

The President

Werner Hoyer

European Investment Bank

98-100, boulevard

Konrad

Adenauer

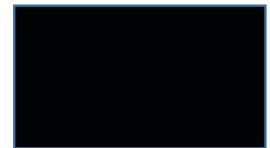
L-2950 Luxembourg

Luxembourg

Date December 10th 2021

REQUEST FOR INTERNAL REVIEW

DEI Democratisch Energie Initiatief



Dear President, Mr Hoyer,

I am writing to you on behalf of **Democratisch Ennergie Initiatief (DEI)** in order to submit a formal request for an internal review pursuant to Article 10 of Regulation (EC) 1367/2006, as amended by Regulation (EU) 2021/1767, 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 (as amended)”).

It has come to the attention of DEI, that the European Investment Bank is engaged in funding the National Energy and Climate Plans (NECPs) and the associated Projects of Common Interest in circumstances wherein, we are given to understand, that the European Union has failed to comply with its legal obligations, including those set out in the Aarhus Convention. In that regard, we are of the view that the EIB’s aforesaid engagement constitutes an

‘administrative act(s)’ as defined in Article 1 of the Aarhus Regulation (as amended)”) which defines an administrative act as follows:

‘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);

The Union’s failure to comply with its legal obligations, including the provisions of the Aarhus Convention relative to the NECPs and associated projects (as decided by the United Nations Economic Commission for Europe (UNECE) in October 2021), is ongoing.

We are sure you will appreciate from the foregoing that implications of a legal nature clearly arise for the EIB which undoubtedly have a significant bearing upon the European Investment Bank’s funding of the NECPs and associated projects in our jurisdiction. It is the opinion of DEI that this matter warrants your immediate attention. We therefore call upon the EIB to conduct an internal review and to take all necessary action to address this matter forthwith so as to ensure compliance with the law and/or environmental law, and in particular, in relation to the Netherlands NECP (“Integraal Nationaal Energie- en Klimaatplan 2021-2030”, INEK, November 25th of 2019) .

LEGAL BASIS FOR REQUEST

DEI is entitled to submit this request for internal review on the grounds that our organisation fulfils the criteria set out in Article 11 of Regulation (EC) 1367/2006 (as amended by Regulation (EU) 2021/1767), (hereafter referred to as the “Aarhus Regulation”). DEI is an independent non-profit making legal entity registered in accordance with Dutch/Netherland’s law. Please see DEI’s Memorandum and Articles of Association enclosed herewith (Annex 1). DEI was founded in 2017 with the aim of (see article 2 of the attachment 1 (Statutes) of Annex 1):

1. The **purpose** of DEI is: to preserve and strengthen the rule of law on an international, European, national, regional and municipal level
2. DEI endeavours to achieve this aim, inter alia, by:
 - Stimulating that policy and decisionmaking processes are conducted democratically, especially regarding the energy transition and climate policy;

- Fully respecting basic rights and the rule of law, especially regarding the energy transition and climate policy;
- Ensuring that basic rights, EU legislation and international law, amongst others on human rights, are being fully respected;
- preparing and offering information to local residents about opportunities to defend their democratic interests and
- preparing and offering information to politicians and administrators about the advantages and disadvantages for residents living near wind energy projects;
- the dissemination of knowledge and fact-based information on wind energy projects to the general public through website(s), publications and social media;
- concluding agreements with experts, in particular legal service providers, to assist local residents in proceedings and other activities;
- organizing conferences and workshops on the social, medical, economic and technical aspects of wind energy;
- and conducting legal proceedings and carrying out actions required in the broadest sense promotes the aims of the association

The subject matter of this request for an internal review is covered by the objective and activities of our organisation.

GROUND FOR SEEKING INTERNAL REVIEW

The primary ground for making the within request relates to the EU's ongoing non-compliance with international law which thereby affects, directly and/or indirectly, the acts of the EIB relative to both its aforesaid funding activities and its legal obligations.

In 2010, the UNECE, through its Aarhus Convention Compliance Committee (the "ACCC"), initiated a compliance investigation against the EU concerning the implementation of Directive (2009/28/EC) in the Republic of Ireland and the National Renewable Energy Action Plans (NREAPs). As a result of its findings during the foregoing investigation, the ACCC declared the EU to be non-compliant with international law. This resulted in the UNECE engaging in compliance proceedings against the EU over the course of the following decade. This

investigation was entitled *Communication ACCC/C/2010/54* and its findings and recommendations were adopted on 2nd October 2012 ¹.

