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Dear Officers

**Decision VII/8s (United Kingdom) - Plan of Action**

1. This is the initial consultation response on behalf of Communicants 85 and 86 to the UK Government's 'Plan of Action' following the decision VII/8s adopted by the 7<sup>th</sup> MoP session on 21 October 2021, and as circulated to communicants and observers on 1 July 2022.
2. Communicants 85 & 86 appreciate and welcome the Compliance Committee's requirement that the UK Government produce a plan of action, and the provision of such plan by the UK Government within the required time frame. However, in light of the lack of consultation in the draft plan of action process, past issues in the Government's consideration of the costs of private nuisance proceedings and the proposed timeframe in terms of consulting on and implementing the required legislation within the strict implementation of 1 October 2024, is of serious concern to the Communicants.
3. The focus of this consultation response is specifically in relation to the response to recommendation para 2(a) of decision VII/8s i.e., '*ensure that the allocation of costs in all court procedures subject to article 9, including private nuisance claims, is fair and equitable and not prohibitively expensive*' (emphasis added).

Public consultation on draft plan of action

4. The Commission's helpful 'information note by the Aarhus Convention Compliance Committee' (dated February 2022)<sup>1</sup> required in Section A of the UK Government's Plan of Action, that efforts were required by the UK Government to ensure that public

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<sup>1</sup> [https://unece.org/sites/default/files/2022-02/toPartyVII.8s\\_07.02.2022\\_info\\_note.pdf](https://unece.org/sites/default/files/2022-02/toPartyVII.8s_07.02.2022_info_note.pdf) (accessed 18 July 2022)

consultation and input from stakeholders was sought and would be taken into account in the drafting. This recommendation was reiterated by Members of the Compliance Committee in the online 'question and answer session' on 17 March 2022.

5. However, and unfortunately, although the UK Government's Plan of Action states that '*where possible we have engaged with stakeholders*', no attempt was made to seek the views of the representatives of Communicants 85 & 86, which would have been welcomed. Had Communicants 85 & 86 been consulted at the initial stages on the UK's draft plan of action, the significant anomalies and omissions as set out below would have been addressed.

#### Environmental Costs Protection Regime ('ECPR') 'Call for Evidence'

6. Communicants 85 & 86 welcome the UK Government's confirmation that '*The UK Government is committed to reviewing the Environmental Costs Protection Regime (ECPR). It proposes to do this through a Call for Evidence in the coming months*'. However, the following observations are made:

- a. First, the ECPR Call for Evidence is already overdue; we understand the review was originally scheduled for April 2020. Although it is appreciated that Covid will have initially impacted this timetable, the parties are concerned and surprised that the Call for Evidence has not already commenced. This is despite the recommendation in the Compliance Committee information note, given the short timescales, that '*the Party concerned should commence its work on the various measures it proposes to take to implement those recommendations in parallel with preparing its plan of action*<sup>2</sup>. As the decision for the submission of a plan of action was made almost a year ago (21 October 2021) it is concerning the Call for Evidence has no specific commencement date.
- b. Second, in the last ECPR consultation undertaken by the UK Government in 2016, and although acknowledging the position as to Aarhus costs compliance and private nuisance, see:

*'117. There was also support for the ECPR to be extended to private nuisance claims from many of the respondents, who referred to findings of the Aarhus Convention Compliance Committee regarding two communications against the UK and a Court of Appeal judgment in Austin v. Miller Argent (South Wales) Ltd, which found that private nuisance claims are capable of falling within the scope of the Aarhus Convention in certain circumstances*<sup>3</sup>.

The UK Government concluded:

*'14. Further, the government does not intend to bring forward any changes to extend the ECPR to private nuisance cases or to other types of cases which could be brought against private individuals. This is because the ECPR was not designed with these types of cases in mind. Defendants in these cases are*

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<sup>2</sup> Ibid p. 2

<sup>3</sup> Ministry of Justice 'Costs Protection in Environmental Claims: the government response to the consultation on proposals to revise the costs capping scheme for eligible environmental challenges' (November 2016) <https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/results/costs-protection-in-environmental-claims-govt-response.pdf> (accessed 18 July 2022)

*not necessarily public authorities, meaning the costs cap model would not necessarily be appropriate. The government will continue to consider how best to address these cases.*’ (emphasis added)

7. On this basis, and without sufficient detail, Communicants 85 & 86 have real concerns that the UK Government, in solely providing the ECPR mechanism in seeking compliance with the UK’s ongoing breaches in its Plan of Action, it will again deem that the ECPR is not a suitable mechanism for consideration of private nuisance regime costs. This position as to the private nuisance costs regime and the ECPR was reiterated by the UK Government in its first progress review in 2019<sup>4</sup>. Further, and of concern, the latest communication from the UK on the compliance indicated that they deemed the UK to be compliant<sup>5</sup>, despite no action taken to ensure compliance.
8. Given the Government’s previous position on private nuisance costs, and in the absence of any clear detail in the UK Government’s ‘Plan of Action’ on how the private nuisance regime costs will be compliant with the Convention, Communicants 85 & 86 are concerned that private nuisance costs protection will not feature in the UK Government’s Plan of Action, resulting in further delay to the UK’s compliance with the Convention.

