Please quote the reference number below when contacting the office:

Your ref: ACCC/C/2010/55
Our ref: JN/fc/251(b)-ACCC

15 February 2011

Mr Aphrodite Smagadi
Secretary to the Aarhus Convention Compliance Committee
Environment Division
Bureau 332
Palais des Nations
CH-1211 Geneva 10
Switzerland

Dear Mr Smagadi,

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with provisions of the Convention in connection with access to information held by privatised water companies (Ref: ACCC/C/2010/55)

Thank you for your letter dated 1st February 2011.

We are grateful that the Compliance Committee has decided that our complaint is admissible and that the Committee is further considering the issues which we have raised

In the same letter you asked a number of questions which we have attempted to answer below:

Response to questions from Secretary to Aarhus Convention Compliance Committee:

1) Could you please comment on the main arguments of the decision of the Upper Tribunal (Case No. GI/2458/2010)?

The decision in Smartsource examines the definition of "public authority" pursuant to Regulation 2(2) of the Environmental Information Regulations 2004 which implements both the Aarhus Convention, as well as the EC Directive on Public Access to Information (2003/4/EC) which in turn both implements the Aarhus Convention and has direct effect in the UK.

The Regulations mirror the wording of both the Convention and the Directive in providing for situations where a public authority is obviously an emanation of state but also where other bodies or legal persons "carry out functions of public administration" (Reg. 2(2)(c)) or where such a body is "under the control of" a public authority (Reg 2(2) (d)) – which correspond to Articles 2 (2) (b) and (c) of the Convention and the Directive.

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The European and Aarhus perspective

We argue that in applying domestic law, a national court must interpret such law "in the light of the wording and purpose of the [relevant] Directive..." (Marks & Spencer v Customs & Excise case C-62/00[2002]ECRI-06325.). We do not believe that the decision does so.

Furthermore, we believe that it is a requirement of European law (and thus of the application of the Aarhus Convention by the UK as a signatory and through its implementation via the Directive) that when deciding such issues as the definition of public authority, that the court or tribunal should, *inter alia*:

i) Consider different language versions of the provision in question;
ii) Examine such versions with a contextual interpretation in relation to the objectives or purposes of the EU law in question and that
iii) a national court or tribunal must be convinced that any interpretation given should be obvious to avoid the need for a reference to the Court of Justice of the European Union.

However, in the Smartsource case, other language versions of the Directive or of Aarhus were not considered (with the exception of one minor reference by the Water Companies to the French version – which appeared in a footnote to the parties' skeleton argument). Furthermore, in order to interpret the meaning of Public authority and functions of public authority, the decision only referred to domestic law and precedent.

Hybridity (Convention 2 (2) (b) and (c)

The UK has many examples of where services which were once emanations of the state have been privatised. For instance, we believe that a water company may have public authority functions which clearly fall within 2(2)(c) of the Regulations (Aarhus and Directive – 2(2)(b) and (c)) but also undertake other functions which do not.

The Aarhus Convention Compliance Mechanism Guidance anticipates such situations: "Water management functions might be performed by either a government institution or a private entity. In the latter case the provisions of the Convention would be applicable to the private entity in so far as it performs public water management functions under the control of the government authority." This suggests that hybridity is possible under the 2(2)(c) of the Convention.

Furthermore, on page 32 of the guidance, it is written that "the Convention, however, tries to make it clear that privatisation cannot take public services or activities out of the realm of public involvement, information and participation."

However, the Upper Tribunal concluded that there was no place for hybridity in the sense that a body might have certain functions which are caught by the ambit of the Regulations, the Directive and of Aarhus whilst other functions may fall without. Bodies are therefore *in* or *out* – but cannot have functions which span both public function and private operations.

We therefore believe that the approach taken in the Smartsource case was contrary to Aarhus Convention guidance.

In support of our view, we have received a letter from the European Commission (copy attached) which indirectly questions the Upper Tribunal's approach to hybridity in stating that, "Article 2(2) was deliberately drafted widely in order to ensure that environmental information such as this would not be privatised out of public access."

Public Administrative Functions (Convention 2 (2) (b))

The Upper Tribunal relied almost exclusively on domestic case law in order to determine whether water companies could be public authorities for the purposes of 2(2)(d) of the Regulations (Aarhus – 2(2)(c) and Directive – 2(2)(c)).

The expression "public administrative functions" was therefore interpreted on a national basis and on domestic case law precedents often taken from different areas of law other than those concerning environmental information – without examining the community-wide meaning or even the community of interpretation for the signatories to Aarhus.

"Under the control of"(Convention 2 (2) (C))

The UT's decision sets the hurdle for inclusion within Regulation 2 (2) (d) (Directive and Convention 2(2)(c)) far too high and suggests that a body which is regulated but privatised is not under the control of a public authority for the purposes of the Regulations.

