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Procedures and mechanisms facilitating the implementation of the Convention: compliance mechanism

Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – Part I*

Summary

This document is prepared by the Compliance Committee pursuant to the request set out in paragraph 21 of decision VI/8 of the Meeting of the Parties (ECE/MP.PP/2017/2/Add.1) and in accordance with the Committee's mandate set out in paragraph 35 of the annex to decision I/7 of the Meeting of the Parties on review of compliance (ECE/MP.PP/2/Add.8). This document, Part I, reviews the progress made by the Party concerned to implement paragraphs 2, 4 and 6 of decision VI/8k concerning the compliance of the United Kingdom of Great Britain and Northern Ireland. The Party concerned's progress in implementing paragraph 8 of decision VI/8k is reviewed in Part II of the report, contained in document ECE/MP.PP/2021/60.

* The present document is being issued without formal editing.

I. Introduction[1]

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). This report reviews the progress made by the Party concerned in implementing paragraphs 2, 4 and 6 of decision VI/8k. The Committee's review of the Party concerned's progress in implementing paragraph 8 of decision VI/8k is contained in Part II of the report, document ECE/MP.PP/2021/60.

II. Summary of follow-up

2. A summary of the Committee's follow-up on paragraphs 2, 4, 6 and 8 of decision VI/8k is contained in Part II of the report, document ECE/MP.PP/2021/60.

III. Consideration and evaluation by the Committee

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

3. To fulfil paragraph 2 (a), (b) and (d) of decision VI/8k, the Party concerned would need, as a matter of urgency, to 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;

…

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

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

5. The Committee considers that paragraph 4 of decision VI/8k, which stems from the Committee's findings on communication ACCC/C/2014/77 (United Kingdom), does not impose any additional obligation beyond those in paragraphs 2 (a), (b) and (d). The Committee thus examines paragraph 4 in the context of its review of paragraph 2 (a), (b) and (d) in England and Wales below.

England and Wales

6. The Committee identifies the following aspects requiring its attention:

(a) Type of claims covered;

(b) Eligibility for costs protection;

(c) Default level of costs caps;

(d) Variation of costs caps;

[1] This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

(e) Schedule of claimant's financial resources;

(f) Costs for procedures with multiple claimants;

(g) Costs protection prior to grant of permission;

(h) Costs relating to determination of an Aarhus claim;

(i) Costs protection on appeal;

(j) Cross-undertakings for damages;

(k) Costs orders against or in favour of funders of litigation;

(l) Costs orders against or in favour of interveners.

7. At the outset, the Committee expresses its disappointment that the Party concerned's formal review of its Environmental Cost Protection Regime (ECPR), due to take place around April 2020, has been delayed.[2] While the Committee understands the pressure that responding to the COVID-19 pandemic has placed on governments, it notes that the Party concerned undertook an "Independent Review of Administrative Law" (IRAL), including certain aspects of judicial review, during the same period. The Committee emphasises the pressing need for the Party concerned to take the steps needed to meet the requirements of decision VI/8k in order to end its longstanding non-compliance with the Convention.

8. The Committee notes the claims by ClientEarth, one of the communicants of communication ACCC/C/2008/33, that certain of the Government's proposals made in response to the IRAL Panel's report may conflict with article 9 of the Convention.[3] While not precluding the possibility to examine these measures, if enacted and the measures are put before it in the context of a future communication, the Committee considers that the matters identified by the communicant are outside the scope of decision VI/8k.

Type of claims covered

9. The Party concerned reports that an amendment to rule 45.41(2)(a) CPR extending cost protection to cover planning challenges under section 288 of the Town and County Planning Act 1990 entered into force on 1 October 2019.[4]

10. The communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86 and observers RSPB, Friends of the Earth and Friends of the Earth Scotland, and Environment Links UK welcome this amendment but regret the Party concerned's decision not to extend the CPR's scope to encompass private nuisance and other private law claims.[5]

11. The Committee appreciates the extension of the cost protection regime to section 288 claims. However, since other types of claims, including private law claims such as private nuisance, are still not covered by the CPR, the Committee finds that the Party concerned has not yet fulfilled paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k regarding the types of claims covered by cost protection in England and Wales.

