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REQUEST FOR INTERNAL REVIEW UNDER TITLE IV OF THE AARHUS REGULATION

OF THE DECISION OF THE BOARD OF DIRECTORS OF THE EUROPEAN INVESTMENT
BANK, approving the financing proposal for the Curtis Biomass Power Generation Project
(ES)

SUBMITTED BY

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TO

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According to Article 11 of Regulation 1367/2006¹ and Commission Decision 2008/50/EC of 13
December 2007.²

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² Commission Decision 2008/50/EC 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).

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INTRODUCTION

1. On 12 April 2018, the Board of Directors of the European Investment Bank (the “**Board**”) approved the financing proposal for the construction of a 50MWe electricity only biomass plant in Galicia, for a maximum amount of EUR 60million, the Curtiss Biomass Power Generation Plant (the “**Contested Decision**”). The decision, contained in the Minutes of the meeting of the Board (the “**Board Minutes**”) was published on 28 June 2018 on the website of the EIB and its publication notified to ClientEarth by email on 29 June 2018.
2. The Board Minutes record only that the Contested Decision was considered and discussed, alongside a number of proposals, and that the Chairman recorded that the Board of Directors approved the financing proposal.
3. Article 10 of 1367/2006 (the “**Aarhus Regulation**”) states as follows:

1. *Any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act.*

Such a request must be made in writing and within a time limit not exceeding six weeks after the administrative act was adopted, notified or published, whichever is the latest, or, in the case of an alleged omission, six weeks after the date when the administrative act was required. The request shall state the grounds for the review.

2. *The Community institution or body referred to in paragraph 1 shall consider any such request, unless it is clearly unsubstantiated. The Community institution or body shall state its reasons in a written reply as soon as possible, but no later than 12 weeks after receipt of the request.*
3. *Where the Community institution or body is unable, despite exercising due diligence, to act in accordance with paragraph 2, it shall inform the non-governmental organisation which made the request as soon as possible and at the latest within the period mentioned in that paragraph, of the reasons for its failure to act and when it intends to do so.*

In any event, the Community institution or body shall act within 18 weeks from receipt of the request.

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4. Article 11(1) of the Aarhus Regulation states as follows:
 1. *A non-governmental organisation shall be entitled to make a request for internal review in accordance with Article 10, provided that:*
 - (a) *it is an independent non-profit-making legal person in accordance with a Member State's national law or practice;*
 - (b) *it has the primary stated objective of promoting environmental protection in the context of environmental law;*
 - (c) *it has existed for more than two years and is actively pursuing the objective referred to under (b);*
 - (d) *the subject matter in respect of which the request for internal review is made is covered by its objective and activities.*
5. ClientEarth requests the internal review of the Contested Decision in accordance with Article 10 and 11 of the Aarhus Regulation, on the following grounds:
6. First, the Contested Decision is vitiated by a failure to state reason within the meaning of Article 296 TFEU which constitutes an infringement of an essential procedural requirement: it fails to provide any reasons whatsoever for the Contested Decision, simply recording that “the Board of Directors approved the financing proposal” (paragraph 11 of the Board Minutes).
7. Second, the Contested Decision is vitiated by a failure to lay down terms and conditions of a financing operation presenting a specific risk profile which is considered to be a special activity, as required by Article 16(3) of the Statute of the European Investment Bank, which constitutes an infringement of an essential procedural requirement.
8. Third, the Contested Decision is vitiated by a failure to determine the terms and conditions for a delegation of its functions to the Management Committee and measures to supervise the execution of any delegated functions, as required by Article 9(1) of the Statute of the European Investment Bank, which constitutes an infringement of an essential procedural requirement.
9. Fourth, to the extent that the Contested Decision is based on the reasoning set out in the Proposal from the Management Committee to the Board of Directors Annex 1 (the “**Committee Proposal**”) the contested decision relies on an incorrect assertion that the Curtis Biomass Project (the “**Project**”) is eligible for financing under Article 309(c) TFEU. Article 309(c) TFEU cannot be relied on in this case, because the Project is not a “project

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of common interest to several member states". The Contested Decision therefore represents a misuse of the EIB's powers and a consequent breach of the TFEU.

10. Fifth, to the extent that the Contested Decision is based on the reasoning set out in the Committee Proposal, the Contested Decision is vitiated by a manifest error of assessment that the Project will have a High contribution to EU Policy by meeting three public policy goals.
11. Sixth, to the extent that the Contested Decision is based on the reasoning set out in the Committee Proposal, the Contested Decision is vitiated by a manifest error of assessment in that it relies on an assertion that the Project will address a market failure because "Low carbon power and heat projects reduce carbon and air pollution externalities".
12. Seventh, to the extent that the Contested Decision is based on the reasoning set out in the Committee Proposal, the Contested Decision is vitiated by a manifest error of assessment of the project's quality and soundness predicated on an error in calculating its Economic Rate of Return.
13. Eighth, to the extent that the Contested Decision is based on the reasoning set out in the Committee Proposal, the Contested Decision is vitiated by a manifest error of assessment in failing to properly consider the financial risks associated with the Project.
14. Please note that ClientEarth has made three separate requests for access to environmental information under Regulation 1049/2001 (as applied by Regulation 1367/2006), which have not been fully answered by the EIB Civil Society Division at the date of submission of this request. ClientEarth reserves the right to supplement or amend this request once the information requested has been disclosed.
15. Before developing these substantive grounds (**B.**), the admissibility of the Request is discussed hereunder (**A.**).

A. ADMISSIBILITY

A.1. Eligibility of the Applicants pursuant to Article 10 of Regulation 1367/2006

A.1.1. ClientEarth fulfils the criteria of Article 10 and 11 of Regulation 1367/2006

16. ClientEarth fulfils the criteria of Articles 10 and 11 of Regulation 1367/2006:
 - It is a non-profit organization;
 - It is dedicated to the protection of the environment;

