

Our Ref: CHTS/HSA110-1129056  
Your Ref: ACCC/2/2014/100  
10 January 2018

Secretary to the Aarhus Convention  
United Nations Economic Commission for Europe  
Environment and Human Settlement Division  
Palais des Nations, Room 429-4  
CH-1211 GENEVA 10

**For the Attention of Fiona Marshall**

Dear Fiona

**Communicant's Observations on Draft Findings in ACCC/C/ 2014/100 (UK)**

I write further to your letter of 30 November 2018 enclosing the Compliance Committee's draft findings.

In relation to those findings the Committee should respectfully:

- (1) make clear, as matter of principle, that the "necessary information" (i) must include information about environmental effects (ii) must be fairly determined; and
- (2) find unfairness in the decision by the UK as to what type of data it considered necessary to assemble for the comparison of alternatives.

In addition at para 102 the draft findings of the Committee have, with respect, failed to give any meaning to the obligation implicit in the adjective "*necessary* [information]". This is an important part of the Communicant's case (see para 62). As the draft findings deal with it at para 102 this phrase in the Convention is effectively changed to "*available* [information]".

There are three problems with this. The first two relate to principle. The third to the facts of the present communication.

First: the concept of fairness cannot, consistently with the scheme and purpose of the Convention, be removed from an assessment of what constitutes the necessary information. The draft findings do that. The Committee does not need to form a view of either (a) the accuracy of data or (b) the appropriateness of choice of alternatives to state clearly that there must be a fair selection of the *type* of data supplied about the alternatives studied and that it must include environmental data.

Second: The draft findings appear to be based on failure to appreciate the context of Lithuania ACCC/C/2006/16. The partial quotation (at para 100 of the draft findings) from the last sentence of para 79 of Lithuania is a *non sequitur*. The draft findings herein states as follows:

"In this regard, the Committee recalls its findings on communication ACCC/C/2006/16 (Lithuania), in which it held that:

DAC Beachcroft LLP  
100 Fetter Lane London EC4A 1BN UK  
dir tel: +44 (0) 20 7894 6269 tel: +44 (0) 20 7242 1011 fax: +44 (0) 20 7831 6630  
email: chstanwell@dacbeachcroft.com DX 45 London

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"The Convention, while requiring the main alternatives studied by the applicant to be made accessible, does not prescribe what alternatives should be studied. Thus, *the role of the Committee is to find out if the data that were available for the authorities taking the decision were accessible to the public.*" (our emphasis)

The full quotation from Lithuania 79 has a very different emphasis:

**"Information to be made available under article 6, paragraph 6**

79. With regard to the communicants' allegations with respect to lack of certain information relevant to the decision-making (para. 45), the Committee does not consider itself in a position to analyse the **accuracy of the data** which form the basis for the decisions in question. The Convention, while requiring the main alternatives studied by the applicant to be made accessible, does not prescribe **what alternatives should be studied. Thus**, the role of the Committee is to find out if the data that were available for the authorities taking the decision were accessible to the public **and not to check whether the data available were accurate.** (our emphasis) "

There is no sound basis for the reliance placed on it for the proposition in the draft findings at 102. The proposition that the *only* requirement is that available information be made accessible does not follow from what preceded it in the Lithuania findings nor is it consistent with the overall final conclusion in the last 10 words of Lithuania para 79. The first two propositions (in the second and third sentences of the paragraph) of Lithuania para 79 are readily understandable, but the selectively quoted apparent third proposition which is introduced by the conjunction "thus" does not follow logically and substitutes "available [information]" for "necessary [information]" without any justification. The draft findings herein omit the last words of para 79 which, by contrast, do follow from the first proposition which precedes it ".....and not to check whether the data available were accurate". These last 10 words are what the Committee was considering and finding in Lithuania at para 79.

Third: (As to the facts of the present Communication): The UK chose to supply certain data about the relative benefits of the Y network in comparison with alternatives but not to assess the environmental effects. That was unfair. A finding to that effect would not imply an assessment by the Committee either of (a) the accuracy of data or (b) the appropriateness of choice of alternatives. It is difficult to see how an approach which excludes environmental data from the necessary information could be considered to be consistent with fairness under the Convention.

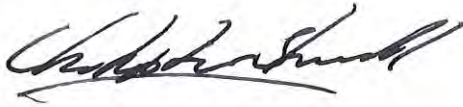
The Committee does not need to assess any facts. They were found by the High Court in the United Kingdom. The High Court held, in an unappealed finding of fact, that "alternatives to the "Y" shape, that is the inverted A, the reverse E and S shapes have **only been considered** and rejected **on their economic and business cases**"(our emphasis)(see draft findings 72) . The submissions of the UK at para 73 cannot alter the basis of factual findings made by its High Court on which the Committee should act. The critical point is that the UK does not seek to deny that the High Court made this finding. It would be impractical for the Committee to seek to assess the findings of facts of the courts of Parties. It would be a dangerous precedent to which Parties would be likely strongly to object.

In conclusion: the Committee should respectfully

- (1) make clear, as a matter of principle, that the necessary information" (i) must include information about environmental effects (ii) must be fairly determined

(2) find unfairness in the decision by the UK as to what type of data it considered necessary to assemble for the comparison of alternatives.”

Yours sincerely

A handwritten signature in black ink, appearing to read 'Christopher Stanwell', with a horizontal line underneath.

**Christopher Stanwell**  
**Partner**  
for DAC Beachcroft LLP

cc: Ms Nikita Bhangu, Department of Environment, Food and Rural Affairs, United Kingdom