Eligibility for costs protection

12. Observers RPSB, Friends of the Earth and Friends of the Earth Scotland claim that costs protection for unincorporated associations is unclear.[6] Based on the cases before the Committee, the issue is not whether unincorporated associations are eligible for costs

[2] Party's final progress report, 30 September 2020, para. 3.
[3] Update from the communicant of communication ACCC/C/2008/33 (ClientEarth), 15 June 2021.
[4] Party's second progress report, 30 September 2019, para. 1, and annex A, pp. 1-2.
[5] Comments on the Party's second progress report by communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86, 8 October 2019, pp. 1-2; comments on Party's second progress report by observers RSPB, Friends of the Earth, and Friends of the Earth Scotland, 29 October 2019, p. 3, and by observer Environment Links UK, 30 October 2019, p. 2.
[6] 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.

protection, but at what level their exposure to costs is capped.[7] As such, the Committee examines this issue under "level of costs caps" below.

13. Based on the foregoing, the Committee finds that the Party concerned has fulfilled paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k regarding eligibility for costs protection in England and Wales.

Default levels of costs caps

(a) Costs caps for individuals and organizations

14. The default costs cap under CPR 45.43 for claimants remains £5,000 for individuals and £10,000 for organizations, with a cross cap on an unsuccessful defendant's liability to pay the claimant's costs of £35,000.[8]

15. 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 £5,000 and £10,000 may be prohibitively expensive for many individuals and organizations.[9] In its report on decision V/9n to the sixth session of the Meeting of the Parties, the Committee accordingly considered that the possibility of the court to lower a claimant's costs cap below the default level, based on the specific circumstances, including the claimant's financial resources, would therefore contribute to fulfilling paragraphs 8 (a), (b) and (d) of decision V/9n.[10] The Committee examines variation of costs caps in paragraphs 20-32 below.

(b) Costs caps for unincorporated associations

16. Observers RSPB, Friends of the Earth and Friends of the Earth Scotland and Environmental Rights Centre for Scotland claim there is uncertainty regarding which costs cap applies to challenges by unincorporated associations and/or individuals on their behalf, citing two cases in which the claims were brought by an individual on behalf of an unincorporated association where the cap was raised from £5,000 to £10,000.[11] They also cite a case in which an interested party sought to increase the costs cap on the basis that the claimant was not an individual though its request was later abandoned when it was made clear she was acting on behalf of an unincorporated association.[12]

17. The Party concerned explains that the £5,000 cap applies where an individual brings an action "as an individual". When an unincorporated association has its own finances and funding support separate from that of its members, the court will take this into account since the association's members have the benefit of those finances and are liable for the association's debts.[13]

18. The observers submit that the ability for judges to take into account any separate finances and funding support available to unregistered associations may have a chilling effect on claimants as, based on that information, a court may increase the cap to an unknown level.[14]

19. Given the foregoing, the Committee considers that the application of the costs caps to unincorporated associations and individuals representing them is presently unclear. The Committee is accordingly not in a position to find that the Party concerned fulfils paragraphs 2(a), (b) and (d) and 4 of decision VI/8k as regards unincorporated associations in England and Wales.

[7] Comments on Party's final progress report by observers RSPB, Friends of the Earth, Friends of the Earth Scotland and Environmental Rights Centre for Scotland, 29 October 2020, paras. 6-10.
[8] Party's second progress report, 30 September 2019, annex B, pp. 1-2.
[9] ECE/MP.PP/2014/23, para. 47.
[10] ECE/MP.PP/2017/46, para. 34.
[11] Comments on the Committee's second progress review from observers RSPB, Friends of the Earth and Friends of the Earth Scotland, 13 March 2020, p. 2.
[12] Comments on Party's final progress report by observers RSPB, Friends of the Earth, Friends of the Earth Scotland and Environmental Rights Centre for Scotland, 29 October 2020, para. 16(3).
[13] Party's final progress report, 30 September 2020, para. 6.
[14] 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.

