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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10
Switzerland

29 April 2016

Dear Ms Marshall

Re: Decision V/9n concerning compliance by the United Kingdom with its obligations under the Aarhus Convention

1. Further to your letter of 13 April please note the response to the Committee's questions:

Please provide your general position on the communicants' and observers' criticisms regarding the recent legislative proposals to amend the costs protection regime in the Civil Procedure Rules (CPR) for the environmental claims.

The Aarhus Compliance Committee is asked to note that the proposals set out in the consultation do not represent the government's finalised policy in this area. The purpose of a consultation is to seek the views of relevant stakeholders. The Government is considering the responses, including those received from communicants carefully and these will be taken into account during the process of finalising the policy

What is the reason for amending the definition of an Aarhus Convention claim in CPR 45.41(2) to refer to claims brought by "a member of the public"? Would this term cover claims brought by more than one person? Would it cover claims brought by legal persons? Would it cover claims brought by associations, organizations or groups of legal or natural persons?

The current costs protection regime does not specify the types of claimant eligible for costs protection. It does however allow individuals and organisations including non-government organisations to apply for and receive costs protection. The intention of the amendment is not to move away from that principle but to ensure a clearer alignment between the wording of the rules and the definitions used in EU law and the Aarhus Convention.

The consultation document in paragraphs 28- 31 sets out the reasons for the changes in more detail – for ease they are set out below.



INVESTORS
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“28. It has though been pointed out that the wording of the current rules does not expressly specify the types of claimant which are eligible for costs protection under the Environmental Costs Protection Regime. On this basis, it has been argued that claimants are entitled to the costs protection under the regime whether or not they are members of the public for the purposes of the relevant Directives and the Aarhus Convention. The Government does not accept that this is a correct interpretation of the current rules. The rules are expressed to apply (see rule 45.41(2)) to “a claim for judicial review... which is subject to the provisions of the [Aarhus Convention]” (emphasis added). Therefore, whether any claim is subject to the Environmental Costs Protection Regime can only be answered by considering the terms, and purpose, of the Aarhus Convention itself. Under the Aarhus Convention, costs protection clearly only applies to persons who are members of the public, as defined in the Convention itself (see below).

29. However, in order to ensure a clearer alignment between the wording of the rules and the obligations arising under Article 9 of the Aarhus Convention and the relevant Directives, and to avoid such arguments being made in the future, the Government proposes amendment of the rules so that only a claimant who is a ‘member of the public’ is entitled to costs protection (see the definition of ‘Aarhus Convention claim’ at proposed rule 45.41(2), proposed rule 45.43(1), proposed paragraph 5.4 of Practice Direction 45 and proposed paragraph 5.1B(1) of Practice Direction 25A, all at Annex A). This is because the relevant obligations arising under Article 9 of the Aarhus Convention and the Directives only apply in relation to a member of the public.

30. Article 2 of the Aarhus Convention contains the following definitions relevant to the term ‘member of the public’:

“The public” means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

“The public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

31. The same definitions are used in Article 1 of the EIA Directive and in Article 3 of the Industrial Emissions Directive. Whether a particular claimant is or is not a member of the public would, in a case where entitlement to costs protection under the Environmental Costs Protection Regime was contested, be a matter for the court to decide, having regard to any further guidance from future case law in this area. The proposed amendments are intended to make it clearer that, as was always intended and as the Government in fact maintains is the correct position under the current rules, eligibility for costs protection under the regime is based not only on the nature of the claim but also on the nature of the individual or body which would benefit from that costs protection.” The draft rules were not intended to exclude claims brought by more than one person, and included

provisions that expressly provided for this type of case. See paragraphs 46 and 53 of the consultation.

As stated above, the Government is considering the responses received carefully and these, including the responses to the questions around eligibility, will be taken into account during the process of finalising the policy.

With respect to the proposal that the applicability of the costs protection regime for the environmental claims would be contingent on a claimant being granted permission to pursue a claim before the court, will there be any cost protection with respect to the procedure of applying for such permission? If yes, what will the level(s) of cost protection be and will there be cost protection for making an application for permission to pursue a claim if that permission is ultimately not granted by the court?

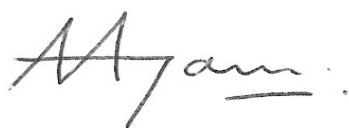
The consultation paper only sought views on the possibility of limiting costs protection to cases where permission to apply for judicial review or statutory review had been given. There are no firm proposals in this regard.

The question arose because this is the approach which has been adopted in relation to costs protection in other areas. The government is aware that additional factors apply in relation to Aarhus cases and, if it were to consider proceeding on this basis, it would carefully consider the potential impact in terms of prohibitive expense as well as the responses of consultees to this question.

What consequences, if any, have the 2015 amendments to sections 84(2), 85, 86 and 87 of the Criminal Justice and Courts Act had for costs protection in environmental cases?

None of the provisions listed have negative consequences—for the availability or nature of costs protection in environmental cases.

2. Yours sincerely.



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