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- It has operated for more than two years;
 - The subject matter of the Contested Decision is covered by the objectives and activities of ClientEarth.
17. ClientEarth is a non-profit making, non-governmental environmental law, science and policy organisation with offices in Brussels, London, Warsaw, New York and Beijing. It opened in London and Brussels in 2008 and currently counts around 110 employees. ClientEarth works to protect the environment through advocacy, litigation and research. ClientEarth provides public interest legal capacity for the environment, working in its own right and with environmental NGOs and other stakeholders; acting as legal advocates for environmental objectives. The statutory goals of ClientEarth specify the objective of promoting and encouraging the conservation and protection of the environment, including the protection of human health.
18. Pursuant to its Articles of Association,³ ClientEarth's activities focus on promoting, assisting, undertaking and commissioning research into law, practice and the administration of justice in connection with the environment and matters relating thereto including the impact, direct or indirect, of any human activity on the environment. Article 4.1. of the Articles of Association provides that the objective of the organisation is *"to promote and encourage the enhancement, restoration, conservation and protection of the environment, including the protection of human health, for the public benefit"*.
19. According to Article 5 of its Articles of Association, ClientEarth has power to:
- *"provide expert legal advice, assistance, and representation in connection with the management, administration regulation, and protection of the environment, and the prudent and rational utilisation of land and other natural resources, including the development of policy or law, the drafting of laws, the implementation thereof, the institution of proceedings, conduct of litigation and resolution of disputes"*;
 - *"subject to any consent required by law, to institute legal proceedings, conduct litigation and participate in alternative forms of dispute resolution"*; and,
 - *"alone or with other organisations to seek to influence governmental and other bodies and institutions regarding the reform, development and implementation of appropriate policies, legislation and regulations [...]"*

³ ClientEarth's articles of association; [Annex 2](#).

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20. ClientEarth has two lawyers working to use appropriate and available legal tools to protect human health and the environment from the harmful effects of unsustainable biomass energy generation at both EU level and within Member States.

A.1.2 Supporting documents of ClientEarth's entitlement to request internal review

21. As required by Commission Decision 2008/50/EC⁴, to prove that ClientEarth meets the criteria listed under Article 11(1) of the Aarhus Regulation, the following documents are provided as Annexes to the Request:
 - Articles of Association of ClientEarth (Annex 2);
 - Annual activity reports of ClientEarth of the last two years (Annexes 3 and 4);
 - A copy of the legal registration with the national authority (Annex 5).
 - ClientEarth has previously been assessed and acknowledged by the Commission as being entitled to make a request for internal review: see Decision C(2009)3337 dated 27 April 2009 (Annex 6). ClientEarth has made several subsequent requests for internal review and its entitlement to make such a request has not been challenged.

A.2. The Contested Decision is an “administrative act” in the sense of the Aarhus Regulation

22. The Contested Decision falls within the scope of an administrative act as described in Article 2(1)(g) of the Aarhus Regulation, i.e. “*any measure of individual scope under environmental law, taken by the Community institution or body, and having legally binding and external effect*”, as detailed below.

A.2.1. The Contested Decision is an administrative act of "individual scope"

23. CJEU case law, the legal text of the Statute and previous decisions taken by EU bodies concerning internal reviews all lead to the conclusion that the Contested Decision is of "individual scope" in the sense of Article 2(1)(g) of the Aarhus Regulation.

⁴ 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, p. 24–26).

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24. Measures of individual scope are not defined under the Aarhus Regulation or any other primary sources of EU law. However, according to the CJEU, in order to determine the scope of a measure, account should first be taken of its purpose and its content.⁵
25. The purpose of the Contested Decision is clearly to provide finance to an individual project, promoted by an individual operator, having immediate legal consequences not generally, or for categories of persons, but for that individual operator.
26. This is to be contrasted with a measure of general scope, which has been held by the Court to be decisions that are addressed in abstract terms to classes of persons who are not specifically defined and apply to objectively defined situations.⁶ The Contested Decision applies only to a specific application, i.e. the Curtis Biomass project, and not “objectively defined situations”. It also does not apply in “abstract terms to classes of persons” but concerns only the legal situation of a specific applicant.
27. Therefore, in light of the purpose and content of the Contested Decision, this administrative act can only be considered as being of “individual scope”.
28. In light of the decision-making practice of EU bodies under the Aarhus Regulation, the case law of the CJEU, and the objective and content of the Contested Decision, the Contested Decision is a measure of “individual scope” in the sense of Article 2(1)(g) of the Aarhus Regulation.

A.2.2. The Contested Decision was issued “under environmental law”

29. The Contested Decision falls within the scope of environmental law as defined by Article 2(1)(f) of the Aarhus Regulation, i.e. “*legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: 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*”.
30. As the CJEU held in T-33/16 TestBioTech v Commission, it is clear that Article 2(1)(f) of the Aarhus Regulation states that the question whether an act was adopted under environmental law does not depend on the legal basis on which the legal provision at issue was adopted⁷. Rather, by referring to the objectives listed in Article 191(1) TFEU, the EU

⁵ See Case T-396/09, para. 26 and the case law cited; Case T-338/08, para. 29 and the case law cited.

⁶ See for instance, Case T-396/09 *Vereniging Milieudefensie*, para. 28 referring to Order in Case T-142/03 *Fost Plus v Commission*.

⁷ T-33/16 Para 42

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legislature intended to give a broad meaning to the concept of environmental law covered by the Aarhus Regulation, not limited to measures in protection of the environment in the strictest sense⁸.

31. The Court found that their finding was confirmed by Article 192(2) TFEU which includes in the field of environmental law a series of types of actions, including the adoption of provisions of a fiscal nature and measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply⁹.
32. The Contested Decision was purportedly issued under the power contained in Article 309(c) of the Treaty on the Functioning of the European Union (the "TFEU"). Following a decision of the EFSI Investment Committee on 9 April 2018, the financing for this project is to be provided under the EFSI guarantee. As such, the Contested Decision has a second legal basis in Regulation 2015/1017 (as amended).
33. Recital 13 of Regulation 2015/1017 states as follows:

The purpose of the EFSI should be to help resolve the difficulties in financing and implementing strategic, transformative and productive investments with high economic, environmental and societal added value.

...

At the same time, the EFSI should be able to support environmentally sound projects and benefit industries and technologies with high growth potential and contribute to the transformation into a green, sustainable and resource-efficient economy.

34. Article 9(2) states as follows:

The EU guarantee shall be granted for EIB financing and investment operations approved by the Investment Committee or for funding or guarantees to the EIF in order to conduct EIB financing and investment operations in accordance with Article 11(3).

...

The operations concerned shall be consistent with Union policies and support any of the following general objectives:

⁸ T-33/16 Para 44

⁹ T-33/16 Para 45

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(b) development of the energy sector in accordance with the Energy Union priorities, including security of energy supply, and the 2020, 2030 and 2050 climate and energy frameworks, in particular through:

(i) expansion of the use or supply of renewable energy;

...

While recognising the demand-driven nature of the EFSI, the EIB shall target that at least 40 % of EFSI financing under the infrastructure and innovation window support project components that contribute to climate action, in line with the commitments made at the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (COP21).

