

Compliance Committee to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters (Aarhus Convention)

**Second progress review of the implementation of decision VI/8k
on compliance by the United Kingdom of Great Britain
and Northern Ireland with its
obligations under the Convention**

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I. Introduction

1. At its sixth session (Budva, Montenegro, 11-13 September 2017), the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) adopted decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention (see ECE/MP.PP/2017/2/Add.1).

II. Summary of follow-up

2. Prior to the adoption of decision VI/8k at the sixth session of the Meeting of the Parties, several statements were submitted to the Committee. Specifically, statements were sent on 1 August 2017 by an observer, Mr. Murphy; on 3 August 2017 by ClientEarth, one of the communicants of communication ACCC/C/2008/33, together with observers RSPB and Friends of the Earth; on 10 August 2017 from the communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86; and on 11 August 2017 a further statement by ClientEarth on its own. The secretariat informed those submitting the foregoing statements that their statements would be considered in the follow-up procedure on the implementation of decision VI/8k.

3. Following the adoption of decision VI/8k, on 20 September 2017 ClientEarth, together with observers RSPB and Friends of the Earth, submitted further information concerning the implementation of that decision.

4. On 5 March 2018, an observer, Environment Links UK, submitted a written statement that it had in parallel submitted to the eleventh meeting of the Convention's Task Force on Access to Justice (Geneva, 27-28 February 2018).

5. On 6 March 2018, the communicant of communication ACCC/C/2013/91 submitted a written statement.

6. On 13 March 2018, the communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86 submitted a joint statement.

7. At its sixtieth meeting (Geneva, 12-15 March 2018), the Committee reviewed the implementation of decision VI/8k in open session with the participation by audio conference of representatives of the Party concerned, the communicants of communications ACCC/C/2008/23, ACCC/C/2008/33, ACCC/C/2010/53, ACCC/C/2012/68, ACCC/C/2013/85 and ACCC/C/2013/86, and RSPB as an observer.

8. On 15 March 2018, observers RSBP, Friends of the Earth and Friends of the Earth Scotland submitted their statement to the Committee's sixtieth meeting in written form.

9. On 22 March 2018, the Party concerned submitted its statement to the Committee's sixtieth meeting in written form.

10. On 1 October 2018, the Party concerned submitted its first progress report on decision VI/8k, on time.

11. On 5 October 2018, the secretariat forwarded the first progress report of the Party concerned to the communicants of communications ACCC/C/2008/23, ACCC/C/2008/27, ACCC/C/2008/33, ACCC/C/2010/53, ACCC/C/2011/64, ACCC/C/2011/65, ACCC/C/2012/68, ACCC/C/2012/77, ACCC/2013/85, ACCC/C/2013/86 and ACCC/C/2013/91 and registered observers, inviting their comments by 1 November 2018.

12. On 31 October 2018, ClientEarth, together with observers RSPB and Friends of the Earth, submitted comments on the first progress report by the Party concerned. On 1 November 2018, ClientEarth on its own submitted further comments on the first progress report.

13. On 9 November 2018, the communicant of communication ACCC/C/2013/91 submitted comments on the first progress report.

14. On 29 November 2018, observer RSPB provided further information regarding recent legislative developments relevant to the first progress report.
15. After taking into account the information received, the Committee prepared its first progress review and adopted it through its electronic decision-making procedure on 24 February 2019. The Committee thereafter requested the secretariat to forward the first progress review to the Party concerned, the communicants of communications ACCC/C/2008/23, ACCC/C/2008/27, ACCC/C/2008/33, ACCC/C/2010/53, ACCC/C/2011/64, ACCC/C/2011/65, ACCC/C/2012/68, ACCC/C/2012/77, ACCC/2013/85, ACCC/C/2013/86 and ACCC/C/2013/91 and registered observers.
16. At its sixty-third meeting (Geneva, 11-15 March 2019), the Committee reviewed the implementation of decision VI/8k in open session, with the participation by audio conference of representatives of the Party concerned and of the communicants of communications ACCC/C/2008/23, ACCC/C/2008/33 (ClientEarth), ACCC/C/2010/53, ACCC/C/2013/85 and ACCC/C/2013/86, as well as a representative of RSPB as an observer.
17. On 15 March 2019, the communicants of communications ACCC/2013/85 and ACCC/C/2013/86 submitted a statement.
18. On 20 March 2019, the communicant of communication ACCC/C/2008/33 (ClientEarth) submitted comments on the statement by the Party concerned delivered at the open session of the Committee's sixty-third meeting.
19. On 22 March 2019, observers RSPB and Friends of the Earth submitted a statement.
20. On 31 July 2019, the secretariat sent the Party concerned a letter to remind it of the deadline of 1 October 2019 for its second progress report.
21. On 30 September 2019, the Party concerned submitted its second progress report, on time.
22. On 2 October 2019, the secretariat sent the second progress report of the Party concerned to the communicants of communications ACCC/C/2008/23, ACCC/C/2008/27, ACCC/C/2008/33, ACCC/C/2010/53, ACCC/C/2011/64, ACCC/C/2011/65, ACCC/C/2012/68, ACCC/C/2012/77, ACCC/2013/85, ACCC/C/2013/86, and ACCC/C/2013/91 and registered observers.
23. On 8 October 2019, the communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86 provided comments on the second progress report by the Party concerned.
24. On 9 October 2019, the communicant of communication ACCC/C/2010/53 provided comments on the second progress report.
25. On 29 October 2019, observers RSPB, Friends of the Earth, and Friends of the Earth Scotland submitted comments on the second progress report.
26. On 30 October, observer Environment Links UK submitted comments on the second progress report.
27. On 31 October 2019, the communicant of communication ACCC/C/2008/33 (ClientEarth) submitted comments on the second progress report.
28. After taking into account the information received, the Committee prepared its second progress review and adopted it through its electronic decision-making procedure on 6 March 2020. The Committee thereafter requested the secretariat to forward the second progress review to the Party concerned and the communicants of communications ACCC/C/2008/23, ACCC/C/2008/27, ACCC/C/2008/33, ACCC/C/2010/53, ACCC/C/2011/64, ACCC/C/2011/65, ACCC/C/2012/68, ACCC/C/2012/77, ACCC/2013/85, ACCC/C/2013/86, and ACCC/C/2013/91 and registered observers.

III. Considerations and evaluation by the Committee

29. In order to fulfil the requirements of paragraph 2 of decision VI/8k, the Party concerned would need to, as a matter of urgency, take the necessary legislative, regulatory, administrative and practical measures to:

(a) Ensure that the allocation of costs in all court procedures subject to article 9 is fair and equitable and not prohibitively expensive;

(b) Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;

(c) Further review its rules regarding the time frame for the bringing of applications for judicial review in Northern Ireland to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework;

(d) Establish a clear, transparent and consistent framework to implement article 9(4) of the Convention;

(e) Ensure that in future, plans and programmes similar in nature to national renewable energy action plans, if prepared, are submitted to public participation as required by article 7, in conjunction with the relevant paragraphs of article 6, of the Convention.

30. In order to fulfil the requirements of paragraph 4 of decision VI/8k, the Party concerned would need to ensure that its Civil Procedure Rules regarding costs are applied by its courts so as to ensure compliance with the Convention.

31. In order to fulfil the requirements of paragraph 6 of decision VI/8k, the Party concerned would need to review its system for allocating costs in private nuisance proceedings within the scope of article 9(3) of the Convention and undertake practical and legislative measures to overcome the problems identified in paragraphs 109 to 114 of the Committee's findings on communications ACCC/C/2013/85 and ACCC/C/2013/86 to ensure that such procedures, where there is no fully adequate alternative procedure, are not prohibitively expensive.

32. In order to fulfil the requirements of paragraph 8 of decision VI/8k, the Party concerned would need to put in place a clear requirement to ensure that:

(a) When selecting the means for notifying the public under article 6(2) of the Convention, public authorities are required to select such means as will ensure effective notification of the public concerned in the territory outside of the Party concerned, bearing in mind the nature of the proposed activity, and the potential for transboundary impacts. In such a case, the Party concerned may engage other existing applicable treaty regimes (for example, the Convention on Environmental Impact Assessment in a Transboundary Context), provided that the procedures meet the requirements under the Aarhus Convention;

(b) When identifying who is the public concerned by the environmental decision-making on ultra-hazardous activities, such as nuclear power plants, public authorities will apply the precautionary principle and consider the potential extent of the effects if an accident would indeed occur, even if the risk of an accident is very small.

General comments

33. The Committee welcomes the second progress report of the Party concerned, which is clear, well-structured, and includes relevant substantiating information. All of these aspects demonstrate a serious engagement with the Committee in its follow-up review of decision VI/8k, responding specifically to many of the points the Committee had made in its first progress review. The Committee encourages the Party concerned to maintain this constructive level of engagement with the Committee going forward in order that it may be found to have come into compliance as soon as possible.

Paragraphs 2 (a), (b) and (d) and paragraph 4 of decision VI/8k

34. As explained its first progress review,¹ the Committee considers that the recommendation in paragraph 4 of decision VI/8k, which stems from the Committee's findings on communication ACCC/C/2014/77 concerning the prohibitive expense of access to justice in England and Wales, does not impose any additional substantive obligation beyond those already contained in paragraphs 2(a), (b) and (d) of the decision. The Committee thus examines the implementation of paragraph 4 in the context of its review of the implementation of paragraph 2(a), (b) and (d) in England and Wales below.

