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Mr. Miguel Arias Cañete
Commissioner for Energy and Climate Action
European Commission
B - 1049 Brussels, Belgium

Delft, 10 December 2015

Subject: Continued non-compliance by member state The Netherlands with the EPBD directive(s).

Dear Commissioner Arias Cañete,

With reference to our Formal Complaint of 27-2-2015 and earlier contacts with your Directorate, we herewith inform you that there is still *no sign* that the Dutch government will (*ever*) implement an 'energy performance certificate' as described in the *Energy Performance of Buildings Directives* (EPBD 2002/91 and EPBD 2010/31 – hereafter also: the EPBD).

On January 4th, 2016, the member state The Netherlands will be 10 years overdue with the implementation of article 7 of the EPBD 2002 (now article 11 of the EPBD 2010).

Your DG-Energy has informed us (Ref. Ares(2015)3735235-10/09/2015) that the European Commission is monitoring the transposition of the EPBD, with a focus on

- Full Transposition
- Correct Transposition
- Correct Application

Although the distinction between these terms is cumbersome¹, it is clear that also the European Commission is of the opinion that The Netherlands has failed to comply with the EPBD.

However, in spite of 3 infringement procedures, the European Commission has *not* brought this matter before the European Court of Justice. We fail to understand why this action has not been undertaken by the Commission.

CONSEQUENCES OF THE DUTCH RESISTANCE TO IMPLEMENTING THE EPBD

The Dutch companies that have specialized in energy performance advising and energy performance certification have been seriously harmed by the irregular EPBD-implementation (incomplete, incorrect). This specific group of *independent experts* had legitimate expectations that the EPBD would be implemented on time and properly. There was no valid excuse for any delay.

We (the EnergyClaim Foundation and its predecessors) have brought our concerns and the related damages to the attention of the European Commission *since 2004*. With regard to the damages, the European Commission has, in response, always referred us to our national Court.

¹ For example: How can there be 'full' transposition without a 'correct' transposition?

Since 2003 the Dutch government has been aware of the damages it was causing to Energy Performance Advisors (certified, specialized companies with independent experts). After years of protests, in 2008 the Dutch government proposed mediation, but that failed in 2009. The National ombudsman declared our complaints to be justified and reprimanded the government in 2010. But the Dutch government rejected the ombudsman's findings, and in 2011 the government refused to honor the ombudsman's recommendations to solve the problems.

Consequently, EnergyClaim took the case to the Court of The Hague in 2012, on behalf of more than 80 damaged companies. We claim compensation for loss of income and damages. We also demand proper implementation of the EPBD.

In 2013 the State has testified before the Court that the EPBD has been implemented 'correctly and on time', and that Dutch energy labels are 'legally valid'.

The State also argued in front of the Court that – in spite of your Commission's infringement procedures - the European Commission had *not* taken the matter to the European Court of Justice (article 226 TFEU).

The Court of The Hague rejected our claims in 2014 - including our demand that the Court orders the State to properly implement an energy performance certificate (as prescribed in the EPBD).

Our legal procedure is now before the Court of Appeal (Gerechtshof) in The Hague.

QUESTIONS

In view of the above we take the liberty to ask you the following questions:

- a. Is it true what our government tells us, that the European Commission has accepted the current Dutch 'energy label' system for houses or that the Commission has given the Dutch authorities the clear message that this will happen (soon)?
- b. Why has the European Commission not assured a timely and proper implementation of the EPBD in The Netherlands, or taken the *adequate* actions to enforce correct compliance by The Netherlands with the EPBD (which is in force since 4-1-2003)?
- c. How can directives and "better regulations" (such as the call for another recast of the EPBD) make sense if the European Commission apparently is not capable to enforce the articles of the original directive that was unanimously adopted in 2002?
- d. Your Commission has referred us to our national Court with regard to our claim for damages that result from the improper implementation of the EPBD directive. We have done so. But this procedure is extremely costly and time-consuming. Do you agree that the European Commission is or should be directly accountable when – after notification² - it fails for nearly ten years to ensure that member state The Netherlands fully and correctly implements the EPBD?

We kindly ask you to address the above points and we look forward to receiving your reply.

We have taken the liberty to send copies of this letter to the First Vice-President of the European Commission, Mr. Frans Timmermans, and to the President of the European Parliament, Mr. Martin Schulz.

Yours sincerely,

(Original signature removed before publication on www.EnergyClaim.nl)

W. Pieter Levenbach
Stichting **EnergyClaim** Foundation

² The European Commission has sent its first infringement notification in February 2006.