Variation of cost caps

20. CPR 45.44 sets out the rules for varying the costs caps in an Aarhus claim.

21. In its second progress review, the Committee invited the Party concerned in its final progress report to report on: (i) the proportion of Aarhus 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.[15]

22. In its final progress report, the Party concerned submits that, between March 2017 and May 2019, there were 279 judicial reviews identified as Aarhus claims. In 39 of these the defendant made an application to vary the cap at the outset of proceedings (13%) and in two cases, the defendant made an application later in proceedings. In seven cases, the costs cap was varied upwards (2.5%).[16]

23. Observers RSPB, Friends of the Earth, and Friends of the Earth Scotland submit that Ministry of Justice data suggests that when the default cap is varied, it is "almost always" (i.e. six out of seven cases) being increased.[17] Communicant ClientEarth and observers RSPB and Friends of the Earth state that in one case where the cap was reduced from £5,000 to £2,000, the defendant's cross-cap was also reduced from £35,000 to £14,000.[18] The observers submit that the outcome of applications for variations are not "reasonably predictable", inducing uncertainty, complexity and cost for claimants.[19]

24. Regarding the stage at which the costs cap may be varied, the observers claim all three of the cases cited in paragraph 16 above included late variations to the costs caps. In the first two cases, the judge ordered the default cap be raised from £5,000 to £10,000 after deciding to refuse permission. In the latter case, the interested party requested the cap be varied after permission had been granted.[20]

25. The observers also cite another case in which a challenge to the claimant's cap was resolved by the court less than a month before the hearing, and the government defendant then sought to challenge the claimant's cap again after judgment was given. They submit that this demonstrates that the CPR, in particular the rule permitting a variance to be sought as a result of a "change of position", do not provide certainty and reasonable predictability for claimants.[21]

26. The Party concerned claims that, in the preceding case, the defendant had queried the claimant's relationship 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. After seeking further information, the defendant applied to vary the costs cap, and the application to vary was dealt with soon after it was brought and before the "rolled up" hearing. It submits that the case therefore does not demonstrate that the CPR are not working as intended.[22]

27. The Party concerned states that CPR 45.44 (5)-(7) aims to ensure that costs caps are settled at the outset or, where a variation is sought, at an early stage, thus delivering certainty to the parties. A failure however to provide sufficient financial information will delay the resolution of the parties' position on cost caps and any variation the court may decide to make. Under CPR 45.44 (6), the court may also consider an application to vary costs caps at a later stage if there has been a significant change in circumstances, including evidence that the

[15] Committee's second progress review, 6 March 2020, para. 49.
[16] Party's final progress report, 30 September 2020, paras. 10-12.
[17] 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.
[18] Comments on the Party's first progress report from communicant ACCC/C/2008/33 (ClientEarth) and observers RSPB and Friends of the Earth, 31 October 2018, p. 6.
[19] Comments on Party's final progress report by observers RSPB, Friends of the Earth, Friends of the Earth Scotland and Environmental Rights Centre for Scotland, 29 October 2020, paras. 14-16.
[20] Ibid., para. 16 (3).
[21] 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.
[22] Party's second progress report, 30 September 2019, para. 9.

claimant's schedule of financial resources contained false or misleading information which means that the proceedings would not now be prohibitively expensive.[23]

28. The Party concerned cites a case in which the defendant filed an application to vary the costs caps after the judgment, which the court granted. It states that the defendant had raised the issue of variation of the cost cap in its acknowledgement of service because the claimant had provided insufficient financial information. Despite the court requesting the claimant to file additional financial information on several occasions, the claimants failed to do so. The Party concerned submits that the claimant's repeated failure was the cause of the late application and the court's willingness to deal with the matter at that stage.[24]

29. Regarding its invitation to the Party concerned to provide relevant data in its final progress report on the variation of costs caps, the Committee takes note of the data provided by the Party concerned in paragraph 22 above but regrets that it concerns the period March 2017–May 2019 only. The Committee thus has no information before it regarding the number of variations applied for or granted since then. Concerning the period March 2017–May 2019, the Committee notes that the claimant's costs cap was only varied upwards in a relatively small number of cases (2.5%). However, the defendant sought an increased costs cap in 15% of judicial reviews in this period. While the percentage of successful applications to vary was significantly lower, the Committee considers that the proportion of cases in which a variation was sought may create a deterrent effect, since each such application creates uncertainty and adds to a claimant's workload and costs.