#### Failure to make reference in the Plan of Action to compliance solutions, including Qualified One-Way Costs Shifting

9. It is the Communicants’ position that the Plan of Action and the ECPR consultation should include reference and consultation comment on private nuisance costs proposals, including Qualified One-Way Costs Shifting (QOWC). The UK Government has previously indicated (March 2018) that this would be considered, see:

*‘...on cost protection in private nuisance in C85 and C86 – the UK has seen the communicants note on these cases. The government will continue to consider one way cost shifting in addition to other solutions. We have had correspondence from the communicants’ representatives and we will respond in due course.’<sup>6</sup>*

10. The Communicants have separately provided a significant amount of information on this position and what sort of form this should take. See for example the 2018 Joint Note for the open session follow-up meeting on Decision VI/8k on behalf of the Communicants in ACCC/C/2013/85 & 86, 15.3.18<sup>7</sup> and raised in correspondence, see note of 15 October 2020<sup>8</sup>.

<sup>4</sup> Letter DEFRA to Aarhus Compliance Committee (30 September 2019) Para 45:

*‘The UK continues to consider the recommendation in paragraph 6 of Decision VI/8k. As detailed in its first progress report, the UK government decided not to extend the scope of the Environment Costs Protection Regime (ECPR) so that it would apply to private nuisance cases or other private law claims as part of the changes to the regime made in 2017.’*  
[https://unece.org/DAM/env/pp/compliance/MoP6decisions/VI.8k\\_UK/Correspondence with the Party concerned/Second progress report/frPartyVI.8k\\_30.09.2019\\_2nd progress report.pdf](https://unece.org/DAM/env/pp/compliance/MoP6decisions/VI.8k_UK/Correspondence%20with%20the%20Party%20concerned/Second%20progress%20report/frPartyVI.8k_30.09.2019_2nd%20progress%20report.pdf) (accessed 18.7.22)

<sup>5</sup> Letter DEFRA to Compliance Committee (19th July 2021) para 7. [https://unece.org/sites/default/files/2021-07/frPartyVI.8k\\_19.07.2021.pdf](https://unece.org/sites/default/files/2021-07/frPartyVI.8k_19.07.2021.pdf) (accessed 18 July 2022)

<sup>6</sup>Para. 17

[https://unece.org/DAM/env/pp/compliance/MoP6decisions/VI.8k\\_UK/Correspondence with the Party concerned/frPartyVI.8k\\_22.03.2018\\_statement at CC60.pdf](https://unece.org/DAM/env/pp/compliance/MoP6decisions/VI.8k_UK/Correspondence%20with%20the%20Party%20concerned/frPartyVI.8k_22.03.2018_statement_at_CC60.pdf) (accessed 18 July 2022)

<sup>7</sup>[https://unece.org/DAM/env/pp/compliance/MoP6decisions/VI.8k\\_UK/Correspondence with communicants and observers/frCommVI.8k\\_13.03.2018\\_statement incl annex 1 C85 86 .pdf](https://unece.org/DAM/env/pp/compliance/MoP6decisions/VI.8k_UK/Correspondence%20with%20communicants%20and%20observers/frCommVI.8k_13.03.2018_statement_incl_annex_1_C85_86.pdf) (accessed 18 July 2022)

<sup>8</sup>[https://unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/VI.8k\\_UK/Correspondence with communicants and observers/frCommVI.8k\\_C85\\_C86\\_15.10.2020 .pdf](https://unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/VI.8k_UK/Correspondence%20with%20communicants%20and%20observers/frCommVI.8k_C85_C86_15.10.2020_.pdf) (accessed 18 July 2022)

11. To ensure the UK's Plan of Action is compliant with Commission's decision VII/8s the Communicants require confirmation that the Call for Evidence will include consideration of the private nuisance regime and the QOWC, as confirmed by the UK Government in its representations to the Committee in 2018.

#### Timing

12. As a final point as to the consultation and implementation of any mechanism by the October 2024 deadline, the Communicants have real concerns given: the overdue consultation since 2020; the failure to commence the consultation prior to submission of the plan of action; and the failure to provide any detailed proposal on private nuisance costs that the UK may not comply by the Compliance Committee's strict October 2024 deadline.
13. This concern is in the context that in the last ECPR change, the consultation ran from September to December 2015, the new rules were substituted by r.8(5) of the Civil Procedure (Amendment) Rules 2017 (2017/95). The new provisions apply only to claims commencing on or after 28 February 2017.
14. As the Communicants are unclear as to the terms of reference to the consultation, the Communicants require confirmation that the Call for Evidence, including private nuisance, will be commenced very shortly and not delayed indefinitely. The lack of any clear and defined timeframe for completion of each stage of the Plan of Action<sup>9</sup> reinforces this concern.

#### **Assistance**

15. Given the issues identified above, representatives of Communicants 85 & 86 offer their assistance to the UK Government to ensure compliance is met within the required period. We are happy to meet with MoJ & DEFRA representatives to assist in ensuring the UK's compliance within the tight deadline.

Yours faithfully

**Richard Buxton Solicitors**

**Hugh James**

cc. Justine Solomons-Moat, Team Leader – Aarhus Convention, DEFRA (by email only: [REDACTED])  
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<sup>9</sup> Plan of Action statements 'It proposes to do this through the coming months'...'The UK Government will respond to the Call for Evidence in due course... etc'