



Department
for Environment
Food & Rural Affairs

Area 3B, Nobel House
17 Smith Square
SW1P 3JR

T: 03459 335577
helpline@defra.gov.uk
www.gov.uk/defra

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

30 September 2019

Dear Ms Marshall,

Re: Decision VI/8k concerning compliance by the United Kingdom with its obligations under the Aarhus Convention

Thank you for enclosing the Committee's first progress review on the implementation of Decision VI/8k concerning compliance by the United Kingdom. I set out below the United Kingdom's second progress report regarding the recommendations included in paragraphs 2, 4, 6 and 8 of Decision VI/8k.

Yours sincerely,

Edward Donaldson-Balan
United Kingdom National Focal Point to the UNECE Aarhus Convention

Edward.Donaldson-Balan@defra.gov.uk

Recommendations in paragraphs 2(a), 2(b), 2(d) and 4 of Decision VI/8k

England and Wales

Types of claims covered

1. As the UK highlighted to the Aarhus Convention Compliance Committee (ACCC) in its letter of 8 March, having reflected fully on the issue of costs protection in planning challenges brought under section 288 of the Town and County Planning Act 1990, the UK government requested the Civil Procedure Rule Committee (CPRC) to amend the Environmental Costs Protection Regime (ECPR), in Part 45 of the Civil Procedure Rules (CPR), to extend its scope to these types of claims. The proposed amendments were approved by the CPRC, and an amending instrument made to come into force on 1 October 2019, which can be found in Annex A¹.

Eligibility for costs protection

2. Unincorporated associations do not have legal personality separate from the individuals which comprise them. Individual members of those associations are ultimately personally responsible for the debts and contractual obligations of the association, usually in accordance with the rules or terms of the particular association.
3. Where 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. Alternatively, an unincorporated association can incorporate and bring an action in the name of the legal entity formed. In either of these scenarios, the individuals acting as individuals or as an unincorporated association, or a legal entity which brings the action can get the benefit of the ECPR where the relevant conditions have been met, i.e. that the claim has been identified as an Aarhus Convention claim and that a schedule of the claimant's financial resources has been filed and served with the claim form.
4. The default costs caps under the ECPR apply such that where an individual brings an action as an individual, the default cap is set at £5,000 (and where multiple individuals bring an action, the £5,000 applies to each one); and where an action is brought by any other party the default cap would be £10,000.
5. Where an unincorporated association has its own separate finances and funding support, then these will be taken into account by the court since the members of the association have the benefit of those finances and equally will be liable for the debts of the association.

¹ Annex A – The Civil Procedure (Amendment No. 3) Rules 2019 Statutory Instrument

6. UK authorities have not been made aware of any specific instances where unincorporated associations have faced significant problems in bringing legal proceedings or in gaining the protection of the ECPR in Aarhus claims.

Level of costs caps

7. The UK government believes the default level of the costs caps is a settled position, which has developed following case law and through amendments to the Civil Procedure Rules (CPR). However, we are committed to considering any developments in case law and keeping the ECPR under review. We will formally review the ECPR when we have sufficient data to do so (which is likely to be around April 2020) and will then publish our findings.
8. On the issue of varying costs caps, the amended ECPR, as explained in the UK's first progress report and again above, provides that default costs caps will apply to all proceedings where the claim is identified as an Aarhus Convention claim and the claimant provides the required financial information with the claim form. The claimant need do nothing further, and the costs cap will be in place for the duration of the proceedings. The only way for some other level of costs cap to apply is if one of the parties makes a separate application to the court. Such applications **must** be made in the claim form or in the Acknowledgement of Service and be determined by the court at the earliest opportunity (Annex B²). In this way, the rules aim to ensure that the issue of a costs cap be settled at the outset or, where variation is sought, at an early stage in the proceedings, thus delivering certainty for the parties. However, these rules are based upon the requirement that the relevant financial information is provided to the court and the parties at the outset. Failure to provide any or sufficient financial information will delay resolution of the parties' position on costs caps and any variation the court may decide to make. The rules also provide that the court **may** consider the issue of the costs cap later in the proceedings if either party makes an application based on a significant change in circumstances of the parties such that proceedings would now or would not now be prohibitively expensive for the claimant (Annex B). The court will exercise its discretion both in relation to whether to hear the application at all (considering whether the application could have been made at an earlier stage) and, if it does hear the application, in determining the merits (considering the underlying principle of the ECPR).
9. In their submissions to the ACCC dated 31 October 2018, ClientEarth, RSPB and Friends of the Earth asserted that the Civil Procedure Rules were not working as intended with regard to the stage at which an application to vary a costs cap should be sought, referring to a judicial review brought by Friends of the Earth against the Secretary of State for Housing and Local Government concerning the National Planning Policy Framework. We understand in that case, the defendant queried the relationship of the claimant to another entity