England and Wales

35. With respect to England and Wales, in its first progress review the Committee identified the following aspects as requiring its further attention:

- (a) Type of claims covered;
- (b) Eligibility for costs protection;
- (c) Level of the costs caps (including default levels; the possibility to vary the caps; who may request a variation; and the procedural stage at which a variation may be sought);
- (d) Costs for procedures with multiple claimants;
- (e) Costs protection on appeal;
- (f) Privacy concerns regarding applications for costs protection;
- (g) Costs protection prior to grant of permission;
- (h) Costs relating to determination of an Aarhus claim;
- (i) Cross-undertakings for damages;
- (j) Costs orders against or in favour of interveners and funders of litigation.²

36. The Committee examines below the information provided by the Party concerned in its second progress report with respect to each of the above matters, together with relevant comments provided by communicants and observers.

Type of claims covered

37. In its second progress report, the Party concerned reports that an amendment of rule 45.41(2)(a) of the Civil Procedure Rules (CPR) which extends its scope to cover planning challenges brought under section 288 of the Town and County Planning Act 1990 entered into force on 1 October 2019.³

38. Observers RSPB, Friends of the Earth and Friends of the Earth Scotland, and Environment Links UK welcome this amendment but regret the decision by the Party concerned not to extend the scope of the CPR to encompass private nuisance cases and other private law claims,⁴ as do the communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86.⁵

39. Based on the above, the Committee welcomes the extension of the cost protection regime to section 288 challenges, which clearly demonstrates that the Party concerned has made progress as to the types of claims covered under the CPR. However, in light of the fact that other types of claims, such as private nuisance claims are still not covered by the costs

¹ Committee's first progress review, 24 February 2019, para. 28.

² Committee's first progress review, 24 February 2019, para. 29.

³ Party's second progress report, 30 September 2019, para. 1, and annex A, pp. 1-2.

⁴ Comments on Party's second progress report by observers RSPB, Friends of the Earth, and Friends of the Earth Scotland, 29 October 2012, p. 3, and comments on Party's second progress report by observer (Environment Links UK), 30 October 2012, p. 2.

⁵ Comments on the Party's second progress report by the communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86, 8 October 2019, pp. 1-2.

protection regime, the Committee considers that the Party concerned has not yet met the requirements of paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k with respect to the types of claims covered by cost protection in England and Wales.

Eligibility for costs protection

40. In its second progress report, the Party concerned states that, since unincorporated associations and residents groups do not have a legal personality separate from the individuals which comprise them, the individual members of those associations are ultimately personally responsible for the debts and contractual obligations of the association.⁶ When an unincorporated association brings legal proceedings this will be done in accordance with any rules or terms of the association; whether in the name of the association acting through a named individual or a group of individuals. Accordingly, if one or more individuals bring an action on behalf of an unincorporated association, the costs cap of £5,000 will apply to each individual who brings the action.⁷ It adds that where an unincorporated association has its own separate finances and funding support, courts will also take these into consideration since the members of the association have the benefit of those finances and equally will be liable for the debts of the association.⁸ The Party concerned submits that alternatively, the unincorporated association can incorporate and bring an action in the name of the legal entity formed.⁹

41. In their comments on the second progress report by the Party concerned, observers RSPB, Friends of the Earth, and Friends of the Earth Scotland submit that there should be one single cap for unincorporated associations, either a single £5,000 cap if represented by individuals, or a single £10,000 if represented as an organization. The observers claim that an unincorporated association should not have to change its legal status and incorporate in order to obtain early certainty over its costs position.¹⁰ The observers also submit that the ability for judges to take into account any separate finances and funding support has a chilling effect on claimants, as based on such information a court may increase the cap to an unknown level.¹¹

42. The Committee notes that, though the cost scheme does not establish a single cap for unincorporated associations for actions brought on behalf of the association, this is essentially linked to the fact that the association has chosen a status which does not confer legal personality. Therefore, in the absence of legal personality of unincorporated associations, the situation of individuals bringing proceedings on behalf of such association is no different from that of individuals bringing proceedings on their own behalf. As a consequence, the Committee evaluates the potential chilling effect of costs or complexity not as an issue of eligibility for the costs protection regime but in its evaluation of the level of the costs caps, including in the case of multiple claimants, below.

43. In the light of the above, the Committee considers that no evidence has been provided that the Party concerned fails to meet the requirements of paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k with respect to the eligibility for costs protection in England and Wales.

⁶ Party's second progress report, 30 September 2019, para. 2.

⁷ Party's second progress report, 30 September 2019, paras. 2-4.

⁸ Party's second progress report, 30 September 2019, para. 5.

⁹ Party's second progress report, 30 September 2019, para. 3.

¹⁰ Comments on Party's second progress report by observers RSPB, Friends of the Earth, and Friends of the Earth Scotland, 29 October 2019, para. 7.

¹¹ Comments on Party's second progress report by observers RSPB, Friends of the Earth, and Friends of the Earth Scotland, 29 October 2019, para. 8.

Level of the costs caps

(a) Default levels of costs caps and cross caps

44. In its second progress report on decision VI/8k, the Party concerned confirms that, pursuant to CPR 45.43, the default costs cap for claimants remains £5,000 for individuals and £10,000 in other cases, with a cross cap on an unsuccessful defendant's liability to pay the claimant's costs of £35,000.¹²

45. In its report on decision IV/9i to the fifth session of the Meeting of the Parties, the Committee expressed concern that the (then fixed) costs caps of £5000 and £10,000 may be prohibitively expensive for many individuals and organizations.¹³ The Committee considers that these levels would therefore only be acceptable if there would be measures enabling the costs caps to be varied downwards in order to take into account the financial capacity of individuals or organizations.

(b) Variation of cost caps

46. Pursuant to CPR 45.44(1), the court may vary the cost caps upwards or downwards.¹⁴

47. Observers RSPB, Friends of the Earth, and Friends of the Earth Scotland submit that, whilst information on this issue is limited because the costs regime is new, data obtained from the Ministry of Justice suggests that when the default cap is varied, it is "almost always" (i.e. in six out of seven cases) being increased. They submit that, if this trend continues, and parties become aware of this as a normal judicial practice, defendants will be encouraged to challenge the level of the default caps as a matter of course, creating the potential for routine satellite litigation on costs, and claimants will be deterred from issuing meritorious claims owing to the resultant cost uncertainty.¹⁵

48. As the Committee has stated previously,¹⁶ it is concerned that this provision may be used more often to increase, rather than decrease, the caps. The Committee also considers that the uncertainty regarding the actual level of the cap that would apply in any particular case due to the possibility of variation may also be contrary to the requirement in article 3(1) of the Convention to establish a clear, transparent and consistent framework to implement the Convention's provisions. Since, at the time of the second progress report by the Party concerned, the possibility to vary the costs caps both upwards and downwards remains unchanged, the Committee continues to hold these concerns.

49. In this regard, the Committee invites the Party concerned in its final progress report to report on: (i) the proportion of Aarhus Convention claims in which an application to vary the cost cap is made, either up or down; (ii) the outcomes of each of those applications; (iii) the quantum of the varied costs cap; and (iv) for each case in which a variation was granted, the reasons given for doing so.

(c) Trigger for varying the costs caps

50. Pursuant to CPR 45.44(2), the court may vary the default cost caps or remove such a limit on an application to vary by one of the parties, but not at the court's own motion.¹⁷

51. As the situation has not changed since the Committee's first progress review,¹⁸ the Committee reiterates that, since the defendant can still seek to vary the cost caps, the

¹² Party's second progress report, 30 September 2019, para. 7, and annex B, pp. 1-2.

¹³ ECE/MP.PP/2014/23, para. 47.

¹⁴ Party's second progress report, 30 September 2019, annex B, p. 2.

¹⁵ Comments on Party's second progress report by observers RSPB, Friends of the Earth, and Friends of the Earth Scotland, 29 October 2019, para. 10.

¹⁶ ECE/MP.PP/2014/23, paras 35-36, and Committee's first progress review, 24 February 2019, para. 39.

¹⁷ Party's second progress report, 30 September 2019, para. 8, and annex B, p. 2.

¹⁸ Committee's first progress review, 24 February 2019, paras. 40-41.

Committee remains unconvinced that CPR 45.44(2) creates sufficient certainty for claimants in practice.

