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ClientEarth
Justice for the Planet

Mr Jeremy Wates
Secretary to the Aarhus Convention
United Nations Economic Commission for Europe
Environment and Human Settlement Division
Room 332, Palais des Nations
CH -1211 Geneva 10
Switzerland

09 September 2009

Dear Mr Wates

**Re: 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)**

ClientEarth are concerned that a number of statements made by Defra in its Observations made to the Compliance Committee on behalf of the Government of the United Kingdom on 28 July 2009 in advance of the hearing on 24 September 2009 in relation to ACCC/C/2008/33 are wrong or misleading (for example in relation to the number of environmental claims which occur yearly in the UK), and would therefore like to take the opportunity – on behalf of the Claimants in ACCC/C/2008/33 - to help to clarify a number of issues.

**A. The role of the Aarhus Convention in the UK**

The binding nature of the Aarhus Convention (paras 8 -19, Defra Observations)

1. We welcome Defra's statement in para 8 of its Observations that the United Kingdom recognises and accepts the Aarhus Convention as binding on the UK as a matter of international law. However, even in spite of this declaration, Defra sets out repeatedly that the Aarhus Convention is merely a factor to be considered by the courts, not a source of binding law in the UK. This view is tantamount to an admission that the UK is in breach of the Convention, as it allows the UK's courts a discretion as to whether and how to apply the Convention, ergo a position where it is possible for courts to decide not to apply the provisions of the Convention and therefore not to comply with it. Indeed, and even more worryingly, in a case relating to public consultation in relation to the government's new concept of 'eco-towns', the Secretary of State for Communities and Local Government '*disputed the legal relevance of [the Aarhus Convention], as it had not been incorporated into UK law*'[1].

2. In this context, we would refer the Committee to paragraphs 5 -25 of Annex II of our Response to the Committee's questions. As to the specific issues raised by Defra in paras 18 and 19, all of these have already been addressed by us in paras 15-18 (and footnote 84) of Annex II of our Response to the Committee's questions. The two cases (*Merck and Christian Dior*) referred to by Defra in para 18 are not directly relevant, as they merely explain that international agreements, which relate to a sphere in

[1]The Bard Campaign & David Bliss v Secretary of State for Communities and Local Government [2009] EWHC 308 (Admin), at para 82 http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2009/308.html&query=aarhus&method=boolean.

relation to which the Community has not yet legislated, fall within Member State competence only. This is clearly not the case in relation to the Aarhus Convention.

3. In any case, even without showing that the Aarhus Convention applies directly in the UK as a matter of EU law, the UK would still be in a situation where it was not complying with the Convention (because it was not applying its provisions, merely considering them, or indeed not considering them at all – see *Bard* case mentioned above), and it would still fall within the Compliance Committee's powers to conclude that the UK is in breach of the Convention and make recommendations accordingly[2].

**B Implementation of Article 9 in the UK** (paras 20 – 26, Defra Observations) and **D Prohibitive Costs Complaint 2** (paras 40 – 87)

Entire costs of litigation covered

4. We welcome the fact that Defra now agrees with the arguments made in paragraphs 92-96 and 139 of our original Communication and para 40 of Annex II of our Response to the Committee's questions that '*the requirement that access to environmental justice should not be prohibitively expensive requires consideration of all aspects of legal costs and access to environmental justice as a whole, not just court fees*' (at para 44, Defra Observations).

5. As Defra has now explicitly accepted this position, we assume that it will no longer be necessary to argue this point in the hearing on 24 September.

The Jackson Review (see para 22 and para 40 of Defra's Observations and in paras 32 and 33 of Annex II, and the entirety of Annex IV of our Response to the Committee's questions)

6. We would like to highlight to the Compliance Committee that the Jackson Review will not have any binding status in law. It will contain recommendations for change, which it is hoped will be taken up and will lead to reform. Therefore, the conclusions that will be reached by the Compliance Committee in this case and its potential recommendations will be crucially important.