² Annex B – Civil Procedure Rule referred to in the UK's 2nd VI/8k progress report

(relevant to the question of the financial resources available to the claimant) and so reserved its position on the costs cap in the Acknowledgement of Service, pending provision of further information. After seeking further information, an application to vary the default costs caps was sought, and was decided before the “rolled up” hearing. Without all the information provided in the claim, the defendant could not immediately assess whether to seek to vary, but did so subsequently. Furthermore, although the case was dealt with on an expedited basis with a “rolled up” hearing, the variation application was dealt with soon after it was made and before that final hearing. This case does not, in our view, demonstrate that the ECPR rules are not working as intended. Since the ACCC’s review report the UK government asked RSPB for details of any other cases they were aware of which supported their assertion. We were directed to the case of *CPRE and POW Campaign Ltd v Waverley Borough Council and Secretary of State for Housing, Communities and Local Government* [2018] EWHC 2969, in which an application to vary a costs cap was made by the defendant after judgment. The ruling on costs is included in Annex C³ and the judgment in Annex D⁴. In that case, 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 court requested the claimant to file additional financial information on several occasions, but they failed to do so. The repeated failure of the claimant in that instance was the cause of the late application and, amongst other factors, the basis of the court’s willingness to deal with the matter at that stage.

10. Overall, the rules on the timing for applications to vary the default position on costs caps provide the best balance of certainty and flexibility to ensure overall fairness to all parties in the proceedings. The rules aim to ensure that a costs cap and any variation from the default amount is resolved as early as possible (generally just after a claim is issued and an acknowledgement filed), but also allow later applications to reflect the reality that parties may not act in accordance with the rules, and that litigation can progress in ways which were not envisaged at the outset.

Costs for procedures with multiple claimants

11. The ACCC’s understanding is correct in that there is a separate costs cap for each claimant. This is to provide fairness and proportionality to all the parties while ensuring costs of claims are not prohibitively expensive. The effect of the rules is to ensure that there are default costs caps imposed for each claimant to an action, and one for the defendant.
12. Where multiple claimants raise different legal arguments, each party has a separate costs cap to separate liability for the costs of each party, since the court may find in favour of some claimants and not others. However, where

³ Annex C – Ruling on permission to appeal and costs – *CPRE Surrey v Waverly*

⁴ Annex D – Judgment – *CPRE Surrey v Waverly*

multiple claimants wish to make the same legal arguments, there should be no incentive to allowing proceedings to be expanded (which does increase cost, administratively as well as legally) simply to allow more individuals to shoulder the costs cap burden. The figures of £5,000 per individual claimant and £10,000 for other claimants are the default positions and it is open to the parties to apply to vary the costs caps where they consider the financial circumstances of the claimant mean a lower or higher cap would better ensure that the proceedings are not prohibitively expensive.

Costs protection on appeal

13. As the ACCC recognises, CPR 52.19A (Annex B) requires the court of appeal to consider whether the costs of the proceedings, which include the appeal, will be “prohibitively expensive”, and if they will be, to make an order to prevent this. In so doing, the court can 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.
14. CPR 52.19A expressly refers back to CPR 45.43 to 45.45 (Annex B), which set the default costs caps and the method of assessing what will be “prohibitively expensive” where a variation is sought. Accordingly, the assessment by the court of appeal is conducted by reference to those provisions and to all the circumstances of the case, including any change in the position of the parties.

