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Competition DG

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Mr. Jake White
Friends of the Earth England,
Wales & Northern Ireland
139 Clapham Road
London SW9 0TP
jake.white@foe.co.uk

cc:Gita Parihar; Head of Legal;
gita.parihar@foe.co.uk

Subject: Request for internal review of the Guidelines on State Aid for environmental protection and energy 2014-2020

In your letter of 6 August 2014¹ you requested, on behalf of Friends of the Earth England, Wales & Northern Ireland ("Friends of the Earth EWNI"), to carry out an internal review of the Communication from the Commission Guidelines on State aid for environmental protection and energy 2014-2020² ("the EEAG").

Your request for internal review has been lodged on the basis of Regulation (EC) № 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 bodies³ ("the Aarhus Regulation").

First, in order to prevent State aid from distorting competition in the internal market and affecting trade between Member States in a way which is contrary to the common interest, Article 107(1) of the Treaty on the Functioning of the European Union ('the Treaty') lays down the principle that State aid is prohibited. In certain cases, however, State aid may be compatible with the internal market under Articles 107(2) and (3) of the Treaty. On the basis of Article 107(3)(c) of the Treaty, the Commission may consider compatible with the internal market State aid to facilitate the development of certain economic activities within the European Union, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The objective of State aid control, which is an exclusive competence of the Commission, is therefore to ensure that government interventions do not unduly distort competition and trade inside the EU.

The Commission has adopted the EEAG on the interpretation of Article 107 (3) (c) of the Treaty when it carries out the assessment of state aid in environmental and energy fields. As stated in recital 10 of the EEAG "[I]n these Guidelines, the Commission sets out the conditions under

¹ Registered on 11 August 2014 under the number ARES (2014)2652274

² OJ C 200, 28.06.2014, p. 1-55

³ OJ L 264 of 25.9.2006, p. 13

which aid for energy and environment may be considered compatible with the internal market under Article 107(3)(c) of the Treaty".

The EEAG are indeed measures adopted by the Commission in its capacity as an administrative review body in the sense of Article 2(2)(a) of the Aarhus Regulation. However as Article 2(2)(a) of the Aarhus Regulation explicitly excludes measures taken under Article 107, the Commission considers that the Aarhus Regulation does not apply to the EEAG. As a result the Commission considers inadmissible, already on this ground, your request for an internal review of the EEAG on the basis of the Aarhus Regulation.

Second, the EEAG are not an administrative act in the sense of Article 2(1)(g) of the Aarhus Regulation. Article 2(1)(g) defines the term administrative act as "*any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects*". However, the EEAG are not a measure of individual scope. In the light of the Court of Justice ("ECJ") case law⁴ Guidelines issued by the Commission should be considered as measures that set out rules of practice that are binding to the Commission. The latter may not depart from these rules when assessing an individual measure without giving reasons that do not counter the principle of equal treatment. Guidelines therefore constitute an act of general application that limit the Commission's discretion when assessing the compatibility of a state aid measure with the internal market. Thus, their scope is general and not individual. As a result, the EEAG have no legally binding and external effects on third parties.

Third, you refer in point 36 of your request to the decisions of the General Court in cases T-338/08 and T-396/08 to stress that the scope of review under the Aarhus Convention should not be limited to measures of "individual scope" but should also cover measures of general scope. In the above mentioned cases and despite the fact that the measures had an "individual scope", the General Court annulled the decisions of the Commission that had rejected the requests for internal review. The General Court annulled the Decisions arguing that Article 2(1)(g) of the Aarhus Regulation was incompatible with Article 9(3) of the Aarhus Convention. The Commission, together with the European Parliament and the Council, has appealed the Decisions from the General Court in the cases involving "Stichting Natuur en Milieu" and "Vereniging Milieudefensie" (Cases C-401/12P to C-405/12P). The appeal cases are still pending. Please note that in Case C-240/09 the Court found that Article 9(3) of the Convention cannot have direct effect in EU law as this Article does not contain any clear and precise obligation capable of directly regulating the legal position of individuals thus cannot be relied on to set aside the provisions of the Aarhus Regulation. The Commission notes that the General Court interpretation of Article 9(3) has departed in the above cases from the principle of direct effect. The Commission notes however that the principle of legal certainty precludes the courts from applying Article 9(3) in the absence of implementing provisions in Union law. These considerations are also applicable to the case at hand.

Should you not agree with the present reply, you may bring proceedings before the Court of Justice of the EU or lodge a complaint with the European Ombudsman under the conditions laid down in Articles 263 and 228, respectively, of the Treaty on the Functioning of the European Union.

Sincerely yours,



Alexander ITALIANER

⁴ See for instance, ECJ Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri v Commission* [2005] ECR I-5425, paragraphs 209-212.