Compliance through a combination of a shift in PCO jurisprudence, legal aid, conditional fee arrangements and the courts' discretion

7. Defra admits that in the past there have been gaps in the implementation of the Aarhus Convention, and that '*there may remain scope for further improvement*'[3]. In relation to Defra's assertion that it is now complying with Article 9(4) of the Aarhus Convention due to a combination of factors, including more flexible PCOs, legal aid, CFAs and the court's discretion[4],we would highlight that:

    - Defra itself agrees that neither legal aid, nor CFAs, nor indeed the PCO regime on their own would be sufficient to comply with Article 9(4)[5].

[2] See Article 15, Aarhus Convention and Decision I/7 on Review of Compliance of the First Meeting of the Parties, ECE/MP.PP/2/Add.8, at para 13 and 14, and 35-37.
[3] E.g. paras 23 and 25, Defra Observations.
[4] See para 23, 25, 41, 42 , Defra Observations.
[5] See for example paras 41, 54 and 57, Defra Observations.

- The uncertainty connected to the grant of PCOs is unchanged, as is the fact that PCOs require additional satellite litigation.
- PCOs are simply one aspect of the courts' discretion.

This means that Defra can only really base its claim to comply with Article 9(4) on the (very limited) availability of legal aid, the (very limited) availability/usefulness of CFAs and the fact that courts have wide discretions as to costs awards:

*Legal aid (see also paras 52 – 54, Defra's Observations)*

8. We have already described the weaknesses of the legal aid system in E&W[6]. In addition, it may be helpful to mention that there is a very recent consultation by the Legal Services Commission which has potential adversely to affect funding for environmental claims still further[7].

*Conditional fee agreements (see also paras 55 – 57, Defra's Observations)*

9. Conditional fee arrangements are currently only of very limited usefulness in the environmental context, particularly in relation to judicial review actions, and are completely unfeasible if the current PCO jurisprudence continues. This is explained in paras 27 and 28 of Appendix IV of our Response to the Committee's questions and in the Jackson Review, Part 7: Chapter 36, para 3.8 and 4.5.

*The courts' discretion (see also paras 36, 47, 48, 68 – 79, Defra's Observations)*

10. Defra argues in para 36 that because of the variety of prospective claimants' means, discretion is '*inherently desirable – certainly not objectionable by reference to Article 9(4)*'. However, we have already explained in detail in our Communication[8] how it is precisely the courts' discretion in relation to costs awards which leads to such a degree of uncertainty that claimants cannot rationally face the possible costs of bringing environmental proceedings (and cannot easily insure against them either).

11. As already stated, this is linked to the general presumption in English law that the loser should pay the winner's costs, but also to the jurisprudence on PCOs. Merely being obliged to consider the Aarhus Convention in deciding on PCOs (see section below) or in making the final costs order in a case, cannot change this and is not evidence that courts are complying with the Aarhus Convention[9].

12. In this context, we would also refer the Committee to paragraphs 42 – 44 of Annex II of our Response to the Committee's questions, which explain that a mere discretion which may be exercised to comply with EU legislation is not sufficient to properly implement EU Treaty obligations. This approach has now been confirmed by the European Court of Justice in the recent case of *Commission v Ireland*[10], which establishes that the courts' discretion in relation to costs orders

    '*is merely a discretionary practice on the part of the courts ... which cannot, by definition, be certain ... cannot be regarded as valid implementation...*'[11].

[6] See Appendix III of our Response to the Committee's questions and paras 123 – 126 of our original Communication, and see also paras27-33 and Annex II of the Sullivan Report and paras 21-40 of the Liberty Report.
[7] See Ministry of Justice, *Legal Aid: Refocusing on Priority Cases*, Consultation Paper CP12/09; pp. 8-9: http://www.justice.gov.uk/consultations/docs/legal-aid-refocusing-on-priority-cases-consultation.pdf.
[8] See paras 100 – 122.
[9] As asserted in Defra's arguments in para 79 of its Observation.
[10] Case C-427/07 at paragraphs 54-55 and 92-94, details of which have been sent to the Committee by CAJE.
[11] At paras 93 and 94.