Schedule of claimant’s financial resources

15. CPR 45.42 (Annex B) provides that the claimant must provide a schedule of financial resources which includes details of (i) “significant assets, liabilities, income and expenditure”; and (ii) “in relation to any financial support which any person has provided or is likely to provide to the claimant, the aggregate amount which has been provided and which is likely to be provided”. The wording of the rule accounts for any potential changes in the financial position of parties during legal proceedings, for example due to planned or previous history of fundraising activities. In relation to the provision of the identity of those providing financial support, the wording of the rules does not require that information.
16. As the ACCC is aware, the CPRC is an independent statutory committee established by the Civil Procedure Act 1997 to make rules of court for the Civil Division of the Court of Appeal, the High Court and the County Court. The CPRC completed its open justice review following a consultation (included at Annex E⁵) on proposed changes to CPR 39 regarding public hearings. Amendments to the CPR came into force on 6 April 2019. The amended CPR 39 affirms the fundamental principle of open justice, central to which is that hearings are to be in public unless the court is satisfied that the criteria for a

⁵ Annex E – Part 39 Civil Procedure Rules (Proposed Changes)

hearing in private are fulfilled, in which case the hearing in question (or the relevant part of it) must be in private.

17. Specifically CPR 39.2 (Annex B) states that “*A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice –...* (c) *it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;...* (g) *the court for any other reason considers this to be necessary to secure the proper administration of justice.*”

18. The CPRC was, of course, aware of the *RSPB* judgment (as explicitly referred to in the consultation document) and considered carefully the right way forward to ensure that the rules balance the principle of open justice with the protection of claimants in Aarhus Convention claims from any “chilling effect” of holding in public any hearing of an application to vary a costs cap in such a claim. The CPRC concluded that the balance would be appropriately maintained by the provision now in the 2019 Amendment Rules, so that any hearing of an application to vary costs caps in Aarhus Convention claims must (as with any other hearing) be held in private if the court is satisfied that the criteria for holding a hearing in private are fulfilled.

Costs protection prior to grant of permission

19. Where there is extensive dispute conducted through correspondence and the threat of litigation, but no proceedings are subsequently issued, each party to that exchange must pay their own costs. There is no legal liability to pay the other side’s costs nor any legal mechanism to seek to recovery of the same. However, where legal proceedings are issued, it is possible that where the court makes a costs order, it may include pre-action costs.
20. Section 51 of the Senior Courts Act 1981 (included at Annex F⁶) provides that the costs of proceedings and costs incidental to those proceedings are at the discretion of the court. CPR 44.2 (Annex B) sets out the broad scope of the court’s discretion regarding (a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid. CPR 44.2(6)(d) is clear that the court may order a party to pay to the other party “costs incurred before proceedings were begun”.
21. CPR 44.2 has detailed provisions about how the court will assess what costs order to make in all the circumstances of the claim including the extent to which the successful party has succeeded in all aspects of their claim, behaviour of

⁶ Annex F – Senior Courts Act 1981 (section 51)

both parties, compliance with any pre-action protocols and whether any issues or arguments raised pre-action were not pursued in the claim.

22. In all Aarhus Convention claims to which a costs cap applies, the cap will cover all and any costs which may be recoverable by either party which, in accordance with the provisions outlined above will include any pre-action costs. The UK government considers that the position on pre-action costs is sufficiently clear and no further guidance or rules are required.

