Inventory of EU Member States' measures on access to justice in environmental matters

Response from the Coalition for Access to Justice for the Environment[1] (CAJE)

General comments

1. CAJE welcomes the Commission's decision to examine the interpretation of the access to justice provisions of the Aarhus Convention within the EU territory. It has become increasingly apparent to CAJE that significant barriers to access to justice exist not only in the UK, but throughout the Community. We recognise the diversity of judicial and administrative systems existing within the EU territory provide considerable difficulties in assessing this issue, however, we believe that this Report represents a robust, thorough and timely examination of the issue which provides Member State Governments with clear priorities for action.

2. We also welcome the opportunity to comment on this Report and hope that its conclusions, and the feedback received on it, will invigorate EU action on the proposal for a Directive on access to justice in environmental matters. Whilst recognising that this is a complex issue, we remain concerned that this last remaining pillar of the Convention has not yet been fully transposed into EU law.

3. CAJE also believes that an EU-wide conference on this issue in 2008 would provide an excellent opportunity to highlight positive mechanisms for achieving access to justice in environmental matters as well as identifying key challenges and common problems. CAJE would be delighted to make a contribution to the conference should the Commission view this as helpful.

4. CAJE notes that the UK is one of the Member States with the worst overall assessment in the Comparative table on access to justice in environmental matters in 25 EU countries[2] (alongside Austria, Germany, Hungary and Malta). Whilst the UK scores highly on legal standing and transparency, it is graded unsatisfactory on effective remedies and costs. These issues are sufficiently serious to negate the effect of positive scores in other areas - and leads to an overall assessment of unsatisfactory. CAJE concurs with this assessment and submits the following comments on the Report for the Commission's consideration.

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[1] CAJE includes Capacity Global, the Environmental Law Foundation, Friends of the Earth, Greenpeace, the Royal Society for the Protection of Birds and WWF-UK. CAJE members specifically endorsing this response include ELF, FoE, RSPB and WWF-UK.

[2] Summary Report page 18

Measures on access to justice in environmental matters (Article 9(3))
Country report for the United Kingdom and Summary Report

5. In 2005, CAJE submitted a complaint to the European Commission concerning the UK's implementation of Article 3(7) of the EC Public Participation Directive[3] (2003/35/EC). The complaint concerned the way in which the costs rules operate in the UK (i.e. that costs "follow the event"), and our view that this renders legal action on environmental matters prohibitively expensive for the vast majority of concerned citizens and NGOs. The complaint also raised a number of other matters, which are referred to later in this submission.

6. We remain concerned about the prohibitive cost of legal action in the UK. Since submitting the complaint, CAJE members have continued to lobby Government at all levels about the problem of prohibitive costs and raised the issue at UNECE meetings on access to justice on environmental matters hosted by the Aarhus Convention Secretariat. CAJE members are also represented on a Working Party on the issue of costs and the Aarhus Convention currently being chaired by Sir Jeremy Sullivan (judge in the Administrative Court), and which is due to report in 2008. Both Defra and the Ministry of Justice were invited to sit on this Working Party, but declined to participate.

7. CAJE remains concerned that, despite all of these activities, the UK Government resolutely refuses to accept that undertaking legal action in this country remains prohibitively costly to most individuals or NGOs. We therefore welcome the UK Country Report's conclusion that the main obstacle to access to justice for members of the public or NGOs in the UK is the issue of costs in judicial review cases[4]. We also note that the same issues in relation to costs arise in other types of environmental cases.

Protective Costs Orders

8. The UK Country Report refers to the main case to date in the UK on Protected Costs Orders (PCOs), namely *R (Corner House Research v Secretary of State for Trade and Industry [2005] 1 WLR 2600* (hereafter referred to as "*Corner House*"). The Report also refers to the conditions the Court of Appeal regard as pre-requisite to the granting of a PCO, i.e. that:

   (a) The issues raised are of general public importance;
   (b) The public interest requires that those issues should be resolved;
   (c) The claimant has no private interest in the outcome of the case;
   (d) Having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order;
   (e) If the order is not made, the claimant will probably discontinue the proceedings and will be acting reasonably in so doing.