30. The Committee notes the lack of examples before it of cases in which the costs caps has been varied downwards. The Committee considers that the default levels could only be acceptable if the possibility to vary them downwards is not only theoretically available but can be predictably relied upon in practice. Based on the cases before it, the Committee is concerned that CPR 45.44 is being used more often to increase, rather than decrease, the caps.[25]

31. The Committee is likewise concerned by the uncertainty for claimants due to the possibility that costs caps may be varied upwards after proceedings have begun. Irrespective of whether the late stage at which variations of costs caps were sought or granted was due to the claimants' failure to provide all requested financial documents, these cases show that applications for varying of costs cap may indeed be introduced at a late stage and even after judgment is 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.

32. Given the above, the Committee considers that the Party concerned has not demonstrated that the rules and practice for variation of costs caps provide a clear and consistent framework that guarantees that costs will be fair, equitable and not prohibitively expensive. The Committee invites the Party concerned, along with each progress report in the next intersessional period, to provide up-to-date data on: (i) the proportion of Aarhus claims in which an application to vary the claimant's cost cap is made, indicating whether this was to vary up or down; (ii) the proportion of Aarhus claims in which an application to vary the cross-cap is made, indicating whether this was to vary up or down; (iii) the stage of the proceeding at which the application to vary was made; (iv) the outcomes of each application; (v) the stage of the proceeding at which the application was decided; (vi) the quantum of each varied costs caps; and (vii) for each case in which a variation to either the claimant's cap or the cross-cap was granted, the reasons given by the court for doing so.

33. Based on the foregoing, the Committee finds that the Party concerned has not yet fulfilled paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k as regards variation of costs caps in England and Wales.

[23] Ibid., para. 8, and annex B, pp. 1-3.
[24] Ibid., para. 9, and annex C.
[25] ECE/MP.PP/2014/23, paras. 35-36.

Schedule of claimant's financial resources and hearings on applications to vary costs caps

34. CPR 45.42(1)(b) provides that claimants seeking costs protection for an Aarhus claim must provide a schedule of their financial resources including details of the aggregate amount of any financial support which any person has provided or is likely to provide to them.[26]

35. Communicant ClientEarth submits that the requirement to provide a schedule of financial resources in every case is an unjustifiable burden given how rarely costs caps are varied upwards in practice.[27]

36. The Party concerned explains that CPR 45.42(1)(b) accounts for any potential changes in parties' financial position during proceedings. It states that the rule does not require that the schedule of a claimant's resources include the identity of those providing financial support.[28]

37. In its first progress review, the Committee noted that, although the High Court has acknowledged that the wording of CPR 45.42 does not require the disclosure of the identity of donors, this information may be required to assess the likelihood of financial support.[29] As such, the chilling effect resulting from privacy concerns may also extend to potential funders of litigation.

38. The Committee also reiterates the concern it expressed in its report on decision V/9n 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.

39. Finally, in the light of the data that the costs cap is varied upwards in only 2.5% of cases, the Committee considers that the requirement for claimants to provide this information in every Aarhus Convention claim creates an unnecessary burden and is thus potentially unfair.

40. As regards hearings on applications to vary costs caps, the Party concerned acknowledged in its first progress report that it "needed to amend the environmental costs protection regime, so that the default position is that any hearing of an application to vary costs caps in an Aarhus Convention claim is to be held in private in the first instance".[30] However, following a review by the Civil Procedure Rules Committee, CPR 39.2 was amended in April 2019 to provide that hearings are to be public unless certain criteria are met. These criteria include that a hearing involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality. [31]

41. The Party concerned submits that there will be very few applications to vary a cost cap that require an oral hearing.[32]

42. Observers RSPB, Friends of the Earth and Friends of the Earth Scotland consider the fact that a claimant's financial affairs may be discussed in public may deter meritorious claims. They point out that claimants' privacy concerns may not necessarily be about "damage to confidentiality" as provided in CPR 39.2.[33]

43. The Committee does not dispute that the general rule of open justice is one of the essential principles of justice. However, there is a risk that potential claimants will be dissuaded from bringing a judicial review on the basis that their financial circumstances will be provided to the defendant and may be discussed in open court. The Committee considers that this creates a further barrier to access to justice under article 9 of the Convention and is thus potentially unfair.