35. It is clear that the EFSI Regulation falls within the definition of legislation that “contributes to the pursuit of the objectives of Community Policy on the environment” both by seeking to ensure the prudent and rational utilisation of natural resources (e.g. expanding the use and supply of renewable energy) and by promoting measures at international level to deal with regional or worldwide environmental problems (e.g. climate action).
36. The EFSI scoreboard for the project (under pillar 1) explains that the project makes a high contribution to EU policy in the field of Climate Action (100%) and a contribution to EFSI of 100% in both development of the energy sector in accordance with Energy Union priorities and in expansion of the use or supply of renewable energy.
37. Under pillar 4, the EFSI scoreboard says “*the high level of investment needed in Spain in order to meet the EU targets for the deployment of renewable energy by 2020.... Makes the deployment of this project essential*”.
38. To the extent that the Contested Decision is based on the reasoning contained in the Committee Proposal, it is also clear that the Contested Decision seeks to rely heavily on environmental justifications for investment. For example (and as examined in more detail in section B below) the Committee Proposal explains that the purpose of the plant is to generate positive local economic, environmental and social externalities (para 2) and that its contributions to EU policy (paras 21 – 23) are said to support national targets for renewable energy generation, contribute to environmental objectives and contribute to the Bank’s lending priority policies on renewable energy and climate action.
39. The power of the Board of Directors to make decisions in respect of granting finance is enshrined in Article 9 of the Statute of the European Investment Bank (the “**Statute**”) which also requires the Board of Directors to ensure that the Bank is managed in accordance with the provisions of the Treaties.

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40. Furthermore the EIB Statement of Environmental and Social Principles and Standards (the “**SESPS**”) states that “*The EIB aims to add value by enhancing the environmental and social sustainability of all the projects that it is financing and all such projects must comply with the environmental and social requirements of the Bank*” (paragraph 3). Paragraph 23 of the SESP S explains that “*The EIB refers to EU environmental law as the primary source of its environmental principles, and is a signatory to the European Principles for the Environment (EPE). There are several environmental principles in the Treaty - implemented in relevant Directives – that are of central importance to the environmental approach of the Bank, notably:*
- *The integration principle (Article 6 [now Article 11 TFEU¹⁰]);*
 - *The principle of aiming at a high level of environmental protection (Article 95 (3) [now Article 114(3) TFEU] and Article 174 (2) [now Article 191(2) TFEU¹¹]) must be applied by the staff of the EIB in all its operations”.*
41. For all of the reasons set out above, it is clear that the Contested Decision was issued “under environmental law”.

A.2.3. The Contested Decision was taken by a Community institution or body

42. As required by Article 10(1) of the Aarhus Regulation, this request for internal review is directed to the European Investment Bank, the institution or body that adopted the Contested Decision. The minutes of the Meeting of the Board of Directors held on 12 April 2018 records that “*The CHAIRMAN recorded that the Board of Directors approved the financing proposal*”.
43. The Contested Decision is taken under the powers contained in Article 9(1) of the Statute, which requires the Board of Directors to take decisions with regard to the granting of finance.

¹⁰ Article 11 TFEU states that “*Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development*”

¹¹ Article 191(2) TFEU states that “*Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.*

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44. In light of the above, the Contested Decision meets the criteria of an administrative act according to Article 2(1)(g) of the Aarhus Regulation. The Request must therefore be held to be admissible. The substantive grounds for the review are set out below.

A.2.4 The Contested decision has a legally binding and external effect

45. The Contested Decision is made under Article 9 of the Statute and represents the formal decision by the EIB to approve financing of the Project. As such it represents a legally binding decision of the Board, which authorises the Management Committee to enter into a contract negotiation with the Project promoter and is the final decision of the Board before completion of that contract.
46. The Contested Decision can therefore be contrasted with an internal measure which, according to the case law of the Court, “have legal effects only within the internal sphere of the administration and do not create any right or obligation for the benefit of third parties.”¹² The Contested Decision certainly creates a right for the benefit of third parties in that it confirms the eligibility of the proposed biomass project for financing. Thereby, the Contested Decision authorizes the subsequent contractual negotiations between the Management Board and the operator.
47. Rather, the decision is analogous to that made when a procurement tender is awarded by a Member State. The EU Remedies Directives¹³ ensure that it is the decision to award a contract in the field of public procurement which is the legally binding and challengeable decision, rather than the signature of the contract itself. In the present case, the Contested Decision is the final decision before the signature of the contract and therefore assumes the same role as the contract award decision in the public procurement context.
48. For the reasons set out above, it cannot be reasonably argued that the Contested Decision does not have legally binding external effects.

¹² See Case T-320/09 *Planet AE v Commission*, ECLI:EU:T:2015:223, para. 63 and case law referred to therein (upheld on appeal in Case C-314/11 P *Commission v Planet AE*, ECLI:EU:C:2012:823).

¹³ Directive 92/13/EEC and Directive 89/665/EEC, as amended by Directive 2007/66/EC

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B. GROUNDS FOR REVIEW

49. ClientEarth requests that the Contested Decision be reviewed on the basis of the following grounds.

B.1. Infringements of essential procedural requirements

B.1.1 Breach of Article 296 TFEU: Failure to provide reasons for the Contested Decision

50. The duty to give reasons for decisions arises from Article 296 (second paragraph) TFEU which states as follows:

Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.

51. The Board of Directors has a power under Article 9(1) of the Statute of the Bank to take decisions in respect of granting finance, in particular in the form of loans and guarantees. The power to grant loans and guarantees is contained in Article 309 of the TFEU. Such decisions therefore constitute legal acts within the meaning of Article 296.
52. The duty to give reasons is also recognised as a right under Article 41(2)(c) of the Charter of Fundamental Rights of the European Union as well as being an essential component of the right to an effective remedy recognised in Article 47 of the Charter of Fundamental Rights of the European Union. According to settled case law, "the duty to state reasons [...] is an essential procedural requirement"¹⁴ and constitutes a separate free standing basis for the annulment of a measure adopted by an EU institution.¹⁵
53. The Court has further established that "*the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review*".¹⁶
54. The Contested Decision simply records that the opinion of the government of the Kingdom of Spain raised no objection and that the opinion of the European Commission was

¹⁴ Case C-535/14 P, para. 37.

¹⁵ See for instance, T-95/94, para. 80 and C-367/95 P, paras. 67-68.

¹⁶ C-182/03 and C-217/03, para. 137)

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favourable and that *“The CHAIRMAN recorded that the Board of Directors approved the financing proposal”*.

