

VIA ELECTRONIC MAIL

Brussels, 2 July 2010

Mr Didier Herbert  
Head of Unit B.1 – Sustainable Industrial Policy  
Directorate General for Enterprise and Industry  
Street address: Av. d'Auderghem 45, B-1040 Brussels  
Postal address: BREY 07/016 - B-1049 Brussels  
Belgium  
Email: [Didier.Herbert@ec.europa.eu](mailto:Didier.Herbert@ec.europa.eu)  
[sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

**Ref: Formal Application request for access to documents on CO2 emissions  
in CITL data base and NACE codes**

Dear Mr Herbert,

On behalf of ClientEarth and Sandbag (collectively the Applicants), we submit this application for access to documents under Regulation 1049/2001 of 30 May 2001 regarding access to European Parliament, Council and Commission document (Public Access to documents EC Regulation 1049/2001) and EC Regulation 1367/2006 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 (Aarhus EC Regulation 1367/2006).

With this application ClientEarth and Sandbag request the European Commission to provide them with access to all documents developed and held by the European Commission that present information related to emissions into the environment from a combined data set composed of installation data in the CITL data base and information in the NACE code classifications for installations in the EU Emissions Trading Scheme that were used in the assessment of sectors exposed to carbon leakage.

This information would enable the applicants to access information on the emissions per installation, facilities or sectoral group of installations and compare it with their allowance allocations in order to determine whether companies under the different NACE codes are accruing surplus or deficit permits. The requested data would provide citizens with information related to carbon dioxide (CO<sub>2</sub>) emissions that are affecting climate change and the use of public funds in the allocation of free allowances.

The requested information has been gathered by the European Commission to enable the development of assessments on the free allocation of emissions allowances to sectors of the economy that may be exposed to international competitive distortions and to inform decisions about which sectors are deemed to be exposed to carbon leakage. Access to the information the Commission holds in the most suitable and practical way for the Commission services would be welcomed.

Regarding disclosure of information **Article 15a of the ETS Directive 2003/87/EC**<sup>1</sup> as amended by Directive 2009/29/EC<sup>2</sup> ('the ETS Directive') states: "Member States and the Commission shall ensure that all decisions and reports relating to the quantity and allocation of allowances and to the monitoring, reporting and verification of emissions are immediately disclosed in an orderly manner ensuring non-discriminatory access. Information covered by professional secrecy may not be disclosed to any other person or authority except by virtue of the applicable laws, regulations or administrative provisions."

ClientEarth and Sandbag are requesting the Commission to make available reports relating to the carbon dioxide (CO<sub>2</sub>) emissions and allowances allocated to facilities or sectors as defined by the NACE codes and which are responsible for the implementation of the ETS Directive. This information does not involve any professional secrecy.

Any decision to withhold such information must be taken in accordance with the **Aarhus EC Regulation 1367/2006 and the Public Access to documents EC Regulation 1049/2001**.

According to article 2 of the Aarhus EC Regulation 1367/2006, the environmental information that should be made available to the public include any information in written, visual, oral, electronic or other material form on issues such as the state of the element of the environment such as **air and atmosphere**...factors such as substances, energy, **emissions**, discharges and other releases to the environment, affecting or likely to affect the elements of the environment. This definition is similar to the one under article 2 of the 2003/4/EC Directive on access to documents applied to Member States. The information requested clearly falls within the definition of environmental information and, moreover it relates to emissions into the environment.

**Article 6 of the Aarhus EC Regulation 1367/2006** regulates the application of exceptions concerning access to environmental information established in Article 4(2) first and third indents of Regulation 1049/2001 and requires EU Institutions and bodies to disclose information **related to emissions** into the environment **should be considered of overriding public interest**. Therefore **exemptions on the grounds of protection of commercial interests of a natural or legal person**, including intellectual property or the purpose of inspections, investigations and audits **cannot be argued**.

Article 6 of the Aarhus EC Regulation 1367/2006 also states: "As regards the other exceptions set out in Article 4 of Regulation (EC) No 1049/2001, the grounds for refusal shall be interpreted in a **restrictive way**, taking into account the **public interest served by disclosure and whether the information requested relates to emissions into the environment**"

---

<sup>1</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC

<sup>2</sup> Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community

The information requested relates to the carbon dioxide (CO<sub>2</sub>) emissions in relation to the allowances allocated and the sectors whose activities have a significant impact on the environment and are responsible for the implementation of the ETS Directive. Therefore, it is clear that all elements of the information requested are related to emissions. Disclosure of the requested information should therefore be considered of overriding public interest.