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[3] A copy of this complaint is attached to this submission as Annex A

[4] UK Country Report page 6

In addition to these conditions, the Court of Appeal said that if those acting for the applicant were doing so *pro bono*, this would be likely to enhance the merits of the application for a PCO.

9. It is important to clarify at the outset that *Corner House* was not an environmental case. However, we are concerned that, in the absence of anything else, the conditions which have become synonymous with *Corner House* are being applied *de facto* to environmental cases. These conditions are not, in our view, applicable to environmental cases (for reasons set out below). It is, therefore, our view that *Corner House* has provided only a limited solution to the issue of prohibitive costs for individuals and NGOs wishing to pursue environmental cases. We examine a number of the *Corner House* conditions below.

Public Interest Cases

10. The *Corner House* conditions were discussed in a Report produced under the Chairmanship of Sir Maurice Kay (judge in the Court of Appeal) and published by Liberty and the Civil Liberties Trust[5] in 2006. The Report concluded that the Courts should be prepared to grant PCOs in public interest cases, which it defined as cases meeting the criteria set out in 7(a) and (b), above.

11. The UK Country Report refers to the fact that the Courts rarely exercise their powers to make PCOs[6]. We would submit that this is, at least in part, because the judiciary has put a restrictive interpretation on what is already a restrictive set of criteria. For example, in respect of criteria (a) and (b) referred to in paragraph 10 above, in *River Thames Society v First Secretary of State & 3 ORS sub nom Lady Berkeley v First Secretary of State*, [2006] EWHC 2829, Mr Justice Underhill refused an application for a PCO on the basis that the issue raised, despite involving a large development in a fairly prominent local site, was not one of general public importance.

12. As set out below, CAJE does not believe that the appropriate test for a protective costs order in environmental cases is a generic public interest test as in other types of administrative law cases. In any event, to the extent that a public interest test as referred to in (a) and (b) of the *Corner house* judgment is relevant to the issues of costs in environmental cases, the relevant threshold is currently set much too high.

13. The relevant legal test under the Aarhus Convention is whether the costs situation prevents access to justice in environmental matters from being "*fair*", "*equitable*" and "*not prohibitively expensive*". The existence of a public interest is already built into the nature of the case. That is because the Aarhus Convention proceeds on the basis that the maintenance of the rule of law in environmental matters is

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5 *Litigating the Public Interest – Report of the Working Group on Facilitating Public Interest* Litigation (2006) published by Liberty and the Civil Liberties Trust – report is available at http://www.liberty-humanrights.org.uk/publications/6-reports/litigating-the-public-interest.pdf (the Liberty Report)

6 UK Country Report page 16

inherently in the public interest and that maintaining the rule of law in this area requires that members of the public have access to the courts to challenge environmental decisions in a manner that is fair, equitable and not-prohibitively expensive. The approach in the Convention recognises that, in the absence of such access by those seeking to protect the environment, both environmental law and the environment itself will suffer. The reason why the Convention assumes that environmental cases engage a strong public interest in this regard include that such cases:

(a) Rarely involve much, if any, element of private interest save that of establishing standing before the Court;
(b) May involve the irreversible loss of, and damage to, areas and/or species of biodiversity importance and the wider environment; and
(c) May affect large numbers of people.

As such, we do not believe that the "exceptional" public interest threshold currently applied by the judiciary to public interest is applicable in the environmental context.

No private interest

14. The Liberty Report also concluded that it should not be a condition for obtaining a PCO that the person or body applying for it have no private interest in the outcome of the case[7]. Whilst judicial doubt has been expressed as to the appropriateness of workability of this criterion[8] it has, in practice, prevented individuals from obtaining a PCO (see *Rita Goodson v (1) HM Coroner for Bedfordshire and Luton (2) Luton and Dunstable Hospital NHS Trust*[9]. However, we are mindful that *Goodson* was not an environmental case and that the Court of Appeal has recognised that this criterion may not be appropriate in the context of access to justice in environmental matters[10].

