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

**First progress review of the implementation of decision V/9n
on compliance by the United Kingdom with its
obligations under the Convention**

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I. Introduction

1. At its fifth session (Maastricht, 30 June–1 July 2014), 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 V/9n on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention (see ECE/MP.PP/20011/2/Add.1).¹

II. Summary of follow-up action with decision V/9n

2. By letter of 28 November 2014, the Committee sent a reminder to the Party concerned of the request by the Meeting of the Parties in paragraph 11 of decision V/9n to provide its first detailed progress report to the Committee by 31 December 2014 on the measures taken and the results achieved thus far in implementation of the recommendations set out in decision V/9n.

3. The Party concerned provided its first progress report on the implementation of decision V/9n on 29 December 2014.

4. At the Committee's request, on 2 January 2015 the secretariat forwarded the Party concerned's first progress report to the communicants of communications ACCC/C/2008/23, ACCC/C/2008/27, ACCC/C/2008/33, ACCC/C/2010/53 and ACCC/C/2012/68, together with observers who had registered their interest to participate in the follow-up to decision V/9n inviting them to provide their comments on that report by 23 January 2015.

5. Comments were received from the communicant of communication ACCC/C/2008/33 (Client Earth) and two observers, a law firm, Richard Buxton and an observer whose name was withheld on request on 23 January 2015.

6. Comments were received from the communicants of communications ACCC/C/2010/53, ACCC/C/2012/68 and an observer (CAJE) on 22 January 2015.

7. Comments were received from one of the communicants of communication ACCC/C/2008/33, Mr. Robert Latimer, on 5, 23, 25 and 28 January 2015.

8. With respect to the recommendations set out in paragraph 8(a) and 8(d), the Party concerned reported the following:

- In England and Wales, following the Court of Justice of the EU's judgment in *European Commission v United Kingdom* (Case C-530/11) in February 2014 the Government is reviewing the costs regime for Aarhus Convention cases set out in the Civil Procedure Rules. As part of the review, consideration is being given to whether the current costs regime should cover relevant statutory review proceedings and whether there is scope to amend the levels of the current costs caps currently set at £5,000 for individuals and £10,000 for

¹ Decisions of the MOP concerning compliance by Parties and documents related to their follow-up can be found on the Convention website at <http://www.unece.org/env/pp/ccimplementation.html>.

organisations. The review is also considering whether the principles for determining the level of costs which would be ‘prohibitively expensive’ in a particular case, as set out in *Edwards v Environment Agency* (Case C-260/11) and reiterated by the UK Supreme Court in *R (Edwards) v Environment Agency* (No. 2) [2013] UKSC 78) could be incorporated into the costs regime.

- In Scotland, the issue of expenses (costs) recoverable in litigation was considered by an independent review, the Review of Expenses and Funding of Civil Litigation in Scotland, led by Sheriff Principal Taylor. The Taylor Review reported in September 2013 and in its response of June 2014, the Scottish Government agreed with the review’s comments that the unpredictability of the costs of civil litigation represents a barrier to access to justice, proposing to implement the changes recommended by this review incrementally. The proposed changes will not affect the usual expenses regime; namely, that an applicant who unsuccessfully brings a claim will generally be expected to pay the reasonable expenses of the defender, unless the applicant has been awarded a “protective expenses order” (PEO), which is the Scottish equivalent of a protective costs order in England and Wales. PEOs are available at common law in both judicial review cases and statutory appeals, as well as being codified in Chapter 58A of the Rules of the Court of Session. An applicant for a PEO must be an individual or non-governmental organisation promoting environmental protection. Scottish case law since Chapter 58A was inserted into the Rules demonstrates that groups are taking advantage of the availability of PEOs both at common law and under statute.⁴ The Scottish Government continues to monitor developments in England and Wales and Northern Ireland but with the Scottish regime in mind. Nonetheless, as part of a programme of wider civil justice reforms, the Scottish Government is also considering whether any amendments might still be made to the current expenses regime in Scotland.
- Regarding Northern Ireland, the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 provide cost protection for applicants in judicial reviews and statutory reviews to the High Court in Northern Ireland of decisions within the scope of the Aarhus Convention. In light of recent case law, including the Northern Ireland is reviewing the cost scheme for Aarhus cases sets out in the Regulations. Consideration is, in particular, being given to whether to amend them to reflect the principles enunciated in the *Edwards* Judgment.

