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Ref: decision IV/9i of the Meeting of the Parties

8 October 2012

Barbara Anning,
International and European Coordination Division,
Department for Environment, Food and Rural Affairs (DEFRA)
Area 1 Nobel House, 17 Smith Square
London SW1P 3JR, United Kingdom

Dear Ms. Anning,

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

I refer to decision IV/9i on compliance by the United Kingdom with its obligations under the Aarhus Convention, adopted by the Meeting of the Parties to the Convention at its fourth session (Chisinau, 29 June-1 July 2011).

At its thirty-eighth meeting (Geneva, 25-28 September 2012), the Committee noted the additional information submitted by you on 17 September 2012, ClientEarth (the communicant for communication ACCC/C/2008/33) on 14 August 2012 and by the Coalition for Access to Justice for the Environment (observer with regard to the original communication) on 19 September 2012.

On the basis of the information received, the Committee considered that there were concerns with respect to manner in which the United Kingdom was proposing to implement the findings in communication ACCC/C/2008/33. Those concerns pertained to the time frame within which the Party concerned was seeking to implement changes, the costs of judicial proceedings, the time limits and the review of the substantive legality. With respect to the cost of judicial proceedings, the Committee observed that the Party concerned appeared to be taking a piecemeal rather than a holistic approach. In addition, the Committee observed that judicial discretion continued to play a significant role in the proposed changes.

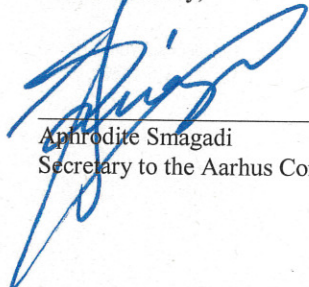
With respect to substantive legality, the Committee recalled that, while in considering communication ACCC/C/2008/33 it had not found that the Party concerned was in non-compliance in that regard, it had nevertheless not been convinced that the United Kingdom met the standards of review required by the Convention and had expressed concern. Furthermore, the Committee had considered that the proportionality principle would provide an adequate standard of review for Aarhus-related cases. In your letter of 17 September 2012, you stated that proportionality was available in EU and human rights cases, while in Aarhus-related cases substantive legality was considered in terms of irrationality or unreasonableness, as originally formulated in the *Wednesbury* case.¹ As the same statement had also been submitted to the Committee during the consideration of ACCC/C/2008/33, the Committee remained unconvinced and continued to be concerned.

1 *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223.

The Committee agreed that it would review the situation at its fortieth meeting (Geneva, 25-28 March 2013), after it had received the report due from the United Kingdom in **February 2013**. You are now invited to submit your report no later than 28 February 2013. At the request of the Committee, you are also invited to address in your report the questions annexed to this letter.

If you require clarification of any of the above, please do not hesitate to contact the secretariat.

Yours sincerely,



Aphrodite Smagadi
Secretary to the Aarhus Convention Compliance Committee

Cc: Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Office and other international organizations in Geneva
Paul Stookes, Richard Buxton Environmental & Public Law
H.L. McCracken, Cultra Residents' Association
James Thornton, CEO ClientEarth
Simon Brockington, Marine Conservation Society
Robert Latimer
Carol Day, WWF-UK, on behalf of CAJE
Gita Parihar, Friends of the Earth UK, on behalf of CAJE

ANNEX

Issues of concern and questions

Protective Cost Orders

- The Party concerned seems to be focusing on Protective Cost Orders (PCOs) for Aarhus-related cases:
 - Will the new rules on PCOs apply to all Aarhus-related cases, not just those regarding public participation?
 - 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?
 - 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?
 - 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.
 - If any conditions apply, is the fact that an individual or an NGO is acting in the public interest among the relevant conditions?
 - 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?
 - Who are to be considered as 'groups' under the proposed PCO rules?
 - 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 limitation 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)?

Cross-undertakings in damages in case of injunctive relief

- Will these remain in place?

Private law claims

- What plans does the Party concerned have for the reduction of costs in case of private environmental nuisance claims?

Time Limits

- 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.