(d) Procedural stage at which a variation can be sought

52. The Party concerned reports that, under CPR 45.44(5), any application to vary must, if made by the claimant, be made in the claim form, and if made by the defendant, be made in the acknowledgement of service.¹⁹ According to that same provision, the court must make its determination on an application to vary at the earliest opportunity.²⁰ The Party concerned states that these rules aim to ensure that the issue of the costs cap is settled at the outset or, where a variation is sought, at an early stage in the procedure, thus delivering certainty to the parties. It states, however, that a failure to provide any or sufficient financial information will delay the resolution of the parties' position on cost caps and any variation the court may decide to make. Moreover, the Party concerned submits that, in accordance with CPR 45.44(6), the court may consider an application to vary the costs at a later stage if there has been a significant change in circumstances, including evidence that the schedule of the claimant's financial resources contained false or misleading information which means that the proceedings would now or would not be now prohibitively expensive for the claimant.²¹

53. In reply to the invitation from the Committee in its first progress review,²² the Party concerned comments on the litigation brought by Friends of the Earth to challenge the government's decision to adopt a revised National Policy Framework. Specifically, the Party concerned claims that in that case, the defendant queried the relationship of the claimant to another entity, in particular regarding the financial resources available to the claimant, and therefore reserved its position on the costs cap in its acknowledgement of service, pending provision of further information. The Party concerned claims that, after seeking further information, the defendant applied to vary the costs cap, and that this issue was decided before the "rolled up" hearing. It claims that the application to vary was dealt with soon after it was brought and submits that therefore the case does not demonstrate that the CPR are not working as intended.²³

54. The Party concerned further refers to the case *CPRE Surrey and POW Campaign Ltd v. Waverley Borough Council and Secretary of State for Housing, Communities and Local Government*²⁴ (*CPRE Surrey v. Waverley*) in which the defendant filed an application to vary the costs caps after the judgment, which the court considered and granted.²⁵ The Party concerned submits that the defendant had raised the issue of variation of the cost cap in its acknowledgement of service because insufficient financial information had been provided by the claimant. The Party concerned submits further that the court requested the claimant to file additional financial information on several occasions, but the claimants failed to do so. The Party concerned claims that the repeated failure of the claimant in that instance was the cause of the late application and the court's willingness to deal with the matter at that stage.²⁶

55. With respect to the litigation by Friends of the Earth described in paragraph 53 above, observers RSPB, Friends of the Earth, and Friends of the Earth Scotland submit that the challenge to the claimant's caps was only resolved by the court less than a month before the hearing, and the government then sought to challenge the claimant's cap again, after judgment had been given. The observers state that this demonstrates that the CPR, in

¹⁹ Party's second progress report, 30 September 2019, para. 8, and annex B, pp. 1-2.

²⁰ Party's second progress report, 30 September 2019, para. 8, and annex B, pp. 1-2.

²¹ Party's second progress report, 30 September 2019, para. 8, and annex B, pp. 1-3.

²² Committee's first progress review, 24 February 2019, paras. 44-45.

²³ Party's second progress report, 30 September 2019, para. 9.

²⁴ [2018] EWHC 2969.

²⁵ Party's second progress report, 30 September 2019, para. 9, and annex C.

²⁶ Party's second progress report, 30 September 2019, para. 9.

particular the provision according to which a variance may be sought as a result of a “change of position”, do not provide certainty and reasonable predictability for claimants.²⁷

56. Whether or not the delays in the defendants’ applying for, and the courts’ granting of cost variances were attributable to the claimants’ failure to provide all requested financial documents, these cases also show that applications for varying of costs cap may be introduced at a late stage of the procedure and even after the judgement was delivered. The Committee considers that the possibility for defendants to apply to vary cost caps during proceedings, and even after judgment, fails to guarantee sufficient certainty for claimants.

57. In light of the above, the Committee considers that the Party concerned has not demonstrated progress in meeting the requirements of paragraphs 2(a), (b) and (d) and 4 of decision VI/8k as regards the procedural stage at which a variance in the cost caps may be sought.

Costs for procedures with multiple claimants

58. In its second progress report, the Party concerned confirms that there is a separate costs cap for each claimant. It submits that this is to provide fairness and proportionality to all the parties while ensuring that the costs of claims are not prohibitively expensive.²⁸ The Party concerned submits that, where multiple claimants raise different legal arguments, each party has a separate costs cap in order to separate liability for the costs of each party, since the court may find in favour of some claimants and not others. The Party concerned claims that, where multiple claimants wish to make the same legal arguments, there should be no incentive to allowing proceedings to be expanded, which it claims increases both legal and administrative costs, simply to allow more individuals to shoulder the costs cap burden.²⁹

59. As it has observed previously,³⁰ the Committee sees no basis for the rule requiring separate costs caps for each claimant. For example, the Committee considers the Party concerned has provided no information to demonstrate that one additional claimant would double a defendant’s costs; two additional claimants would triple the costs etc. Moreover, the Party concerned has not addressed the Committee’s concerns that the rule removes the possibility for members of the public to defray the costs of the proceeding by sharing cost burdens and that it also increases the likelihood of satellite litigation, thereby increasing uncertainty. To the contrary, the position of the Party concerned suggests that cost sharing is undesirable. The Committee cannot agree.

60. With respect to the statement of the Party concerned that the rule requiring a separate costs cap per claimant provides fairness and proportionality for all parties, the Committee points out that, as observers RSPB, Friends of the Earth England and Friends of the Earth Scotland correctly observe, the concept of “fairness” in article 9(4) refers to what is fair for the claimant, not the defendant.^{31,32}

61. Based on the information before it, the Committee considers that the Party concerned has not demonstrated that it has made progress towards meeting the requirements of paragraphs 2(a), (b) and (d) and 4 with respect to procedures with multiple claimants.

²⁷ Comments on Party’s second progress report by observers RSPB, Friends of the Earth, and Friends of the Earth Scotland, 29 October 2019, para. 9.

²⁸ Party’s second progress report, 30 September 2019, para. 11.

²⁹ Party’s second progress report, 30 September 2019, para. 12.

³⁰ ECE/MP.PP/2017/46, para. 39, and Committee’s first progress review, 24 February 2019, para. 47.

³¹ ACCC/C/2008/33 (ECE/MP.PP/C.1/2010/6/Add.3), para. 135.

³² Comments on Party’s second progress report by observers RSPB, Friends of the Earth, and Friends of the Earth Scotland, 29 October 2019, para. 11.

Cost protection on appeal

62. In its second progress report, the Party concerned refers to CPR 52.19A which it submits incorporates CPR 45.43 to 45.45 by reference. The Party concerned states that these provisions have the result that the court of appeal is to assess the cost of procedure by reference to those latter provisions and to all the circumstances of the case, including any change in the position of the parties.³³ It claims that CPR 52.19A enables the court to make an assessment of whether any costs cap previously applicable or ordered should continue to apply in the appeals stage or whether a new order be made.³⁴

63. Observers RSPB, Friends of the Earth, and Friends of the Earth Scotland submit that in Friend of the Earth's climate litigation concerning the expansion of Heathrow Airport, the government sought a costs cap for both parties to be set at £35,000. They report that the court instead ordered a second £10,000 cap on appeal, bringing the total costs cap for Friends of the Earth to £20,000.³⁵

64. The Committee notes that CPR 52.19A requires the court to consider whether the costs of the appeal procedure will be prohibitively expensive, and if they will be, to make an order limiting the recoverable costs to the extent necessary to prevent this. However, as it has previously made clear,³⁶ the Committee considers that the lack of a maximum costs caps in CPR 52.19A fails to ensure sufficient clarity or costs protection for claimants in appeals regarding Aarhus Convention claims. In this regard, the Committee notes that there is nothing which would prevent or dissuade defendants from seeking costs caps for claimants on appeal which are higher than those established under CPR 45.43 to 45.45 as was allegedly done in the Friends of the Earth litigation mentioned in paragraph 63 above, nor indeed anything to prevent a judge from ordering such higher costs caps.

65. The Committee furthermore underlines that the costs to be ordered on appeal, including any possible costs caps that may be introduced into CPR 52.19A must recognize that the requirement not to be prohibitively expensive applies to the procedure *as a whole*, encompassing all stages of the procedure.

66. Finally, the Committee notes the explicit requirement in paragraph 3 of CPR 52.19A that the court, when considering the financial resources of a party for the purposes of this rule, must have regard to "any financial support which any person has provided or is likely to provide to that party."³⁷ The Committee's considerations in paragraphs 69-73 below therefore apply equally to this provision of CPR 52.19A.

67. Based on the information before it, it is the Committee's understanding that the situation with respect to cost protection on appeal remains unchanged since the time of its report to the sixth session of the Meeting of the Parties. Accordingly, the Committee considers that the Party concerned has not demonstrated any progress towards meeting the requirements of paragraphs 2(a), (b) and (d) and 4 with respect to costs protection on appeal.

Schedule of claimant's financial resources

68. CPR 45.42(b) provides that a claimant seeking costs protection for an Aarhus Convention claim must provide a schedule of his or her financial resources which provides details of any financial support which any person has provided or is likely to provide to the claimant, as well as the aggregate amount which has been provided and which is likely to be provided.³⁸ The Party concerned explains that this rule accounts for any potential changes in

³³ Party's second progress report, 30 September 2019, paras. 13-14, and annex B, p. 1.

³⁴ Party's second progress report, 30 September 2019, para. 13.

³⁵ Comments on Party's second progress report by observers RSPB, Friends of the Earth, and Friends of the Earth Scotland, 29 October 2019, para. 13.

³⁶ ECE/MP.PP/2017/46, para. 42, and Committee's first progress review, 24 February 2019, paras. 50-52.

³⁷ Party's second progress report, 30 September 2019, annex B, p. 1.

