The Hothouse
274 Richmond Road
London E8 3QW
t +44 (0)20 7749 5970
f +44 (0)20 7729 4568

Avenue de Tervueren 36
1040 Brussels
t +32 (0)2 808 34 65
f +32 (0)2 733 05 27

Aleje Ujazdowskie 39/4
00-540 Warszawa
t +48 22 3070190

info@clientearth.org
www.clientearth.org

ClientEarth
Justice for the Planet

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, 23 June 2011

Dear Ms Smagadi

Summary of events regarding the UK's progress in implementing the recommendations of the Compliance Committee in communications ACCC/C/2008/33 and others

Introduction

1. ClientEarth wishes to update the Aarhus Convention Compliance Committee (ACCC) on the United Kingdom's (UK) progress in implementing the recommendations of the ACCC[1] before the Meeting of the Parties (MOP) to the Aarhus Convention on 29 June – 1 July. We will also be preparing a short summary in this respect for the State Parties to the Convention, but would be happy for this letter to be passed on to the MOP as well.

2. In respect of the ACCC's findings of 24 September 2010 as regards the costs of access to justice in the UK, namely that the UK must review its costs system to ensure that procedures are fair, equitable and not prohibitively expensive, the UK have responded by:

    - Preparing amendments to the Civil Procedure Rules[2] by way of codifying the case law surrounding protective cost orders (PCOs).[3]

[1] Findings and Recommendations with regard to communication ACCC/C/2008/33 (ECE/MP.PP/C.1/2010/6/Add.3).
[2] The Civil Procedure Rules govern the way in which court cases are conducted in England and Wales http://www.hmcourts-service.gov.uk/infoabout/cpr/index.htm

- Consulting on the UK's cost rules, which considered qualified one way cost shifting (QOCS) in relation to environmental cases.
- Consulting on the requirement for cross-undertakings in damages in environmental judicial review.

3. Each of the developments outlined above will be summarised in turn, highlighting that any actions taken lack substance. Accordingly, the UK has failed and continues to fail to address the ACCC's findings in relation to costs so as to ensure compliance with the Aarhus Convention.

Protective Cost Orders

4. The ACCC's recommendations in relation to PCOs were for the UK to review its costs system in environmental cases, undertake measures to overcome the problems identified with PCOs and to ensure that costs are fair, equitable and not prohibitively expensive.

5. On 15 February 2011, DEFRA proposed rule changes with regard to PCOs in England and Wales (E&W). ClientEarth responded on 15 March 2011 outlining why the proposal to clarify the rules on PCOs is wholly inadequate.[4]

6. On 15 February 2011, DEFRA also stated that these rule changes would take place by April 2011. According to information received by ClientEarth from DEFRA at the end of May 2011, the PCO rules have not yet been amended and DEFRA is still considering how best to deliver the new rules, 'in the light of recent developments'. ClientEarth are concerned that 'recent developments' could mean two recent UK cases brought to the Court of Justice of the European Union (CJEU) (see paragraphs 14-15). In 2008 the average preliminary reference took 16.8 months to complete,[5] and the average Commission case takes 50 months when the case is closed after the reasoned opinion and before the case is sent to the Court.[6] If DEFRA delays the new rules until after the CJEU's decisions, this will mean a substantial delay which will mean that the UK will remain in breach of the Aarhus Convention as found by the ACCC for a significant amount of time, possibly indefinitely.

7. In addition, the government has made no attempt to engage all relevant stakeholders and consult, formally or informally, on the implementation process of the proposed codification of PCOs. This is potentially in breach of Article 8 of the Aarhus Convention. In the UK, the Better Regulation Executive (BRE) provides guidance on when to consult the public.[7] The BRE state that '*you should consider carrying out a formal, written, public consultation exercise on measures that are likely to impact significantly on business, the public sector, charities, the voluntary sector or on a specific sector or*

[3] See letter dated 15 February 2011 from DEFRA to the ACCC, available at http://www.unece.org/env/pp/compliance/C2008-33/correspondence/7%20Jan%202011%20follow%20up/FrUK2011-02-15Followup23_27_33.doc
[4] Available at http://www.unece.org/env/pp/compliance/C2008-33/correspondence/7%20Jan%202011%20follow%20up/frClientEarth15.03.2011/frClientEarthLetterACCC15March2010.pdf
[5] Morten Broberg, Preliminary References to the European Court of Justice (March 2010), p6.
[6] Commission Communication (2007) 502 final, a Europe of results – applying Community law, p4.
[7] Government Code of Practice on Consultation (July 2008).

sectors of the community."[8] New rules on PCOs would significantly impact access to justice for charities and members of the community. No impact assessment was carried out either.

8. Therefore, the UK has made no progress in implementing the ACCC's recommendations on costs and the PCO regime, is delaying the process for complying for an indefinite amount of time and is not consulting on the rules adequately. It is still in breach of the Aarhus Convention and the recommendations of the ACCC.