Pro bono **representation**

15. The inclusion of *pro bono* representation as a factor in whether to grant a PCO is regrettable. It is of concern to CAJE that in order to be able to conduct what the court considers litigation of public importance, we (and the lawyers we instruct) are expected to work for free. Many individuals and NGOs are unable to instruct the lawyers of their choice and, in any event, finding lawyers who are prepared to work *pro bono* at short notice (i.e. within JR timescales) is difficult. Reliance upon goodwill and charity can only go so far towards achieving access to justice. It is our contention that *pro bono* assistance does not, and cannot, provide a meaningful contribution to access to environmental justice in the long-term.

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7 See page 10 of the Liberty/Civil Liberties Trust Report

8 See *Susan Wilkinson (petitioner) v (1) Celia Kitzinger (2) Attorney-General (Respondents) & Lord Chancellor (INtervenor)* [2006] EWHC 835

9 LTL 12/10/2005: (2006) ACD 6: Times

10 See the comments of Lord Justice Carnwath in *R (on the application of Derek England (Apellant) v Tower Hamlets London Borough Council (Respondent) & Team Ltd & ORS (Interested Parties)* LTL 20/12/2006 (Unreported elsewhere), which refers to *R (on the application of Sonia Burkett) v London Borough of Hammersmith and Fulham* LTL 15/10/2004

Limiting liability

16. The restrictive effect of the above criteria is compounded by the fact that PCOs thus far have tended to be granted on a fairly formulaic basis. The approach of the courts has generally not been to exclude liability for the costs of the Defendant, but to set a limit on the claimant's liability at a level which is broadly proportionate to its size and unrestricted income. So, for example, in *R v The Prime Minister ex p CND* [2002] EWHC 2712 (Admin) the Divisional Court made a PCO in favour of the claimants to the extent that any award of costs against them should be capped in the sum of £25,000. Similarly, in *R (on the application of the British Union for the Abolition of Vivisection) v Secretary of State for the Home Office* [2005] EWHC 531 (Admin), Mr Justice Bean capped BUAV's liability at £40,000 (as opposed to the £20,000 BUAV proposed) on the basis of the financial resources of the parties and the likely costs in the case.

17. The resounding issue for many here is again that of uncertainty as to the exact level of liability faced. A number of large NGOs, such as WWF, Greenpeace and the RSPB do not apply for PCOs on the basis that the level of their turnover and/or unrestricted income would result in a limit on liability that would not, in practice, be very different from that which might arise from the normal application of the costs rules. Although the payment of costs in that order would not cause the organisation to cease operating, it would require the NGO to re-direct significant resources away from other planned activities (for which the NGO is accountable to its members and trustees) and, along with the possibility of an order for costs in favour of an interested third party, has a considerable "chilling" effect. In this context it is important to have regard to the fact that costs orders in these types of cases will regularly run into tens of thousands of pounds. Anecdotal evidence suggests that these levels of costs are much higher than in other EU countries.

18. CAJE would prefer to see an explicit reference in the Civil Procedure Rules to the need for the Courts to take a more flexible approach to PCOs in environmental cases. For example, some NGOs currently benefit from a variation on the traditional PCO in which each party "bears its own costs". These costs are sufficiently significant to warrant careful consideration of prospective legal action (for few environmental NGOs can routinely enlist the support of *pro bono* lawyers in litigation) yet they do not represent an insurmountable hurdle to overcome. Other individuals or groups may prefer a capped liability such as that outlined above. In exceptional circumstances, individuals or NGOs may request a total exclusion of liability on the basis that any other order would result in access to justice being *prohibitively expensive*. There may also be other mechanisms, aside from PCOs, that may serve to enhance access to environmental justice – some of which will be discussed in the forthcoming report under the Chairmanship of Sir Jeremy Sullivan.

