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Dear Ms Smagadi

RE: Decision IV/9i of the Meeting of the Parties to the Aarhus Convention

1. We refer to the Committee's letter of 8th October 2012. Following the endorsement of the Committee's findings and recommendations with regard to communication ACCC/C/2008/33 we note that the Meeting of Parties (in decision IV/9) requested that the Committee provide advice and assistance and, where appropriate, make recommendations to Parties concerned in the implementation of measures referred to in decision IV/9i.

2. We reply on the basis that this request for further information forms part of the Committee's work in respect of decision IV/9 and our report on progress in complying with the Committee's findings and recommendations. We are, however, disappointed that the Committee is making requests on some matters that did not give rise to a finding of non-compliance and others which were not considered by the Committee in its findings or recommendations. Our response is confined to those matters that arise from decision IV/9i, and which relate to the Committee's findings and recommendations on the original communication, in order to assist the Committee in the terms given under decision IV/9. For example, as the Committee notes, the United Kingdom was not found to be in non-compliance with respect to substantive legality. We do not propose to add to the statements made in respect of decision IV/9i on this point, including those set out in our letter of 17th September 2012.

3. As the Committee has been made aware, proposed changes to the Civil Procedure Rules in England and Wales designed to address the findings of non-compliance were

consulted on by the Ministry of Justice. Changes were made through the Civil Procedure (Amendment) Rules 2013, which come into force on 1st April 2013.[1]

4. Proposed changes to legislation in Northern Ireland designed to address the Committee's findings were consulted on by the Department of Justice. It is proposed that regulations will be made providing a protective costs order regime to apply to judicial reviews and statutory reviews to the High Court in Northern Ireland of decisions, acts or omissions subject to the Convention. It is intended that these will also come into operation in April 2013. The amendments are very similar to those which will apply in England and Wales.

5. The Scottish Government has consulted on introducing a costs capping regime via court rules on protective expenses orders in Scotland following the Committee's findings. The making of rules in response is the responsibility of the Court of Session. It is understood that rules designed to address the findings of non-compliance will be made shortly.

6. There are a wide range of people and groups as well as the communicants and observers to this case who will be affected by changes to the Civil Procedure Rules and their equivalents in Scotland and Northern Ireland. We trust that the Committee will agree that the United Kingdom must be able to consider the views of others alongside those of the communicants and observers in reaching any decision, within the framework of compliance with article 9. The views of the communicants and observers are important, and it is clear that the Committee has found their comments of assistance in preparing its letter. However, the promotion of such views must not be to the exclusion of those that have been expressed by others who are also entitled to have their submissions considered as part of the overall decision-making process.

7. The United Kingdom welcomes the opportunity to provide an update at this stage, following decision IV/9i. The Committee will also have noted the ongoing proceedings in Case C-260/11 (reference for a preliminary ruling in *R. (on the application of Edwards and another)* v *Environment Agency*) and the infraction proceedings against the United Kingdom on the EU Public Participation Directive held pending the outcome of the *Edwards* litigation, and will therefore appreciate that the position cannot yet be regarded as settled.

Responses to specific questions

8. Our responses are set out below by reference to questions in the letter of 8th October 2012, and refer to the amendments to the Civil Procedure Rules in England and Wales:

i) "**Will the new rules on PCOs apply to all Aarhus-related cases, not just those regarding public participation?"**

Yes. The amendments made by the Civil Procedure Rules will apply to "Aarhus Convention claims", defined in rule 45.41(2) as: "a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject".

[1] Available at: http://www.legislation.gov.uk/uksi/2013/262/contents/made.

ii) **"Do the more limited PCOs only apply to judicial review cases or also to statutory review cases, such as those involving challenges to planning decisions?"**

The amendments will formalise, within the Civil Procedure Rules, principles for the award of PCOs that were developed by the courts in the context of judicial review cases. These were considered at length in the Committee's findings and recommendations. If the reference to 'planning decisions' is to third party appeals against planning decisions (rather than, for example, an appeal by the person who made the planning application), it is judicial review that provides third parties with the means of challenge.

iii) **"Do the more limited PCOs apply to each stage of the proceedings, i.e. does a judge in first, second and third instance re-determine whether the limits are to apply anew and at the levels of GBP 5 000, 10 000 and 35 000 at each level or will a different manner of granting PCOs be applicable for appeals, and if so what system?"**

The cost limits apply to any Aarhus Convention claim, which is a claim for judicial review. The fixed recoverable costs limits apply only at first instance. On appeal, the general rule proposed by Lord Justice Jackson, for all cases which were under a fixed or no-costs regime at first instance but enter a costs-shifting (i.e. "loser pays") regime on appeal, will apply. That rule (which will be a new rule 52.9A) provides for the court at the outset of the appeal to determine what the costs position should be, and to be able to order a recoverable costs limit, taking account of the means of the parties, the circumstances of the case, and the need to facilitate access to justice.

iv)**"Will a judge have discretion in granting the PCOs and if so what conditions frame that discretion? Or does an Aarhus-related case automatically engage the proposed PCOs"**

Limits on costs apply where a claimant has stated in their claim form that they are making an Aarhus Convention claim and ask for it to be treated as such, unless the defendant successfully argues before the court that it is not an Aarhus Convention claim. The new rule 45.44(3) provides that, in proceedings for determining whether the case is an Aarhus Convention claim, where the court holds that it is not, the court will not normally make an order for costs. If the court holds that it is an Aarhus Convention claim in such proceedings, it will normally order the defendant to pay the claimant's costs of those proceedings on the indemnity basis.

v) **"If any conditions apply, is the fact that an individual or an NGO is acting in the public interest among the relevant conditions?"**

Under the new rules, the limits on costs may apply to any Aarhus Convention claim where the claimant asks for the case to be treated as such. It will be for the defendant to argue before the court that a claim is not an Aarhus Convention claim.