9. With regard to the recommendation, set out in paragraph 8(b) of decision V/9n, which addressed article 9, paragraph 5 of the Convention, the Party concerned drew the Committee’s attention to paragraph 34(o) of the Report of the 5th session of the Meeting of the Parties which had recorded that the United Kingdom’s position was set out in the United Kingdom’s letter of 21 March 2014. That letter set out the United Kingdom’s view that the requirements of article 9, paragraph 5 had already been met in the context of the allegations of non-compliance originally considered by the Committee. In its first progress report, the Party concerned indicated that its position remained the same.

10. With respect to the recommendation set out in paragraph 8(c), the Party concerned reported that:

- In England and Wales, changes to Civil Procedure Rule 54.4 introduced in July 2013 harmonised the time limits for planning judicial reviews with those for statutory planning appeals (six weeks) and do not include a “promptly” requirement. However, the issue of whether or not time limits for judicial reviews generally

should be clarified had not been taken forward as part of the wider reforms of judicial review in England and Wales being undertaken by the United Kingdom Government.

- With respect to Scotland, Section 89 of the Courts Reform (Scotland) Act 2014 inserts new sections 27A to 27D into the Court of Session Act 1988 which governs judicial review proceedings in the Court of Session. Once in force, Section 27A provides a three month time limit for bringing an application for judicial review. There is no additional requirement that a judicial review be lodged “promptly” and the court may override this time limit if the court considers it equitable to do so.
- Northern Ireland is currently reviewing its time limits for judicial reviews in light of the Committee’s recommendations and the Uniplex (C-206/08) case. Any change will require amendments to the Rules of the Court of Judicature (Northern Ireland) 1980 made by the Court of Judicature Rules Committee with the allowance of the Department of Justice in Northern Ireland. The Department is currently considering the various options available for reform and has sought the views of the Lord Chief Justice of Northern Ireland who chairs the Court of Judicature Rules Committee.

11. With respect to recommendation set out in paragraph 9 of decision V/9n, the Party concerned reiterated its position on the Committee’s draft findings on communication ACCC/C/2012/68 dated 28 August 2013, in which the Party emphasised its awareness of the obligations under article 7 and the need to act in compliance with them where they apply.

Comments from communicants and observers on the Party’s first progress report

12. Client Earth, a communicant of communication ACCC/C/2008/33 observed that in several recent cases the Party concerned’s judiciary had commented that the Party was not in compliance with the Convention with respect to costs, but that change would require legislative intervention as it was not possible through exercise of judicial discretion. However, new legislation, the Criminal Justice and Courts bill, working its way through the Parliament, would in fact increase the UK’s non-compliance.

13. Mr. Robert Latimer, one of the communicants of communication ACCC/C/2008/33, submitted multiple comments but none of them commented directly on the implementation of any of the paragraphs of decision V/9n. The Committee will not consider them further.

14. The communicant of communication ACCC/C/2012/68, inter alia, commented that in Scotland, serious risks of prohibitively expensive fees remained and the system of protective expense orders was working badly. For example, in October 2014, an application for a PEO took two full days of hearing and was then refused. The cost to the applicant of the failed PEO application was at least half what the actual judicial review would have cost. The communicant did not directly comment on the Party concerned’s implementation of paragraph 9 of decision V/9n, i.e. whether the Party concerned had since the fifth session of the Meeting of the Parties prepared any plans and programmes similar in nature to national renewable energy action plans (NREAPs), and if so, whether they had been submitted to public participation as required by article 7.

15. The observer, CAJE, in its comments stated that the challenges in England and Wales are somewhat different. The shortened deadline for judicial review and the inability to reduce the figures for the adverse caps and increase the cross-caps in England and Wales caused persistent problems and current proposals to further undermine the system of

judicial review would exacerbate these difficulties. CAJE further expressed its view regarding the barriers to legal aid in Scotland resulting inter alia from regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, including that (i) if other persons might have a joint interest with the applicant it was assumed that those other persons should help fund the case; (ii) to qualify for legal aid, the applicant must show that he or she would be seriously prejudiced in his or her own right without it; and (iii) that community groups are not able to apply for legal aid. CAJE submitted that the removal of regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 would be essential for compliance with article 9, paragraph 4 of the Convention. It also reported that these difficulties were exacerbated in 2013 by the introduction of a cap on the expenses of a judicial review to be covered by legal aid (including Counsel's fees, solicitors' fees and outlays) of £7,000 which CAJE submitted was an entirely unrealistic figure to run a complex environmental judicial review.

