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Brussels, 24 February 2014

GENERAL SECRETARIAT

European Commission
B-1049 Brussels, Belgium

By email: Sg-Acc-Doc@ec.europa.eu

RE: GestDem 2013/6264 - Confirmatory application for reconsideration of the Commission's decision to deny ClientEarth's full access to the documents adopted within trilogue meetings relating to the review of the EIA Directive

In conformity with Article 7(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (hereafter the "Regulation"), ClientEarth hereby submits a confirmatory application with regard to the partial refusal to disclose the requested documents.

- (1) The Commission provided partial access to the reports prepared after the trilogue meetings with the Council and the European Parliament as well as to the GR fiches used within the Commission in view of the meeting on inter-institutional relation group on the topic. However, so many parts of the documents have been deleted that the information provided does not allow us to know the content of the discussion that took place within these meetings. The partial access provided therefore amounts to no access to information on the positions adopted by the EU institutions within the review of this directive and on the decisions that are being made on this crucial matter.
- (2) The detailed discussion that took place between the Council, the European Parliament and the Commission during the trilogue meetings that is kept confidential by the Commission is precisely what the public should have access to. The Commission does not provide any solid explanation as to how disclosing the positions of the different institutions would seriously undermine their decision-making process. This is purely hypothetical, the Commission's only justification to refuse full access to the requested documents is that the decision-making procedure is still on-going and the agreement on the file is still pending, awaiting the vote of the European Parliament's plenary. However, the only fact that the review of the Directive is not over and that discussions are still taking place is no legal ground to withhold the requested information. The required test provided by Article 4(3) of Regulation 1049/2001 is that disclosure would seriously undermine the decision-making process of institutions. Yet, the Commission does not put forward any arguments demonstrating that it would be the case, it only makes an affirmation. The Commission uses the Council's refusal to disclose their relevant documents and in

accordance with Article 4(4) of Regulation 1049/2001 and states that "according to the Commission's own analysis, the reasoning relied on by the Council is valid" without providing their own analysis. No justification and solid reasons are thus provided.

- (3) The internal decision-making process of the Council and of the Commission would not be seriously undermined by disclosure of documents containing the discussions on the adoption of an EU directive.
- (4) The process leading to the adoption of the reviewed directive is a legislative process. Article 12 (2) of Regulation 1049/2001, stresses the fact that "legislative documents" should be made directly accessible through the public registers.
- (5) In Cases C-39/05 and C-52/05, the Court draws from recital 2 and 6 of the Regulation's preamble to conclude that "*openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.*

It is also worth noting that, under the second subparagraph of Article 207(3) EC, the Council is required to define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in such cases. Similarly, Article 12(2) of Regulation No 1049/2001 acknowledges the specific nature of the legislative process by providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for Member States should be made directly accessible¹."

- (6) This is confirmed by Article 4 of Regulation 1367/2006 in environmental matters.
- (7) The Commission must therefore act openly and transparently within these trilogue meetings in which the three institutions decide what EU law will provide.
- (8) The trilogue procedure is not provided by the EU Treaties and is kept completely confidential. It is now commonplace and increasingly occurs before the EP has held a plenary vote on the piece of legislation, as it is the case for the adoption of EIA directive. Yet, Article 1, 6(1) and 11 TEU and 15 TFEU as well as Article 42 of the Charter of Fundamental Rights and Freedoms make clear that the institutions must act openly and transparently and as closely as possible to the citizens. Therefore, the confidentiality that the Commission and the Council impose within legislative processes at EU level is in breach of these provisions and founding principles of the EU. Information must precisely be provided while the legislative process is on-going to allow transparency and public participation. Disclosing the information once the law is adopted is not complying with either the Aarhus Convention, Regulation 1367/2006 or Regulation 1049/2001 as interpreted by the EU courts.

¹ Joined cases C-39/05 P and C-52/05P, *Sweden and Turco v Council*, [2008] ECR I-0000, paras. 46-47.

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- (9) It is common practice at national level in democratic states that the adoption of laws is discussed in public. The position of each institution is publicly debated. There is no reason justifying a difference at EU institutional level. On the contrary, EU directives and regulations apply to 28 Member States, their adoption should therefore be subject to full transparency and openness.
- (10) Moreover, even if the decision-making process at stake would be undermined, there would anyway be an overriding public interest in disclosure. The review of the EIA directive will affect the lives of every single person living in the EU and possibly abroad, in impacting the environment they live in as well as their health. Knowing how the industrial projects' impacts on the EU people's environment will be assessed and possibly avoided, compensated for or not on the basis of the decision adopted in these trilogue meetings is a right of citizens. Being able to comment, participate, oppose or support decisions being adopted on these matters is also a right that needs to be upheld by institutions involved in this process. The Commission and the Council must act transparently to ensure their accountability and the democratic character of the adoption of decisions at EU level.
- (11) Keeping the Commission's and the Council's positions confidential prevents the organization of a democratic debate. The positions of the Member States, national governments, on the proposal of the Commission simply cannot be kept confidential as these institutions are accountable to the EU citizens with regard to the decisions they adopt in "Brussels" in the area of EU law. These discussions must not take place behind closed doors. The upcoming elections of the European Parliament and the discussions which started on these elections, very clearly demonstrate that citizens all over the EU need and require greater transparency and more democratic behaviour, in order to keep confidence in the EU institutions and their activities. The secrecy which the Council and the Commission maintain with regard to the content of trilogue meetings, will just increase the anti-EU attitudes of parts of the public, and neither help the Council nor Member States nor the EU as a whole.
- (12) The Commission therefore breached Article 4(3) of Regulation 1049/2001. For all these reasons, ClientEarth hereby requests that the Commission grants full access to the requested documents.

Yours sincerely,

[Redacted signature]

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