55. Contrary to the legal obligation contained in Article 296, the Contested Decision does not present any detail of discussion by the Board of Directors or any indication of how the decision to approve the financing proposal has been justified and provides no reasoning whatsoever for the decision.
56. The complete lack of reasoning prevents a proper understanding of the reasons underlying the Contested Decision within the meaning of the case law cited above.
57. The Contested Decision also contains a reference to “Doc 18/291”. This corresponds to a document provided to ClientEarth in response to a request for environmental information, namely the Proposal from the Management Committee to the Board of Directors Annex 1 (the “**Committee Proposal**”). This Committee Proposal is redacted and does not provide any recommendation to the Board. This Committee Proposal provides some information, but in the absence of any details of the Board’s discussion, or of formal reasons for the decision, set out in the Board Minutes, the Committee Proposal is no substitute. Indeed the Committee Proposal was not prepared by the decision-maker (i.e. the Board of Directors) and predates any discussion by the Board. It is therefore factually impossible that the Committee Proposal could record the reasoning of the Board in coming to its decision.
58. Therefore, the European Investment Bank has violated its obligation to state reasons under Article 296 TFEU, which constitutes an infringement of an essential procedural requirement. On that ground, the Contested Decision must be reviewed.

B.1.2 Breach of the EIB Statute: Failure to lay down the terms and conditions of a financing operation for a Special Activity

59. The EFSI scoreboard for the Project under Pillar 4 explains that *“such a long tenor [up to 17 years] together with the above mentioned riskier elements, have never been combined in project finance structure in the biomass sector in Spain. The operation under EFSI shall thus fall under the Special Activity category”*. The Cover page of the Committee Proposal is also marked as “Special Activities”.
60. The second sub paragraph of Article 16(3) of the Statute of the Bank states as follows:

in accordance with the principles established by the Board of Governors pursuant to Article 7(3)(b), and where the implementation of projects provided for in Article 309 of the Treaty on the Functioning of the European Union so requires, the Board of Directors shall, acting

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by a qualified majority, lay down the terms and conditions of any financing operation presenting a specific risk profile and thus considered to be a special activity.

61. There is no acknowledgement in the Contested Decision either that the Project is a Special Activity, or that the Board, in making its decision to finance the Project, laid down any terms and conditions of the financing operation. Indeed there is no indication that the requirement to lay down terms and conditions under Article 16(3) was even considered at the Board meeting.
62. To the extent that the Contested Decision is based on the Committee Proposal, paragraph 45 of that proposal refers to “disbursement conditions” as “*necessary steps to sufficiently strengthen the forestry supply chain*”. However, there is no indication that the “disbursement conditions” referred to would meet the requirements of Article 16(3) of the Statute, or that these or any other conditions were formally laid down by the Board in the Contested Decision.
63. Therefore, the Board of Directors has violated its obligation to lay down terms and conditions of financing operations which are considered to be a Special Activity, which constitutes an infringement of an essential procedural requirement. On that ground, the Contested Decision must be reviewed.

B.1.3 Breach of the EIB Statute: Failure to lay down the terms and conditions of a financing operation for a Special Activity

64. Article 9 of the Statute of the Bank allows the Board “*on the basis of a decision taken by a qualified majority, [to] delegate some of its functions to the Management Committee. It shall determine the terms and conditions of such delegation and shall supervise its execution*”.
65. The Contested Decision does not contain any indication that the powers of the Board of Directors have been delegated to the Management Committee. No terms and conditions or method of supervision is set out anywhere in the Contested Decision.
66. To the extent that the Contested Decision is based on the Committee Proposal, paragraph 41 to 47 of the Committee Proposal assesses the risks associated with the Project and in several cases finds that matters described as high or medium risk are “*to be assessed by LTA during the Bank’s Stage II Appraisal*”.
67. These matters are:
 - i) Implementation delay (high risk)
 - ii) Promoter implementation Capacity (high risk)

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- iii) EPC Contractor O&M Capacity (medium risk)
 - iv) Promoter Electricity trading capacity (medium risk)
68. These are not small inconsequential matters. For example, implementation delay would have two catastrophic consequences. Firstly, if the plant is not registered with the special regime registry in Spain by 28 March 2020 it will be rendered financially unviable. Secondly, as described below at paragraph 95 if the plant is not operational during 2020 any energy it produces cannot be counted towards the EU or Member State renewable energy targets under Directive 2009/28, which would further undermine any argument that the Project meets EU policy goals.
69. Whilst this risk is said to have several mitigants, there is “no mitigant” described for a situation where non-registration is caused by a third party delay, or by the promoter’s delay. The Promoter’s lack of experience is assessed to represent a high risk under “Implementation Capacity” at paragraph 43 of the Committee Proposal, potentially compounding that risk.
70. Paragraph 5 of the Committee Proposal explains that “*the Bank’s services have decided to advance the financing approval process in parallel with the Lender’s Technical Adviser’s due diligence and stage II appraisal, whilst being cognisant of the fact that there are significant risks identified*”. The proposed process at paragraph 15 of the Committee Proposal is described as “*following stage one Board approval, the outcome of final due diligence and the detailed loan and project documentation will be presented to the Management Committee for final agreement..... in the event that the final terms deviated from the conditions specified in this approval, a further approval from the Board would be sought*”.
71. To the extent that the Board might rely on a previous or general delegation of powers, ClientEarth considers that the height of the risks outlined above, and their potential to derail the entire project are such that extra diligence should be taken in this case. Whilst the preparation of detailed loan and project documentation might be capable of being reasonably discharged by the Management Committee in a low risk case, judgments on the outcome of a due diligence exercise in such a high risk case should not be delegated other than by express delegation setting out terms and conditions and methods of supervision.
72. To the extent that the Contested Decision fails to formally delegate assessment of the risks of the Project and fails to set out terms and conditions or method of supervision to the Management Committee as required by Article 9 of the Statute, this represents an infringement of an essential procedural requirement and on this ground the decision must be reviewed.

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B.2. Manifest errors contained in the Proposal from the Management Committee to the Board of Directors

73. Whilst no reasons are given in the Contested Decision, the EIB has provided, in response to a request for access to environmental information, a redacted version of the “**Committee Proposal**” which is referenced only by number in the Contested Decision. This document has been redacted and does not contain any concrete recommendation to the Board. However, to the extent that it may provide information on which the decision of the Board of Directors is based, it contains manifest errors of assessment, as set out below, which would accordingly also vitiate the Contested Decision.