³⁸ Party's second progress report, 30 September 2019, para. 15, and annex B, pp. 3-4.

the financial position of parties during legal proceedings, for example, due to planned or previous history of fundraising activities.³⁹ It states that the rule does not require that the schedule of a claimant's resources include the identity of those providing financial support.⁴⁰

69. The Committee reiterates the concern it expressed in its report to the sixth session of the Meeting of the Parties that the reference to financial support "which is likely to be provided" is vague and ambiguous and accordingly reduces certainty for claimants. Moreover, as the Committee noted in its first progress review,⁴¹ the High Court has acknowledged that though the wording of the CPR 45.42 does not require the disclosure of the identity of donors, this information may be required for assessment of the likelihood of financial support.

70. As regard the possibility to hold private hearings on cost caps, the Party concerned in its second progress report informs the Committee that CPR 39.2 was amended following the Civil Procedure Rules Committee review and the amendment entered into force on 6 April 2019. This amendment maintains public hearings for applications to vary cost caps with the possibility to grant an exception in order to protect confidential information or other reason necessary to secure the proper administration of justice.⁴²

71. Observers RSPB, Friends of the Earth, and Friends of the Earth Scotland submit that the requirement that certain conditions must be met for hearings on cost caps to be held in private may have a chilling effect by adding an extra procedural hurdle in order to prove a private hearing is required. Additionally, they submit that the focus on "damage to confidentiality" is not necessarily the same concern that a claimant may have on what is or is not private. They submit that the way the rule is drafted creates unwelcome ambiguity when it could have been much clearer and certain for claimants. They ask the Committee to request the Party concerned to monitor the effectiveness of CPR 39.2 and publish its findings.⁴³

72. The Committee does not dispute that the general rule of open justice is one of the essential principles of justice. However, whether CPR 39.2 will be sufficient to protect the interests of claimants and avoid a chilling effect on potential claims will depend on how the rule is applied in practice. The Committee accordingly invites the Party concerned to monitor the courts' application of CPR 39.2 and to provide an update in its final progress report.

73. In the light of the above, the Committee considers that the Party concerned has not yet demonstrated that it has met the requirements of paragraph 2(a), (b), and (d) and 4 with respect to the schedule of financial resources needed to support an application for costs protection.

Costs protection prior to the grant of permission

74. In its second progress report, the Party concerned states that, in all Aarhus Convention claims to which a costs cap applies, the cap will cover all costs which may be recoverable by either party, including any pre-action costs.⁴⁴

75. The above information is not disputed by the communicants or observers.

76. In the light of the above, the Committee considers that the United Kingdom has demonstrated that it has met the requirements of paragraph 2(a), (b), and (d) and 4 with respect to costs protection prior to the grant of permission.

³⁹ Party's second progress report, 30 September 2019, para. 15.

⁴⁰ Party's second progress report, 30 September 2019, para. 15.

⁴¹ Committee's first progress review, 24 February 2019, para. 57.

⁴² Party's second progress report, 30 September 2019, paras. 16-18, and annex B, pp. 4-5.

⁴³ Comments on Party's second progress report by observers RSPB, Friends of the Earth, and Friends of the Earth Scotland, 29 October 2019, para. 15.

⁴⁴ Party's second progress report, 30 September 2019, para. 22.

Costs relating to the determination of an Aarhus claim

77. In its second progress report, the Party concerned acknowledges that the change introduced to the CPR in February 2017, which replaced the provision that an unsuccessful defendant would usually pay costs on an indemnity basis with an amended CPR 45.45(3)(b) stipulating that such costs will normally be paid on the lower, standard basis, could lead to more defendants challenging claimants' assertions that their claim is an Aarhus claim and deter claimants from bringing claims.⁴⁵ The Party concerned submits however, that the amended rule still provides an appropriate disincentive against unmeritorious challenges, and that courts still have the discretion to decide to impose costs on an indemnity basis.⁴⁶

78. The Committee notes that the situation has thus remained unchanged since the Committee's report to the sixth session of the Meeting of the Parties.⁴⁷ Accordingly, the Committee reiterates that the 2017 amendment has moved the Party concerned further away from meeting the requirements of paragraph 2(a), (b), and (d) and 4 with respect to the costs related to the determination of an Aarhus claim.

Cross-undertakings for damages

79. With respect to cross-undertakings for damages, in its report to the sixth session of the Meeting of the Parties, the Committee took the view that, while the 2017 CPR amendments may provide for some greater clarity as regards how the court should determine what would be prohibitively expensive for the applicant, they do not give any further clarity to applicants as to: (a) whether a cross-undertaking will be required, and (b) if a cross-undertaking is required, what its level will be. As the Committee explained, this situation fails to meet the requirement in article 3(1) of the Convention for a clear, transparent and consistent framework to implement the provisions of the Convention.⁴⁸

80. In its second progress report, the Party concerned states that, according to data it had collected between April 2013 and May 2015, there were 12 applications for interim injunctions in that period, 8 of which were granted and in only one order did the claimant give a cross-undertaking for damages. The Party concerned acknowledges it has no subsequent data on instances of cross-undertakings for damages.⁴⁹

81. The lack of data on the number of cross-undertakings required in Aarhus claims since the 2017 amendment means that the Committee has no evidence before it upon which to assess whether the Party concerned has made progress towards meeting the requirements of paragraphs 2(a), (b) and (d) and 4 of decision VI/8k with respect to cross-undertakings for damages. The Committee thus invites the Party concerned, together with its final progress report, to report on the number of cross-undertakings required in Aarhus Convention claims since the 2017 CPR amendment.

Costs orders against or in favour of interveners and funders of litigation

82. With respect to funders of litigation, the Party concerned in its second progress report confirms that it has no plan to bring sections 85 and 86 of the Criminal Justice and Courts Act 2015 into force in the foreseeable future.⁵⁰ So long as sections 85 and 86 of the Criminal Justice and Courts Act are not brought into force with respect to Aarhus Convention claims, the Committee considers that the Party concerned will have met the requirements of paragraphs 2(a), (b) and (d) and 4 with respect to costs orders against funders of litigation.

⁴⁵ Party's second progress report, 30 September 2019, para. 23, and annex B, p. 3.

⁴⁶ Party's second progress report, 30 September 2019, para. 23.

⁴⁷ ECE/MP.PP/2017/46, para. 51.

⁴⁸ ECE/MP.PP/2017/46, para. 54.

⁴⁹ Party's second progress report, 30 September 2019, paras. 26-27.

⁵⁰ Party's second progress report, 30 September 2019, para. 29.

83. With respect to interveners, in its second progress report the Party concerned confirms that section 87 of the Criminal Justice and Courts Act 2015 remains unchanged.⁵¹ It explains that an intervener is a person who is not a party to judicial review proceedings but has been given permission by the court to file evidence or to make submissions. If one of the parties applies, the court has the power to make an order that an intervener pay costs to the other parties, but there are a number of conditions which must be met. These include both the behaviour of the intervener (section 87(6)) which led to the parties incurring additional costs, and also consideration of whether there are reasons why such an order should not be made, including any applicable rules of court, including the CPR. The Party concerned claims that section 87 recognises that interveners can add value and expertise to a case, but also that voluntary interventions can significantly increase the legal costs of a case. It states that the court retains complete discretion not to award costs against an intervener and, moreover, the parties to the proceedings may agree not to seek costs against the intervener. Finally, it points out that, as an alternative, a potential intervener can apply to become a party to judicial review proceedings and would thereafter have the benefit of the Aarhus Convention costs cap.⁵²

84. With respect to the assertion by the Party concerned that in order to avoid a possible costs order an intervener could apply to become a party, and thus benefit from the CPR costs cap, the Committee considers that encouraging interveners to become parties would simply add additional cost for all parties to the proceeding. The Committee however takes note of the reference by the Party concerned to the costs cap. The Committee accordingly invites the Party concerned to clarify in its final progress report whether, in calculating any costs order against an intervener who intervenes in support of a claimant in an Aarhus Convention claim, courts are already required to have regard to the costs cap in CPR 45.43(2), bearing in mind that that costs cap in CPR 45.43(2) is for a claimant, and thus, any order for an intervener should surely be significantly less.

85. In addition, with respect to the possibility that an unsuccessful claimant in an Aarhus Convention has to pay costs to an intervener, the Committee invites the Party concerned in its final progress report to clarify whether the claimant's maximum liability would remain capped at the levels set out in CPR 45.32(2), or whether an intervener's costs would be considered a ground for variation under CPR 45.44.

86. In the light of the above, the Committee considers that the Party concerned has not yet made progress towards meeting the requirements of paragraphs 2(a), (b) and (d) and 4 with respect to costs orders against or in favour of interveners.

Final remarks regarding England and Wales

87. In light of paragraphs 35-86 above, whilst welcoming the various positive developments described above, the Committee considers that the Party concerned has not yet met the requirements of paragraphs 2(a), (b) and (d) and 4 of decision VI/8k with respect to England and Wales.

88. In its second progress report, the Party concerned indicates that it is planning to undertake a review of its environmental costs protection regime, likely in April 2020.⁵³ The Committee invites the Party concerned, in the context of this review, to examine, inter alia, the points raised in paragraphs 49, 72, 81, 84 and 87 above. It invites the Party concerned in its final progress report to inform the Committee of the results of this review and to provide the text of any resulting proposals to adjust its environmental costs protection regime.

