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To:

Aphrodite Smagadi
Legal Officer - Aarhus Convention Secretariat
Environment Division
UN Economic Commission for Europe
S.348, Palais des Nations
CH- 1211 Geneva 10, Switzerland

From:

James Thornton

By:

Email (aphrodite.smagadi@unece.org)

London, 15 March 2011

Dear Ms Smagadi

Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with provisions of the Convention in connection with the scope of judicial review, costs, timing and other issues related to access to justice (Ref. ACCC/C/2008/33)

Thank you for your letter dated 16 February 2011 attaching Defra's follow-up of 15 February 2011 on communications ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33.

We have the following comments on this communication from Defra:

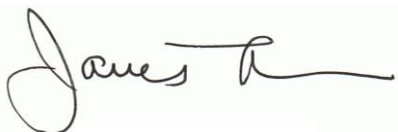
Codifying the current case law on protective costs orders (PCOs) will not resolve the areas in which the UK is in breach of the Aarhus Convention according to the findings and recommendations of the Aarhus Convention Compliance Committee of 24 September 2010:

- The suggested automatic costs cap of £25,000 is prohibitively expensive for most ordinary citizens (£25,543 was the average **annual** salary in the UK in 2010) and is therefore in breach of Article 9(4) of the Aarhus Convention.
- A rule which allows individuals to apply for a lower costs cap is envisaged, but it will be subject to means testing in a separate application. This process will continue to involve the use of judicial discretion which has been held to be in breach of the Aarhus Convention by the Aarhus Compliance Committee (at para 135 of its findings). The UK will continue to be in breach of Articles 3(1), 9(4) and 9(5) of the Aarhus Convention.
- No costs cap is envisaged for environmental organisations, only individuals. This means environmental organisations would be subject to potentially unlimited costs. Rules for such organisations would remain unchanged from the current rules in relation to which

the Aarhus Convention Compliance Committee has already found that they are in breach of Articles 3(1), 9(4) 9(5) of the Aarhus Convention.

- In addition, in the appendix entitled 'Key Features of Proposed Rule Changes', Defra states that PCOs are available 'where an individual member of the public is acting on behalf of an organisation' (but without the £25,000 cap – see above). Defra remains silent as to the situation where organisations act on their own behalf, but the statement could be read to imply that organisations bringing claims on their own behalf will not be eligible for PCOS. In the UK's recent consultation on civil litigation costs, it is said that 'qualified one way costs shifting', which is held out to be another way of potentially complying with the requirements of the Aarhus Convention, is not appropriate for non-governmental organisations (NGOs) as they benefit from protection through PCOs. Therefore, at best, the UK's stance is confusing in relation to costs protection for NGOs. At worst, it could remove all costs protection for environmental organisations. In any case, what is clear is that the UK is not changing its rules to bring it into compliance with the Aarhus Convention as required by the findings and recommendations of the Aarhus Convention Compliance Committee.
- The proposed PCO codification rules are restricted to cases which are covered by the EU's Public Participation Directive (2003/35/EC). They do not extend to any cases covered by Article 9(2) or 9(3) of the Aarhus Convention which are not covered by this Directive. In relation to all such cases, the old rules continue to apply, which have been held to be in breach of Articles 3(1), 9(4) and 9(5) of the Aarhus Convention.
- Cross caps are to be permitted under the codified PCO rules, apparently (though the wording is confusing) on the same basis as any PCO awarded to the claimant. Since respondents are likely to be corporate entities and capped PCOs only appear to be available to individuals, this introduces a very unfair system that puts respondents at an unfair advantage and discriminates against NGOs.
- Qualified one-way costs shifting, envisaged in the 'longer term' by the UK according to Defra's communication, have recently been subject to a public consultation exercise, and, if passed as proposed in that consultation, will not ensure compliance with the Aarhus Convention either. We attach our detailed responses to the UK Government's consultation in this regard.
- Similarly, we also attach our response to the UK Government's recent consultation on cross-undertakings in damages in environmental judicial review cases.

Yours sincerely



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