13. Although this case only strictly relates to Article 9(4) as implemented in the Environmental Impact Assessment and Public Participation Directives, the underlying principle is one of general EU law and therefore applies much more generally to the requirements of Article 9(4) in general, and to any attempt to implement the Aarhus Convention through procedures based on judicial discretion. Therefore, the same reasoning applies both to the issue of the application of the 'loser pays' rule and the award of PCOs, as well as certain aspects of the review of substantive legality and timing issues where courts are given wide discretions.

14. Moreover, with regard to Defra's Observations in paras 72 and 73, an additional consequence of the Court's potential discretion (which in our experience is very rarely exercised in favour of the claimant) is that there is no certainty in advance.

*PCOs* (mainly paras 58 – 67, Defra Observations)

15. We dispute the Government's view that there has been any significant change in judicial practice in relation to PCOs. To the extent that there has been a slight shift in focus, it is still not sufficient to comply with the Convention, as the fundamental problems of uncertainty about potentially prohibitive costs remain, both when PCOs are granted and when they are not granted.

16. In fact, the cases attached by Defra in Annex III, which are provided as evidence to prove this shift in emphasis merely appear to show (in addition to some of the issues already highlighted above):

    - support for the conclusions of the Sullivan Report and the fact that the UK appears to be in breach of the provisions of the Aarhus Convention;
    - the fact that courts have the discretion to take a relatively flexible approach to some of the principles set out in *Corner House*[12], for example in relation to exceptionality or private interests, but no duty to do so.

17. However, the cases in Annex III do not :

    - Add any certainty that a PCO will be given in an environmental case, what the nature of a PCO will be, or even whether it will be reversed during the hearing of the case. However, even under the apparently new and flexible approach to PCOs, the Master of the Rolls, the second most senior judge in England & Wales, warned '*costs should ordinarily follow the event ... it is for the claimant who has lost to show that some different approach should be adopted on the facts of a particular case*' [13] and that this rule should only be departed from exceptionally[14]. The judge in the *Bassetlaw* case also added that '*there is a danger of losing sight in all of this of the fact that a decision as to costs lies in the discretion of the judge*[15]', which summarises the jurisprudence of the English courts rather succinctly and highlights again the extent of the court's discretion and the uncertainty this causes.
    - Guarantee that a flexible approach will be taken in allowing that a case is in the public interest – see our original Communication, the Sullivan Report and the Jackson Review, as well as numerous other reports[16].

[12] *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600

[13] At para 29, *Davey* and para 23 of *Bassetlaw* in Defra's Annex III..

[14] At para 29, *Davey*.

[15] *Bassetlaw*, at para 27, see Defra's Annex III.

[16] At paras 112 – 118 and the entirety of Annex IV of the Communication, see also the Sullivan Report at paras 41 – 55 and Appendices 3 and 4, CAJE's amicus brief at paras 37 -44 and the Jackson Review at Part 7: Chapter 35, paras 3.1 – 3.7, and 4.1 – 4.8, and Part 7: Chapter 36, para 4.4 and 4.6 – 4.9.

- Address the claimant's own, potentially substantial, legal costs: As pointed out by Lord Justice Jackson (in Part 7: Chapter 36, para 4.5), most claimants in environmental judicial review claims can only meet their own costs through legal aid (which is of very limited application, as already seen) or under a CFA, which, as also already explained, will not be effective if the claimants' costs as well as the defendants' are capped in a PCO, forcing claimants into a position where environmental judicial review applications can only really be made if the claimants' lawyers are acting pro bono.

The meaning of 'probitively' expensive

*Article 3(8)*

18. Defra argues in paras 45 and 71 of its Observations that Article 3(8) of the Convention in combination with Article 9(4) allows the use of the loser pays rule, and permits costs that are '*merely 'expensive''*, as long as they are not 'prohibitively' expensive. However, a careful reading of Article 3(8) shows that only 'reasonable' costs can be awarded, and we would argue that on any interpretation 'expensive' costs are not 'reasonable'.