⁵¹ Party's second progress report, 30 September 2019, para. 30, and annex G.

⁵² Party's second progress report, 30 September 2019, paras. 30-33.

⁵³ Party's second progress report, 30 September 2019, para. 7.

Scotland

89. With regard to Scotland, in its first progress review the Committee identified that the following issues required its further attention:

- (a) Type of claims covered;
- (b) Level of the costs caps (including default levels of costs caps and cross caps and the possibility to vary them);
- (c) Costs protection on appeal.

90. The Party concerned in its second progress report confirms that the revised Rules for Protective Expenses Orders (PEOs) entered into force on 10 December 2018 with the publication of the Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018, which amends Chapter 58A of the Court of Session Rules.⁵⁴

Type of claims covered

91. The Party concerned indicates that although the revised PEO rules do not apply to private law cases, most environmental cases involve public authorities and would therefore be covered by the PEO rules.⁵⁵

92. Since private law claims remain outside the PEO rules, the Committee considers that the Party concerned has made no progress towards meeting the requirements of paragraphs 2(a), (b) and (d) of decision VI/8k with respect to the type of claims covered in Scotland.

Level of the costs caps

- (a) Default levels

93. The default levels of the costs caps have not changed since the Committee's report on decision V/9n to the sixth session,⁵⁶ namely £5,000 for a PEO (whether the claimant is an individual or an organization), with a cross-cap of £30,000.⁵⁷

- (b) The possibility to vary the level of the costs caps

94. Under the new PEO rules, the default cost levels can pursuant to Chapter 58A.7 be varied up or down "on cause shown".⁵⁸ Previously, they could only be varied in a manner favourable to the claimants, which the Committee specifically welcomed, in contrast to the regime in England and Wales.⁵⁹

95. In its second progress report, the Party concerned indicates that the new PEO rules are untested, but that it was not expected that there will be large numbers of cases in which the costs caps are increased. The Party concerned reports that the changed rule is justified by the need to give some margin of appreciation to courts in responding to the particular circumstances of the case.⁶⁰

96. The Committee already made clear in its review of decision V/9n that £5,000 should be the maximum amount of costs payable by a claimant in proceedings covered by article 9 of the Convention, with the possibility for the court to lower that amount if the circumstances of the case mean that it is reasonable to do so.⁶¹ The new rule mean that costs could be raised

⁵⁴ Party's second progress report, 30 September 2019, para. 34 and annex H.

⁵⁵ Party's second progress report, 30 September 2019, para. 37.

⁵⁶ ECE/MP.PP/2017/46, para. 62.

⁵⁷ Party's second progress report, 30 September 2019, annex H, p. 4.

⁵⁸ Party's second progress report, 30 September 2019, annex H, p. 4.

⁵⁹ ECE/MP.PP/2017/46, para. 69.

⁶⁰ Party's second progress report, 30 September 2019, paras. 38-39.

⁶¹ ECE/MP.PP/2017/46, para. 65.

above the £5,000. Moreover, the term “on cause shown” introduces legal uncertainty and could have a chilling effect. Accordingly, the Committee considers that the 2018 amendment reflected in Chapter 58A.7, as amended, moves the Party concerned significantly further away from fulfilling the requirements of paragraphs 2(a), (b) and (d) of decision VI/8k with respect to the level of the costs caps.

Cost protection on appeal

97. Chapter 58A.8 now provides that when a respondent appeals, the PEO is carried over to that appeal, but where a claimant appeals, the claimant must reapply for a PEO.⁶² In its second progress report, the Party concerned indicates that the 2018 amendment was justified by the need to give some flexibility for courts to respond to the circumstances of the case. It submits that, for instance, if the circumstances, or the claimant, have changed on appeal a PEO may no longer be appropriate. The Party concerned reports that in most cases a fresh PEO will be granted, under the revised, less cumbersome process.⁶³

98. It is the Committee’s understanding that, based on Chapter 58A.8, when the respondent appeals, subject to review by the appeal court, the claimant’s costs will remain capped at £5,000 and the respondent’s cross-cap at £30,000, total for both proceedings. In contrast, when the claimant appeals, it must reapply for a new PEO and if it is successful, a new cap of £5,000 and cross-cap of £30,000 will apply. It is not immediately clear from the text of Chapter 58A that the costs-cap covers all costs of both procedures, for example the costs of interveners and court fees (see also paragraphs 107 and 108 below). The Committee invites the Party concerned in its final progress report to clarify whether the costs-cap indeed covers all costs of the procedure.

99. In its report on decision V/9n to the sixth session of the Meeting of the Parties, the Committee had welcomed the proposal to automatically extend the application of the cost cap to cover an appeal filed by the respondent and had encouraged the Party concerned to consider applying this approach to appeals filed by the applicant also, or at least to adopt the approach taken in Northern Ireland, where costs protection automatically continues, albeit a further cap (at the same level) is applied.⁶⁴ The Committee regrets that the Party concerned has not to date adopted either of the Committee’s suggested approaches.

100. In the light of the above, the Committee considers that while the Party concerned has met the requirements of paragraphs 2(a), (b) and (d) of decision VI/8k with respect to cost protection in appeals brought by respondents, it has not yet done so with respect to appeals brought by claimants.

Other issues

101. In its first progress review, the Committee noted that the communicant of communication ACCC/C/2008/33 (ClientEarth), RSPB and Friends of the Earth had raised various other concerns regarding the then-proposed amendments to the PEO rules.⁶⁵ However, since the Committee had not at that time been provided with the text of the proposed amendments, it indicated that it would consider those issues in its second progress review.⁶⁶ The issues raised by the communicant and observers included the definition of what is “prohibitively expensive”, the procedure for applying for a PEO, the costs cap on the application for a PEO, the relevance of whether applicants for a PEO are represented pro bono, the use of an estimate of expenses to assess what would be prohibitively expensive, liability for interveners’ costs, court fees and the confidentiality of applicants’ financial information. The Committee considers each of these issues in paragraphs 102-109 below.

⁶² Party’s second progress report, 30 September 2019, annex H, p. 5.

⁶³ Party’s second progress report, 30 September 2019, para. 40.

⁶⁴ ECE/MP.PP/2017/46, para. 71.

⁶⁵ Comments on the Party’s first progress report by the communicant of ACCC/C/2008/33 (ClientEarth) and observers RSPB and Friends of the Earth, 31 October 2018, pp. 10-12.

⁶⁶ Committee’s first progress review, 24 February 2019, para. 91.

102. The Committee notes that the definition of “prohibitively expensive” costs which is now included in Chapter 58A.1(3) is based on the criteria sets out by the CJEU in the *Edwards* case.⁶⁷ The Committee considers that the elements included in this provision are relevant and appropriate, and provided that they are appropriately applied in practice, set a useful framework to ascertain whether costs are to be considered prohibitively expensive for a particular applicant. The Committee welcomes this change and considers that Chapter 58A.1(3) moves the Party concerned significantly closer toward fulfilling paragraph 2(a), (b) and (d) of decision VI/8k with respect to Scotland.

103. With respect to the PEO procedure, the Committee welcomes the simplified, written procedure for applying for a PEO under Chapter 58A.5 and 58A.6 accomplished through the 2018 amendments, and considers this change likewise moves the Party concerned closer towards meeting paragraphs 2(a), (b) and (d) of decision VI/8k.

104. Concerning the cost of applying for a PEO, the Committee welcomes that under Chapter 58A.9 (2), the cost of an unsuccessful PEO application is limited to £500, other than on exceptional cause shown.⁶⁸ As the Committee pointed out when this was only a proposed amendment,⁶⁹ this increases certainty for applicants and is thus a positive step towards fulfilling paragraph 2(a), (b) and (d) of decision VI/8k.

105. The Committee notes that Chapter 58A.5(3)(ii) requires that the applicant must lodge with the motion information concerning the terms on which the applicant is represented.⁷⁰ The Committee is concerned regarding the rationale for this particular provision and does not see why this information should be required in order to apply for a PEO. This could require disclosure concerning pro bono representation and threaten the economic viability of environmental lawyers representing clients in public interest cases in the mid to long-term. The Committee invites the Party concerned to comment in its final progress report on this provision’s rationale and to provide information on the effects of this rule to date.

106. Pursuant to Chapter 58A.5(3)(iv),⁷¹ the evaluation of expenses of each other party for which the applicant may be liable in relation to the proceeding is based on estimates. The Committee considers that not only does preparing such an estimate entail additional work (and thus cost) for the applicant, there is a risk in case of underestimation of respondent expenses with the consequence that no PEO is granted because the original estimate is deemed not prohibitively expensive, yet the situation changes as the case progresses and the expenses increase beyond initial estimates. The Committee thus invites the Party concerned in its final progress report to explain the need for such a rule, which is not found in the costs protection regimes in England and Wales or Northern Ireland.

107. With respect to the costs of interveners, the Committee notes that they do not appear to be included in the cost caps, which address only the costs’ liability between the applicant and respondent, although the costs of interveners may perhaps be considered under Chapter 58.A.1(4) as part of (a) “the costs incurred by the applicant in conducting the proceedings.”⁷² The Committee invites the Party concerned in its final progress report to clarify how the costs of interveners are dealt with under the Scottish costs protection regime.

