



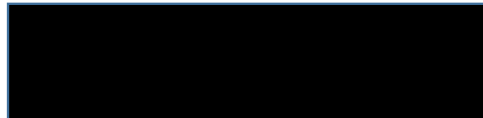
Европейска инвестиционна банка
Evropská investiční banka
Den Europæiske Investeringsbank
Europäische Investitionsbank
Euroopa Investeeringispank
Ευρωπαϊκή Τράπεζα Επενδύσεων
European Investment Bank
Banco Europeo de Inversiones
Banque européenne d'investissement
Banca europea per gli investimenti
Eiropas Investīciju banka

Europos investicijų bankas
Európai Beruházási Bank
Bank Ewropew tal-Investment
Europese Investeringsbank
Europejski Bank Inwestycyjny
Banco Europeu de Investimento
Banca Europeană de Investiții
Európska investičná banka
Evropska investicijska banka
Euroopan investointipankki
Europeiska investeringsbanken

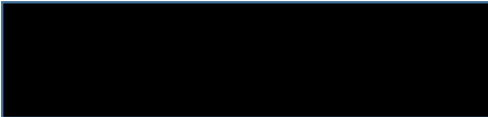
NLVOW Nederlandse Vereniging Omwonenden Windturbines



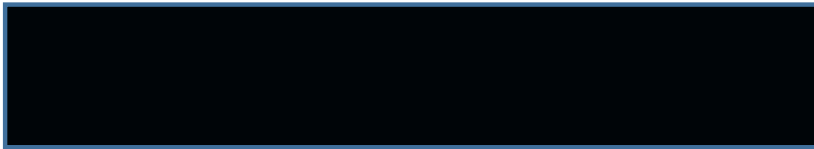
DEI Democratisch Energie Initiatief



NKPW Nationaal Kritisch Platform Windenergie



C/O - By email to:



EIB Corporate

Luxembourg, 1 April 2022

JU/CORP/CL/2022-4883/GF/KC/LM/av

Subject: Request for Internal Review pursuant to Regulation No 1367/2006

Dear Sirs,

Reference is made to your requests, submitted to the European Investment Bank (EIB), on 10 and 13 December 2021, pursuant to Article 10 of 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 (hereinafter “the Aarhus Regulation”)¹, on behalf of Nederlandse Vereniging Omwonenden Windturbines (NLVOW), Democratisch Energie Initiatief (DEI) and Nationaal Kritisch Platform Windenergie (NKPW)².

By your requests, you have asked the EIB to:

¹ As amended by Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 (OJ L 356, 8.10.2021, p. 1-7), which entered into effect on 28 October 2021.

² Requests submitted separately as follows: request of NLVOW submitted by email of 10 December 2021; request of DEI submitted by email of 13 December 2021; request of NKPW submitted by email of 13 December 2021.



- i) conduct an internal review of the EIB's funding of the National Energy and Climate Plan (NECP) and associated projects in the Netherlands in light of what you refer to as *"the ongoing non-compliance with international and EU law, and in particular [Decision] VII/8f [of the Meeting of the Parties to the Aarhus Convention, concerning compliance by the EU with its obligations under said Convention]"*;
- ii) address, in the context of said internal review, whether the EIB has provided European Fund for Strategic Investments (EFSI) funding to projects and other activities that are associated with the Netherlands NECP for the periods of 2011-2020 and 2021-2030 and whether the EIB has received applications for EFSI funding for projects and activities associated with the Netherlands NECP for 2021-2030;] and to
- iii) *"remedy the situation by taking all appropriate action in order to bring the EIB's funding activities into full compliance with international and EU law"*.

The competent services of the EIB have reviewed your requests in detail. Due to their identical nature, the EIB has combined them in accordance with Article 10 (2) of the Aarhus Regulation. This letter constitutes the EIB's joint response to your requests for internal review, which, for the reasons set out below, the EIB deems inadmissible.

