



CLIENTEARTH  
JUSTICE FOR THE PLANET

European Commission  
Ms Catherine Day  
Secretary General of the European Commission  
200, Rue de la Loi  
1049 Brussels

27 January 2009

**Ref.: The Commission Statement ad Article 10 paragraph 3 of the EU ETS Directive (2008/0013(COD)) adopted by the European Parliament on 17<sup>th</sup> December 2008. EU Climate and Energy Package 2008. Request for Internal Review**

Dear Ms Day,

The final elements of a compromise on the EU's major climate and energy legislative package were agreed by the European Council on 12 December 2008. The whole legislative package was adopted by the European Parliament on 17<sup>th</sup> December 2008. The Commission Statement regarding the support to the construction of power plants was published alongside the EU ETS Directive (2008/0013(COD)) in an Annex to its Article 10 paragraph 3 as adopted by the European Parliament on 17<sup>th</sup> December 2008.

With this letter ClientEarth requests the European Commission for an internal review of its Statement allowing state aid for the construction of power plants published on 17<sup>th</sup> December alongside the ETS Directive on the basis of the following grounds:

1. The European Commission Statement ad Article 10 paragraph 3 of the EU ETS Directive (2008/0013(COD)) adopted by the European Parliament on 17<sup>th</sup> December 2008 contemplates the use of auctioning revenues as State aid to support the construction of efficient power stations, including power stations that are capture ready:

*Article 10(3). 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.*

2. The reference to new "CCS-ready" or capture ready power stations<sup>1</sup> is based on the concept defined under article 34 of the Directive on Geological Storage of Carbon Dioxide (CO<sub>2</sub>) amending the Large Combustion Plant Directive requiring Member States to ensure that operators of all combustion plants with a rated electrical output of 300 MW or more have assessed whether certain conditions relating to preparing for Carbon Capture and Storage are met. The Commission statement purports to allow State subsidies (from ETS auctioning revenues) for new fossil fuel power stations which do not use and are not required to incorporate CCS technology now but that would be ready to do it in the future. The Carbon Storage Directive does not require the use of Carbon capture and Storage technology but to plan its use for an undefined moment when installations would be required to retrofit. As drafted, the Statement text would allow subsidies for the investment in new coal power stations, not CCS.

---

<sup>1</sup> The reference to "CCS-ready" is taken to be a reference to the new definition of "capture ready" introduced in article 34 of the Directive on Geological Storage of Carbon Dioxide as adopted.

3. The timeframe proposed in the Commission Statement (2013-2016) is of particular concern since there are new coal power stations currently being proposed for construction in the EU even despite the Commission's proposals for full auctioning of allowances in the power sector and the prospect of high future carbon prices. Building new high-CO<sub>2</sub> emitting coal power stations would go against the Heads of State commitment to reduce CO<sub>2</sub> emissions signed in March 2007. The construction of new high-CO<sub>2</sub> emitting power stations between 2013 to 2016 would present a very high risk of lock-in to long-lived, high carbon infrastructure with no guarantee that capture ready power stations will ever be retrofitted with CCS. The Directive on Geological Storage of CO<sub>2</sub>, as adopted by the European Parliament, does not require new power stations to meet an emissions performance standard for CO<sub>2</sub> emissions.
4. Article 87 of the EC Treaty considers incompatible with the common market *"any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States."* However article 87.3.c) of the EC Treaty, states that it could be considered compatible with the common market *"aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest"*. The European Commission is exclusively competent to declare compatible with the common market this type of State aid although the Council could also decide on other categories if acting on a decision by qualified majority.

Any proposal by a Member State to grant State aid in accordance with this provision would be required to notify the Commission to seek approval for the grant. On this basis the European Commission adopted in April 2008 the Community Guidelines on State Aid for environmental protection (2008/C 82/01 dated 1 April 2008) to increase legal certainty and transparency in the Commission decision making. These Guidelines as well as the above-mentioned Commission Statement as made public, oblige the European Commission to apply them when considering notifications from any Member State and they need to be based and comply with the referred articles of the EC Treaty.

5. In our view, State aid for capture ready power stations would not be in line neither with the general rules governing state aid derived from article 87 of the EC Treaty nor with current Community Guidelines on State Aid for environmental protection, which require any grant to go beyond Community standards. This type of aid must fulfil the condition of providing **individual incentives for companies to achieve higher environmental protection resulting from its activities by going beyond the applicable mandatory Community standards.**
- 5.1 The Commission Statement refers to Annex 1 of the Decision 2007/74/EC setting harmonised efficiency reference values for production of electricity. For hard coal, the reference value (2006-2011) is 44.2%; for lignite, 41.8%; for natural gas, 52.5%. These reference values cannot be considered mandatory Community Standards.
- 5.2. The concept of capture ready is defined under article 34 of the Directive on Geological Storage of CO<sub>2</sub>, and sets mandatory standards for construction of new thermal combustion plants of more than 300MW to "capture ready" standards, including technically and economically feasible retrofit of CCS. Article 34 states:

*“Member States shall ensure that operators of all combustion plants with a rated electrical output of 300 megawatts or more for which the original construction licence or, in the absence of such a procedure, the original operating licence is granted after the entry into force of Directive XX/XX/EC of the European Parliament and of the Council, have **assessed** whether the **following conditions are met**:*

- *Suitable storage sites are available,*
- *Transport facilities are technically and economically feasible;*
- *It is **technically and economically feasible to retrofit for CO2 capture.**”*

