

ClientEarth's response to the United Kingdom's first progress report on compliance with decision VI/8k and its obligations under the Aarhus Convention

1 Introduction

1. ClientEarth is one of the three communicants¹ of communication ACCC/C/2008/33. It was also a co-claimant in legal proceedings² challenging the lawfulness of the UK's amendments to the 2013 Environmental Costs Protection Regime (**ECPR**) through changes to Section VII of Part 45 of the Civil Procedure Rules made by the Civil Procedure Amendment Rules 2017/95 (**2017 Amendments**)³ (**ECPR Judicial Review**). ClientEarth's co-claimants in the ECPR Judicial Review were the Royal Society for the Protection of Birds (**RSPB**) and Friends of the Earth (**FoE**).
2. We refer to the submission made by RSPB, FoE and ClientEarth on 31st October 2018. In this further submission, ClientEarth (as a communicant), comments on the UK's longstanding failure to implement the findings Aarhus Convention Compliance Committee (**Committee**) in communication ACCC/C/2008/33 and its subsequent decisions.
3. We are grateful for the opportunity to comment on the UK's first progress report on compliance with decision VI/8k dated 1 October 2018, as it relates to England and Wales.

2 Background to the UK's non-compliance

4. It is important to consider the chronology of key events since communication ACCC/C/2008/33 was submitted:

DATE	EVENT
2 December 2008	ClientEarth communication ACCC/C/2008/33 submitted to the Committee.
24 September 2010	Report of 29 th meeting of the Committee on communication ACCC/C/2008/33 makes a finding that the UK is not compliant with articles 3(1) and 9(4) of the Aarhus Convention. ⁴
1 July 2011	Decision IV/9i adopted by the 4 th Meeting of the Parties to the Aarhus Convention, endorsing the findings of the Committee that: <ol style="list-style-type: none"> a) <i>“By failing to ensure that the costs for all court procedures subject to article 9 were not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary</i>

¹ Joint communicants are the Marine Conservation Society and Robert Lattimer.

² *RSPB, Friends of the Earth & Client Earth v. Secretary of State for Justice* [2017] EWHC 2309 (Admin), 15 September 2017.

³ <http://www.legislation.gov.uk/ukxi/2017/95/contents/made>.

⁴ The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998.

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	<p><i>to this effect, the Party concerned failed to comply with article 9, paragraph 4 of the Convention;</i></p> <p><i>b) The system as a whole was not such as “to remove or reduce financial [...] barriers to access to justice” as article 9 paragraph 5, of the Convention requires a Party to the Convention to consider...;</i></p> <p><i>c) By not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4, the Party concerned also failed to comply with article 3, paragraph 1 of the Convention”.</i></p>
<p>15 September 2017</p>	<p>Decision VI/8k adopted by the 6th Meeting of the Parties to the Aarhus Convention, endorsing the findings of the Committee that:</p> <p>Paragraph 2 : <i>Reaffirms its decision V/9n and requests the Party concerned to, as a matter of urgency, take the necessary legislative, regulatory, administrative and practical measures to:</i></p> <p><i>(a) Ensure that the allocation of costs in all court procedures subject to article 9 is fair and equitable and not prohibitively expensive;</i></p> <p><i>(b) Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;</i></p> <p><i>(d) Establish a clear, transparent and consistent framework to implement article 9, paragraph 4, of the Convention;</i></p> <p>Paragraph 4: <i>Recommends that the Party concerned ensure that its Civil Procedure Rules regarding costs are applied by its courts so as to ensure compliance with the Convention;</i></p> <p>Paragraph 5: <i>Endorses the finding of the Committee with regard to communications ACCC/C/2013/85 and ACCC/C/2013/86 that, by failing to ensure that private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention, and for which there is no fully adequate alternative procedure, are not prohibitively expensive, the Party concerned fails to comply with article 9, paragraph 4, of the Convention;</i></p> <p>Paragraph 6: <i>Recommends that the Party concerned review its system for allocating costs in private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention</i></p>

5. This chronology demonstrates the UK's longstanding failure to comply with its obligations under article 9 of the Aarhus Convention. As a result, more than eight years after the

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findings of the Committee in communication ACCC/C/2008/33, claimants still face high and uncertain costs that can be prohibitively expensive.

3 UK's first progress report on compliance with decision VI/8k in England and Wales

6. The UK accepts at paragraphs 1 and 5 of its first progress report that the 2017 Amendments were intended to address compliance with UK and EU law, including Case C-530/11. The subsequent changes to the ECPR were introduced to implement the civil procedures needed to clarify that the rules varying costs caps are, in practice, consistent with EU law, in accordance with the judgment of Hon. Mr Justice Dove in the ECPR Judicial Review⁵.
7. The UK has therefore directed its efforts at implementing changes to bring it into compliance with EU law and not in accordance with Decisions IV/9i and VI/8k. In particular, the UK's first progress report is silent on the progress, if any, it has made towards achieving compliance with paragraph 2 (a), (b), and (d), paragraph 4 and paragraph 6 of Decision VI/8k. We can therefore only conclude from the contents of the report that the UK has no plans to implement the necessary changes to its legislative, regulatory, administrative and practical measures to ensure that costs in all court proceedings are not prohibitively expensive for members of the public who wish to bring claims in the public interest to protect their environment.
8. When we submitted our comments on draft decision VI/8k, we were hopeful that the UK would take the opportunity presented by Brexit to review all its legislative, administrative and procedural processes in order to implement necessary changes to ensure compliance with the Committee's longstanding findings and recommendations and to give full domestic effect to the Convention. Regrettably, our optimism was misguided.
9. In our view, the UK's actions put into question the UK government's commitment to protect the environment and comply with its international legal obligations.

4 Conclusion

10. As the UK prepares to leave the EU, there can be no excuse for continued failure to comply with the recommendations of the Committee. As a first important step with respect to access to justice, we once more invite the UK to seize this opportunity to implement the long overdue changes required to reduce financial barriers and ensure that allocation of costs in all court procedures subject to article 9 is fair, equitable, and not prohibitively expensive.

⁵ Civil Procedure (Amendment) Rules 2018 (No.239/L.3) SI5 (which came into force on 6 April 2018) and implementing administrative arrangements for a hearing on a variation of costs caps to be heard in private.

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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