[26] Party's second progress report, 30 September 2019, para. 15, and annex B, pp. 3-4.
[27] Comments on the Party's final progress report by the communicant of ACCC/C/2008/33 (ClientEarth), 29 October 2020, para. 22.
[28] Party's second progress report, 30 September 2019, para. 15.
[29] Committee's first progress review, 24 February 2019, para. 57.
[30] Party's first progress report, 1 October 2018, para. 8.
[31] Party's second progress report, 30 September 2019, paras. 16-18 and annex B, pp. 4-5.
[32] Party's final progress report, 30 September 2020, para. 24.
[33] 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. Based on the above, the Committee finds that the Party concerned has not yet fulfilled paragraph 2 (a), (b), and (d) and 4 of decision VI/8k regarding either the schedule of financial resources needed to support an application for costs protection or hearings on applications to vary the costs caps in England and Wales.

Costs for procedures with multiple claimants

45. The Party concerned submits that a separate costs cap for each claimant provides fairness and proportionality for all parties while ensuring that the costs of claims are not prohibitively expensive.[34] It claims that this rule is not based on defendants' costs being doubled by two claimants or tripled by three claimants. It submits however that multiple claimants can result in an increase in administration, complexity and the number of matters to be addressed by the defendant and resolved by the court. Courts may also uphold some claims and not others where claimants raise different legal arguments. Where multiple claimants make the same legal arguments, the Party concerned claims that there should be no incentive to allowing proceedings to be expanded simply to allow more individuals to shoulder the costs cap burden. It submits that compliance with the Convention does not require claimants to be able to share a cost burden or for costs caps to reflect the actual costs of proceedings.[35]

46. The Committee continues to see no basis for the rule requiring separate costs caps for each claimant, in particular where the claimants make the same legal arguments on the same factual basis. The Committee does not agree that it is undesirable for claimants to be able to share the costs burden for challenges within scope of the Convention.

47. Based on the information before it, the Committee finds that the Party concerned has not yet fulfilled paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k as regards costs in procedures with multiple claimants in England and Wales.

Costs protection prior to the grant of permission

48. The Party concerned states that, in all Aarhus 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.[36]

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

50. The Committee accordingly finds that the Party concerned has fulfilled paragraph 2 (a), (b), and (d) and 4 of decision VI/8k regarding costs protection prior to grant of permission in England and Wales.

Costs relating to the determination of an Aarhus claim

51. Prior to February 2017, defendants who unsuccessfully challenged that a claim was an Aarhus claim were required to pay "indemnity costs" to claimants regarding that challenge. Since February 2017, defendants are required to pay the claimants' costs regarding the challenge on the "standard" basis, which is lower.[37]

52. Observers RSPB, Friends of the Earth, Friends of the Earth Scotland state that it is unfair for claimants not to be able to recover all the costs of successfully defending against a challenge that a claim is not an Aarhus claim.[38]

53. The Party concerned submits that the amended rule still provides an appropriate disincentive against unmeritorious challenges that a claim is not an Aarhus claim, and that courts still have the discretion to decide to impose costs on an indemnity basis.[39] It acknowledges the existence of concerns that such a change may lead to more frequent challenges by defendants that a claim is not an Aarhus claim but states that it has seen no

[34] Party's second progress report, 30 September 2019, para. 11.
[35] Party's final progress report, 30 September 2019, paras. 12, 17 and 20.
[36] Party's second progress report, 30 September 2019, para. 22.
[37] Ibid., para. 23.
[38] Comments on Party's second progress report by observers RSPB, Friends of the Earth and Friends of the Earth Scotland, 29 October 2019, para. 16.
[39] Party's second progress report, 30 September 2019, para. 23.