B.2.1. Breach of Article 309(c): misuse of powers of the EIB

74. To the extent that the Contested Decision is based on the Committee Proposal, it relies on an incorrect assertion that the Project is eligible for financing under Article 309(c) TFEU.
75. Paragraph 24 of the Committee Proposal, under the heading “reference to Treaty” states that “*The Project is therefore eligible under Article 309 point (c) Common Interest (energy).*”
76. Article 309 of the Treaty on the Functioning of the European Union (TFEU) states as follows:

The task of the European Investment Bank shall be to contribute, by having recourse to the capital market and utilising its own resources, to the balanced and steady development of the internal market in the interest of the Union. For this purpose the Bank shall, operating on a non-profit-making basis, grant loans and give guarantees which facilitate the financing of the following projects in all sectors of the economy:

....

(c) projects of common interest to several Member States which are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States.

77. It is not clear how a very low efficiency, energy only project in one member state could be described as “of common interest to several member states”. There is no indication in any of the documents associated with this Project that the development, which is limited to one very low efficiency 50MWe power plant in Galicia, will have any cross border features or impacts whatsoever. As is explained in section B.2.2 below, the project does not contribute to EU policy on renewable energy or climate action. There is also no indication that any Member State other than Spain is involved or has any interest in the project

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78. ClientEarth does not consider that a development which is not a cross border project, has no cross border features or benefits and is not a project necessary for an energy infrastructure corridor can be described as a “*project of common interest to several member states*”. The Project is not therefore eligible for finance under Article 309(c) TFEU.
79. To the extent that the Contested Decision relies on the reasoning contained in paragraph 24 the Committee Proposal, this represents a misuse of the EIB’s powers and is in breach of the Treaty and on this ground the decision must be reviewed.

B.2.2. Manifest errors in assessment of contribution to EU public policy goals

80. To the extent that the Contested Decision is based on the Committee Proposal, it relies on an assertion that the Project will have a High contribution to EU Policy by meeting three public policy goals. The conclusion on each one of these three goals represents a manifest error of assessment, for the reasons outlined below.

- a) **The conclusion that the operation supports EU and National targets for RE generation and contributes to security of energy supply and environmental objectives represents a manifest error of assessment**
- i) **The assertion that the project supports EU and national targets for renewable energy generation is not supported by evidence**

81. Directive 2009/28/EC sets out the criteria for counting bioenergy towards national and EU energy targets and Article 17(1) states as follows:

1. Irrespective of whether the raw materials were cultivated inside or outside the territory of the Community, energy from biofuels and bioliquids shall be taken into account for the purposes referred to in points (a), (b) and (c) only if they fulfil the sustainability criteria set out in paragraphs 2 to 6:

(a) measuring compliance with the requirements of this Directive concerning national targets;

(b) measuring compliance with renewable energy obligations;

(c) eligibility for financial support for the consumption of biofuels and bioliquids.

82. Paragraphs 2 – 6 of Article 17 sets out a series of sustainability criteria relating to land use, as well as a requirement for projects of this type to meet the 60% threshold for GHG emissions savings set out in Article 19(1).

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83. The Environmental and Social Data Sheet (the “ESDS”) for the project (which is referenced as having been provided to the Board in the Committee Proposal at paragraph 34), states that the developer has given an undertaking that fuels used for the project will meet the sustainability standards required by Directive 2009/28. However, that undertaking is not evidenced amongst the documents, and the risk assessment contained in the Committee Proposal does not explain how sustainability of biomass in accordance with the Directive Criteria (for example ensuring that fuel is not sourced from land with high biodiversity value) will be monitored or enforced.
84. Paragraph 45 of the Committee Proposal explains that “*Ensuring the feedstock supply for the project will be challenging considering the Promoter’s current timber harvesting and transporting capabilities as well as the wider forestry supply chain in Galicia...increased competition for wood raw material is expected and might lead to an increase in wood prices in the Project’s sourcing area*”. Such competition for resources carries an associated increased risk that sustainability standards are compromised. When feedstock is in short supply, there is a risk that wood which does not meet sustainability standards could be substituted in an effort to keep up supply. No consideration of this risk appears in the Contested Decision, the ESDS or the Committee Proposal.
85. In the event that the fuels used for the plant do not meet the criteria in Article 17 – 19 of the Renewable Energy Directive, the project will do nothing to support EU or national targets for renewable energy generation.
86. Article 3 of Directive 2009/28 requires Member States to ensure that the share of energy from renewable sources in gross final consumption of energy in 2020 at least meets the national overall target set out in Annex I of the Directive. In the event that the plant is not completed and operational during 2020, it will not count any energy towards the Kingdom of Spain, or the EU’s renewables target for 2020 in any event. It is acknowledged in paragraph 5 of the Committee Proposal that this is a very tight completion schedule, and at paragraph 42 that the risk of implementation delay is high.
87. To the extent that the Contested Decision relies on the assertion that the Project supports EU and national targets for renewable energy generation in Paragraph 21 of the Committee Proposal, this assertion is not supported by evidence and represents a manifest error of assessment and on this ground the decision must be reviewed.
 - ii) **The assertion that the project contributes to security of energy supply is undermined by the Committee Proposal**
88. Any assertion that the project contributes to security of energy supply is undermined by paragraph 28 of the Committee Proposal which explains that “*The Spanish electricity sector is characterised by significant oversupply; thus, extra firm generation capacity, as provided*”

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by the project under appraisal, is of little or no economic value to the power system and thus not valued in the banks economic and financial appraisal of the project”.

89. To the extent that the Contested Decision relies on the assertion that the Project contributes to security of energy supply in Paragraph 21 of the Committee Proposal, this assertion is not supported by the text of the Committee Proposal and represents a manifest error of assessment and on this ground the decision must be reviewed.

iii) **The assertion that the project contributes to environmental objectives is not supported by evidence**

90. Any assertion that the project contributes to environmental objectives cannot be supported given the very low efficiency of this kind of power plant acknowledged in paragraph 26 of the Committee Proposal.

91. Whilst paragraph 26 of the Committee Proposal describes a gross efficiency of 35.6% for “the kind of power plant” it should be noted that the permit for the Project dated Tuesday 27 March 2018¹⁷ describes a claim that the efficiency of the plant is lower, at 31.8% because it produces only electricity and not heat. This figure is not disputed in the permit, which simply states that the plant falls within margins which are common for such facilities.