Costs relating to determination of an Aarhus claim

23. As a result of the change made to the ECPR in February 2017, the UK government replaced the provision that an unsuccessful defendant would usually pay indemnity costs for challenging the legitimacy of the case with a provision that such costs will normally be paid on the lower, 'standard' basis. The UK government recognised concerns that this could lead to defendants bringing more challenges to the assertion that a claim is an Aarhus claim, and could deter claimants from bringing claims. However, the Government takes the view that an adverse costs award assessed on the standard basis still provides an appropriate disincentive against unmeritorious challenges, and notes that the courts still have the ability to choose to impose costs on an indemnity basis. Almost all defendants are publicly-funded bodies and they need to be satisfied that they have sufficient grounds to justify spending public money on bringing such a challenge.

Cross-undertakings for damages

24. The rules allow for the court to properly consider the financial position of the claimants and the need to ensure that proceedings are not prohibitively expensive, when considering whether to grant an injunction. It follows that the court has a discretion to order the injunction without a cross-undertaking. The costs of applying for injunctive relief within proceedings will be covered by any costs cap.

25. CPR Practice Direction 25A, which can be found in Annex B, states:
"5.3(1) If in an Aarhus Convention claim to which rules 45.43 to 45.45 apply the court is satisfied that an injunction is necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings, the court will, in considering whether to require an undertaking by the applicant to pay any damages which the respondent or any other person may sustain as a result, and the terms of any such undertaking–
(a) have particular regard to the need for the terms of the order overall not to be such as would make continuing with the claim prohibitively expensive for the applicant; and
(b) make such directions as are necessary to ensure that the case is heard promptly."

26. In 2015, the UK government was asked for and provided data to the RSPB on the number of injunction applications made in Aarhus Convention claims made between April 2013 and May 2015. The data was subsequently submitted to the Committee by Wildlife and Countryside Link on 17 December 2015 in relation to Decision V/9n. The data shows that in the period there had been 12 applications for an interim injunction, of which 8 were granted. In only 1 order did the claimant give a cross undertaking in damages.
27. The UK government has not subsequently collected data on this type of application and nor has it been made aware of any instances where a cross undertaking in damages in an Aarhus claim has been required, or where there have been difficulties in securing injunctive relief over the question of a cross undertaking.
28. The circumstances in which applications for injunctive relief are made and the terms of the relief sought will vary enormously, as will the circumstances of the applicant. The current rules make clear that the court has a discretion in Aarhus claims, to award interim injunctive relief without requiring a cross undertaking in damages; and that consideration must be given to whether a cross undertaking would make proceedings prohibitively expensive. This sets the rules on interim relief firmly within the ECPR framework, and it is from within such framework that the court will exercise its discretion on the issue of any interim relief; assessing whether to request a cross undertaking and if so in what amount according to the same parameters as CPR 45.43-45 (Annex B). This offers sufficient clarity and protection to applicants whilst allowing the court its proper discretion to consider each application on its own facts. It is the UK government's position that there is no need at this time, and where no evidence has been provided that the current framework is causing difficulties for claimants seeking interim injunctions, to make any further amendments to Practice Direction 25A.

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

29. The UK government has no plans to bring sections 85 and 86 of the Criminal Justice and Courts Act 2015 into force in the foreseeable future.
30. Section 87 of the Criminal Justice and Courts Act 2015 (CJCA) regarding costs and interveners in judicial review proceedings is included in Annex G⁷ (CPR Rule 46.15, which allows applications to be made under section 87 CJCA, can be found in Annex B).
31. 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. The default position is that an intervener will not recover their costs of making

⁷ Annex G – Criminal Justice and Courts Act 2015 (section 87)

the intervention from either of the parties unless the court considers there are exceptional circumstances. In relation to an intervener's liability to pay costs of the other parties in judicial review proceedings, the court has the power to make such an order if one of the parties applies, but there are a number of specific conditions which must be met. These concern both the behaviour of the intervener (s.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. For Aarhus Convention claims, this would require consideration of the ECPR.

32. The rules recognise that interveners can add value and expertise to a case, but also that interventions should be made in the right cases after careful consideration. They recognise that voluntary interventions can significantly increase the legal costs of a case, and so allow for the parties who are expected to bear those costs to ask the court to order the intervener to pay those additional costs. However, the court retains complete discretion not to award costs against an intervener.
33. Importantly, the parties to the proceedings may agree not to seek costs against the intervener. And any party has an alternative to applying to be an intervener, which is to apply to become a party to judicial review proceedings. In any Aarhus Convention claim, all parties to proceedings will have the benefit of the costs caps set out in the ECPR.