19. In any case, the purpose of Article 3(8) is not to deal with the reasonableness of court fees, but rather to protect members of the public from persecution and harassment if they want to assert their rights under the Convention. Excessive costs awards could amount to persecution and harassment, but Article 3(8) seeks to clarify that 'reasonable' court fees should not. This is confirmed by the opinion of Advocate General Kokott in *Commission v Ireland*[17], where Ireland made a similar claim to Defra's.

*What is reasonable?*

20. Through its Observations and the case law contained in Annex III, Defra makes it clear that it (and/or the English courts) do not regard the following costs as unreasonable:

- £2,000-£7,000 for an application for a PCO (in addition to the underlying judicial review application)(see para 64, Defra Observations): In our view this is wrong - such costs are excessive – the Sullivan Report similarly suggested a much lower risk (£500[18]);
- In *Bassetlaw*[19], listed in Defra's Annex III, the Court of Appeal agreed that a costs cap of £50,000 was reasonable and not prohibitively expensive[20] in relation to an application to quash the grant of planning permission: In our view, costs of £50,000 are completely unreasonable and excessive.
- In para 66 of its Observations, Defra states that £10,000 at first instance and a further £10,000 [21]on appeal is an affordable and reasonable PCO cap for a small NGO, such as *Buglife*. We disagree. £20,000 is not a cost that many NGOs, especially small NGOs, can afford. Indeed, we understand that Buglife itself struggled to raise these funds, and was only able to take on the appeal and application for a second PCO by dint of generosity of some members and reorganisation of other more important conservation priorities, and because the costs straddled two financial years. Thus in contrast to Defra's Observations at para 66, the problem was that Buglife's finances were not considered when setting the level of the cap. In this context, it should be explained that NGOs are subject to very strict

[17] At para 90.
[18] See Appendix 4, bullet point 6 of Sullivan Report.
[19] See *Littlewood* in Defra's Annex III.
[20] At para 24 of judgement.
[21] See for example, para 2.4.2 Conclusions of Milieu Report Executive Summary. In addition, the UK was one of only five EU Member States identified by the Milieu Study as providing over-all unsatisfactory access to justice in environmental matters (together with Austria, Germany, Hungary and Malta (see table in part 3 of the Executive Summary Report).

rules as to how to apply their available funds (both restricted and unrestricted), and do not have excess monies in reserve to be able to pay (uncertain amounts of) costs in court proceedings.

21. In the context of reasonable costs, we would also draw the Committee's attention to the fact that out of the 25 EU Member States reviewed in the Milieu Study[22], and judging, in addition, by our own review of the legal systems in the United States and New Zealand, the UK has the highest costs barriers to access to environmental justice out of all these 27 countries.

<u>The number of environmental cases</u>

22. Defra claims in paragraph 23 that there cannot be a problem with access to justice, because there has never been a substantiated complaint against the UK to the Committee, and because there are a large number of environmental claims before English courts[23].

23. We fail to see how the first point serves to show that the UK is compliant with the Aarhus Convention. In relation to the second point, Defra refers to a number of 150 environmental claims a year in England & Wales, a number it claims is mentioned in the Sullivan Report itself[24]. However, Defra's statement in this regard is simply not true. It is a complete mis-interpretation and mis-representation of the Sullivan Report. The Sullivan Report found that in 2007, 155 cases were '*lodged*' in the Administrative Court in relation to land, pollution and town & country planning[25], of which only a small proportion were actually environmental cases: only around 20 cases a year[26]. Only around 20% of cases lodged actually proceed beyond the permission stage to actual judicial review proceedings[27]. In addition, according to the Sullivan Report, information from leading UK environmental organisations showed that they only brought one case a year, if any[28]. Therefore, Defra's figures quoted are not just mis-leading, they are simply wrong.

24. Furthermore, Defra's argument in para 43(iii) that there is no problem with access to environmental justice in the UK, as it has not been argued by the Communicants or CAJE that there are fewer environmental challenges in the UK than elsewhere, is fundamentally mis-leading. It is simply not possible to generalise like this and draw valid comparisons, because:

- socio-cultural conditions differ between countries;
- access to justice in different countries occurs in many different ways, including judicial and administrative procedures;
- the conditions and obstacles to access to justice are different in each individual country: some countries may have broader legal standing , but high costs (e.g. UK); others may have very restrictive standing requirements, but low costs (e.g. Germany)[29].