Consultation on Costs

9. On 15 November 2010 the UK consulted on its civil litigation costs rules, taking the opportunity to consider Lord Justice Jackson's proposed 'qualified one way cost shifting' in the context of environmental cases.[9] ClientEarth responded in February 2011.[10] On 29 March 2011, the government response to its consultation paper failed to take the opportunity to address the issue of environmental costs, mentioning the word 'Aarhus' and 'environmental' just once in the main body of text. No draft bill on litigation costs has been published yet, but one is expected in the next few months. However, given the government's comments on the consultation, it is unlikely that one way costs shifting, whether 'qualified' or otherwise, will be introduced in the UK for environmental cases.

10. Therefore, the government's intention of addressing the ACCC's recommendations on costs through the introduction of qualified one way costs shifting in environmental cases is not likely to occur. The UK will remain in breach of the Aarhus Convention and the ACCC's recommendations.

Consultation on Cross-undertakings in Damages in Environmental Judicial Review

11. On 24 November 2010, the government consulted on the requirement for cross-undertakings in damages in relation to environmental judicial review.[11] ClientEarth responded in February 2011.[12] The government have yet to respond to this consultation paper.

12. Therefore, the UK is still in breach of the Aarhus Convention and the ACCC's recommendations on cross-undertakings in damages.

---

[8] Department for Business Innovation & Skills website, http://www.bis.gov.uk/policies/better-regulation/consultation-guidance/when-to-consult

[9] Proposals for Reform of Civil Litigation Funding and Costs in England and Wales Consultation paper CP 13/10 (November 2010), p53-55.

[10] Available at http://www.unece.org/env/pp/compliance/C2008-33/correspondence/7%20Jan%202011%20follow%20up/frClientEarth15.03.2011/ClientEarthJacksonConsultationResponseFinal.pdf

[11] Cross-undertakings in damages in environmental judicial review claims, consultation paper CP 17/10 (November 2010).

[12] Available at http://www.unece.org/env/pp/compliance/C2008-33/correspondence/7%20Jan%202011%20follow%20up/frClientEarth15.03.2011/ClientEarthConsultationResponse_crossundertakingsindamages.pdf

Other Developments

13. On 15 November 2010, the government consulted on the reform of legal aid. The consultation closed on 14 February 2011 and the government have yet to respond to this consultation paper. The government propose to cut legal aid by an estimated £350m, which would deny hundreds of thousands access to justice. This means that the UK will not be complying with the Committee's recommendations "*to remove or reduce financial… barriers to access to justice*", as required by Article 9 (5) of the Aarhus Convention.[13]

14. On 6 April 2011, the European Commission announced that it is referring the UK to the CJEU because of the UK's prohibitively high costs in relation to challenges against environmental decisions.[14]

15. There is an on-going preliminary reference in the case of *Edwards*[15] regarding the meaning of 'prohibitive expense'. This case was referred to the CJEU on 17 May 2011. This case considers whether an 'objective' or 'subjective' test should be applied to the meaning of 'prohibitive expense'. It should be noted that regardless of the outcome of this decision, the real underlying issues are those identified by the ACCC at paragraph 135 of the findings, namely, that the costs system as a whole does not meet the requirements of the Convention and that the considerable discretion of the Courts of E&W leads to '*considerable uncertainty regarding the costs to be faced where Claimants are legitimately pursuing environmental concerns that involve the public interest*'.

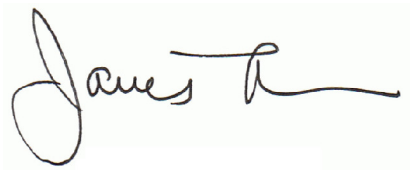
16. In case *C-240/09*[16], the CJEU ruled that in respect of challenges concerning EU environmental law, Member State courts must interpret national law, to the fullest extent possible, consistently with the objectives of the Aarhus Convention. A new case in the UK (*Austin)*[17], potentially changes the position previously argued by the courts in *Morgan*[18] so that it is possible that UK courts must interpret English law consistently with the objectives of the Aarhus Convention, rather than simply requiring that the '*principles of the Convention are at the most something to be taken into account'.*[19]

17. However, *Austin* was a permission case, and as such, the argument before the full Court has yet to be heard and is yet to be decided upon. If applied, this principle would go a little way towards improving potential compliance (by at least accepting that the Aarhus Convention's provisions on prohibitive costs apply in all cases, not just those covered by EU law Directives[20]).

[13] At paras 136 and 142 of the Committee's findings.
[14] See Commission press release, available at http://ec.europa.eu/unitedkingdom/press/frontpage/2011/1152_en.htm
[15] *R (on the application of Edwards and another v Environment Agency and others* [2010] UKSC 57.
[16] C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo ivotného prostredia Slovenskej republiky*
[17] *Austin and others v Miller Argent (South Wales)* [2011] EWCA Civ 363.
[18] *Morgan v Hinton Organics Ltd* [2009] EWCA Civ 107.
[19] Ibid., at para 44.
[20] As expressed in *Morgan*, at paragraph 47 (ii).

18. However, even this would not ensure the abolition of prohibitive costs in the UK. The UK remains in breach of the Aarhus Convention.

Yours sincerely



James Thornton
CEO, ClientEarth
+44(0) 2077495970
jthornton@clientearth.org