evidence of a sustained increase in applications to challenge whether a claim is an Aarhus claim.[40]

54. The Committee considers that, whether or not the amended rule has led to an increase in challenges in practice, it is indeed unfair that claimants do not recover their full costs in the case of an unsuccessful challenge. Since the situation has remained unchanged since the Committee's report on decision V/9n to the sixth session of the Meeting of the Parties,[41] the Committee reiterates its conclusion in that report that the 2017 amendment moved the Party concerned further away from fulfilling paragraph 2 (a), (b), and (d) and 4 of decision VI/8k regarding the costs related to the determination of an Aarhus claim.

55. Based on the foregoing, the Committee finds that the Party concerned has not yet fulfilled paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k as regards the costs relating to the determination of an Aarhus claim in England and Wales.

Cost protection on appeal

56. Costs on appeal are governed by CPR 52.19A. The Party concerned states that the Court of Appeal is required to assess the cost of the procedure by reference to CPR 45.43-45.45 and to all the circumstances of the case (including any change in the position of the parties) and if necessary to make an order to prevent costs being prohibitively expensive. 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 should be made.[42]

57. The observers emphasise that the issue of the lack of certainty regarding cost protection on appeal is relevant for proceedings not just before the Court of Appeal, but also the Supreme Court, which has its own rules and procedures separate from the CPR.[43]

58. The Committee notes that CPR 52.19A requires the Court of Appeal to consider whether the costs of the appeal procedure will be prohibitively expensive, and if so, to make an order limiting the recoverable costs to the extent necessary to prevent this. However, as it has previously made clear,[44] the Committee considers that the lack of any costs caps in CPR 52.19A fails to ensure sufficient clarity or costs protection for claimants in appeals regarding Aarhus claims.

59. The Committee also notes the explicit requirement in paragraph 3 of CPR 52.19A that the Court of Appeal, 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."[45] The Committee's considerations in paragraphs 34-44 above are thus equally applicable here.

60. The Committee moreover 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.

61. In line with the preceding point, the Committee makes clear that the requirement in article 9 (4) for the procedure not to be prohibitively expensive also applies to proceedings before the Supreme Court.

62. Based on the above, it is the Committee's understanding that the situation regarding cost protection before the Court of Appeal remains unchanged since the time of its report to the sixth session of the Meeting of the Parties and it has no information before it concerning

[40] Party's final progress report, 30 September 2020, para. 27.
[41] ECE/MP.PP/2017/46, para. 51.
[42] Party's second progress report, 30 September 2019, paras. 13-14, and annex B, p. 1.
[43] Comments on the Committee's draft report from observers RSPB, Friends of the Earth England, Wales and Northern Ireland, Friends of the Earth Scotland, Environmental Rights Centre for Scotland, C & J Black Solicitors, 19 July 2021, p. 3.
[44] ECE/MP.PP/2017/46, para. 42.
[45] Party's second progress report, 30 September 2019, annex B, p. 1.

costs protection before the Supreme Court. Accordingly, the Committee considers that the Party concerned has not yet fulfilled paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k as regards costs protection on appeal in England and Wales.

Cross-undertakings for damages

63. In its report to the sixth session of the Meeting of the Parties, the Committee took the view that the 2017 CPR amendments did not give any further clarity to applicants seeking interim injunctions as to whether a cross-undertaking will be required, and if so, at what level. The Committee held that this situation fails to meet the requirement in article 3 (1) for a clear, transparent and consistent framework to implement the Convention's provisions.[46]

64. The Party concerned states that there were 12 applications for interim injunctions between April 2013 and May 2015, 8 of which were granted and in only one order did the claimant give a cross-undertaking for damages. It states that it has no subsequent data on cross-undertakings for damages.[47]

65. The lack of data on the number of cross-undertakings required in Aarhus claims since May 2015 means that the Committee is not in a position to assess whether the Party concerned has met paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k regarding cross-undertakings for damages in England and Wales.