PCOs - summary

19. *Corner House* drew attention to the problem of prohibitive costs and the judgment represents a step towards a workable solution. However, the Court of Appeal itself expressed hope that the Civil Procedure Rules (CPR) Committee and the senior costs judges might formalise the *Corner House* principles in an appropriate codified form[11]. CAJE supports this view. We are, firstly, concerned that the development of jurisprudence cannot, by its very nature, provide the requisite level of certainty for claimants and that the specific requirements of the Aarhus Convention may not be properly distinguished. Secondly, we are concerned that these factors would be exacerbated by the fact that the judiciary encounter a relatively low number of environmental cases.

20. CAJE is, therefore, of the view that the CPR should be amended to make explicit reference to the Aarhus Convention and the contribution that PCOs (in a variety of forms) could make to the achievement of access to justice in environmental matters. We believe such orders should still be made at the discretion of the Court but that it should be made clear that the application of the conditions set out in the *Corner House* judgment is not appropriate. We attach a draft amendment to the CPR that we are currently promoting as Appendix B to this submission.

21. There is a further problem in relation to PCOs which is that even the process of applying for such an order engages costs risks that are potentially significant (certainly for very small NGOs or for local environmental amenity associations). The guidance given by the Court of Appeal in Corner House means that any person applying for a PCO is at risk of liability for costs both for the public authority's response to such an application (up to £1,000 where there is no hearing and up to £2,500 where there is such a hearing) and also for the authority's costs of replying to the application for judicial review up to that stage (un-quantified but potentially several thousands of pounds).

22. CAJE therefore welcomes the UK Country Report's conclusions[12]. We submit that PCOs provide only a partial solution to the problem of prohibitive costs and we continue to press the Government to effect amendments to the CPR as set out above.

Interim injunctions

23. The Report cites the Lappel Bank case as an interesting example of the interaction of judicial review, injunctions and cross-undertakings in damages[13]. CAJE remains concerned that the requirement to provide a cross-undertaking in damages represents a barrier to the achievement of access to justice and would point out that it is extremely rare for an application for interim relief to be made in environmental cases.

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11 *Corner House* judgment, paragraph 81

12 UK Country Report, pages 21-22

13 UK Country Report page 18

24. The issue of "timeliness" is critical to the operation of interim injunctions and has implications for the requirement to provide a cross-undertaking in damages. Some countries, such as Belarus and Ireland, have instituted arrangements to ensure that cases involving issues of an urgent and time sensitive nature can be heard very promptly. This not only prevents irreversible environmental harm from occurring whilst an application for interim relief is pending, it alleviates undue prejudice on third parties who would generally wait several months for a case to come to Court.

25. CAJE is currently pressing for a removal of the requirement to provide a cross-undertaking in damages in environmental cases on the basis that, firstly, cases in which interim relief is sought are heard within one month of permission being granted and, secondly, that the court is satisfied that relief:

(a) is required to prevent irreparable harm to the environment;
(b) is necessary to preserve the factual basis of the legal proceedings; and
(c) the claimant has a reasonable chance of succeeding on the merits.

26. To conclude, we welcome the Summary Report's recognition that interim relief costs represent a significant burden for members of the public challenging acts or omissions by an administration in the UK[14].

Other issues

Standing

27. The UK Country Report recognises that it is now rare for the issue of standing (for either an individual or an NGO) to be challenged where there is alleged to be an environmental issue at stake in the UK[15]. Whilst we would agree with this, we remain concerned about the disparity between the existing rules on standing[16] and evolving case law. CAJE is therefore of the view that the CPR should be amended to reflect current jurisprudence and make explicit reference, on the basis of the Aarhus Convention, to the need to grant standing to individuals and NGOs in environmental cases.

Length of procedure and number of cases

28. The UK Country Report states that between 2000-2003, there were an average of 18 environmental judicial review cases per year in the High Court and that the average length of proceedings was six months from the date of lodging the application to the final court order[17].