108. The communicant of communication ACCC/C/2008/33 (ClientEarth), RSPB, Friends of the Earth and Friends of the Earth Scotland claim that court fees have significantly increased in recent years.⁷³ It is the Committee’s understanding that court fees should be included in the cost protection regime under Chapter 58.A.1(4) as (a) “the costs incurred by

⁶⁷ Case C-260/11, *Edwards and Pallikaropoulos v. Environment Agency et al*, ECLI:EU:C:2013:221.

⁶⁸ Party’s second progress report, 30 September 2019, annex H, p. 5.

⁶⁹ ECE/MP.PP/2017/46, para. 72.

⁷⁰ Party’s second progress report, 30 September 2019, annex H, p. 4.

⁷¹ Party’s second progress report, 30 September 2019, annex H, p. 4.

⁷² Party’s second progress report, 30 September 2019, annex H, pp. 2-3.

⁷³ Comments on the Party’s first progress report by the communicant of ACCC/C/2008/33 (ClientEarth) and observers RSPB and Friends of the Earth, 31 October 2018, p. 12; comments on Party’s second progress report by observers RSPB, Friends of the Earth, and Friends of the Earth Scotland, 29 October 2019, para. 26.

the applicant in conducting the proceedings.”⁷⁴ However, the Committee invites the Party concerned to clarify this point in its final progress report and encourages the Party concerned to follow the approach of English and Wales to expressly include any court fees in the assessment of what would be prohibitively expensive.

109. Chapter 58A.⁶⁷⁵ provides that the procedure for PEO applications is by default a written procedure. The Committee has no evidence that the default proceedings is not followed in the majority of cases. However, if a public PEO hearing is held, the absence of confidentiality of financial information may have a deterrent effect on applicants. The Committee invites the Party concerned in its final progress report to provide information on the number of PEO applications dealt with through a public hearing and what measures are provided to protect financial information in this context.

110. Finally, the Committee notes that observers RSPB, Friends of the Earth, and Friends of the Earth Scotland claim that Regulation 15 of the Civil Legal Aid Regulations appears to exclude environmental public interest cases, that very few environmental cases receive legal aid (and most that do are private law cases) and that the cap of £7000 on legal aid is unrealistic to run a complex judicial review procedure.⁷⁶ The Committee invites the Party concerned to provide its comments on each of these points in its final progress report.

Final remarks regarding Scotland

111. Based on paragraphs 89-110 above, the Committee welcomes the 2018 amendments to the Scottish Court of Session rules, in particular with respect to costs protection in appeals brought by respondents, the definition of “prohibitively expensive”, the simplified procedure for PEO applications, and the £500 cap on unsuccessful PEO applications. However, as described above, there remain a number of aspects of the system which do not yet meet the requirements of paragraphs 2 (a), (b) and (d) of decision VI/8k with respect to Scotland.

Northern Ireland

112. With regard to Northern Ireland, in its first progress review the Committee identified that the following issues required its further attention:

- (a) Type of claims covered;
- (b) Cross-undertakings for damages.

113. At the outset, the Committee takes note of the statement by observers RSPB, Friends of the Earth, and Friends of the Earth Scotland that the 2017 amendments to the Cost Protection Regulations in Northern Ireland have, to date, operated reasonably well in practice, within their limits.⁷⁷

Type of claims covered

114. In its second progress report, the Party concerned confirms that the costs protection regime in Northern Ireland still does not cover private law claims.⁷⁸

115. Accordingly, the Committee considers that, by excluding private law claims from the scope of costs protection, the Party concerned has not yet met the requirements of paragraphs 2(a), (b) and (d) with regard to the type of claims covered in Northern Ireland.

⁷⁴ Party’s second progress report, 30 September 2019, annex H, pp. 2-3.

⁷⁵ Party’s second progress report, 30 September 2019, annex H, p. 4.

⁷⁶ Comments on Party’s second progress report by observers RSPB, Friends of the Earth, and Friends of the Earth Scotland, 29 October 2019, para. 26.

⁷⁷ Comments on Party’s second progress report by observers RSPB, Friends of the Earth, and Friends of the Earth Scotland, 29 October 2019, para. 28.

⁷⁸ Party’s second progress report, 30 September 2019, para. 41.

Cross-undertakings for damages

116. In its second progress report, the Party concerned confirms that the costs protection regime in Northern Ireland remains similar to that in England and Wales as regard cross-undertakings for damages (see para. 80 above). It indicates that it is not aware of any Aarhus Convention case in Northern Ireland in which an injunction was sought, and thus, has no evidence on cross-undertakings.⁷⁹

117. The Committee has previously stated that the uncertainty related to cross-undertakings fails to meet the requirement in article 3(1) of the Convention for a clear, transparent and consistent framework to implement the provisions of the Convention.⁸⁰ However, based on the lack of data before the Committee, it is not clear whether the courts in the Northern Ireland still require cross-undertakings for damages when an injunction is sought in an Aarhus Convention claim or not. The Committee accordingly invites the Party concerned in its final progress report to provide evidence on whether indeed in practice courts still require cross-undertakings for damages when an injunction is sought in an Aarhus Convention claim.

118. In the absence of the above information, the Committee considers that the Party concerned has not yet demonstrated that it has met the requirements of paragraphs 2(a), (b) and (d) with regard to cross-undertakings for damages in Northern Ireland.

Final remarks regarding Northern Ireland

119. The Committee welcomes the confirmation by communicants and observers that the Regulations, as amended, have operated reasonably well in practice. However, in the light of paragraphs 112-118 above, the Committee considers that the Party concerned has not yet demonstrated that it has fully met the requirements of paragraphs 2(a), (b) and (d) and 4 of decision VI/8k with respect to Northern Ireland.

Paragraphs 2(c) of decision VI/8k

120. With regard to paragraph 2(c) of decision VI/8k, in its second progress report the Party concerned reports on the amendment to Rule 4 of Order 53 of the Court of Judicature, which amended the time limits to bring judicial review in Northern Ireland.⁸¹ Following the amendment which, entered into effect on 8 January 2018, the “promptitude” requirement is no longer applicable and the time limit for an application for judicial review runs “from when the grounds for the application first arose, unless the court considers that there is good reason for extending that period”.⁸² The Party concerned states that, where caselaw of the Court of Justice of the European Union (CJEU) is applicable, the time runs from when the applicant knew or ought to have known of an alleged illegality.⁸³

121. Based on the information before it at the time of the adoption of its second progress review, the Committee considers that the Party concerned has provided sufficient evidence to demonstrate that it has fulfilled paragraph 2(c) of decision VI/8k with respect to time limits for judicial review in Northern Ireland. Accordingly, in the absence of evidence to the contrary in the meantime, the Committee will, in its report to the seventh session of the Meeting of the Parties, report that the Party concerned has fulfilled the recommendation in paragraph 2(c) of decision VI/8k.

⁷⁹ Party’s second progress report, 30 September 2019, para. 41.

⁸⁰ ECE/MP.PP/2017/46, para. 91.

⁸¹ Party’s second progress report, 30 September 2019, para. 42 and annex I.

⁸² Party’s second progress report, 30 September 2019, annex I, pp. 1-2.

⁸³ Party’s second progress report, 30 September 2019, para. 43.

Paragraph 2(e) of decision VI/8k

122. With regard to paragraph 2(e) of decision VI/8k, in its second progress report the Party concerned refers to public consultations in the context of adoption of its draft National Energy and Climate Plan (NECP).⁸⁴

123. The Committee welcomes the information provided regarding the draft NECP and considers that the NECP, as the successor instrument to the national renewable energy action plan (NREAP), is clearly “similar in nature” to the NREAP at issue in communication ACCC/C/2012/68.

124. The Committee points out, however, that the information provided by the Party concerned in its second progress report still does not describe any “legislative, regulatory and administrative measures and practical measures” that it has taken to ensure that, in future, plans and programmes similar in nature to the NREAPs are submitted to public participation as required by article 7 of the Convention.

125. Though not mentioned by the Party concerned in its second progress report, the Committee notes that at page 16 of the NECP of the Party concerned, reference is made to the obligations of the Party concerned under article 7 of the Convention “which are set out in the UK’s published Consultation Principles.”⁸⁵ The Committee accordingly invites the Party concerned to provide, together with its final progress report, the current version of these Consultation Principles. It also invites the Party concerned to provide the text of any other legislative, regulatory, administrative and practical measures that it has put in place since the Committee’s findings on communication ACCC/C/2012/68 to ensure that in future, plans and programmes similar in nature to NREAPs are submitted to public participation as required by article 7 of the Convention.

126. In the light of the above, the Committee considers that the Party concerned has not yet demonstrated that it has met the requirements of paragraph 2(e) of decision VI/8k.

Paragraph 6 of decision VI/8k

127. With respect to paragraph 6 of decision VI/8k, the Party concerned reports that it “continues to consider the recommendation in paragraph 6 of decision VI/8k”.⁸⁶ The Party concerned however does not report on any practical or legislative measures it has taken to ensure that its system for allocating costs in private nuisance proceedings within the scope of article 9(3) of the Convention, and for which there is no fully adequate alternative procedure, is not prohibitively expensive.

