



EUROPEAN COMMISSION

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ClientEarth
Avenue de Tervuren, 36
1040 Brussels

Subject: Commission Decision responding to the request of ClientEarth to the European Commission for an internal review of the Commission Statement ad Article 10 paragraph 3 of the EU ETS Directive (2008/0013(COD)) adopted by the European Parliament on 17th December 2008.

Dear Sirs,

Thank you for your letter dated 27 January 2009, in which you request, in the name of ClientEarth, the European Commission to carry out an internal review of its statement concerning Article 10, paragraph 3 of the amended Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community (2008/0013(COD)), which was adopted by the European Parliament on 17 December 2008. ClientEarth alleges that this statement is unlawful in the light of Article 87 of the EC Treaty and the Community Guidelines on State Aid for environmental protection. With the agreement of the Directorates General for Competition and Environment, I can reply to you the following:

The statement, annexed to the text of the amended Directive 2003/87/EC when adopted by the European Parliament on 17 December 2008, reads as follows:

Between 2013 and 2016, Member States may also use revenues generated from the auctioning of allowances to support the construction of highly efficient power plants, including new energy power plants that are CCS-ready. For new installations exceeding the degree of efficiency of a power plant according to Annex 1 to the Commission Decision of 21 December 2006 (2007/74/EC) the Member States may support up to 15% of the total costs of the investment for a new installation that is CCS-ready.

You submitted this request on the basis of article 10 of Regulation (EC) 1367/2006¹ 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 bodies (hereafter the Aarhus Regulation).

The Commission has assessed your request on the basis of the provisions of Article 10 of the Aarhus Regulation. This Article entitles any non-governmental organization which meets the criteria set out in Article 11 to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act.

The administrative act is further defined in Article 2(1)(g) of the Aarhus Regulation, as a *"measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects"*. The definition further states in Article 2(2) that: *"Administrative acts and administrative omissions shall not include measures taken or omissions by a Community institution or body in its capacity as an administrative review body, such as under: (a) Articles 81, 82, 86 and 87 of the Treaty (competition rules) (...)"*.

First, the Commission assessed whether ClientEarth is an organization that meets the criteria of Article 11 of the Aarhus Regulation. From the information provided by you, in particular in the "Memorandum and Articles of Association of ClientEarth", it seems that ClientEarth is an organization that is an independent non-profit-making legal person registered in the United Kingdom under the Companies Acts 1985 & 1989 as a company limited by guarantee and not having share capital. Its primary stated objective is promoting environmental protection in the context of environmental law. It has existed for more than two years, namely since 7 October 1993² and is actively pursuing its primary objective as described in the submitted Activity Report for the years 2007 and 2008. The subject matter, in respect of which the request for internal review is made, namely the legislative proposals of the climate change package, is covered by ClientEarth's objective and activities. Therefore, the Commission's services concluded that ClientEarth complies with the criteria set in Article 11 of the Aarhus Regulation and is therefore entitled to make a request for internal review.

The Commission has further assessed if the request for internal review is admissible under the provisions of Article 10 of the Aarhus Regulation.

The Commission is of the opinion that the statement does not constitute an administrative act in the meaning of Article 10 of the Aarhus Regulation.

¹ OJ L 264 of 25.9.2006

² The name of the company changed by written resolution on the 13 November 2006

It is worth recalling in this respect that the statement was originally issued by the Commission in connection with the elements of the final compromise regarding the energy and climate change package as agreed by the European Council at its meeting on 11 and 12 December 2008, to which paragraph 20 of the European Council conclusions (as set out in Council document 17271/08) refers. More specifically, the statement can be found in Annex V to Council document 17215/08 of 12 December 2008. Therefore, although the Commission statement was published alongside the EU ETS Directive (2008/0013(COD)), the statement of the Commission is not part of the EU ETS Directive.

It appears from the circumstances of the adoption of the statement that the latter is to be seen as part of the overall political process whereby the European Council was able to reach a political agreement on the energy and climate change package.

The Commission notes in addition that the statement was made without following the procedure that the Commission established for the adoption of guidelines for State aid and therefore cannot be regarded as constituting such guidelines.

Therefore, the Commission fails to see how the statement can be described as a legislative measure and is of the opinion that the Commission's statement was a statement of political character and is considered not to be legally binding and not to have external (legal) effects.

In any event, the Commission is of the view that the statement – even if it were to be considered as having legally binding and external effects – would not be a reviewable administrative act as it is of general scope.

The statement does not address objectively determined situations and entail legal effects for individual beneficiaries. Therefore, the statement of the Commission cannot in any event be seen as an act of individual scope.

Provided the support mentioned in the statement fulfills the conditions of Article 87(1) EC Treaty, it would normally classify as State aid. As the Aarhus Regulation explicitly excludes in its Article 2 from the review under its Title IV any measures taken by the Commission under Article 86 and 87 of the EC Treaty, such measures in any event – even if it would be considered to have individual scope and legally binding character – would not be a reviewable administrative act as it is excluded from the definition of Article 2 of the Aarhus Regulation.

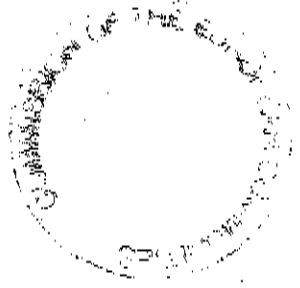
Taking the above into consideration, the Commission is of the view that the measure in question, namely the Commission's statement concerning possible State aid to support the construction of new highly efficient and CCS-ready power plants between 2013-2016, does not fulfil the criteria of an administrative act as set out in the Aarhus Regulation.

Following the above assessment, the Commission concludes that the request is inadmissible under the provisions of Article 10 of Aarhus Regulation because it is not of individual scope and does not have legally binding or external effects.

Should you not agree with the present reply, you may bring the matter before the European Ombudsman or before the Court of First Instance if you have a complaint which falls within the conditions laid down in Articles 195 and 230 respectively of the Treaty.

Catherine Day

Secretary General



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For the Secretary - General
P. A. Puigarnau
Jordi AYET PUIGARNAU
Director of the Registry