Firstly, pursuant to Article 10 of the Aarhus Regulation, a request for an internal review may be made with respect to an administrative act³ (or omission), on the grounds that such act (or omission) contravenes environmental law, within the meaning of Article 2(1)(f) of the Aarhus Regulation⁴. Furthermore, pursuant to the same Article 10, the request for internal review shall be made within eight weeks after the administrative act at issue was adopted, notified or published, whichever is the latest. The EIB also takes note of the fact that, pursuant to Article 1 of Commission Decision 2008/50/EC⁵, any non-governmental organisation (NGO) which submits a request for internal review of an administrative act or omission, within the meaning of the Aarhus Regulation, shall specify that act or omission in its request.

It must be observed that your requests for internal review have not referred to a specific act of the EIB, with respect to which an internal review is sought. Your requests do not, therefore, satisfy the requirements of Article 10 of the Aarhus Regulation, nor can they be considered as being sufficiently clear and precise. Incidentally, your failure to identify a specific act as the subject-matter of your internal review requests leads to the impossibility for the EIB to confirm compliance with the time-limits specified in Article 10 of the Aarhus Regulation for lodging such requests. Hence, your requests must be deemed inadmissible.

Secondly, it is noted that your requests refer in general to a review of the EIB's funding of the Netherlands NECP and associated projects. This can be understood as, in essence, concerning any potential financing approval granted by the EIB Board of Directors related to

³ Pursuant to Article 2(1)(g) of the Aarhus Regulation, as amended in October 2021, *"administrative act" means any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1) [of the Aarhus Regulation]"*.

⁴ Pursuant to Article 2(1)(f) of the Aarhus Regulation, *"environmental law" means Union legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Union policy on the environment as set out in the TFEU : preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems"*.

⁵ Commission Decision of 13 December 2007, laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts, OJ L 13, 16.1.2008.



the Netherlands NECP, which would have consequently led to the negotiation and conclusion of a finance agreement.

In this regard, the EIB notes that the application of the internal review procedure under Article 10 of the Aarhus Regulation to the EIB is incompatible with the functional independence of the EIB in the sphere of its financial operations as set out in the Treaties. That functional independence is derived from various provisions of EU primary law, most notably:

- Article 15(3) of the Treaty on the Functioning of the EU (TFEU) which clearly demonstrates that the EIB carries out, on the one hand, administrative tasks and, on the other, non-administrative tasks;
- Article 271(c) TFEU which provides that only the Commission and Member States can challenge financing approvals of the EIB Board of Directors and only for procedural grounds;
- Articles 308 and 309 TFEU which provide for the EIB's legal, institutional and financial autonomy within the EU system.

It is clear from these provisions of EU primary law that the EIB has a dual function which results in it carrying out administrative and non-administrative tasks and rendering, by way of consequence, administrative and non-administrative acts. When acting within the realm of the latter, its functional independence must be preserved so that it can exercise its commercial discretion as accorded to it by the Treaties and enshrined in the EIB Statute⁶. Financing approvals by the EIB Board of Directors fall undoubtedly within the scope of the EIB's *non-administrative tasks* which, in turn, undoubtedly fall outside the scope of internal review of *administrative acts* in accordance with the Aarhus Regulation.

Furthermore, Article 271(c) TFEU clearly shows that EIB Board of Directors approvals of finance projects cannot be subject to judicial scrutiny by way of internal review requests submitted by those NGOs that meet the criteria set down in the Aarhus Regulation. Such scrutiny is limited to very specific conditions that serve to protect the EIB's commercial discretion as accorded to it by the Treaties and enshrined in the EIB Statute.

In addition to the above and in view of its nature, a Board of Directors approval cannot be considered to constitute a non-legislative act of general scope⁷ within the meaning of the Aarhus Regulation. Such approvals merely constitute internal non-administrative acts that, in accordance with Articles 9 and 19 of the EIB Statute, are required prior to the commencement of contract negotiations and consequent potential signature of a corresponding finance agreement. They have no general application, their approval in no way automatically leads to the signature of a finance agreement, nor does it create any right for the counterparty to demand such signature. As such, a Board of Directors approval does not have any legal and external effects, as required by the Aarhus Regulation⁸, since an approval alone cannot create

⁶ <https://www.eib.org/en/publications/statute-2020>

⁷ As mentioned in Recital 8 of Regulation (EU) 2021/1767.

