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FRIENDS OF THE EARTH

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Communication ACCC/C/2015/128 concerning compliance by the European Union with provisions of the Convention in relation to the approval of state aid for Hinkley Point

Dear Madam,

I write on behalf of Friends of the Earth England, Wales & Northern Ireland (FoE) in respect of the above complaint, in which our sister organisation, Global 2000/FoE Austria, is a co-claimant. We understand that the Aarhus Convention Compliance Committee (ACCC) will be reviewing this communication in the future. We are therefore writing to provide some additional information in relation to this matter which may be useful to the Compliance Committee. This concerns our experience of using the Aarhus Regulation to make a complaint concerning the Guidelines on State Aid for Environmental Protection and Energy 2014-2020 (the Guidelines). The Committee may recall that we prepared a letter on this subject in support of ACCC/C/2008/32 Part II; the points raised at that time are equally as relevant to this case. As previously, 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 like Global 2000, we are 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.

Access to Justice at EU level

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. On the question of matters relating to the environment, as we pointed out at paragraph 37 of our request, the framing of the Aarhus regulation focuses on policy objectives relating to the environment in order to define whether a matter is environmental, rather than adopting the narrow approach taken by the Commission in this and other cases. The same point applies to the decision at issue in the current case, which stems from Article 108 but clearly relates to environmental matters.

We found the reasoning in the response from the EU to our internal review request 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 currently have a two lawyer team advising on all our campaigns from

[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.

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. This results in a serious gap in access to justice and consequently, in the substantive protection of the environment. 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.

Access to Justice at UK level

We do not understand either the EU or the UK to be making a submission that a claim of this nature could have been brought in the UK courts. For example, we note that there is no reference to the UK court system in the UK's submission. However, we note that there are references within the EU submission (for example at paragraph 39) to the possibility of challenging acts in a national court. We therefore deal briefly with this point below.

Firstly we do not see any basis under which a UK court would accept jurisdiction to decide on validity of act of EU institution and falling within the competence of that institution.

In addition we wish to point out that the UK has been found by the ACCC to be in non-compliance with its obligations under Article 9 (4) of the Aarhus Convention to ensure that judicial review procedures are not prohibitively expensive (as per Communications C23, C27, C33 and C77). Steps were taken to improve the position in the UK in 2013 by introducing new costs rules for environmental cases imposing a cap on adverse costs liability for unsuccessful claimants. However, under the new rules, organisations like FoE Austria would still be subject to costs of up to £10,000 if they brought a case and lost, which would likely be a big deterrent to them, particularly in a context where it seems highly unlikely that a UK court would consider it had jurisdiction to hear the matter.

In addition, the current costs caps are now subject to further consultation which might see them increased significantly and/or operate in such a flexible way that any certainty on the part of a claimant as to their costs risk in bringing a claim is likely to be entirely removed. In such circumstances it is difficult to see how or why Global 2000 would venture to bring a claim of this nature within the UK court system.

We hope these submissions are of assistance to the ACCC in its deliberations.

Yours faithfully

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