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DIRECTORATE-GENERAL FOR ENERGY

Directorate C - Renewables, Research and Innovation, Energy Efficiency
C.1 - Renewables and CCS policy

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Dear Mr Duchamp,

Thank you for your e-mail of 22 March 2012 in which you announce a forthcoming complaint to the EU Ombudsman related to a number of alleged cases of maladministration. Please find below our responses to the different allegations brought forward in your letter.

Concerning the mentioned communication ACCC/C/2010/54 under the Aarhus Convention, the Compliance Committee has found the EU regulatory framework in force not to be precise enough as regards public participation prior to adoption of NREAP in conformity with the principles laid down in Articles 6 and 7 of the Aarhus Convention¹. The Commission has already started to reflect on how to properly address these Committee findings.

As regards the obligation of Member States to conduct a Strategic Environment Assessments (SEA) according to Directive 2001/42/EC², it is the view of the Commission services that whether or not a NREAP requires a SEA depends on the specific content of the plan. It follows from Directive 2009/28/EC that the aim of the NREAP is to pave the way as to how the Member States are planning to achieve their national mandatory targets. In case a Member State has decided not to include in its NREAP specific mandatory measures to comply with, a SEA is not required at this stage. However, when implementing the NREAP, as appropriate, through more specific plans (e.g. national/regional energy programmes) setting the framework for future development

¹ http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Findings/C54_EU_Findings.pdf

² Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197, 21.7.2001.

consent of projects, SEAs will have to be carried out. On the basis of the available information, the Commission services could not establish that the adoption of the NREAPs in Member States, including Ireland, was not compliant with the requirements of Directive 2001/42/EC.

You furthermore claim that the information related to emission savings as presented in Section 10 of the Progress Reports according to Art. 22 of Directive 2009/28/EC are incorrect. First, I would like to point out that this claim is both very general and not substantiated further in your letter. It is therefore impossible to verify on what grounds you consider the figures in question to be false. Moreover, I would like to point to the fact that the methodology according to which Member States should estimate the emission reductions in question is transparently explained in the Commission's guidance document that is available on its website in the section "Template for the Member States' Reports"³. The guidance on the relevant section 10 not only proposes a standard calculation methodology, but also requires Member States to explain any alternative methodology they might use⁴. This clearly indicates the Commission's commitment to transparency when it comes to the environmental information provided. Likewise your claims that both the GP Wind and the WINDFACTS projects, both financed under the Intelligent Energy Europe programme, contain incorrect information on emission savings are not substantiated.

You also claim in your letter that the Commission did not observe the rules of the Aarhus Convention, and in particular Article 7, when it conducted the public consultation on the renewable energy strategy which closed on 7 February of this year. As stated in the earlier responses to the questions received during the consultation, and to which you refer in your letter, this consultation was conducted in full conformity with the Commission's own guidelines⁵. We would reject your allegation that these guidelines do not comply with the Aarhus Convention for which, again, you fail to produce any justification. It should rather be stressed that the consultation in question was held at a very early stage of the political process given that the resulting Communication⁶ itself is setting the scene for subsequent formulation of more concrete political measures to be taken. Thus stakeholders were given the opportunity to voice their opinion at an early stage in the process when all options were open via an online consultation which was open from 6 December 2011 to 7 July 2012 and a stakeholders' conference. As regards the process, its transparency is underlined by the fact that all contributions received as well as a detailed summary have been made available on the publication website⁷. Moreover, the Impact Assessment to the Communication also contains a summary of the views expressed by stakeholders during the consultation and explains how they relate to the different policy options discussed⁸. Finally, as regards your reference to the provisions on access to

³ Available on: http://ec.europa.eu/energy/renewables/reports/2011_en.htm.

⁴ Cf. comment in section 10: *"If a Member State chooses not to use the suggested methodology for estimating the net greenhouse gas emission savings, please describe what other methodology has been used to estimate these savings."*

⁵ COM(2002)704.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: "Renewable energy: a major player in the European energy market", COM (2012) 271, http://ec.europa.eu/energy/renewables/doc/communication/2012/comm_en.pdf

⁷ http://ec.europa.eu/energy/renewables/consultations/20120207_renewable_energy_strategy_en.htm

justice and in particular Article 11 of Regulation 1367/2006⁹ I would like to point out that these relate to "administrative acts" which are defined as "any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects"¹⁰. Therefore these provisions clearly cannot be related to the public consultation or the ensuing Communication as neither of them fulfils the above criteria.

You also claim in your letter that the Commission ignored the provisions of the Aarhus Convention when it approved the REFIT I and the REFIT II State aid schemes in 2007 and 2012. However, you do not indicate which articles of the Aarhus Convention would allegedly have been ignored and fail to produce any justification for your statement. We are thus not in a position to examine your arguments.

We would also like to draw your attention to the fact that according to Art. 2 (2) (a) of Regulation (EC) No 1367/2006, state aid decisions of the Commission are not regarded as administrative acts (and thus subject to internal review) under the Regulation nor amount to decisions under articles 6 or 7 of the Aarhus Convention..