128. The communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86 confirm that the Party concerned has failed to extend the CPR to cover such claims.⁸⁷

129. In light of the above, the Committee considers that the Party concerned has not yet met the requirements of paragraph 6 of decision VI/8k, nor demonstrated any progress in that direction. The Committee invites the Party concerned together with its final progress report to provide the text of any practical and legislative measures it has by that date taken to ensure that its system for allocating costs in private nuisance proceedings within the scope of article 9(3) of the Convention and for which there is no fully adequate alternative procedure, is not prohibitively expensive.

⁸⁴ Party’s second progress report, 30 September 2019, para. 44.

⁸⁵ Party’s second progress report, 30 September 2019, annex J, p. 16.

⁸⁶ Party’s second progress report, 30 September 2019, para. 45.

⁸⁷ Comments on the Party’s second progress report by the communicants of ACCC/C/2013/85 and ACCC/C/2013/86, 8 October 2019.

Paragraph 8(a) and (b) of decision VI/8k

Relevant legal framework

Clear requirement

130. With respect to the reference in paragraph 8 of decision VI/8k to putting in place “a clear requirement”, in its second progress report the Party concerned confirms that Planning Advice Note 12 is policy guidance and has no statutory or legal status. Rather, Planning Advice Note 12 is part of a “suite of advice” provided by the Planning Inspectorate and which applies to all Nationally Significant Infrastructure Projects (NSIPs).⁸⁸

131. The Party concerned does not state that the Planning Inspectorate and other public authorities involved in the decision-making procedure are legally required to comply with Planning Advice Note 12 but only that the Secretary of State, as the competent permitting authority for such projects, “would *expect* the process in Advice Note 12 to have been followed,”⁸⁹ which is not the same. In addition, the caveat following that statement of the Party concerned that “unless the recommendation indicates otherwise”⁹⁰ indicates that Advice Note 12 provides guidelines which can be diverged from in practice.

132. Despite the Committee’s invitation in its first progress review for the Party concerned to provide a legal text (e.g. legislation or court decision) in which an obligation to comply with Planning Advice Note 12 is laid down,⁹¹ the Party concerned has not to date done so. Similarly, the Party concerned has failed to substantiate by reference to any relevant decisions by courts or other review bodies, that a failure to follow the advice in Planning Advice Note 12 could be successfully challenged through administrative or judicial review, despite the Committee’s invitation in its first progress review for the Party concerned to do so.⁹² The Committee notes that the Party concerned has not provided any evidence to demonstrate that Planning Advice Notes in general establish “clear requirements” either.

133. The Committee also notes that, as discussed further in paragraph 145 below, the advice in Planning Advice Note 12 was not necessarily followed with respect to the Wylfa Newydd project. This causes the Committee to further doubt whether Planning Advice Note 12 could be considered to be a “clear requirement” within the meaning of paragraph 8 of decision VI/8k.

134. In the light of the above, the Committee considers that the Party concerned has not demonstrated that Planning Advice Note 12 establishes a clear requirement that will ensure that paragraphs 8(a) and (b) of decision VI/8k are met. The Committee accordingly invites the Party concerned together with its final progress report to provide evidence that it has by that date taken measures to put in place a clear requirement that will ensure that paragraphs 8(a) and (b) of decision VI/8k are met.

Content of Planning Advice Note 12

135. Section 7.1 of Planning Advice Note 12 sets out the Planning Inspectorate’s approach to public participation in the context of transboundary procedures. This provision states that:

“7.1.1 The Espoo/Aarhus conventions set out provisions for public participation in the EIA procedure. The Inspectorate will (where relevant) invite participation in the PA2008 process from the public in EEA State(s) and other relevant states. Public participation will occur:

- Where the proposed development is, in the view of the Inspectorate, likely to have a significant effect on the environment in other specific EEA State(s); and

⁸⁸ Party’s second progress report, 30 September 2019, para. 46, and annex K, p. 1.

⁸⁹ Party’s second progress report, 30 September 2019, para. 47, emphasis added.

⁹⁰ Party’s second progress report, 30 September 2019, para. 47.

⁹¹ Committee’s first progress review, 24 February 2019, para. 111(a).

⁹² Committee’s first progress review, 24 February 2019, para. 111(b).

- Where the proposed development is a nuclear NSIP. In these cases the Inspectorate will make reasonable effort to engage the public in relevant states.

7.1.2 The Inspectorate will issue press releases to the media in the EEA State(s) and/or relevant states. The press releases will include information on the transboundary screening assessment including links to the Inspectorate’s National Infrastructure Planning Website, and details of how the public can express their views on the application for development consent and (if they so wish) how they may formally participate in the PA2008 examination process. On this basis members of the public are afforded the same ability as the UK public to participate in the process should they wish to do so.”⁹³

136. The Committee considers that section 7.1 of Planning Advice Note 12 is lacking in some key respects.

137. First, the Committee can see no justification for the limitation in the first bullet of section 7.1.1 for public participation on non-nuclear activities to only include the public in affected EEA States. The Committee makes clear that if an activity may have a significant effect on the public in a particular State, that public is part of the public concerned and should be notified, irrespective of whether the State is an EEA State.

138. Second, the Committee points out that the definition of the “public concerned” in article 2(5) of the Convention includes not only the public affected or likely to be affected by the environmental decision-making but also the public “having an interest in” that decision-making. The Committee can see no requirement in section 7.1 to notify the public that may have an interest in the activity, for examples NGOs and other members of the public that regularly participate in decision-making on that type of activity.

139. Third, the Committee considers that the statement in section 7.1.2 that “the Inspectorate will issue press releases to the media in the EEA State(s) and/or relevant states” fails to include any requirement that, when selecting the means for notifying the public under article 6(2) of the Convention in a particular case, the Inspectorate will select the means that will ensure effective notification of the public concerned in the territory outside the United Kingdom, bearing in mind the nature of the proposed activity and the potential for transboundary impacts. The express inclusion of such a requirement will be important in order to direct the Inspectorate when deciding in a particular case in which media the press releases should be published.

140. In the same vein, article 6(2) of the Convention requires the public concerned to be informed in “an adequate, timely and effective manner”. The Committee considers that the reference in the second bullet of section 7.1.1 to the Inspectorate making “reasonable efforts to engage the public in relevant states” is a lower standard.

141. Based on the above, the Committee considers that the Party concerned has not demonstrated that the content of Planning Advice Note 12 fully meets the requirements of paragraphs 8(a) and (b) of decision VI/8k. The Committee invites the Party concerned together with its final progress report to provide evidence to demonstrate that it has by that date put in place measures to address each of the points identified by the Committee in paragraphs 137-140 above.

Application of Planning Advice Note 12 in practice – notice of the Wylfa Newydd project

142. With respect to paragraph 8(a) of decision VI/8k, in its second progress report, the Party concerned provides the press notice of 6 July 2018 regarding the Wylfa Newydd project published by its embassies in nine States.⁹⁴ The Party concerned reports that the press notice of 6 July 2018 was translated in German and in French and published on the websites of the British embassies in Austria, Belgium, Denmark, France, Germany, Republic of Ireland,

⁹³ Party’s second progress report, 30 September 2019, para. 48, and annex K, p. 9.

⁹⁴ Party’s second progress report, 30 September 2019, para. 55, and annex M.

Luxembourg, Netherlands and Norway.⁹⁵ It states that “the precise measures for cascading the press notice was left to the discretion of the embassies”.⁹⁶

143. The Committee welcomes the above information, which addresses a number of the questions set out at paragraph 122 of its first progress review. However, the Party concerned has omitted to provide any information on paragraphs 122 (a) and (f). The Committee underlines that the replies by the Party concerned to these points will be pivotal to the Committee’s assessment of whether the Party concerned has met the requirements of paragraph 8(a) and (b) with respect to the Wylfa Newydd notification in practice. To reiterate, paragraphs 122(a) and (f) of the Committee’s first progress review asked:

“(a) What instructions or other guidance was provided by the Planning Inspectorate to the British embassies with respect to how the public concerned should be identified and notified of the Wylfa Newydd project? The United Kingdom is invited to provide the text of these instructions or guidance, together with its second progress report.

...

(f) For each State in which the public concerned was informed about the Wylfa Newydd project by the local British embassy, through which mediums were the public concerned in that State informed (e.g. embassy website, local newspaper, national newspaper, public notice board in local libraries etc.) and in which language(s)?”

144. Since the Party concerned has not yet provided the above information, the Committee is not in a position to properly assess whether the Party concerned has met the requirements of paragraph 8(a) with respect to the Wylfa Newydd notification. The Committee thus invites the Party concerned, in its final progress report due on 1 October 2020 to address the above points.

145. In the meantime, however, the Committee makes some observations on the information already before it, including the text of the press notice of 6 July 2018. First, while Planning Advice Note 12 states that the Planning Inspectorate “will issue press releases to the media in the EEA State(s) and/or other relevant states”, the Committee has not been provided with any evidence that the press notice of 6 July 2018 was in fact published in the media of any of the nine States. Rather, the Party concerned has informed the Committee only that its embassies in each of the nine States published the notice on their websites. That is not the same.