Such an **assessment** has an efficiency component, which is required to be taken into account. Indeed, a reduction in efficiency would result from the capture of CO<sub>2</sub> emissions upon retrofit of CCS. Therefore any new installation would need to increase efficiency from the start so that when it retrofits to CCS, the installation would still be economically viable. In this context, the IPCC Special Report on Carbon Capture and Storage states that: *“Retrofitting existing plants with CO2 capture is expected to lead to higher costs and significantly reduced overall efficiencies than for newly built power plants with capture. The cost disadvantages of retrofitting may be reduced in the case of some relatively new and highly efficient existing plants or where a plant is substantially upgraded or rebuilt.”* For example, Supercritical Pulverised Coal units with CCS would have an efficiency within the range of 30-35% whereas without CCS their efficiency would reach about 45% or even higher. In addition, this type of technology is already commercial and is not innovative technology which would justify support. The mandatory assessment under Community law, Directive on Geological Storage of CO<sub>2</sub>, requires higher efficiency standards to ensure that when power plants retrofit, they would be economically viable. Economic viability will probably be limited to those power stations that are much more efficient such as those based on IGCC technology or oxy-fuel technologies (for reference see table S.3 of IPCC Special Report on Carbon Capture and Storage).

The efficiency standards included in the concept of capture ready defined by the Directive on Geological storage of CO<sub>2</sub> supersedes the reference values in Annex 1 of the Decision 2007/74/EC which, as that they are lower, are no longer applicable to set the baseline for state aid to power stations. Any state aid granted to power stations should go **beyond the new set of standards under the new Directive on Geological Storage of CO<sub>2</sub>**. Accordingly, the Commission Statement would not be consistent with such a requirement as it proposes allowing state aid to apply mandatory standards under the Directive on Geological Storage and not to go beyond them.

6. The Commission Statement allowing State aid for capture ready power station therefore does not comply with State aid rules on the requirements for compatibility with the common market. Even if the European Commission adopted new State Aid Guidelines, the requirement to “go beyond community standards” remains applicable since it is developing the “incentive effect “ principle under article 87 of the EC Treaty, ruling out subsidies for capture ready fossil fuel power stations. The incentive effect is applicable in relation to State aid in general under article 87 of the Treaty and reflected in the Commission State Aid Action Plan.

7. The Community Guidelines on State Aid for environmental protection expressly recognize that support to fossil fuel power plants or other industrial installations equipped with CO2 capture, transport and storage facilities, or individual elements of the Carbon Capture Storage chain, envisaged by Member States “could constitute State aid but, in view of the lack of experience, it is too early to lay down guidelines relating to the authorisation of any such aid.” And in any case projects would have to be “assessed under the rules in Article 87 (3)(c) of the Treaty...” following the above mentioned rules and requirements. On this basis, even if the European Commission statement leads to the adoption of new Guidelines, the requirement to “go beyond community standards” would always need to be respected since it is at the heart of state aid legislation known as the “incentive” principle.
- 7.1 Indeed, article 87 of the Treaty as interpreted by the European Court of Justice requires any State Aid granted to be necessary and justified under any of the objectives foreseen under article 87 (3) of the Treaty (Ruling of 17 September 1980, *Philip Morris/Commission*, 730/79, point 17). On this basis, the European Court of Justice ruled that article 87 of the Treaty requires that any State Aid should provide an incentive effect or an added value as further defined in the Ruling of 14 May 2002, *Graphischer Maschinenbau/Commission*, T-126/99, point 34.
- 7.2. The European Court of Justice Rulings of 25 June 1970, *France/Commission*, 47/69, point 7, and 25 June 1998, *British Airways e.a./Commission*, T-371/94 et T-394/94, point 283, stress the need to ensure that there is balance between the financial support provided to certain economic activities and the benefits of the state aid granted. In this sense, the State Aid Action Plan adopted in June 2005 requires that the balance test includes the recognition of the incentive effect.
8. In the context of state aid for environmental protection, the Guidelines also require that it should be taken into account the overall effect the aid may have in terms of sustainable development and full application of the polluter pays principle.

On this basis, it is considered that the Commission Statement ad Article 10 paragraph 3 of the EU ETS Directive (2008/0013(COD)) adopted by the European Parliament on 17<sup>th</sup> December 2008, does not comply with State aid rules. The Commission Statement does not comply with the general principle of incentive effect of state aid rules derived from article 87 since it does not require state aid to go beyond Community standards. This principle is reflected in the Community Guidelines for environmental protection. For the above mentioned reasons the Commission Statement that allows granting state aid to power stations which are required to apply capture ready standards should be deleted or reviewed (maybe even before the final adoption of the Climate and Energy package by the Council), in order to require the use of innovative technologies such as IGCC, oxy-fuel or any other that would ensure going beyond community standards.

With this letter, ClientEarth represented by the undersigned, Ms Marta Ballesteros, requests 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 17<sup>th</sup> December 2008, on the basis of article 10 of Regulation (EC) 1367/2006 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 bodies (the Aarhus Regulation).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Marta', with a long horizontal stroke extending to the right.

Marta Ballesteros,  
**ClientEarth**

The contact details of the person empowered by ClientEarth for the purpose of the request for internal review are:

**Marta Ballesteros**

t +32(0)2 808 34 67

m +32(0) 479 459 121

e mballesteros@clientearth.org

**[www.clientearth.org](http://www.clientearth.org)**

**Brussels**

Av. de Tervuren 36

Bruxelles 1040

ClientEarth is a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 2-6 Cannon Street, London EC4M 6YH. [www.clientearth.org](http://www.clientearth.org)