16. Richard Buxton, a lawfirm that had represented the communicants of communications ACCC/C/2008/23 and ACCC/C/2013/86 among others, reported inter alia on the Court of Appeal's judgment of 27 November 2014 in *Secretary of State for Communities and Local Government v Sarah Louise Venn* [2014] EWCA Civ 1539 which had held that article 9, paragraph 3 of the Convention applied to the type of statutory challenge under review. It also found that Civil Procedure Rule 45.41 was in non-compliance with the Convention, but since "the exclusion of statutory appeals and applications from CPR 45.41 was not an oversight, but was a deliberate expression of a legislative intent, it necessarily follows that it would be appropriate to exercise a judicial discretion so as to side-step the limitation" (para 33).

17. At its forty-eighth meeting (Geneva, 24-27 March 2015), the Committee reviewed the implementation of decision V/9n in open session with the participation by audio conference of the Party concerned and taking account the written comments received from communicants and observers and well as the observers present at the meeting. Following the discussion in open session, the Committee commenced in closed session the preparation of its first progress review on the implementation of decision V/9n. The Committee adopted its first progress review at its fiftieth meeting (Geneva, 6-9 October 2015) and instructed the secretariat to thereafter send it 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 and ACCC/C/2012/68 as well as observers who had registered their interest to participate in the follow-up to decision V/9n.

III. Considerations and evaluation by the Committee

18. In order to have fulfilled the requirements of decision V/9n, the Party concerned would need to provide the Committee with evidence that:

- (a) Its system for allocating costs in all court procedures subject to article 9 of the Convention has been further reviewed, and practical and legislative measures to ensure that the allocation of costs in all such cases is fair and equitable and not prohibitively expensive has been undertaken;
- (b) The establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice has been further considered;
- (c) Rules regarding the time frame for the bringing of applications for judicial review to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework have been further reviewed;

(d) The necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4, of the Convention have been put in place; and

(e) Plans and programmes similar in nature to NREAPs are being submitted to public participation as required by article 7, in conjunction with the relevant paragraphs of article 6, of the Convention.

19. The Committee welcomes the first progress report of the Party concerned, which was submitted on time, and the information contained therein.

20. The Committee also welcomes the comments on the Party concerned's implementation of decision V/9n received from communicants and observers.

21. With respect to paragraph 3 of decision V/9n and the comments received from the communicant of communication ACCC/C/2010/53, the Committee notes that the communicant's representative, while expressing his concern regarding other environmental developments in his location, confirmed that the Party concerned continues to release the requested raw data to the public in accordance with article 4, paragraph 1 of the Convention.

Paragraphs 8(a), (b) and (d) of decision V/9n – costs

22. With respect to the recommendations set out in paragraph 8(a), (b) and (d) of decision V/9n, the Committee welcomes the Party concerned's report about its continuing review of the rules providing for cost protection for claimants in cases under the Aarhus Convention throughout the United Kingdom, and considering measures aimed to reducing financial barriers to access to justice in such cases. The Committee invites the Party concerned to take into account, in this respect, the comments received from communicants and observers (see paras. 12-16 above), and to reflect on them in its second progress report due on 31 October 2015 or otherwise by 31 December 2015.

England and Wales

23. The Committee welcomes the Party concerned's report that it is currently carrying out a cross-government exercise in England and Wales to review the costs regime for Aarhus Convention cases following the judgment of the Court of Justice of the European Union in *European Commission v United Kingdom* (Case 530/11) in February 2011 and in particular that consideration is being given to whether the current costs regime should be extended to statutory review proceedings, whether the current costs caps should be amended and whether the principles set out in *Edwards v Environment Agency* (Case C-260/11) for determining the level of costs which would be prohibitively expensive could be incorporated into the costs regime.

24. The Committee invites the Party concerned, in its second progress report due on 31 October 2015 or otherwise by 31 December 2015, to report on the outcomes of this review, together with the actions it has by then taken, or proposes to take, together with a timeline for doing so, to ensure that the allocation of costs in all court procedures in England and Wales subject to article 9 is fair and equitable and not prohibitively expensive.

Scotland

25. The Committee notes the Party concerned's report that the Scottish Government is to monitoring developments in England and Wales and Northern Ireland and that as part of

its programme of wider civil justice reforms, the Scottish Government is also considering whether any amendments might still be made to the current expenses regime in Scotland. On this point, the Committee considers that, indeed, amendments should be made to Scotland's current expenses regime in a number of respects, including but not necessarily limited to (i) broadening the type of proceedings in which the applicant is entitled to apply for a Protective Expenses Order to include all court procedures subject to article 9 and not just judicial and statutory review cases falling within the scope of the Public Participation Directive, and (ii) to extend those who can seek to include community groups and similar bodies.