[22] For example at Sections 2.5,3 and 4 of *Executive Summary Report on access to justice in environmental matters, see* also Summary Tables in Appendix.
[23] See also para 43(1) Defra Observations.
[24] At para 103, Sullivan Report..
[25] Ibid. at para 103.
[26] Ibid. at para 104.
[27] See Jackson Report, para 3.7, Chapter 5; and confirmed by figures cited in the Sullivan Report – at para 105.
[28] See para 104, Sullivan Report and see also Annex V of our Communication, in particular at paras.5 - 8.
[29] See Part 2.1 and 2.2 of the de Sadeleer Report referred to at point 12 of Annex VI of our original Communication and Annex V of our Communication.

Availability of alternative avenues (para 50 and 51 Defra Observations)

25. Here we would comment that none of the alternative avenues described by Defra result in binding and enforceable decisions by administrative/judicial bodies, nor do they provide 'adequate and effective remedies', including injunctive relief, under Article 9(4). We would also refer the Committee to paras 34-35 of Appendix II and para 4 of Appendix III of our Response to the Committee's questions in this regard.

Liability for third party costs (para 74, Defra Observations)

26. Defra is correct in asserting that it is usual for an unsuccessful party only to be liable for one set of costs. However, it is nonetheless possible to be liable for an interested party's costs too[30]. For example, if the interested third party demonstrates a separate issue which needs to be heard, or it requires separate representation, then the claimant may be required to pay the interested party's costs[31]. As the '*Ghosts Ships*'[32] case shows, such costs can be potentially substantial[33].

27. Therefore, because experience shows that interested parties do apply for their – very substantial – costs in relation to environmental judicial review cases, and there is a possibility that they might be successful, this is an additional risk of added costs, which most claimants in environmental cases cannot afford or justify incurring.

Interim injunctions and cross-undertakings for costs (paras 80 – 85, Defra Observations)

28. We refer the Committee to the arguments set out in paras 119 – 122 of our Communication and in para 73 of the Sullivan Report. In addition, in spite of Defra's assertion that cross-undertakings are not always required, the cases it cites[34] and the conclusions it arrives at[35] go to show that cross-undertakings in damages are generally required. *SmithKline Beecham PLC & Others v Apotex Europe Limited & Others*[36] sets out the court practice for requiring cross undertakings in damage.

**C Substantive Review: Complaint 1** (paras 27 – 39, Defra Observations)

Does the right to challenge the acts and omissions include a right to challenge the 'substantive legality' under Article 9(3)? (paras 27(3), 31 - 37, Defra Observations)

29. We only addressed this question in our Communication very briefly[37], as the point seemed to us self-evident. However, in response to Defra's assertions, we would now like to address this issue:

    - Article 9(3) has a different focus from Article 9(2). It does not just relate to the acts and decisions of public authorities. It also affects the acts and omissions of individuals. Moreover, it relates to all breaches of national environmental laws (which, as a matter of international and EU law necessarily also includes the Aarhus Convention – see above), not just breaches of provisions of the Aarhus

[30] As referred to in the example in paras 105 and 106 of our Communication.
[31] See first paragraph of headnote of *Bolton*, referred to by Defra in para 74 of its Observations.
[32] See para 106 of the Communication.
[33] See also para 73, Environmental Justice Project Report at para 9 of Annex VI of our Communication and para 6, CAJE 07/04 Briefing – at para 7 of Annex VI of our Communication.
[34] See para 84 Defra Observations.
[35] See para 85 Defra Observations.
[36] [2005] EWHC 1655 (Ch) at paras 25 – 49: http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2005/1655.html&query=apotex&method=boolean.
[37] see para 68.

Convention itself. This means that the underlying right to access to justice in Article 9(3) has necessarily been expressed in a more general and wide way than in Article 9(2), which is much more specific in its focus.