29. Statistics obtained from the Administrative Court in 2007 show that the average length of time has since increased to nine months (an increase of 33%) as a result of

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14 Summary Report page 15

15 UK Country Report page 21

16 Section 31(3) Supreme Court Act 1981 states that "*No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant* ***has a sufficient interest in the matter to which the application relates****.*"

17 UK Country Report page 16

a significant increase in the number of cases now lodged with the Court[18]. These additional cases are not environmental cases. The statistics show that the number of environmental cases lodged annually between 2002 and 2007 has remained consistent. However, the general increase in the number of cases lodged is causing considerable delays in the Administrative Court, to the extent that it is now questionable whether environmental cases are dealt with in a timely manner. While timeliness may not be an issue in every environmental case, it is certainly so in cases for which interim relief would ideally be sought (see above).

30. Our conclusion would therefore be that while we agree that the average length of proceedings in the UK is comparatively good (when judged against other Member States), we are concerned that timeliness is increasingly becoming an issue for some environmental cases, at least in England and Wales.

Community Legal Service

31. Public funding is theoretically available in environmental public law cases – on the same basis as for other public law cases. However, in practice, such funding is usually only granted on the basis of a significant community contribution from the local community. In many cases this will have the effect that funding is not sufficient to allow the case to proceed. CAJE considers that further thinking is required by the Legal Services Commission to ensure that its processes are sufficient to ensure that access to justice in environmental matters (where it is involved) are *not prohibitively expensive*.

32. Article 9(5) of the Aarhus Convention requires contracting parties to consider the establishment of appropriate *assistance mechanisms* to remove or reduce financial and other barriers to access to justice. CAJE is of the view that public funding does not fulfill this requirement as it is extremely restricted and not available to NGOs. Furthermore, CAJE is not aware that the UK Government has introduced or considered any other funding mechanisms in order to give effect to this provision.

Judicial Review in Scotland and Northern Ireland

33. CAJE notes that the findings of the UK Country Report focus on England and Wales[19]. However, we believe that many of the issues raised by our complaint, and the Report, apply equally to Scotland and Northern Ireland. For example, we have recently become aware of a recent case in which Friends of the Earth Scotland applied to the Outer Court of Session for a PCO but were forced to withdraw the case when it became clear that the Court was not willing to grant the application and it would be liable for the defendant's costs should it lose. Friends of the Earth Scotland could not, therefore, continue with the case.

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[18] Statistics obtained by Sir Jeremy Sullivan and presented to a Public Law Project Conference on Judicial Review in September 2007. It is understood that there now in the order of 1,000 applications for judicial review lodged every month.

[19] UK Country Report page 5

34. It also remains of concern to CAJE that standing in Scotland is very restrictive. The requirement to show *title and interest to sue* means that any NGO or individual which is not directly affected by a proposal will be unable to demonstrate sufficient standing to start legal proceedings. This seems to be the reverse of the requirement of the *Corner House* judgment (see above) in which a PCO cannot be granted if a private interest exists. The difficulty of bringing legal actions in Scotland – despite the aims and objectives of NGOs being clearly relevant in matters of environmental importance is, in our view, inconsistent with the rest of the UK and the provisions of the Aarhus Convention.

Conclusion

35. CAJE would like to conclude by reiterating its support for the Report. We concur with the conclusion that the main obstacle to access to justice in the UK is the application of the current costs rules (and specifically that "costs follow the event"). There is now a plethora or reports in the UK which identify this as a significant hurdle and we remain concerned that the UK Government consistently refuses to acknowledge that any problem exists. We can only hope that the publication of this Report, alongside the submission of complaints to the Commission and, in due course, the Compliance Committee of the Aarhus Convention, are instrumental in pressing the UK Government to address this critical issue.