As to your claim that the Commission failed to comply with rules for State aid for environmental protection, you seem to consider that the Commission did not apply the proportionality requirement mentioned in Section 5.2.1.4 and Section 1.3.5 of the Community Guidelines on State aid for environmental protection¹¹ ("EAG 2008").

In this regard, we would like to draw your attention to the fact that Section 1.3.5 of the EAG 2008 sets out general considerations and indications as to how it can be ensured that the aid is proportionate to the environmental protection sought. However, when an aid scheme falls within one of the specific categories of aid measures identified in Chapter 3 of the EAG, in accordance with paragraph 39 of the EAG 2008, the Commission will examine whether the aid measure is proportionate to the environmental protection sought on the basis of the specific conditions and parameters set out in Chapter 3 for each category of aid measures concerned. These conditions aim at ensuring that State aid is proportionate. It is only when certain thresholds are reached (listed under paragraph 160 of the EAG) that the Commission will undertake the detailed and individual analysis of aid measures in accordance with Chapter 5 (including the detailed proportionality test of Section 5.2.1.4.).

The REFIT II scheme establishes operating aid for renewable energy sources (wind energy, hydro power and land fill gas) within the meaning of paragraph 70(9) of the EAG. This category of aid is dealt with under Section 3.1.6.2 of the EAG. Consequently, the Commission examined the REFIT II scheme in the light of those provisions, in particular paragraph 109 of the EAG 2008. Regarding in particular proportionality, the Commission observed in particular that the REFIT mechanism is designed in such a way as to compensate only the difference between the production costs of energy from

⁸ <http://ec.europa.eu/energy/renewables/doc/communication/2012/ia.pdf>

⁹ Regulation (EC) No 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 bodies, OJ L 264, 25.9.2006.

¹⁰ Art. 2(1)(g).

¹¹ OJ C 82, 1.4.2008, p. 1.

renewable sources concerned and the market price and that the support level is based on the evolution of the market price, so that the support mechanism is such as to avoid overcompensation. On the basis of this, the Commission concluded in its decision of 12 January 2012 (SA.31236) that the aid scheme complied with the proportionality test enshrined in paragraph 109 of the EAG 2008.

Given that the REFIT II scheme as a whole did not provide (only) for aid above the thresholds listed under paragraph 160 of the EAG, it was not examined under Chapter 5 of the EAG. The Irish authorities committed nevertheless to notify individual aid measures when the thresholds are met. These individual aid measures will then be examined by the Commission under Chapter 5 of the EAG and will thus be subject to the detailed proportionality test under Section 5.2.1.4.

As for the REFIT I scheme, it was analysed in the light of the parameters and conditions set out in Section E.3.3. of the Community Guidelines on State aid for environmental protection applicable at the time the Commission examined the REFIT I scheme¹² ("EAG 2001"). This Section contains specific conditions and parameters to assess operating aid for renewable energy sources. It also includes a proportionality test (see in particular paragraph 59 of the EAG 2001) very similar to the one that is applied under paragraph 109 of the EAG 2008. The Commission concluded in its decision of 25 September 2007 (State aid N 571/2006) that the REFIT I scheme fulfilled all conditions set out in Section E.3.3 of the EAG 2001.

We therefore see no reasons to believe that the REFIT I and II schemes did not comply with the applicable rules for State aid for environmental protection.

You also refer to the reporting requirement on the progress made in reflecting the external costs of electricity produced from non-renewable energy related to Directive 2001/77/EC¹³ which has now been repealed. The analysis on the attempts to internalise the external costs of energy has been the basis for several energy and climate policy initiatives, including progress reports of the Commission, the 2008 Energy and Climate Package and the EU emissions trading scheme itself.¹⁴ It must however be noted that Member States' reports under Directive 2001/77/EC did not provide information on externalities of the non-renewable energy sources and thus no separate report of the Commission to explicitly address Article 8 was produced. Furthermore, with the adoption of the EU Emission Trading System and the internal energy market legislation the issues related to the external costs of the electricity produced from non-renewable energy sources gained wider attention and better coverage in the reporting within these

¹² OJ C 37, 3.2.2001, p. 3.

¹³ Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ L 283, 27.10.2001.

¹⁴ COM (2005) 627 on The Support of Electricity from Renewable Energy Sources, COM (2006) 848 *The Renewable Energy Roadmap* and the accompanying impact assessment (SEC (2006) 1719), SEC (2008) 57 on the Support of electricity from renewable energy sources and the Impact assessment accompanying proposals for Directive on amending directive 2003/87/EC, Decision on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 and the Directive on the promotion of use of renewable energy sources (SEC(2008)85/3).

legal frameworks¹⁵. Therefore the Commission considers that the substantive reporting requirements as established in Directive 2001/77/EC have been met as the analysis required in Article 8 has been covered in various publicly available Commission documents referred to above.

Yours sincerely,



Hans van Steen

¹⁵ Cf. e.g. the EU Greenhouse Gas Inventories and Progress Reports, http://ec.europa.eu/clima/policies/g-gas/documentation_en.htm, or the Impact Assessment to the 2008 energy and climate package, http://ec.europa.eu/energy/climate_actions/doc/2008_res_ia_en.pdf, and related documents.