- It seems very obvious that a challenge to acts and omissions which contravene national environmental laws, i.e. breaches of environmental laws, must be a challenge to the legality of such acts and omissions. What else could it be?
- Similarly, it seems very obvious that a challenge to the legality of acts and omissions must include all sub-categories of what 'legality' comprises, including procedural and substantive legality.
- Article 13(1) of the Environmental Liability Directive reflects the access to justice requirements of Article 9(3) of the Aarhus Convention by providing for review of the 'procedural and substantive legality' of decisions, acts and failures to act. Therefore, such procedural and substantive legality review must be implicit in Article 9(3).
- Without a right to review the procedural and substantive legality of a case, it is impossible to fully meet the requirements of certainty, transparency, accountability, fairness and equity that are needed to comply with Article 9(3), or the requirement of adequate and effective remedies, including injunctive relief under Article 9(4), or to meet the goals and objectives of the Aarhus Convention, in particular, its expectations for wide public access to justice[38].

30. Defra's interpretation as set out in paras 33 – 35 of their Observations would render Article 9(3) completely meaningless.

<u>The meaning of 'substantive' legality</u> (see paras 27(1) and (2), 28 – 30, Defra Observations)

31. Defra suggests that Articles 9(2) and 9(3) reflect the scope of judicial review in the United Kingdom, which does not cover a 'full merits review'[39] and do not allow a right to challenge '*the factual basis of any decision*'[40]. Instead, Defra argues that 'substantive' legality under Article 9(2) merely covers unlawfulness and unreasonableness, as interpreted by the English courts in relation to judicial review actions in England & Wales[41].

32. The issue thus becomes one relating to the correct interpretation of the word 'substantive'. Although it is, in our opinion, in any case self-evident that 'substantive' legality includes 'factual' legality, i.e. the possibility to review the 'factual' legality of a case, it may be helpful to cite some arguments in support of this view:

    - It is clear from the combination of statements made by the European Court of Justice in *Commission v Ireland*, and by Advocate General Kokott in her Opinion on the case[42], that the European Commission argued that merits review should be part of Irish judicial review law in order to comply with the Article 3(7) and Article 4 of the Public Participation Directive, and that Ireland had therefore failed to transpose these requirements. In its summary of the Commission's case, the European Court of Justice merely referred to '*the substantive legality of decisions, acts or omissions*[43] in order to

[38] See for example Recitals 10, 11, 18 relating to accountability, transparency, accessible effective judicial mechanism, protection of legitimate interests and law enforcement.
[39] See para 30, Defra Observations.
[40] See para 30(i) Defra Observations.
[41] See para 28 -30, Defra Observations, and see also paras 73 and 74 and Annex II of our Communication for a brief summary of the law of judicial review in England & Wales.
[42] See e.g. ECJ judgement at para 74, explaining that Ireland argued that an exhaustive review of the merits of a decision was not required and statements by Advocate General Kokott in her opinion at para 81 and 83 referring to two Irish cases in which the issue of merits review is raised.
[43] At para 73 of judgment.

describe the Commission's case, thereby implying that this included merits review by its very nature. However, the European Court of Justice left this point unresolved, because it held that Ireland had not actually failed to transpose the Directive in this regard, but that no judgment could be made on the **extent (and quality)** of Ireland's implementation[44].

- As explained in our Communication in paras 73 – 74 and Annex II, paras 5-8, there is actually already scope, albeit very limited, within the English legal system to challenge the factual legality of a decision. As in relation to costs, the application of the relevant doctrines hinges on the interpretation/discretion of the judges, and is only applied very restrictively. In any case, if our interpretation is correct, the mere existence of a possibility (discretion) to apply the law in compliance with the Aarhus Convention, would not actually be sufficient to comply (see *Commission v Ireland* case and paras 12 and 13 above).
- We refer to the arguments set out in paras 79 – 81 of our Communication, which show that other jurisdictions regard it as self-evident and obvious that a substantive review of the legality of a decision should include the review of the underlying facts and factual legality.
- In addition, the European Court of Justice itself has confirmed this point both in relation to the review of decisions of Community institutions in general[45] and in relation to national cases on environmental impact assessments[46]. Thus, it said in *Tetra Laval*:

  '*Not only must the Community Courts, inter alia, establish whether the evidence relied on **is factually accurate**, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is **capable of substantiating the conclusion drawn from it**.*[47] (emphasis added)

  This statement reflects the EU law view that the review of the material accuracy of facts is one aspect of judicial review in general.
- Moreover, there is a continuing disparity in English domestic law as to the right of appeal in development control (and other) decisions such that an applicant who is refused (say) planning permission may appeal to the Secretary of State, with a right of review of the facts, but third parties cannot do so and have to proceed by the more difficult route of judicial review with the problems in relation to factual review that have already been set out.
- The practical objections set out by Defra in para 30(iii) and (iv) reflect weaknesses in the English legal process, but should not be allowed to excuse the UK from having to comply with the Aarhus Convention.

**E Acts of Private Individuals: Complaint 3** (paras 88 – 93, Defra Observations)

33. Most of the examples that Defra sets out in paras 88 -93 refer to rights either of the public to complain or report environmental cases to public bodies, or they refer to proceedings that are brought by public authorities against individuals, or by directly affected individuals against other individuals. In this context, we also believe that Defra's comments as to the usefulness of the Ombudsman process, for example, are considerably overstated. In any event, this process is not a means of challenging decisions themselves, but rather the administrative processes that leads up to decisions. In other words, decisions are never quashed, but one can obtain compensation (usually very low). In any case, none of the proceedings listed

[44] See paras 87 – 89.
[45] See Case -12/03 *European Commission v Tetra Laval BV*.
[46] See for example Cases C-75/08 *Mellor v Secretary of State for Communities and Local Government*; see in particular paras 59-66; and C-435/97 *WWF v Autonome Provinz Bozen*, at paras 48-49.
[47] At para 39.

satisfy the conditions set out in Article 9(3) for the public to bring administrative or judicial proceedings against individuals for breaches of environmental laws, where such proceedings also have to satisfy:

- the requirements of Article 9(4) relating to equity and fairness and the availability of effective remedies, such as injunctions or declarations;
- the requirement for effective judicial mechanisms and proper enforcement of environmental laws (see Recital 18 for example);

34. Defra's failure to identify any appropriate procedures shows that what is needed in the UK is an effective quasi-judicial review type procedure through which the public has a mechanism to enforce environmental laws with a right to effective remedies and sanctions.

**F Timing Rules: Complaint 4:**

35. In our opinion, Defra's observations have already been appropriately addressed in our original Communication (paras 161 – 169). We disagree with Defra that rules on timing are reasonable and would argue that:

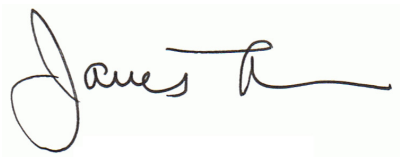
- time limits for judicial review are unreasonably short;
- the additional requirement for promptness once again allows a degree of discretion which provides uncertainty and is not in compliance with the rule that a discretion of the court is not sufficient implementation of EU law (see *Commission v Ireland).*

36. In relation to Defra's reference to human rights and national case law on the acceptability of the requirement for 'promptness' in the English rules, environmental public interest cases should be distinguished from other types of cases involving private interests. Just because a rule is not a breach of Article 6 of the European Human Rights Convention, does not mean that it is not in breach of the Aarhus Convention. Considerations of fairness and equity, transparency and rights to enforce under the Aarhus Convention need to be considered in addition to any human rights arguments. We also refer to paras 168 and 169 of our Communication.

<u>Conclusion</u>

We hope that the above serves to further elucidate some of the relevant core issues. In this document we have only sought to address some of Defra's observations regarding our general legal case, because we felt that not to do so would have meant that too many factual and legal errors and misrepresentations would need to be dealt with in the hearing on 24 September. However, we have not addressed any questions in relation to the Port of Tyne case, as this would have resulted in too large a document and should better be left for the hearing itself.

Yours sincerely



James Thornton
Chief Executive Officer/General Counsel