92. Firstly, there is no indication in the Committee Proposal or the ESDS that the plant has been subject to a cost benefit analysis as required by Article 14(5)(a) of Directive 2012/27/EU on energy efficiency, or that it falls under one of the exemptions set out in Article 14(6) of that Directive. Directive 2012/27/EU aims to reduce greenhouse gas emissions in a cost-effective way and thereby to mitigate climate change by improving energy efficiency, including by moving to high efficiency co-generation. In the absence of such an analysis it cannot be said that the project contributes to environmental objectives.

93. Secondly, a recast of the Renewable Energy Directive has just been agreed in dialogue, which will apply to plants becoming operational from 3 years after the adoption of the Directive (expected to be later this year). Article 26(8) of the agreed text states as follows:

Electricity from biomass fuels shall be taken into account for the purposes referred to in points (a), (b) and (c) of paragraph 1 of this Article only if it meets the following requirements, and for electricity-only-installations provided that these do not use fossil fuels as a main fuel:

....

¹⁷ https://www.xunta.gal/dog/Publicados/2018/20180327/AnuncioG0424-160218-0006_es.html

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c) For installations with a total rated thermal input above 100 MW, it is produced either applying high efficient cogeneration technology as defined under Article 2(34) of Directive 2012/27/EU, or for electricity-only installations achieving a net-electrical efficiency of 36%, or applying Biomass Carbon Capture and Storage.

94. At 50MWe, with a gross efficiency of 35.6% (one would expect net-electrical efficiency to be lower than gross, as net electrical efficiency takes into account losses attributable to the process of actual generation), the plant will have a total rated thermal input of 140.45 MWth. If the energy efficiency is 31.8%, the plant will have a total rated thermal input of 157MWth.
95. In either calculation, the energy produced would not be eligible to contribute towards the Union target and Member States' renewable energy share and would not be eligible for subsidies. Given that these thresholds have been very recently agreed by the EU institutions, it cannot reasonably be said that approving funding for a plant with such low electrical efficiency that it would not count towards post 2020 renewables targets contributes to the environmental objectives of the EU.
96. To the extent that the Contested Decision relies on the assertion that the Project contributes to environmental objectives in Paragraph 21 of the Committee Proposal, this assertion is not supported by evidence and represents a manifest error of assessment and on this ground the decision must be reviewed.

b) The conclusion that the Project also contributes to the prevention of forest fires and to the sustainability of the forestry activity in the Galicia region, by fostering regional demand for forest wood residues represents a manifest error of assessment.

97. The assertion that the project will contribute to the prevention of forest fires is based on Law 7/2012 of the Galician Administrative Region, which is described in paragraph 2 of the Committee Proposal as "*oblig[ing] the collection of biomass waste from the forest (subject to penalties) with the objective of using it as a source of energy (reducing the use of fossil fuels) and primarily to avoid the occurrence of forest fires*".
98. This represents a fundamental misunderstanding of Law 7/2012¹⁸ of the Galician region. Law 7/2012, does not oblige the collection of biomass with the objective of using it as a source of energy. The law requires two things, separately:
99. Firstly, As a general mandate to the legislator (not as a legal obligation) Article 95 of law 7/2012 says that: "*in application of the policies on the gradual reduction in the use of fossil fuels for energy purposes, and considering the role of biomass as an alternative energy*

¹⁸ Consolidated version http://noticias.juridicas.com/base_datos/CCAA/ga-l7-2012.html#i

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source with neutral emissions of carbon dioxide, the Forestry Administration will regulate the use of forest biomass, when it comes from forest energy crops, remains of forest exploitation and other silvicultural operations in the forests, to be used as the main fuel”.

100. Secondly, Article 128 of Law 7/2012 lists an offence of *“the realization of timber exploitation without removal or shredding of residual forest biomass, except in the cases referred to in this law”*. Article 95 says that *“Logging will involve the extraction or crushing of residual forest biomass, except for the events of justified mechanization difficulties, environmental reasons, orography or rainfall conditions that pose a risk of erosion, or those that are determined by order of the competent Forestry authorities”*.
101. The law requires that where one does harvest timber, there is a requirement to remove or shred any residues, but this does not constitute a requirement to remove forest residues with the objective to reduce the use of fossil fuels and avoid forest fires.
102. Law 7/2012 also makes amendments to law 3/2007¹⁹ of the Galician region which deals with the prevention of forest fires. Law 3/2007 (as amended) requires the collection of biomass, not throughout all forested areas of Galicia, nor in commercial plantations, but only through “biomass management strips”, located in the vicinity of strategic infrastructure and buildings. For example within 5 metres of electricity network infrastructure (Article 20bis(1)(c)), in the areas of public domain along the line of roads and railways (Article 20bis(1)(a)) or within 50 metres of buildings in residential areas (Article 21(1)(b)).
103. Article 50 of law 3/2007 imposes penalties for failure to collect biomass from forests in these specific zones, but there is no obligation whatsoever to collect biomass from the general forest area for the prevention of wildfires, and certainly no association with collecting biomass for energy production.
104. Law 7/2012 categorically does not oblige the collection of biomass from the forest with the objective of using it as a source of energy. To the extent that the Contested Decision is based on an assertion that the Project will contribute to the prevention of forest fires by using biomass for energy production, this is a misinterpretation of law 7/2012.
105. Moreover, it is clear from paragraph 45 of the Committee Proposal, that rather than using biomass cleared from forests with the specific aim of preventing forest fires, the project will require an increase in timber production and harvesting in the region, in order to create enough wastes and residues to fuel this very low efficiency plant.
106. Evidence shows that increasing timber production can lead to more forest fires. Research shows that heavily logged areas and tree plantations can burn more than natural forests

¹⁹ Consolidated version http://noticias.juridicas.com/base_datos/CCAA/ga-l3-2007.html

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and can increase forest fire severity²⁰. This is broadly because logging disturbs the natural balance and key characteristics of a forest, changing it from a diverse 'mosaic' of trees towards a monoculture.