Scotland

34. The revised rules for Protective Expenses Orders (PEOs) are attached at Annex H⁸.

Type of claims covered

35. The PEO regime for environmental appeals and judicial reviews applies to:
 - a) an appeal under section 56 of the Freedom of Information (Scotland) Act 2002() as modified by regulation 17 of the Environmental Information (Scotland) Regulations 2004(7);
 - b) relevant proceedings which include a challenge to a decision, act or omission which is subject to, or said to be subject to, the provisions of Article 6 of the Aarhus Convention;
 - c) relevant proceedings which include a challenge to an act or omission on the grounds that it contravenes the law relating to the environment.

36. "relevant proceedings" means—

⁸ Annex H – Protective Expenses Order revised rules, 2018

- a) applications to the supervisory jurisdiction of the court, including applications under section 45(b) (specific performance of a statutory duty) of the Act of 1988;
- b) appeals under statute.

37. Thus, the PEO regime applies to certain judicial and statutory reviews but not to private law claims. Whilst this is something that the Scottish Government would wish to keep under review it is generally public bodies in Scotland which enforce nuisance matters in the public interest. Therefore, the need and scope of private nuisance remedies is less extensive and less central in principle to the protection from nuisance.

Level of the cost caps

38. The new rules which were introduced in December 2018 by the Scottish Civil Justice Council (from hereon, 'the Council') are to date, untested.

39. On costs caps, it is not expected that there will be large numbers of cases in which cost caps are increased but the Council's conclusion was that a measure of flexibility should be granted to the court in responding to the particular circumstances of the case.

Cost protection on appeal

40. On costs protection on appeal, again, the Council's conclusion was that a measure of flexibility should be granted to the court in responding to the particular circumstances of the case. In essence this means that if the circumstances of the case (or the claimant) have changed on appeal then a PEO may no longer be appropriate. In most cases a fresh PEO will in all probability be granted, under the revised, less cumbersome process, on the grounds that little will have changed.

Northern Ireland

41. The Costs Protection Regulations in Northern Ireland only offers costs protections to applications for judicial or statutory review. This will be kept under review. With regards to cross-undertakings for damages, the rules operate in the same way as those in England and Wales, as outlined in paragraphs 24-28. The UK would also note that it is not aware of any evidence of an Aarhus Convention case in Northern Ireland in which an injunction was sought, therefore, it has no evidence on cross-undertakings.

Recommendations in paragraphs 2(c) and 2(d) of Decision VI/8k

42. The amended Rule 4 of Order 53 of the Court of Judicature (Northern Ireland), amending judicial review time limits in Northern Ireland, is attached at Annex I⁹.
43. 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. Where the Court of Justice of the European Union (CJEU) case law is applicable time runs from when the applicant knew or ought to have known of an alleged illegality.

Recommendation in paragraph 2(e) of Decision VI/8k

44. The UK government is aware of its obligations to consult, at an appropriate time, on the National Energy and Climate Plan (NECP). The UK government has conducted a number of public consultations across the five dimensions of the Energy Union, and elements of the NECP have already been the subject of public consultations – these are listed in the UK’s 2018 draft NECP, included in Annex J¹⁰, at figure 3 on p.16-18.

Recommendation in paragraphs 6 of Decision VI/8k

45. The UK continues to consider the recommendation in paragraph 6 of Decision VI/8k. As detailed in its first progress report, the UK government decided not to extend the scope of the Environment Costs Protection Regime (ECPR) so that it would apply to private nuisance cases or other private law claims as part of the changes to the regime made in 2017.