66. The Committee thus invites the Party concerned, in its progress reports in the next intersessional period, to provide up-to-date data on (a) the number of Aarhus claims in which an interim injunction was sought; (b) whether a cross-undertaking was required; and (c) if so, the amount required.

67. Based on the foregoing, the Committee finds that the Party concerned has not yet fulfilled paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k as regards cross-undertakings for damages in England and Wales.

Costs orders concerning funders of litigation

68. The Party concerned has confirmed 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.[48]

69. So long as sections 85 and 86 of the Criminal Justice and Courts Act are not brought into force as regards Aarhus claims, the Committee finds that the Party concerned has fulfilled paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k regarding costs orders concerning funders of litigation in England and Wales.

Costs orders against or in favour of interveners

70. The Party concerned explains that, upon a party's application, the court has the power to make an order that an intervener pay costs to the other parties, but this is subject to the conditions in section 87 of the Criminal Justice and Courts Act 2015. These include both the behaviour of the intervener leading to the parties incurring additional costs and consideration of any other reasons why such an order should not be made.[49]

71. The Party concerned states that it is only in exceptional circumstances that an intervener will recover its costs, but the costs caps in CPR 45 do not apply to interveners. It submits that it is common practice for any liability of the parties to pay an intervener's costs to be agreed between the parties prior to an application to intervene being made. In the absence of agreement, the Court would be asked to address the point as part of the order allowing the intervention. It claims that it is common practice that the costs liability of an intervener is resolved at the point a party is given permission to intervene.[50]

[46] ECE/MP.PP/2017/46, para. 54.
[47] Party's second progress report, 30 September 2019, paras. 26-27.
[48] Ibid., para. 29.
[49] Ibid., para. 30, and annex G.
[50] Party's final progress report, 30 September 2020, para. 31.

72. The observers disagree that this is a common practice and point to their own litigation experience in this regard.[51]

73. The Party concerned 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. It points out that, as an alternative, a potential intervener can apply to become a party to the proceedings and thereby benefit from the Aarhus costs cap.[52]

74. Finally, the Party concerned submits that the wording of CPR 45.43 (1) makes clear that the costs cap relates to the total costs that a claimant or defendant may be ordered to pay, including any costs the unsuccessful party is ordered to pay to an intervener.[53]

75. The observers claim that the court does not retain complete discretion not to award costs against an intervener, since its decision in this regard is subject to certain conditions under section 87 of the Criminal Justice and Courts Act 2015.[54]

76. Concerning the Party concerned's submission that in order to avoid a possible costs order an intervener could apply to become a party, and thus benefit from the Aarhus costs cap, the Committee considers that encouraging interveners to become parties would simply add additional cost for all parties to the proceeding.

77. Regarding interveners who intervene against the claimant, the Committee welcomes the Party concerned's confirmation that the costs cap is inclusive of any order to pay interveners' costs. The Committee finds that the Party concerned has fulfilled paragraphs 2 (a), (b) and (d) and 4 with respect to the costs payable to interveners who intervene against the claimant in England and Wales.

78. In contrast, the Committee considers that members of the public who join proceedings as interveners in support of the claimant are also entitled to benefit from the Convention's requirement that proceedings must not be prohibitively expensive. The Committee accordingly finds that the Party concerned has not fulfilled paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k as regards interveners who intervene in support of the claimant in England and Wales.

Final remarks regarding England and Wales

79. Based on paragraphs 9-78 above, the Committee concludes that the Party concerned has met the requirements of paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k with respect to the eligibility for costs protection, costs protection prior to grant of permission, costs orders concerning funders of litigation and interveners who intervene against the claimant in England and Wales. This does not however preclude the Committee revisiting these issues in its future follow-up if the legal framework applicable to those issues is changed from that examined in the preceding paragraphs. The Committee concludes that the Party concerned has not yet met the requirements of paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k as regards the other matters examined in paragraphs 9-78 above.

80. Given the foregoing, the Committee finds 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.

Scotland

81. The Committee identifies the following issues requiring its 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;

[51] Observers' comments on the Committee's draft report, 19 July 2021, p. 5.
[52] Party's second progress report, 30 September 2019, paras. 30-33.
[53] Party's final progress report, 30 September 2020, para. 32.
[54] Observers' comments on the Committee's draft report, 19 July 2021, p. 5.