107. More specifically, logging can change microclimates, stand structure and species composition of a forest, as well as its biomass characteristics and patterns of landscape cover. These changes can influence fires²¹. For example, selective logging of the largest and most fire-resistant trees can increase fire severity as smaller and younger trees burn more easily. Removal of trees can also create canopy openings, which can increase wind and dry out the vegetation of the forest floor.
108. Clear-cutting forests for plantations also reduces heterogeneity, which can increase the spread of wildfire through landscapes, particularly if fast-growing but flammable species such as eucalyptus is planted. Timber plantations are often based on short-rotation processes and quick-growing, evergreen species such as eucalyptus and pine (two of the most common plantation species). These species take up water from the ground the whole year leading to extreme dry grounds fuelling wildfires²².
109. In some European countries, the number of wildfires has increased since the second half of the 20th century, in parallel with the increase in tree plantations. A recent study from the University of Vigo found that fire frequency in north-west Spain could be predicted by the amount of eucalypt biomass in forest plantations. Across the Mediterranean, the research found a positive correlation between eucalypt plantations and fire frequency²³.
110. Neither the Committee Proposal, nor the ESDS include any evidence to demonstrate that the Contested Decision will in fact lead to a reduction in forest fires, nor any risk assessment of the potential for increased timber production to increase the risk of forest fires.
111. To the extent that the Contested Decision relies on the fundamental misunderstanding of Law 7/2012 and the consequent assertion that the Project will reduce forest fires, this assertion represents a manifest error of assessment and on this ground the decision must be reviewed.

²⁰ https://www.fs.fed.us/psw/publications/documents/psw_gtr208en/psw_gtr208en_525-534_stone.pdf

²¹ <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1755-263X.2009.00080.x>

²² <https://globalforestcoalition.org/wp-content/uploads/2017/09/plantations-flyer.pdf>

²³ <https://peerj.com/preprints/3348.pdf>

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- c) The conclusion that the financing of the project is in line with the Bank's energy lending priority for "renewable energy" and contributes to the Bank's lending priority policies on Renewable Energy and Climate Action represents a manifest error of assessment.
112. To the extent that the Contested Decision is based on the Committee Proposal, it relies on an assertion in paragraph 23 that the financing of the project is in line with the banks energy policy for renewable energy and contributes to the Bank's priority policies on Renewable Energy and Climate Action.
113. Firstly, it is acknowledged at paragraph 26 of the Committee Proposal that the Project's economic cost of power generation is above the applicable Bank's economic threshold for mature renewables, due to the "very low efficiency" of the plant. As noted above, whilst paragraph 26 of the Committee Proposal states that the efficiency of the plant is 35.6%, it may in fact be as low as 31.8%.
114. Secondly, the ERR figure of 5% described in paragraph 26 of the Committee Proposal is reached only by factoring in the purported benefit of forest fire prevention, which as explained above, is based on a misinterpretation of law 7/2012 and is not supported by evidence (see further section B2.2(b) above).
115. Thirdly, at paragraph 29 the Committee Proposal explains that the financial sustainability of the project is supported by the regulatory framework set by the Spanish Government which ensures cost recovery for a standard biomass plant, and describes this as "generous financial support". However, as described at paragraph 42 of the Committee Proposal, if the plant is not operational by 28 March 2020 and registered in the special regime registry it will lose its support and be rendered economically unviable. This is described as a high risk.
116. ClientEarth understands that as yet construction of the Project has not commenced and that further permits are required at local level before construction can take place.
117. Fourthly, the assertion that the project contributes to priority policies on climate action is exceptionally misguided. It is clear from paragraph 8 and 45 of the Committee Proposal that the project will not rely solely on "biomass waste" or "forest residues" in the commonly known sense of the word – i.e. incidental residues which would have existed but for the project.
118. Rather, as is described in paragraph 45 of the Committee Proposal "*suppliers will need to increase their capacities (new machinery and employees) in order to deliver the required feedstock for the plant*". At paragraph 5, the Committee Proposal explains that the supplier currently manages a volume of wood which translates to 175,000 tonnes of forest residues

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per year and has signed contracts with other wood suppliers for 424,000 tonnes of forest residues. This combined with a requirement for new employees and machinery at paragraph 45 suggests that a sizeable increase in harvesting will be needed in order to create enough biomass to feed the plant.

119. This need to increase timber harvests in order to manufacture more fuel has a significant effect on the carbon emissions of the Project and ought to have a significant effect on any assessment of the contribution of the Project to EU policies on Climate Action.
120. At its most basic level, one can see that if trees are not harvested they continue to grow and continue to absorb carbon. Any increase in timber production will therefore automatically have an impact on the uptake of carbon by those trees²⁴. When calculating the impact on carbon emissions of the Contested Decision it is not sufficient to treat the fuel for this plant as any normal forest residue, because in the absence of increased logging operations triggered by the Contested Decision, those residues would not exist. Rather, any calculation must take into account the carbon emissions that would have otherwise been sequestered by growing trees.
121. Evidence exists to demonstrate that combustion of forest biomass for power generation or heating will generally release more carbon dioxide to the atmosphere per unit of delivered electricity or heat than fossil fuels, owing to biomass having lower energy density and conversion efficiency (Stahls et al., 2011; JRC, 2013; Smyth et al., 2016a; Soimakallio et al., 2016)²⁵. It is not therefore correct to say that the Contested Decision will contribute to priority policies on climate action. To the extent that the Contested Decision results in timber harvesting which would not otherwise take place, it is likely to detract from efforts to meet priority policies on climate action.
122. The Bank's list of eligible sectors and eligibility criteria for Climate Action²⁶ explains that biomass may be counted as a renewable energy "only with net GHG emissions savings demonstrated". It is not clear that net GHG emissions savings have been demonstrated in the case of this project.
123. To the extent that the Contested Decision relies on the assertion that the financing of the project is in line with the bank's energy policy for renewable energy and contributes to the

²⁴ Chatham House, Woody Biomass for power and Heat, Impacts on Global Climate (2017)
<https://www.chathamhouse.org/sites/default/files/publications/research/2017-02-23-woody-biomass-global-climate-brack-final2.pdf>

²⁵ European Academies Science Advisory Council, *Multi-Functionality and Sustainability in the European Union's Forests* (2017), http://www.easac.eu/fileadmin/PDF_s/reports_statements/Forests/EASAC_Forests_web_complete.pdf

²⁶ www.eib.org/attachments/strategies/climate_action_lending_eligibility_list_en.pdf

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Banks priority policies on Renewable Energy and Climate Action, this assertion represents a manifest error of assessment and on this ground the decision must be reviewed.