Recommendations in paragraphs 8(a) and 8(b) of Decision VI/8k

46. Planning Advice Note 12, included at Annex X¹¹, is policy guidance which applies to all Nationally Significant Infrastructure Projects (NSIP), including but not limited to nuclear projects. It has no statutory or legal status but instead forms part of a suite of advice provided by the Planning Inspectorate on the NSIP process. However, for all NSIPs which are subject to an Environmental Impact Assessment (EIA), the Planning Inspectorate would determine whether or not the development is likely to have significant effects on the environment in another European Economic Area (EEA) State. In doing so, the Planning Inspectorate would follow the process set out in Advice Note 12.
47. The Planning Inspectorate does not make the final decision on NSIP applications but submits a recommendation to the relevant Secretary of State, who then decides whether a Development Consent Order should be granted or

⁹ Annex I - Order 53 Rule 4 of the Rules of the Court of Judicature (Northern Ireland)

¹⁰ Annex J – The UK’s Draft Integrated National Energy and Climate Plan (NECP)

¹¹ Annex K – Planning Advice Note 12

refused. The Secretary of State would expect the process in Advice Note 12 to have been followed unless the recommendation indicated otherwise. If a Secretary of State were to grant development consent for an NSIP in circumstances where the Planning Inspectorate had not properly carried out transboundary consultation by following the guidance in Advice Note 12 then there could be grounds to seek Judicial Review to overturn the grant of development consent. Such a challenge may succeed if there were no clear reasons to explain why Advice Note 12 did not need to be followed in the case in question or to indicate that the outcome would have been the same if Advice Note 12 had been followed.

48. Section 7.1 of Advice Note 12 sets out the Planning Inspectorate's approach to public participation with reference to the requirements of the Aarhus Convention and the EIA Regulations. Paragraph 7.1.1 provides for direct notification of the public in EEA states and other relevant states, including but not limited to states party to the Aarhus and Espoo Conventions. In the case of nuclear developments, this is irrespective of whether the NSIP is likely to have a significant adverse effect on the environment in that state or whether that state has indicated that it wishes to seek the opinion of its public under the provisions of the Espoo Convention.
49. Paragraph 3.2.1 of Advice Note 12 makes clear that a precautionary approach shall be adopted in deciding whether a NSIP is likely to have significant effects on the environment in another State.
50. A record of the transboundary screening undertaken by the Planning Inspectorate on behalf of the Secretary of State for the Wylfa Newydd project is included in Annex L¹².
51. The first screening presented in the document was undertaken in February 2017 (at the pre-application stage and based on the information available at that time). It identified that the proposed development was likely to have a significant effect on the environment in the Republic of Ireland and France. Both were formally notified on 1 February 2017 under Article 7 of the EU EIA Directive (2011/92/EU). In accordance with the special arrangements for nuclear NSIPs set out in Advice Note 12, information letters were also sent to all other EEA States, Espoo and Aarhus signatories on the same date, informing them of the transboundary screening and offering the same opportunities to participate as if significant transboundary effects in those states had been identified.
52. The second screening presented in the document (undertaken during the pre-examination stage, following the acceptance of the application to proceed to examination) only identified the proposed development as being likely to have a significant effect on the environment in the Republic of Ireland. The Planning

¹² Annex L – Wylfa Newydd transboundary screening overview

Inspectorate subsequently consulted them on 6 July 2018. Again, in accordance with the special arrangements for nuclear NSIPs, information letters were also sent to all other EEA States, Espoo and Aarhus signatories on the same date.