In June 2014, a Meeting of the Parties (MoP) took place in Maastricht, Belgium (this was the 5th Meeting of the Parties of the Aarhus Convention). The Parties adopted decision V/9g in relation to ACCC's findings and recommendations noted in ACCC/C/2010/54 (*cf.* <https://unece.org/env/pp/cc/european-union-decision-v9g>). Pursuant to the ACCC's decision V/9g of Non-Compliance in International Law, the MoP found the EU to be in breach of international law and declared that the EU was obliged to demonstrate the following [Emphasis added]:

(a) That it had adopted a proper regulatory framework and/or clear instructions for implementing Article 7 of the Convention with respect to the adoption of *National Renewable Energy Action Plans* (NREAPs);

(b) It would ensure that the arrangements for public participation in its Member States are **transparent and fair** and that within those arrangements the **necessary information is provided** to the public;

(c) It would ensure that the requirements of Article 6, paragraphs 3, 4 and 8, of the Convention are met, including **reasonable time frames**, allowing sufficient time for informing the public and for the public to prepare and participate effectively, allowing for **early public participation when all options are open**, and ensuring that **due account is taken of the outcome of the public participation**;

(d) It had adapted the manner in which it evaluates NREAPs accordingly.

In the interim between the 5th ACCC Meeting of the Parties (MoP) in 2014 and the 6th MoP in September 2017, the ACCC continued to investigate the EU over its ongoing failure to comply with its decision V/9g as referred to above.

¹ *cf.* https://unece.org/env/pp/cc/accc.c.2010.54_european-union

Thereafter, the ACCC engaged in further investigations between September 2017 and October 2021, when the 7th MoP took place in Geneva. During that period, the ACCC focused on the adoption of the *National Energy and Climate Plans* (NECPs) for the period 2021 – 2030.

Following a detailed analysis during the 7th MoP between 18th to 21st October 2021, the ACCC concluded that the NECPs have been unlawfully adopted by the EU, constituting a repeat of the same failures in respect of compliance with the provisions of the Aarhus Convention which were inherent in the EU's adoption of the NREAPs in the past.

During the 7th MoP, the ACCC observed that the EU had failed to comply with all of the requirements set out in the Committee's decision V/9g as adopted by the parties in 2014. In that regard, VII/8f (as amended) was adopted on 21st October 2021 concerning the EU's said non-compliance.

Accordingly, the NECPs were declared unlawful in international law (and hence EU law). In this regard, the ACCC concluded that:

“(a) The Party concerned has put in place a regulatory framework that meets the requirements of article 6 (3) of the Convention with respect to NECPs but has not yet demonstrated that it has adopted either a proper regulatory framework or clear instructions to ensure that the other requirements of article 7 are met in the adoption of NECPs, as required by the first three sentences of paragraph 3 of decision V/9g;

(b) While welcoming the fact that the Party concerned has carried out an assessment of public participation on each member State's NECP, albeit in brief, the Party concerned has not yet met the requirements of the final sentence of paragraph 3 of decision V/9g.”²

The ACCC further stated:

“The Committee recommends to the Meeting of the Parties that it reaffirm its decision V/9g and, in particular, request the Party concerned, as a matter of urgency:

² https://unece.org/sites/default/files/2021-09/ECE.MP.PP.2021.51_ac.pdf, para 144.

(a) To provide the Committee with evidence that it has adopted a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of NECPs, and, in particular, to take the necessary legislative, regulatory or practical measures to:

(i) Ensure that the arrangements for public participation in its member States are transparent and fair and that, within those arrangements, the necessary information is provided to the public;

(ii) Ensure that the adopted regulatory framework and/or clear instructions ensure that the requirements of article 6 (4) and (8) of the Convention are met, including allowing for early public participation when all options are open, and ensuring that due account is taken of the outcome of the public participation;

(b) To adapt the manner in which it evaluates NECPs accordingly.”³

In light of the foregoing, it is evident that the EU’s acts and omissions are very much at odds with the requirement of strict observance with international law as enshrined in Art 3 (5) TEU (*ex Article 2 TEU*) and, therefore, constitute a breach of both international and EU law which the EU has to date failed to address and rectify.