Applicants request access to information related to emissions that has been compiled by the Commission. The format of that information, whether in a database or not, is irrelevant and the content should be considered of overriding public interest. Article 3 of Public Access to documents EC Regulation 1049/2001 defines document as “any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities or decisions falling within the institution’s sphere of responsibility”. Article 4 of the of the Aarhus EC Regulation 1367/2006 refers to the EU Institutions and bodies obligation to make information available in electronic databases and to the need to encourage operators to inform the public regularly. Article 4 states:

“Community institutions and bodies shall organise the environmental information which is relevant to their functions and which is held by them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology in accordance with Articles 11(1) and (2), and 12 of Regulation (EC) No 1049/2001. They shall make this environmental information progressively available in electronic databases that are easily accessible to the public through public telecommunication networks”

DG Enterprise accordingly has not only the obligation to provide access to the information it holds but has a positive duty to proactively disseminate the environmental information (including information relating to emissions to the environment) it holds in databases in a systematic way. This duty goes beyond the scope of this request and suggests that DG Enterprise should consider how this duty will be met on an ongoing basis, and in particular, DG Enterprise should consider making the relevant information/database easily accessible to the public.

In previous conversations you referred to Council Regulation 322/97 of 17 February 1997 on Community Statistics. Under Article 10 of the EC Regulation 322/97, Community statistics are to be governed by the principles of statistical confidentiality and transparency. EC Regulation 322/97 has been adopted prior to the signature of the Aarhus Convention by the EC and has not been adapted yet to comply with its requirements. Until a decision is taken for its adaptation its provisions must be interpreted in the least restrictive way in line with the provisions of the Aarhus Convention and the implementing legislation at EU level in order to provide the greatest access to information in general and to grant access to the information requested by this application in particular.

Article 13 (2) of EC Regulation 322/97 includes a derogation to the confidentiality of statistical information that allows statistical units to be identified. Data taken from sources which are available to the public and remain available to the public at the national authorities according to national legislation shall not be considered confidential.

The information requested by the applicants combines the information on the classification of economic activity of installations provided by the NACE code and the installations participating in the EU Emissions Trading Scheme including information on emissions of those installations and the allowances allocated to them as provided in the CITL data base. Both CITL data base and the NACE codes are public data bases and therefore the information requested should not be considered confidential. Moreover, information on the NACE code of an installation and the CO2 emissions is provided for under the E-PRTR database selecting facilities and CO2 emissions. The list of facilities is quite big and yet, information per installation and the corresponding NACE code is provided for in the context of the IPPC Directive and its data base. Not providing Applicants with the information requested only means making more difficult access to information that is already public.

### **Conclusion and request**

The information requested by the Applicants has been compiled and it is held by the Commission. It is related to emissions and disclosure should be considered of overriding public interest. Each of the elements of the information requested is already public.

On the basis of **Article 6** of the Aarhus EC Regulation 1367/2006 ClientEarth and Sandbag request the European Commission to provide them with access to all documents hold by the European Commission presenting information related to emissions into the environment from a combined data set composed of installation data in the CITL data base and information in the NACE code classifications for installations in the EU Emissions Trading Scheme that were used in the assessment of sectors exposed to carbon leakage. As required by **Article 7** of the Public Access to documents EC Regulation 1049/2001, we respectfully request that this application is registered and handled promptly and we look forward to receiving acknowledgement of our application, and to the Commission's decision on the application 15 working days at the latest.

To the extent possible, we prefer the documents in electronic format with access provided to [bryony@sandbag.org.uk](mailto:bryony@sandbag.org.uk). Any hard copies or disk should be sent to Mrs Bryony Worthington at Sandbag Climate Campaign, 4 Charterhouse Square, London EC1M 6EE. We are also willing to confer with the Commission to establish a fair and practical way in which to access the information. However, we request that this be done promptly to avoid delay in the processing of this application.

If you have any questions or concerns on the request, please do not hesitate to contact Marta Ballesteros of ClientEarth at + 32 (0) 495 265 990 or at [mballesteros@clientearth.org](mailto:mballesteros@clientearth.org) or alternatively Bryony Worthington at +44 (0) 7876 130 352 or to the above mentioned email address.

Yours sincerely,

Bryony Worthington,  
Sandbag Climate Campaign  
Director

Marta Ballesteros,  
ClientEarth  
Director of Brussels office