To: Fiona Marshall Secretary to the Aarhus Convention Compliance Committee
From: Pat Swords EPAW
Re: ACCC/C/2013/96 and EU Commission's Reply in Relation to Cost of Access to European Courts
Date: 3rd December 2015

Dear Fiona

In response to the EU Commission's response of today, it is useful to first summarise the chronology of events to date:

(i) The original communication was submitted in October 2013 and considered preliminary admissible by the Compliance Committee at their December 2013 meeting.

(ii) In March 2014 yourselves in the UNECE Secretariat wrote to the EU Commission providing them with the customary five months under the Compliance Committee procedures to respond to the issues raised.

(iii) The EU Commission requested extra time and did not respond to the matters raised until mid-December 2014. The Compliance Committee procedures are that if Parties wishes to contest the admissibility of the Communication, they should do so as soon as possible, but no later than five months after receipt of Communication. However, the response in mid-November, eight and a half months after receipt of the Communication, failed to address the substantive issues raised and sought instead to contest the admissibility of the Communication, based on failure to exhaust domestic remedies, i.e. take the issues concerned into the European Court of Justice.

(iv) The Compliance Committee in June 2015 then sought a formal response from the Communicant in respect to the issues raised with regard to access to the European Court of Justice.

(v) As the Communicant I responded a few days later with a detailed reply. This pointed out that with respect to bringing an action with regard to Article 7 of the Convention on plans and programmes, no effective remedy existed at the European Court and as EPAW had already demonstrated, any access with regard to standing rights were extremely limited and did not recognise the criteria established under Irish law for environmental NGOs active in Ireland. Furthermore, with regard to appeals with respect to access to information (Article 4), there were major barriers to access to justice in the European Court due to the costs and complexity involved.

(vi) The Compliance Committee following their next meeting then had yourselves in the Secretariat write to the EU in early October 2015, pointing out that they had, on the basis of the information now available to them, re-confirmed that the Communication was admissible with respect to Article 7 and requesting the EU to provide them with examples of costs from access to information cases at the European Courts. This was to be provided by the 2nd November and that myself as the Communicant was to comment on the EU's reply within a period of seven days.

(vii) The EU wrote back to yourselves in UNECE a few days later requesting a time extension until the 21st December, coincidentally after the Compliance Committee meeting scheduled for the 15th to 18th December, citing the complexity of the issues involved. A point hard to accept, when as myself the Communicant had pointed out in my reply in June 2015, there were only six cases in the European Court in the last five years, which could be considered as relating to access to environmental information. Itself alone a clear demonstration of the practical barriers to access to justice, which were occurring.

(viii) Yourselves in the Secretariat then informed the EU Commission on the 10th November 2015 that the 16th December 2015 was now set as the date for the hearing in Geneva and that the EU Commission should bring what information they had on Article 4 to that meeting for consideration.

As it turns out the EU Commission has now replied with this documentation containing further information on its use of domestic remedies, notably, *"to provide examples of the costs for cases on access to information at all instances before the EU courts".* While acknowledging time is rapidly closing in on the scheduled hearing date of the 16th December, I would like to make a few short comments on what has been received today.

First, it is hard to see why it took so long to prepare this reply, i.e. nearly two months, as it contains very little if any additional information to what I had raised in June. There are no new relevant European Court cases referenced, while the short part of the reply, which is related to the specific questions set by the Compliance Committee, is no more that which can be described as general knowledge on the subject.

Secondly, there is again a complete fixation with the issue of admissibility and a failure to deal with the substantive issues raised to date. If we consider the Guidance Document on the Aarhus Convention Compliance Mechanisms[1], then this stresses that "Communications should be as concise as possible". Note the original Communication was concise, but it did in its Section VI on 'domestic remedies' highlight that EPAW had an on-going case at the European Court, which was then awaiting the outcome of another legal appeal there[2].

Furthermore, if we examine Annex III of the same Guidance Document on the Aarhus Convention Compliance Mechanisms, this states.

- *The fact that our proceedings will not follow the adversarial model also means that the Committee will not feel constrained to only examine those arguments presented by a communicant, by the secretariat, by a submitting Party or by a Party concerned. Since the Committee's initial purpose in each case is to establish whether there appears to be non-compliance, it may formulate its*

[1] http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf

[2] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2013-96/Communication/Communication_to_Aarhus_Convention_Compliance_Committee_by_European_Platform_Against_Windfarms__EPAW_.pdf

own arguments and draw conclusions which go beyond the scope of those presented by the parties concerned and communicant.

The fact that following the position articulated in December 2014 by the EU Commission, the Compliance Committee sought to investigate further the extent of access to justice provisions available with regard to 'domestic remedies' in the European Court is entirely reasonable. It is therefore quite remarkable that the EU Commission could conclude today in their reply:

- *33. In the EU's view, the supplementary communication should be deemed inadmissible, as it extends the scope of the original communication.*

- *34. In any event, the Communicant's supplementary claims regarding the cost of procedures on access to documents before the EU courts are unfounded. The costs related to access to documents cases in environmental matters before the EU courts are clearly not "prohibitive".*

Firstly, there has never been a supplementary communication, just clear responses to the Committee's questions.

Secondly, as the EU Commission's response clearly demonstrates, costs in the European Courts are actually "*prohibitive*", not least as there are no arrangements related to otherwise with regard to Aarhus access to information cases. Not only are there no cost protection rules, as relying on the discretion of the opposing party to only claim for travel expenses is an inadequate 'rule', but the procedure, requiring as a minimum representation by a professional lawyer in the European Court in Luxembourg, is disproportionate to the issue at stake. Namely that of routine access to information on the environment prescribed in the Convention and associated supporting documentation.

As such then, a degree of 'fairness' is required, as is recognised in other legal systems, where appeal decisions in this regard are adjudicated by offices of information commissioners, tribunals or similar lower administrative courts. In each case expensive legal representation, long distance travel or lack of cost protection are not applicable. Indeed with regard to 'fairness' one could highlight the "Aarhus Convention: An Implementation Guide", which states:

- *In its findings on communication ACCC/C/2008/27 (United Kingdom), the Compliance Committee held the communicant's judicial review proceedings were judicial procedures under article 9, paragraph 3, of the Convention, and thus also subject to the requirements of article 9, paragraph 4, of the Convention. The Committee stressed that "fairness" in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant, a public body. The Committee, moreover, held that in cases of judicial review where a member of the public is pursuing environmental concerns that involve the public interest and loses the case, the fact that the public interest is at stake should be accounted for in allocating costs. The Committee held that the manner in which the costs were allocated in that case was unfair within the meaning of article 9, paragraph 4, of the Convention and thus, amounted to non-compliance.*

Finally, one can only comment with irony on the EU Commission, who now because of budgetary constraints are having difficulties in attending in person in Geneva on the 16th December, but still expect the ordinary citizen when denied access by them

to legitimate environmental information, to hire a professional lawyer and attend a case in the European Court in Luxembourg.