146. Secondly, the Party concerned reports that the press notice was published in English, French and German. As the Committee pointed out, it goes without saying that the requirement for public authorities to “select such means as will ensure effective notification of the public concerned in the territory outside of the Party concerned” in paragraph 8(a) of decision VI/8k includes also the language(s) in which this is done.⁹⁷ Bearing in mind the languages spoken in the nine States in which the notice was published, the Committee is not convinced that publication of the notice in English, French and German was sufficient. (The Committee’s observation on this point relates only to the notice; the Committee does not deal here with the language of other documentation relevant to the decision-making.)

147. With respect to paragraph 126 of its first progress review and the information provided in the notice on opportunities for the public to participate, the Committee considers that the public notice provides clear information on how members of the public may register to participate. However, regarding any further information on the opportunities for the public to participate, the press notice simply provides a weblink to Advice Note 8.2, which, as the communicant of communication ACCC/C/2013/91 already pointed out in her comments on the Party’s first progress report, was available only in English. The Committee make clear

⁹⁵ Party’s second progress report, 30 September 2019, paras. 55-56, and annex M.

⁹⁶ Party’s second progress report, 30 September 2019, para. 56.

⁹⁷ Committee’s first progress review, 24 February 2019, para. 125.

that, for each of the languages in which the notice is published, all the required components of the notice listed in article 6(2) of the Convention should be provided.

148. With respect to the requirement in paragraph 8(b) of decision VI/8k that, when identifying who is the public concerned by the environmental decision-making on ultra-hazardous activities such as nuclear power plants, public authorities will apply the precautionary principle and consider the potential extent of an accident, the Party concerned submits that, importantly, the States in which the press notice was published were not limited to the one State in which a transboundary impact had been identified, namely, the Republic of Ireland. It submits that this fact demonstrates that it clearly applied the precautionary principle.⁹⁸ It is not the role of the Committee to review if the precautionary principle was applied correctly by the Party concerned. However, it is the Committee's role to examine whether the requirements of paragraph 8(b) are met. In addition to requiring the Party concerned to apply the precautionary principle, paragraph 8(b) requires that, in identifying the public concerned for the purposes of the decision-making on an ultrahazardous activity such as a nuclear power plant, public authorities must consider the potential extent of the effects if an accident would occur, even if the risk is small. Having examined the transboundary screening opinions, the Committee cannot identify any references in those opinions that would indicate that the public concerned have been identified considering the potential extent of the effects if an accident would occur. Rather, the screening opinions state that the "applicant will report on accidental release scenarios as part of the article 37 assessment of transboundary impacts". The Committee thus invites the Party concerned, in its final progress report, to explain to the Committee, with references to the relevant documentation, how and where the potential extent of the effects of an accident was taken into account when identifying the public concerned in the decision-making on the Wylfa Newydd project.

149. In light of the above, the Committee considers that the Party concerned has not yet demonstrated that it has fulfilled the requirements of paragraphs 8(a) and (b) of decision VI/8k in practice. The Committee invites the Party concerned together with its final progress report to reply to the points raised by the Committee in paragraphs 143 and 148 above. The Committee also invites the Party concerned in its final progress report to provide evidence that in any measures that it puts in place to address paragraphs 134 and 141 above, the points raised in paragraphs 145-148 above are also expressly addressed, so that the deficiencies identified in those paragraphs do not occur again in notifications under article 6(2) in the transboundary context in the future.

Concluding remarks about paragraph 8(a) and (b) of decision VI/8k

150. Based on its considerations in paragraphs 130-149 above, the Committee considers that the Party concerned has not yet demonstrated that it has met the requirements of paragraphs 8(a) and (b) of decision VI/8k.

Other matters – the promptitude requirement in England and Wales

151. The Party concerned in its second report reports that following the CJEU judgment in *Uniplex*, promptitude does not apply in relation to any legal action in England and Wales concerning European Union law.⁹⁹ It states that, while the requirement that the claim for judicial review be filed "promptly" remains in CPR 54.5(1), in practice courts consider the requirement for a claimant to act promptly as being demonstrated with the 3 month limit.¹⁰⁰ It submits that the elements on which the Committee relied to consider that the issue of "promptness" was settled for England and Wales are still valid, and that this issue does not form part of the process of reporting on the recommendations in decision VI/8k.¹⁰¹

⁹⁸ Party's second progress report, 30 September 2019, para. 57.

⁹⁹ Party's second progress report, 30 September 2019, para. 60.

¹⁰⁰ Party's second progress report, 30 September 2019, para. 61.

¹⁰¹ Party's second progress report, 30 September 2019, paras. 58-62.

152. The communicant of communication ACCC/C/2008/33 (ClientEarth) claims that the requirement that claims be filed “promptly” is still a problem in England and Wales, and that the court’s order of 1 August 2019 in *ClientEarth and the Marine Conservation Society v. the Department for Environment, Food and Rural Affairs (CO/2317/2019)* demonstrates that defendants still argue that claims brought within three months should be considered out-of-time.¹⁰² The communicant adds that, even if it is not the court’s general practice to grant such an application, the defendant’s willingness to make such arguments means that claimants face uncertainty, will be deterred from bringing claims, and must incur the costs of opposing such an application.¹⁰³

153. The Committee notes that, in the court order of 1 August 2019, the judge refers to promptness but does not refuse the application on this ground. Accordingly, based on the information before it, the Committee has no evidence before it to show that in practice courts in England and Wales refuse applications for judicial review brought within three months as being out-of-time for not being prompt. The Committee will not therefore examine this issue further in the context of its review of decision VI/8k, though it makes clear that this does not preclude it doing so in the context of a future communication if relevant evidence is put before it.

IV. Conclusions

154. The Committee welcomes the second progress report of the Party concerned, which was submitted on time and moreover was detailed, well-structured, and accompanied by relevant supporting documentation.

155. In the absence of evidence to the contrary in the meantime, the Committee will, in its report to the seventh session of the Meeting of the Parties, report that the Party concerned has fulfilled the recommendation in paragraph 2(c) of decision VI/8k.

156. The Committee considers that the Party concerned has not yet met the requirements of paragraphs 2(a), (b) and (d), 4, 6 and 8(a) and (b) of decision VI/8k.

157. The Committee invites the Party concerned in its final progress report due on 1 October 2020:

- (a) With respect to paragraphs 2(a), (b) and (d) and 4 of decision VI/8k, in England and Wales:
 - (i) To report on any developments with respect to the matters listed in paragraph 35 above and to provide the text of any relevant amendments to the CPR or court decisions in that regard.
 - (ii) To report on the points raised in paragraphs 49, 72, 81, 84 and 87 above.
 - (iii) To inform the Committee of the results of the upcoming review of its environmental costs protection regime and to provide the texts of any resulting proposals to adjust its environmental costs protection regime.
- (b) With respect to paragraphs 2(a), (b) and (d) of decision VI/8k, in Scotland:
 - (i) To report on any developments with respect to the matters listed in paragraph 89 above and to provide the text of any relevant amendments to the PEO rules or court decisions in that regard.
 - (ii) To reply to each of the points raised in paragraphs 98 and 105-110 above.

¹⁰² Comments on the Party’s second progress report by the communicant of ACCC/C/2008/33 (ClientEarth), 31 October 2019, paras. 11-16, and annex.

¹⁰³ Comments on the Party’s second progress report by the communicant of ACCC/C/2008/33 (ClientEarth), 31 October 2019, paras. 14-15.

(c) With respect to paragraphs 2(a), (b) and (d) of decision VI/8k, in Northern Ireland:

(i) To report on any developments with respect to the matters listed in paragraph 112 above and to provide the text of any relevant amendments to the Cost Protection Regulations or court decisions in that regard.

(ii) To provide evidence, as set out in paragraph 117 above, on whether in practice courts still require cross-undertakings for damages when an injunction is sought in an Aarhus Convention claim.

(d) With respect to paragraph 2(e) of decision VI/8k, to provide:

(i) The current version of its “Consultation Principles”.

(ii) The text of any other legislative, regulatory, administrative and practical measures that it has put in place since the Committee’s findings on communication ACCC/C/2012/68 to ensure that in future, plans and programmes similar in nature to NREAPs are submitted to public participation as required by article 7 of the Convention.

(e) With respect to paragraph 6 of decision VI/8k, to provide the text of any practical and legislative measures it has by that date taken to ensure that its system for allocating costs in private nuisance proceedings within the scope of article 9(3) of the Convention and for which there is no fully adequate alternative procedure, is not prohibitively expensive.

(f) With respect to paragraph 8(a) and (b) of decision VI/8k:

(i) To provide evidence that it has by that date taken measures to put in place a clear requirement that will ensure that paragraphs 8(a) and (b) of decision VI/8k are met.

(ii) To provide evidence to demonstrate that it has by that date put in place measures to address each of the points identified by the Committee in paragraphs 137-140 above.

(iii) To reply to the points raised by the Committee in paragraphs 143 and 148 above.

(iv) To provide evidence that in any measures that it puts in place to address paragraphs 134 and 141 above, the points raised in paragraphs 145-148 above are also expressly addressed, so that the deficiencies identified in those paragraphs do not occur again in notifications under article 6(2) in the transboundary context in the future.

158. The Committee reminds the Party concerned that all measures necessary to implement decision VI/8k must be completed by, and reported upon, by no later than 1 October 2020, as that will be the final opportunity for the Party concerned to demonstrate to the Committee that it has fully met the requirements of decision VI/8k.