36. Please do not hesitate to contact the CAJE members listed below should you wish to obtain further information or clarification on any of the points made in this submission:

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POSSIBLE DRAFT AMENDMENT TO CPR PART 54

Background

Please find below a possible amendment to Part 54 of the Civil Procedure Rules (CPR) in relation to Protective Costs Orders (PCOs).

CAJE was prompted to send this draft amendment to the Civil Procedure Rules Committee as a result of LJ Brooke's comments in *Burkett*, which centred on the very high costs of legal action and a possible conflict with the provisions of Article 9 of the Aarhus Convention and the judgment in *Corner House*, in which the Court of Appeal explicitly expressed their hope that the Civil Procedure Rules committee would act to codify.

CAJE believes that the amendment strikes an appropriate balance between the merits of providing certainty on an issue which has its basis in an international convention which the UK has ratified whilst at the same time retaining the Court's discretion to grant an Order on such terms and conditions as it deems appropriate. As such, it represents an important but fairly conservative step forward, which we believe the judiciary (at least) may support.

CAJE notes that PCO applications have not been restricted to environmental cases. We therefore believe that it would be useful to make specific reference to Orders made under the Aarhus Convention in order to ensure that the provisions of the Convention are duly considered by the Court.

Proposed amendment to Part 54 CPR

<u>Protective Costs Orders (including Orders made under Article 9 of the UNECE Aarhus Convention)</u>

54.20A

(1) A Protective Costs Order ('PCO') means an order made by the Court in a claim for judicial review with the purpose of limiting or extinguishing the potential liability of the Claimant for the costs of any other party.

(2) A PCO made in accordance with Article 9 of the UNECE Aarhus Convention shall have the express purpose of facilitating access to justice in environmental matters.

(3) A PCO may be made on such terms and subject to such conditions as the Court deems appropriate.

(4) An application by the Claimant for a PCO should usually be included in the Claim Form but may be made at any stage.

(5) An application for a PCO (whether in the Claim Form or otherwise) must be accompanied by:
  (a) a draft Order;
  (b) an explanation why the applicant is seeking the PCO; and
  (c) a statement of the facts relied on.

(6) In the case of an application for a PCO made in a Claim Form
  (a) Any party wishing to resist the application must:
    (i) say so in his acknowledgment of service; and
    (ii) set out his grounds for resisting the application

(7) Where the Court refuses to grant a PCO on the papers the applicant may request the decision to be reconsidered at a hearing. A request under this paragraph must be filed and served within 7 days after service of the reasons for refusal to grant the PCO.

(8) Where an application for a PCO has been refused at a hearing in the High Court the applicant may apply to the Court of Appeal for permission to appeal that refusal. Such application must be made within 7 days of the decision of the High Court.

(9) An application to set aside a PCO must be made within 7 days of the PCO being granted. A PCO will only be set aside where there are compelling reasons for doing so. An unsuccessful application to set aside a PCO will normally result in an award of costs against the applicant on an indemnity basis.

AMENDMENT TO PRACTICE DIRECTION PD54

Rule 54.20A – Protective Costs Orders

PCO without a hearing

20A.1 The Court will generally, in the first instance, consider an application for a PCO without a hearing. Where an application for a PCO has been made in or accompanying the Claim Form, the Court will usually grant or refuse the PCO at the same time that it makes the order giving or refusing permission to proceed.

20A.2 Where an application for a PCO is refused without a hearing then the court will not generally make an order for costs against the claimant. However, where an order as to costs is made against the applicant for a PCO in such circumstances the applicant's liability for costs will not normally exceed £1,000 in respect of each receiving party.

PCO hearing

20A.3 Neither the defendant nor any other interested party need attend a hearing on the question of a PCO unless the Court directs otherwise.

20A.4 Where the defendant or any party does attend a hearing on an unsuccessful renewed application for a PCO then the court will not generally make an order for costs against the claimant. However, where an order as to costs is made against the applicant for a PCO in such circumstances the applicant's liability for costs will not normally exceed £2,500 in respect of each receiving party.