B.2.3. Manifest errors in assessment of the market failure addressed by the policy

124. To the extent that the Contested Decision is based on the Committee Proposal, it relies on an assertion in paragraph 25, that the Project will address a market failure of “Low carbon power and heat projects reduce carbon and air pollution externalities”.
125. Firstly, the suggestion that “Low carbon heat and power projects reduce carbon and air pollution externalities” is a “Market Failure” to be addressed is bizarre. A market failure is a situation where the commercial lending market cannot be relied upon to finance certain projects or categories of projects which are beneficial to society or the EU. It is not clear that this is a market failure at all. No justification is provided.
126. Secondly, it should be noted that this is not a heat and power project. Rather, it is a very low efficiency, electricity only project. Electricity only projects are by their nature significantly less efficient than heat and power projects and in this case the project is described in paragraph 26 of the Committee Proposal as “very low efficiency”.
127. Third, this is not a low carbon project. As explained above, the very low efficiency of the plant together with the fact that the Project will rely for a proportion of its fuel on an increase in forest harvesting means that the assertion that the project is “low carbon” or that it will result in reduced carbon externalities represents a manifest error of assessment.
128. Fourth, it is also incorrect to conclude that the Project will result in reduced air pollution. Biomass burning is recognised as a significant source of fine particles (PM2.5) and black carbon, and is also associated with emissions of oxides of nitrogen²⁷. Even applying Best Available Techniques, it is not possible that the Contested Decision will result in a reduction in air pollution externalities.
129. The ESDS for the Project explains that “*during operation, the main impacts are expected to result from emissions of the combustion processes*” and that “*Increased Road haulage traffic due to the regular delivery will also be a feature. Up to 70 trucks per day may be necessary for deliveries*”. In addition, if the production of fuel for the Project requires an increase in timber harvesting in the region (as per paragraph 45 of the Committee Proposal) and an associated increase in traffic movements, there is no evidence to demonstrate that the Contested Decision will result reduced air pollution externalities.

²⁷ Covered in Smoke: why burning biomass threatens European Health, Fern (2018) <http://fern.org/report/biomassandhealth>

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130. To the extent that the Contested Decision is based on the Committee Proposal, it relies on an assertion that the Project will address a market failure because the Project is a low carbon heat and power project. This assertion represents a manifest error of assessment and on this ground the decision must be reviewed.

B.2.4. Manifest error of assessment in the assessment of the quality and soundness of the project, by miscalculating the Economic Rate of Return

131. To the extent that the Contested Decision is based on the Committee Proposal, paragraph 26 of the Committee Proposal, which assesses the Project's Quality and soundness, explains that the project's economic cost of power generation is above the bank's threshold value for mature renewable energy technologies. However, the corresponding ERR is said to be 5% as the project has "*an additional benefit, in the form of forest fire prevention, which has been take into account in the ERR calculations*".
132. Firstly, the calculation of economic cost of power generation is stated to be based on the assumption that the gross efficiency of the plant is 35.6%. However, documents in the permitting process at national level indicate that the efficiency of the plant may be as low as 31.8%. To the extent that the calculation of economic cost of power generation is based on the higher electrical efficiency figure, it may well be overoptimistic.
133. The project's economic cost of power generation is said to be "*slightly above the applicable Bank's economic threshold value for mature renewable energy projects*" at 93 EUR/MWhr (paragraph 26 of the Committee Proposal). However, no strict thresholds are publicly available. Rather the EIB's guide on the Economic Appraisal of Investment Projects at the EIB (the "**Economic Appraisal Guidance**") explains that "*The Bank's approach to assessing the viability of mature renewables is based on the cost of the next best alternative, which is normally a fossil fuel alternative*". The case studies presented in the Economic Appraisal Guidance show a Combined Cycle Gas Turbine project has an electricity generation cost, with CO₂, of 51, and a comparable coal plant has a cost of 92 (Table 18.1). On the basis of these case studies, the Project would appear to have an economic cost of power generation which is higher than a coal fired power plant. If an overoptimistic figure for energy efficiency has been used, the economic cost of power generation would be expected to be even higher. This would amount to a serious lack of precaution and a manifest error of assessment.
134. Secondly, as explained above, the law relied upon in the Contested Decision (law 7/2012) does not say what the Committee Proposal purports it to say. Furthermore no evidence has been provided to demonstrate that the Project will in fact lead to forest fire prevention, and indeed, scientific evidence shows a risk that increased timber production may lead to a greater risk.

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135. In taking into account forest fire prevention in calculating ERR the Bank has made a manifest error of assessment. The Economic Appraisal Guidance explains that “*An ERR at or above the social discount rate is a prerequisite for the project to be financed by the Bank*” (paragraph 2.2.3). The Economic Appraisal Guidance suggests that the social discount rate is 5% “based on EU guidance” (see Table 8.1).
136. To date the EIB has refused to provide its economic assessment on which the assertions in paragraph 26 of the Committee proposal are based. It is not therefore clear how the assertion that the Project will prevent forest fires factors into the calculation of an ERR of 5% (although given the Project’s poor comparison to fossil fuel generation, it is logical to assume that the weight is substantial). It is also not clear what the corresponding social discount rate is and how the ERR compares. However, it is clear that this “very low efficiency” Project, which does not meet the Bank’s threshold on economic cost of power generation would have a significantly less favourable ERR without the supposed benefit of forest fire prevention having been factored in.
137. To the extent that the Contested Decision relies in its economic assessment on an overoptimistic energy efficiency figure and on the assertion that the Project will have an additional benefit in the form of forest fire prevention, these assertions represent a manifest error of assessment and on this ground the decision must be reviewed.

B.2.5. Manifest errors in assessment of the project financial risks and mitigants

138. To the extent that the Contested Decision is based on the Committee Proposal, paragraph 47 of the Committee Proposal underestimates the financial risk of the Project.
139. Paragraph 47 of the Committee Proposal states that the Financial Risk of the Project is medium and provides the following justification as “Mitigants”:

“the project seems to be well placed vis-à-vis the regulatory benchmark cost assumptions, given the economies of scale obtained from its size (50MW) and the low biomass price in the Galicia region. The Bank will require stress testing of the financial model”.
140. Paragraph 45 of the Committee Proposal states as follows:

“increased competition for wood raw material is expected and might lead to an increase in wood prices in the project’s sourcing area”.
141. The risk of increased prices in wood material in the sourcing area (described as a medium risk) would tend to undermine the argument that Financial risks are mitigated by the low biomass price in the Galicia region.

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142. To the extent that the Contested Decision relies on an assessment of financial risks of the project which is based on the low biomass price in Galicia the Contested Decision contains a manifest error of assessment and on this ground the decision must be reviewed.

Brussels, 9 August 2018

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SCHEDULE OF ANNEXES

No. of Annexes	Description
1.	Proposal from the Management Committee to the Board of Directors
2.	ClientEarth articles of association
3.	ClientEarth annual activity report (2016)
4.	ClientEarth annual activity report (2017)
5.	Client Earth legal registration with the national authority
6.	Commission Decision C(2009)3337 dated 27 April 2009

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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