a low-carbon transition appropriate to the specific circumstances...”

role which SMEs can play in producing renewable energy<sup>19</sup>; of decentralised energy projects<sup>20</sup>; and the opportunities for growth which their activities present<sup>21</sup>.

24. The consideration of these impacts in the Impact Assessment does little to cure the problems with the Guidelines. The Impact Assessment contains little in-depth analysis of the impacts on such organisations, for example by way of calculation of financial impacts or losses. Whilst the Assessment notes that the Guidelines create a risk of under bidding, and that the “flexibility features... would however mitigate this negative risk”, it does not identify the scale or severity of the risk, or the extent to which the risk is believed to be mitigated. This relatively superficial consideration of impacts suggests the Commission may in fact be unclear as to the extent to which the Guidelines will, in practice, undermine the promotion of small and medium scale renewables, or the role of SMEs and community projects in delivering them.

#### Exemptions from duty to bid

25. Although the exemptions from competitive bidding in paragraph 126 do not discriminate on the basis of the source of the energy generated, we believe they do not substantively mitigate the harmful impacts which paragraph 127 is liable to give rise to. First, neither set of exemptions (or partial exemption in the case of the second set) apply clearly or automatically to small or medium sized projects (including wind) such as we are concerned with. Both sets require interpretation, which introduces uncertainty and suggests that notification and clearance will generally be necessary (which takes time). Experience to date suggests that Member States may not take advantage of these exemptions in any event<sup>22</sup>. Assuming that the first set of exemptions dis-applies the requirement to bid altogether, the second set is inadequate in that it does not achieve this (but enables technology specific bidding). It will be clear from the above that this is inadequate from our point of view, because it is the fact of participating in a competition which deters SMEs and community projects from seeking State support, and thereby being able to deploy.

#### Changes required

26. We believe that the scheme of the Directive requires the exemption for other renewables to be raised to the same level as for wind (in both cases), because this ensures the promotion of renewable energy in accordance with the Directive; enables Member States to determine how best to achieve their renewables targets; and enables SMEs and decentralised projects to play a full part in the process of decarbonisation process as recognised in the Directive.

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<sup>19</sup> Recitals 3 and 4 – for example “Small, currently non-commercial, decentralised production such as from individual households may need to be supported in specific ways. If such need is established, such an approach could allow to deliver socially and economical-optimal levels of renewable energy and to support a wide portfolio of renewable energy technologies.”

<sup>20</sup> Recital 6.

<sup>21</sup> Recital 4: “When favouring the development of the market for renewable energy sources, it is necessary to take into account the positive impact on regional and local development opportunities, export prospects, social cohesion and employment opportunities, in particular as concerns SMEs and independent energy producers”. We note that stimulating growth is one of the three objectives set out in the Commission Communication on state aid modernisation<sup>21</sup> – see paragraph 11 of the Guidelines.

<sup>22</sup> See UK consultation on changes to the Feed-in Tariffs regime referred to above. This is perhaps due to fact of the central aim of the Guidelines, namely to limit aid to the minimum necessary (see recital 12) so as to avoid distortion of competition and the importance of a bidding process as the key mechanism set out in the Guidelines to achieve this (see for example paragraphs 20, 52, 80 and 109).

## Ground 2: Equal treatment

27. The EU law principle of equal treatment is enshrined in Article 2 of the Treaty on the Functioning of the European Union. We argue that the principle of equal treatment includes a duty of consistency, namely to treat like cases alike, unless there is an objectively justifiable ground for distinguishing them. We argue this principle is part of the principle of equality, which is not confined to grounds such as sex and nationality<sup>23</sup>. We argue that small to medium sized renewables projects are similar and required to be treated alike for the reasons set out above – namely that competitive bidding presents a significant burden for all small and medium sized enterprises and other relatively small or community projects whether involved in wind or other forms of renewable energy. In this case, the Guidelines contain discriminatory provisions which are unjustified. The Commission has provided no evidence to suggest that organisations seeking to deliver small to medium sized wind projects face greater burdens or challenges in this (or any other) respect. It therefore seems clear that these discriminatory provisions are unjustified.
28. The discrimination in favour of wind based projects is made still worse by the fact that the Guidelines exempt wind projects of up to 6 MW *or 6 generation units* from bidding. Given that individual wind turbines may have a capacity of considerably in excess of 1 MW, it is clear that the Guidelines exempt wind projects with a capacity considerably in excess of 6 MW. Since no such flexibility is afforded to other forms of renewable energy, the discrimination in favour of wind in this case is somewhat egregious.
29. Given we argue that the burdens and barriers such organisations face are not determined by the source of renewable energy concerned, but by the size of the organisation involved in delivering the project, it will be clear we believe that small to medium sized renewable energy projects are required to be treated equally and the exemption from competitive bidding should therefore be raised to 6 MW for all sources of renewable energy in paragraph 127. Reducing the threshold for wind installations to those which apply to all other kinds of renewable energy installations would compound the problem we have identified, as it would extend the burden of bidding still wider, thereby dis-incentivising the development of small to medium sized energy projects across the board.