Funding by the European Investment Bank (EIB)

The NECPs define renewable capacity, interconnectors, and similar infrastructure to be delivered between 2021 and 2030 in the European Union. Furthermore, DEI understands that the EIB intends to leverage a trillion Euro in climate related investments over the forthcoming decade. From various publications NLVOW deduces that about 4 billion Euro’s will be funded each year by the EIB to projects in the Netherlands, of which a larger part will be spent on supporting the targets of the Netherlands NECP 2021-2030.

DEI has also taken note of the conclusions of the EU Ombudsman, case 1251/2020/PB of June 8th 2021, that, in short, the EIB is not sufficiently transparent to determine how much funding above or under 25 million Euro’s is provided by the EIB to energy projects related to the

³ Ibid, para 145.

Netherlands NECP 2021-2030. However, the Netherlands NECP 2021-2030 refers to the European Fund for Strategic Investment (EFSI) of the EIB as a potential source for financing projects and other activities that will contribute to achieving the goals of the NECP.

It is common case that as a matter of EU law the NECPs must undergo Strategic Environmental Assessment (SEA) before adoption, which incorporates the requirements of Article 7 of the Aarhus Convention. DEIO understands that no such assessments have taken place in the instant matter in relation to the Netherlands NECP 2021-2030. In view of the above observations on the Aarhus Convention, DEI finds it remarkable that in its first paragraph the Netherlands NECP states quite openly that only a small and selected group of stakeholders had been participating in drafting the plan, while clearly there was no citizen participation at the moment when all options were open. On the contrary: after finishing a first draft of the plan just a limited set of questions were submitted to the public in the form of an internet consultation.

Moreover, DEI also draws the attention of the EIB to the fact that in a decision of June 30, 2021 in case 201504506/1/R6 the Council of State ruled that national norms on windturbine noise and shadow flicker could no longer be used in granting permits for wind farms as these norms were in violation of EU law on the ground they had been adopted in 2010 without a proper SEA. Since then there has been a great deal of legal uncertainty on the procedures to approve new wind farm projects and even on the validity of permits granted in the past.

So far DEI has not seen any information on the EIB's website that suggests the EIB is aware of this situation and the legal issues and uncertainties that arise from it.

These observations lend strength to the view of the DEI that the EIB has failed to comply with the provisions of the Aarhus Convention, namely, Article 7 thereof. Therefore, the EIB is in breach of both international and EU law. Accordingly, this is of significant import regarding the EIB's aforesaid NECP funding activities in our jurisdiction.

As you will no doubt be aware, Article 1 of the Statute of the EIB states:

“The European Investment Bank established by Article 308 of the Treaty on the Functioning of the European Union (hereinafter called the ‘Bank’) is hereby

constituted; it shall perform its functions and carry on its activities in accordance with the provisions of the Treaties and of this Statute.”

In light of the forgoing, it is the respectful opinion of NLVOW that the EIB's NECP funding activities in our jurisdiction must be addressed as a matter of urgency in order to ensure full compliance with EU law and/or environmental law.

The following documents are enclosed herewith (see **Annex 1**):

- The Applicant's statutes of the organisation;
- The Applicant's Annual reports for two years prior to this request;
- Evidence of the Applicant's registration as a non-profit organisation in The Netherlands
- The Applicant's technical background for making this request;

CONCLUSION

In light of the foregoing, **DEI** respectfully asks the EIB to do the following:

- Conduct an internal review of the EIB's funding of the Netherlands NCEP in light of the ongoing non-compliance with international and EU law, and in particular VII/8f (as amended), adopted on 21st October 2021;
- More specifically, the NLVOW requests the EIB in its internal review to address the following questions: (1) has the EIB provided EFSI funding to projects and other activities that are associated with the NL NECP 2021-2030; (2) has the EIB received applications for EFSI funding for projects and other activities that are associated with the NL NECP 2021-2030; and (3) has the EIB provided EFSI funding to projects and other activities that are associated with the NL NECP 2011-2020 ?
- 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;
- Inform the applicant herein about its decision in relation to the foregoing.

Thank you in advance for your kind consideration.

Yours sincerely,

For and on behalf of Democratisch Energie Initiatief (DEI)

[Redacted signature]

Annex 1 added in 4 attachments