However, the Convention allows for situations where, for instance, water companies might carry out functions of public authority under the control of a state regulator, pursuant to Article 2 (2) (c). The Guidance helps here in explaining that such a provision "may cover entities performing environment-related public services which are subject to regulatory control…" (Page 33). The Commission's letter also reflects this saying that "given the role played by water companies in England and Wales in providing water and sewage services is regulated by legislation and carried [out] under the over-sight of government and other public administrations such as OFWAT, it would be of some concern if the information held by these companies was deemed to fall outside of public scrutiny." It indicates furthermore that "Article 2(2) of the Directive was deliberately widely drafted in order to ensure that environmental information such as this would not be privatised out of public access."

General comments on decision

Overall, we believe that the UT decision takes a very narrow view and leads us to the present situation where we are reliant for the most part on the voluntary disclosure of environmental information from water companies without the certainty of legal obligation.

It must be remembered that there is at present an inequality of access to information even within the UK given that as in Scotland and Northern Ireland water companies are state owned and therefore fall under Article 2 (2) (a). The Commission's letter, in support of this concern, indicates "such information would presumably be available in other parts of the United Kingdom and other member states where these functions have not been privatised leading to unequal access for what is effectively the same information."

We believe that the Upper Tribunal should have referred the issue to the European Court of Justice in order for these issues to be clarified but that was not done.

2) Under the applicable law, can you appeal the decision of the Upper Tribunal (Case No. GI/2458/2010)?

As explained in our previous letter, *Smartsource* was one of four appellants which appealed the decision of the Information Commissioner's Office that water companies were not

subject to the Environmental Information Regulations 2004 as they were not public authorities.

In May 2010, the Tribunal ordered that Smartsource would be taken as the "lead case" and that all other appellant cases would be "stayed" or held in abeyance – in order that the lead case could be determined first.

After the Smartsource decision, the Tribunal wrote to the parties asking if they wished to proceed with their appeals. The stay on Fish Legal's case was lifted and although one of the appellants – Mr Reeve – subsequently withdrew his appeal, the current appellants are Fish Legal and Emily Shirley.

The Tribunal produced directions (copy attached) which invited the Information Commissioner to "strike-out" the appeals on the basis that there was no reasonable prospect of the appellants' cases succeeding.

We produced a response to the application by the Information Commissioner's Office (copy attached). We argued that the European Directive had not been examined and that a reference should be made to the Court of Justice of the European Union (CJEU) for a preliminary ruling on whether the water companies came under the Directive. We had in support of this a letter from the Commission which agreed with Fish Legal's concerns and recommended that the issue should be sent up to the CJEU

The hearing took place on 7th February 2011. The water companies were invited to take part in the hearing and, although the ICO had withdrawn its own application for our case to be struck out, the water companies argued that we had no reasonable prospect of succeeding.

Given the nature of the arguments and the procedural issues involved, the appeals of Fish Legal and Emily Shirley were dismissed by the Tribunal and we are now considering an application for permission to appeal this decision.

We enclose a copy of the Order dated 14th February 2011. It is not a certainty that we will be given leave to appeal the hearing.

3) *Please provide information about the regulatory framework (including the text of the relevant laws) that governs the relationship between the State and the privatised water and sewage companies. Does the State apply any monitoring/control of the operations of these companies?*

We have enclosed a copy of the Water Industry Act 1991. This is for the most part the statute which governs the operation of the water companies. It has been amended so that references to the Director General of Water Services is now the "Water Services Regulation Authority". The "Director" is now the "Authority" - also known as "OFWAT".

There are many obligations and powers that the Act gives the water companies. Section 3, for instance, imposes general and environmental duties on water companies; Part II, chapter 1 of the Act deals with the appointment of undertakers; the Secretary of State has powers to impose conditions on appointments of undertakers (Section 11(1)). Part 2, chapter 3 of the 1991 Act, at section 27, describes the general duty of OFWAT to review the activities of water companies. Companies are also required to provide water mains to provide a sufficient domestic supply for a particular area (section 41).

Part 4 deals with general functions of *sewage* undertakers. There is a general duty upon sewage undertakers to provide and maintain a system of public sewers. Section 157 gives the water and sewerage undertakers byelaw making powers. Section 118 requires that any

person seeking to discharge trade effluent to the public sewer must have the consent of the sewerage undertaker. Sections 119 to 141 govern the water companies' consent for discharging. Section 118(5) makes it a criminal offence to discharge without the consent of the sewerage undertaker – for which the sewerage undertaker is the prosecuting authority.

The degree of control can be best illustrated by sections 6 and 7 under which the Secretary of State can appoint and terminate the appointment of a WASC as a water and sewerage undertaker.

OFWAT oversees the investments in capital infrastructure through the Asset Management Plans (AMP) by water companies with the input of the Environment Agency.

We understand that the status of water companies in England and Wales may be somewhat of a curiosity to the Committee, but we are aware that the Guidance clearly anticipates circumstances where the water services are privatised and specifically explains that the Convention would apply: "water management functions might be performed by either a government institution or a private entity. In the latter case, the provisions of the Convention would be applicable to the private entity insofar as it performs public water management functions under the control of the governmental authority".

We hope that we have been successful in setting out our view of the UT decision – but we would be very happy to help further with any queries which the Aarhus Convention Compliance Committee might have

Yours sincerely,

Justin Neal
Head Solicitor for Fish Legal

Encs.