## Ground 3: State aid

30. We argue that imposing bidding requirements in respect of small and medium sized renewables projects (other than wind) creates undue distortions of competition, in view of the burdens on business and other organisations which this requirement is likely to cause.
31. First, it seems clear that the purpose of the Guidelines is, *inter alia*, to focus scrutiny on cases with the biggest impact on the internal market<sup>24</sup>. We struggle to see that small to medium sized renewables projects (other than wind) in excess of 1 MW capacity fall within this category. Accordingly, it appears that the requirements complained of may fail to achieve one of the underlying objectives of the Guidelines.

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<sup>23</sup> Aidan O’Neill “EU law for UK lawyers” 2 edn, 2011.

<sup>24</sup> Paragraph 11.

32. Second, the requirement to enter into a bidding process for all non-wind projects above these thresholds seems disproportionate in the case of small and medium sized projects. The Commission has set out no rationale or evidence in support of its approach in this regard. Its approach penalises small and medium sized non-wind projects, is unjustified and disproportionate.
33. Third, as set out above, given the disproportionate risks to and community based organisations the Guidelines risk giving rise to monopolies in favour of larger energy undertakings. As set out above, participating in such processes is likely to be proportionately more expensive and burdensome for small organisations than for larger operators, many of whom may lack the expertise or resources necessary to participate in such processes. We are genuinely concerned that certain sectors of the renewables industry could simply disappear as a result of this provision of the Guidelines. The Guidelines are therefore at real risk of causing undue distortions of competition of more or less the kind which they seek to prevent (that is favouring one group of undertakings over another leading to market distortion).
34. The Commission cannot credibly argue that removing support for small or medium sized renewable projects from competition risks failing to limit the aid to generators to the minimum necessary<sup>25</sup>, since it must follow from paragraph 127 of the Guidelines that it believes that this risk is low so far as small and medium-sized wind projects are concerned. We argue that the risk of aid exceeding the minimum necessary for other small or medium sized renewables projects is equally low and therefore justifies raising the threshold for all forms of renewable energy to 6 MW.

#### Application of the Aarhus Regulation to this request

35. Under Article 10 (1) of the Regulation Friends of the Earth EWNI is entitled to make a request for an internal review to “*the community institution or body that has adopted an administrative act under environmental law.*” “*Administrative act*” is further defined in Article 2 (1) (g) of the Regulation as “*any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects.*”
36. On the question of “*individual scope*”, we wish to emphasise the decisions of the General Court in cases T-338/08 and T-396/08 that the scope of review under the Aarhus Convention is not only limited to measures of “*individual scope*”<sup>26</sup> but also addresses measures of general scope. We are aware that these decisions are the subject of appeal by the Commission, but the decisions as they stand are good law. We understand that the recently published Advocate General’s opinion on the cases takes the view that the regulation being challenged was adopted on the basis of the legislative powers of the Commission rather than being an administrative act. As such it does not disturb the findings of the court below on individual scope. However we have been unable to verify this as a result of the lack of availability of an official English translation of the Opinion. In any event, pending a judgment from the Court of Appeal, the correct approach is for the Commission to apply the findings of the General Court.

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<sup>25</sup> See for example the Communication on State aid modernisation referred to in recitals 11 and 12 of the Guidelines and the statement in recital 12: “The compatibility conditions set out in these Guidelines are based on these common assessment principles”.

<sup>26</sup> See paras 71-79 of Case T-338/08 and paras 58-59 of case T-396/09



37. Environmental law is defined in the regulation as “*Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment*”. The Guidelines were produced by the Commission, pursuant to its powers under Article 107 (3) (c) concerning internal market state aid. However as set out in their title, the Guidelines relate to state aid for environmental protection and energy and consider the use of state aid as a tool to meet environmental targets. Therefore their adoption is clearly a decision falling within the ambit of the Aarhus Regulation. This is confirmed by the Recital to the Guidelines which refers to the 2030 Climate and Energy targets and the Resource Efficiency Roadmap amongst other matters<sup>27</sup>.
38. As set out in paragraph 16 above, it is well established in law that guidelines adopted and published by the Commission have external effects. The Guidelines set out the way in which the Commission will assess support schemes in Member States to ensure compatibility with Article 107(3)(c) of the Treaty on the Functioning of the European Union. The Commission’s “Frequently Asked Questions” page states that: “*From 1 July 2014, the Commission will assess new and pending notified state aid measures according to the criteria set out in the new guidelines. Member States have one year from the publication of the guidelines in the EU Official Journal to bring existing aid schemes in line with the new guidelines, except for schemes for operating aid for renewable sources and cogeneration, which only need to be brought in line if they are prolonged or adapted.*”<sup>28</sup> From this it is clear that the Guidelines have legally binding and external effects.
39. In addition and in any event, we wish to emphasise that the Aarhus Regulation is intended to apply the provisions of the Aarhus Convention<sup>29</sup> to Community institutions and bodies. As such it should be interpreted in such a manner as to give effect to the provisions of the Aarhus Convention.

We look further to hearing from you at your soonest convenience and in any event within the deadline set out in the Aarhus Regulation.

Yours faithfully

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**Friends of the Earth England, Wales & Northern Ireland**

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<sup>27</sup> See for example paras (5) and (6) of the Recital.

<sup>28</sup> [http://europa.eu/rapid/press-release\\_MEMO-14-276\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-276_en.htm)

<sup>29</sup> <http://www.unece.org/env/pp/treatytext.html>