53. The Planning Inspectorate's letters stated: 'The Secretary of State has had regard to the findings of the Espoo Convention Implementation Committee in relation to EIA/IC/CI/5 and the UK's obligations under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the 'Aarhus Convention'). The Secretary of State has therefore decided to inform your State of the Proposed Development as if significant adverse transboundary effects on the environment in your State were likely for the purposes of Articles 3(1) and 2(4) of the Espoo Convention. This letter therefore invites your State to participate in the procedure under paragraphs 5 to 8 of Article 3 and Articles 4 to 7 of the Espoo Convention in relation to this application'. The letters also set out how to register as an Interested Party to participate in the Examination.
54. As outlined above, participation in the transboundary EIA procedure involves two stages: a pre-application transboundary EIA procedure and the examination of the application itself. Austria, Germany, Denmark, Finland, Luxembourg, the Netherlands and Norway (and Isle of Man, although not an EEA state) expressed an interest in participating in the EIA transboundary procedures. At the examination stage Austria, Denmark, Germany, the Republic of Ireland, Norway, Netherlands, Poland, Slovakia and Spain registered an interest. Some of these states sought to register to participate in the examination and provide submissions as "Interested Parties". The Examining Authority also exercised its discretion to accept submissions during the examination from some states as "additional submission". Others made requests to be kept informed and either provided no substantive submissions or confirmed there were no likely significant transboundary effects.¹³
55. The UK reiterates that additional steps were taken to inform the public concerned about the Wylfa Newydd project through local British embassies and websites. The text of the press release of 6th July 2018 is included at Annex M¹⁴.
56. The precise measures taken for cascading the press notice was left to the discretion of the embassies. The embassies which published the press release informing the public concerned about the Wylfa Newydd project were in the following States: Austria, Belgium, Denmark, France, Germany, Republic of Ireland, Luxembourg, Netherlands and Norway.

¹³ All the communications pertaining to the transboundary process can be found on the Wylfa Newydd section of the Planning Inspectorate website:

<https://infrastructure.planninginspectorate.gov.uk/projects/wales/wylfa-newydd-nuclear-power-station/?ipcsection=docs>

¹⁴ Annex M – Wylfa Newydd Project Press Release

57. The UK considers the publication of the press notice on 6th July 2018 to have fulfilled the requirement in Article 6(2) of the Aarhus Convention to inform the public concerned in an adequate and effective manner. It is important to note that the states in which the press notice was published were not limited to those where a transboundary impact had been identified (i.e. Ireland), thus demonstrating clear application of the precautionary principle.

Promptitude requirements

58. As the ACCC notes, the 6th Meeting of the Parties found the UK to be in compliance on the issue of time limits for judicial review claims with regards to England and Wales. It does not, therefore, form part of the process of reporting on the recommendations made in Decision VI/8k that is outlined in paragraph 9 of that Decision. Whilst the UK therefore finds it unusual for the ACCC to use the follow-up reporting process in this way, it is content to offer a clarification in this instance.

59. The UK's position remains that set out previously. The requirement for Judicial Reviews is as set out in CPR 54.5(1) (Annex B): that "the claim form must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose."

60. That rule still stands, and applies across the whole range of judicial review claims that are issued. Following *Uniplex*, promptitude alone does not apply in relation to any legal action concerning European law obligations.

61. The submissions of the UK in its second progress report on V/9n indicated that the courts do not apply "promptly" in the same way now and confirmed that planning and procurement cases now have set time limits for issuing cases. In practice, the courts consider the requirement for a claimant to act promptly as being demonstrated by complying with a 3 month limit.

62. ClientEarth's submissions of 31 October 2018 do not provide details of cases which have been refused permission or otherwise dismissed/disallowed on the basis that they were not issued "promptly", but within 3 months of the decision complained of.

Annexes

- A – The Civil Procedure (Amendment No. 3) Rules 2019 Statutory Instrument.
- B – Civil Procedure Rule referred to in the UK's 2nd VI/8k progress report
- C – Ruling on permission to appeal and costs – CPRE Surrey v Waverly
- D – Judgment – CPRE Surrey v Waverly
- E – Part 39 Civil Procedure Rules (Proposed Changes)
- F – Senior Courts Act 1981 (section 51)
- G – Criminal Justice and Courts Act 2015 (section 87)
- H – Protective Expenses Order revised rules, 2018
- I – Order 53 Rule 4 of the Rules of the Court of Judicature (Northern Ireland)
- J – The UK's Draft Integrated National Energy and Climate Plan (NECP)
- K – Planning Advice Note 12
- L – Wylfa Newydd transboundary screening overview
- M – Wylfa Newydd Project Press Release