The Committee will have noted Advocate General Kokott's opinion in Case C-260/11, which includes a discussion of how individual interests and the prospects of a claim being successful may have a bearing on establishing public interest and associated levels of permissible costs within the framework of EU legislation.

vi) **"How were the figures GBP 5 000, 10 000 and 35 000 determined? In other words, why does the Party concerned find that these figures meet the conditions of article 9, paragraph 4 of the Convention?"**

The figures were included in the public consultation on formalising PCOs in the Civil Procedure Rules, and consultees were asked their views on these figures. The limits on costs for individuals and others bringing an Aarhus Convention claim of £5,000 and £10,000 respectively take account of the amounts developed by the courts for PCOs (notably the decision in *R. (Garner)* v *Elmbridge Borough Council* [2010] EWCA Civ 1006). The £35,000 limit for defendants reflects a reasonable limit on the amount of recoverable costs that may be incurred by a claimant bringing an Aarhus Convention claim.

In the case of an individual whose financial means might dissuade them from bringing proceedings because of the possibility of having to pay costs of up to the £5,000 limit, it is likely that they would be entitled to legal aid (subject to the usual means and merits tests).

Enabling a claimant to recover up to £35,000 of their costs from a defendant will still enable them to recover the reasonable costs of bringing a judicial review if an award is made, which again is consistent with the article 9 paragraph 4 requirement to ensure that procedures are not prohibitively expensive. We do not consider it to be reasonable, in the context of a limit being placed on how much a defendant may recover in costs, to expose a defendant to what may be excessive costs incurred by a claimant. The £35,000 limit still allows a claimant to recover its reasonable costs from a defendant.

The response to the public consultation regarding England and Wales was published by the Ministry of Justice[2] and further explains the reasoning behind these figures.

We again note the Advocate General's opinion in Case C-260/11 in relation to the EU implementation of the Convention, and that judgment from the Court is awaited.

vii)**"Who are to be considered as 'groups' under the proposed PCO rules?"**

We note that the Committee did not make any specific findings or recommendations regarding 'groups' in this case.

A claimant bringing an Aarhus Convention claim and asking for it to be treated as such may be subject to the limits on recoverable costs. The limit is £5,000 in the case of an individual, where that claimant is acting only as individual and not on behalf of others. In other cases the limit is £10,000.

viii)**"Given that the recovery of success fees has been prohibited by the 2012 Legal Aid, Sentencing and Punishment of Offenders Act, might it be that this prohibition takes away from public interest litigants what might be achieved through the proposed limitations of PCOs (resulting in a neutral position or limited positive effect, when it comes to the reducing of the costs of engaging in judicial review procedures)?"**

[2] https://consult.justice.gov.uk/digital-communications/cost_protection_litigants/results/cost-protection-litigants-response.pdf

The proposed reforms on costs limits address the findings and recommendations of the Committee in this case. As far as we are aware, no communication, submission or referral has been brought before the Committee in respect of the regime referred to above, and we do not consider this to be within the scope of a request for further information in respect of the United Kingdom's compliance with decision IV/9i.

ix) **"Will [cross-undertakings in damages in case of injunctive relief] remain in place?"**

Yes. However, the amendments to the relevant Practice Direction of the Civil Procedure Rules will make specific provision for Aarhus Convention cases. If the court is satisfied that an injunction is necessary it will have regard to the need for any order for an undertaking from the applicant not to be such as would make continuing with the claim prohibitively expensive for the applicant. This protects applicants for injunctions in Aarhus Convention cases from orders to give undertakings in damages that would otherwise be prohibitively expensive and in breach of article 9 paragraph 4 of the Convention.

x) **"What plans does the Party concerned have for the reduction of costs in case of private environmental nuisance claims?"**

The Committee did not make a finding of non-compliance on this matter in this case. We do not consider this to be within the scope of a request for further information in respect of the United Kingdom's compliance with decision IV/9i.

xi) **"The Party concerned in case of time limits seems to continue to rely on judicial discretion when it comes to time limits. It is not clear to the Committee how the Party is going to ensure that the rules on time limits set a clear starting point for when the time limit starts to run; and how it is going to set a clear time limit for bringing a case against a contested decision. Could you please clarify"**

The overall time limit is quite clear. It is three months from when the cause of action arose. The requirement, over and above the three month limit, that the application be made "promptly" (which may mean that a claim is out of time even if brought within three months) is not applied in cases where a remedy for breach of an obligation or right under EU law is sought; and that will include many cases which fall under the Aarhus Convention.

Scotland

9. The position in relation to Scotland regarding each of these questions is broadly the same, although there are some differences reflecting the separate and distinct nature of the Scottish legal system, Scottish legal practice and devolved policy responsibilities. For example, the 2012 Legal Aid Act does not apply in Scotland and cross-undertakings are not typically used in Scottish litigation.

Northern Ireland

10. A similar position is expressed in proposals for Northern Ireland in respect of most of these questions, including on the scope of the amendments to the rules and the positions on appeals and cross-undertakings. The Northern Ireland regulations will apply to judicial reviews and statutory reviews to the High Court. We understand that

the consultation response will be published in March. The 2012 Legal Aid Act does not apply in Northern Ireland.

Yours sincerely,

Ceri Morgan