⁸ Reference is made in this regard to Recital 11 of Regulation (EU) 2021/1767, which clearly states that “an act is considered to have external effects, and thus to be capable of being subject to a request for review, if it is intended to produce legal effects vis-à-vis third parties. Preparatory acts, recommendations, opinions and other non-binding acts that do not produce legal effects vis-à-vis third parties and cannot therefore be considered to have external effects, in accordance with the case law of the CJEU, should, therefore, not be considered to constitute administrative acts under Regulation (EC) No 1367/2006”. Furthermore, Recital 12 of the same Regulation states that “[i]n order to ensure legal consistency, an act is considered to have legal effects, and thus to be capable of being subject to a request for review, in accordance with Article 263 TFEU, as interpreted by the CJEU [...]. Considering an act to have legal effects implies that an act can be subject to a request for review, regardless of its form, as its nature is considered with regard to its effects, objective and its content.”



any rights or obligations for a third party. Finally, and in light of the above, a Board of Directors approval, which is a purely internal act paving the way for contract negotiations which may or may not lead to an agreement, does not contain provisions capable of contravening environmental law. A Board of Directors approval triggers contract negotiation but does not contain provisions, the latter being reserved for the potential contract that follows. In view of the foregoing, an approval by the Board of Directors to finance a project does not fall under the definition of 'administrative act' set out in Article 2(1)(g) of the Aarhus Regulation.

For the sake of completeness, and in the absence of your identification of a specific act of the EIB for which you request an internal review, the EIB notes that an internal review request of a financing agreement would equally be inadmissible. Finance agreements concluded between the EIB and its counterparties are agreements concluded on the basis of principles of private law, and in no way can be considered as administrative acts amenable to internal review in accordance with the Aarhus Regulation.

In light of the foregoing, even if your requests had been sufficiently precise and had specified which act constituted their subject matter, they would have, been in any event considered inadmissible for the reasons outlined above.

Furthermore, from your requests, it cannot be concluded in a definitive manner that the entities you represent fully meet the eligibility criteria of Article 11 of the Aarhus Regulation⁹ in order to be entitled to make a request for internal review. Indeed, it does not unequivocally follow from your requests that the entities have as their 'primary' and explicitly 'stated' objective the promotion of environmental protection and whether this is carried out 'in the context of environmental law'. In addition, not all of the entities have demonstrated that they have been registered, are in existence, and have pursued their activities, for a period of at least two years prior to submitting the internal review request.

Considering that your requests are inadmissible on the grounds set out above, the EIB will not herein further elaborate on the eligibility of each entity. However, the present letter should in no way be understood as an acknowledgement by the EIB that the entities you represent satisfy the eligibility requirements of the Aarhus Regulation.

Regarding your question concerning the EIB support to projects associated with the Netherlands' NECP, we would first like to clarify that the EIB is not involved in the establishment of the NECPs in the Member States. Within this context, the EIB does not have, and therefore cannot provide, a list of investments which may be associated with the Netherlands NECP for the periods requested. All EIB operations in the Netherlands are published on the Bank's website and can be searched through the following link: <https://www.eib.org/en/projects/all/index.htm>¹⁰.

⁹ Pursuant to Article 11(1) of the Aarhus Regulation, an NGO is entitled to make a request for internal review, provided inter alia that it has the primary stated objective of promoting environmental protection in the context of environmental law and has existed as an independent non-profit-making legal person for more than two years, actively pursuing this objective.

¹⁰ A list of EIB projects financed under EFSI can also be searched here: <https://www.eib.org/en/products/mandates-partnerships/efsi/efsi-projects/index.htm>



Please allow us to underline that the EIB firmly believes that stakeholders' feedback and constructive engagement can contribute to the quality of EIB activities. The EIB recalls that several channels and accountability mechanisms are available for NGOs and other stakeholders to constructively address their concerns and help us constantly improve our financing in supporting EU policies¹¹.

Yours sincerely,

EUROPEAN INVESTMENT BANK



¹¹ Contacts can be found on the EIB website: <https://www.eib.org/en/index.htm>