26. The Committee invites the Party concerned, in its second progress report due on 31 October 2015 or otherwise by 31 December 2015, to report on the outcomes of the Scottish Government's considerations, together with the actions it has by then taken, or proposes to take together with a timeline for doing so, to ensure that the allocation of costs in all court procedures in Scotland subject to article 9 is fair and equitable and not prohibitively expensive. The Committee also invites the Party concerned to consider the comments of observers concerning the barriers to legal aid in Scotland (paragraph 15 above).

Northern Ireland

27. The Committee welcomes the Party concerned's report that Northern Ireland is also reviewing the cost scheme for Aarhus cases sets out in the Regulations. Consideration is, in particular, being given to whether to amend them to reflect the principles enunciated in the Edwards Judgment. The Regulations already apply to statutory reviews to the High Court in Northern Ireland of decisions within the scope of the Aarhus Convention. The Committee notes the cases cited by CAJE demonstrating the challenges caused by current levels of the costs-caps for £5000 for an individual and £10,000 in other cases as well as the existence of the cross-cap of £35,000. CAJE also reported that legal aid is invariably denied in Northern Ireland when a group of objectors have a similar interest in objecting to a scheme in development and accordingly, financial assistance from public funds is rarely available for potential applicants in environmental legal challenges.

28. The Committee invites the Party concerned, in its second progress report due on 31 October 2015 or otherwise by 31 December 2015, to report on the outcomes of Northern Ireland's review of the costs scheme for Aarhus cases set out in the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, together with the actions it has by then taken, or proposes to take together with a timeline for doing so, to ensure that the allocation of costs in all court procedures in Northern Ireland subject to article 9 is fair and equitable and not prohibitively expensive.

Paragraph 8(c) and (d) of decision V/9n – time limits

29. With respect to the recommendations set out in paragraph 8(c) and 8(d) of decision V/9n, the Committee notes with concern the information provided by CAJE regarding time limits for judicial review in Northern Ireland, that the time limit for judicial review, still includes a "promptly" requirement as well as a maximum three month limit for all cases not concerning EU law. Moreover, that Courts are in practice that the Courts are ruling domestic environmental law challenges out of time when brought within, but towards the end of the three month time limit.

30. The Compliance Committee considers that neither the "promptly" requirement of the Northern Ireland time limit nor the manner in which that requirement is allegedly being applied in practice are fair or amount to a clear and transparent framework. The Committee invites the Party concerned, in its second progress report or otherwise by 31 December

2015, to report on its proposed actions together with a timeline for their implementation, to abolish the “promptly” requirement for cases within article 9 of the Convention in order to ensure that the timeframes in Northern Ireland are fair and provide a clear and transparent framework to implement the Convention.

Paragraph 9 of decision V/9n

31. With respect to paragraph 9, the Committee takes note of the Party concerned’s statement regarding its awareness of the obligations under article 7 and the need to act in compliance with them where they apply. The Committee notes that no information has been brought before it in the context of its review of the implementation of decision V/9n that the Party concerned has not acted in accordance with article 7 in practice.

32. In the light of the above considerations, the Committee finds that the Party concerned has not yet fulfilled the requirements of decision V/9n, but welcomes the steps taken by the Party concerned to date in that direction.

IV. Conclusions

33. The Committee finds that the Party concerned has not yet fulfilled the requirements of decision V/9n, but welcomes the steps taken by the Party concerned to date in that direction.

34. The Committee invites the Party concerned, taking into account the comments received from communicants and observers on its first progress report summarized in paragraphs 12-16 above, in its second progress report or otherwise by 31 December 2015, to report on:

(a) The outcomes of England and Wales’ cross-government review, together with the actions it has by then taken, or proposes to take together with a timeline for doing so, to ensure that the allocation of costs in all court procedures in England and Wales subject to article 9 is fair and equitable and not prohibitively expensive;

(b) The outcomes of the Scottish Government’s considerations, together with the actions it has by then taken, or proposes to take together with a timeline for doing so, to ensure that the allocation of costs in all court procedures in Scotland subject to article 9 is fair and equitable and not prohibitively expensive;

(c) The outcomes of Northern Ireland’s review of the costs scheme for Aarhus cases set out in the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, together with the actions it has by then taken, or proposes to take together with a timeline for doing so, to ensure that the allocation of costs in all court procedures in Northern Ireland subject to article 9 is fair and equitable and not prohibitively expensive;

(d) Any other measures that it has by then taken or proposes to take together with a timeline for doing so, aimed to remove or reduce reducing financial barriers to access to justice it considered, including possible establishment of appropriate assistance mechanisms;

(e) Its proposed actions, together with a timeline for their implementation, to abolish the “promptly” requirement in order to ensure that the timeframes in Northern Ireland are fair and amount to a clear and transparent framework and in particular, to remove the “promptly” requirement for cases within article 9 of the Convention.