(d) Issues arising since the 2018 revised PEO Rules:

(i) Definition of "prohibitively expensive";

(ii) PEO application procedure and costs;

(iii) Interveners;

(iv) Court fees;

(v) Legal Aid.

82. As an initial point, the Committee notes that the Scottish Government is considering the possibility of making the Convention justiciable within its law.[55] The Committee welcomes any action that furthers the implementation, effectiveness and objectives of the Convention within domestic legal systems.

Type of claims covered

83. The revised Rules for Protective Expenses Orders (PEOs) entered into force on 10 December 2018, through the amendment of Chapter 58A of the Court of Session Rules.[56]

84. The Party concerned states that the PEO regime applies to certain judicial and statutory reviews but not to private law claims. The Party concerned indicates that although the revised PEO rules do not apply to private law cases, it is generally public bodies that enforce nuisance matters in Scotland.[57]

85. The observers note that some but not all private Aarhus claims may be covered by the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.[58]

86. Since at least some private law claims remain outside the PEO rules, the Committee finds that the Party concerned has not fulfilled 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

87. The default levels of the costs caps have not changed since the Committee's report to the sixth session,[59] namely £5,000 for a claimant (whether an individual or an organization), with a cross-cap of £30,000 for the defendant.[60]

88. Under the 2018 PEO rules, the default cost levels can be varied up or down "on cause shown".[61] 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.[62]

89. In its second progress report, the Party concerned indicated that the 2018 PEO rules were untested, but that it was "not expected" that there will be large numbers of cases in which the costs caps would be increased.[63] The Party concerned has not provided any information since its second progress report on how the caps are being applied in practice.

90. The Committee already indicated in its review of decision V/9n that £5,000 should be the maximum amount of costs payable by a claimant in proceedings under article 9 of the Convention, with the possibility for the court to lower that amount if the circumstances of the case make it reasonable to do so.[64] It therefore regrets that the 2018 PEO rules allow for both increases and decreases in the costs cap for both parties. Moreover, the vague term "on cause shown" introduces legal uncertainty and could have a chilling effect. The Committee thus

[55] Party's final progress report, 30 September 2020, para. 40.
[56] Party's second progress report, 30 September 2019, para. 34, and annex H.
[57] Ibid., para. 37.
[58] Comments on Party's final progress report by observers RSPB, Friends of the Earth, Friends of the Earth Scotland and Environmental Rights Centre for Scotland, 29 October 2020, para. 36.
[59] ECE/MP.PP/2017/46, para. 62.
[60] Party's second progress report, 30 September 2019, annex H, p. 4.
[61] Ibid.
[62] ECE/MP.PP/2017/46, para. 69.
[63] Party's second progress report, 30 September 2019, paras. 38-39.
[64] ECE/MP.PP/2017/46, para. 65.

considers that the 2018 PEO rules move the Party concerned further away from fulfilling paragraphs 2(a), (b) and (d) of decision VI/8k.

91. Given the lack of data on how the 2018 PEO rules are being applied in practice, the Committee invites the Party concerned, in its progress reports in the next intersessional period, to provide up-to-data on the points (i)-(vii) in paragraph 32 above with respect to costs caps under the PEO rules in Scotland also.

92. Based on the foregoing, the Committee finds that the Party concerned has not yet fulfilled paragraphs 2 (a), (b) and (d) with respect to the level of the costs caps in Scotland.

Cost protection on appeal

93. 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.[65] The Party concerned states that this is justified by the need to give some flexibility for courts to respond to the circumstances of the case. It submits, for instance, that if the circumstances, or the claimant, have changed on appeal a PEO may no longer be appropriate. It claims that in most cases a fresh PEO will be granted, under the revised, less cumbersome process.[66]

94. It is the Committee's understanding that, based on Chapter 58A.8, when the respondent appeals, 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 the successful party's court fees. In its final progress report, the Party concerned states that the Scottish Government "would expect that the costs cap covers all of the costs of the procedure".[67] That is not, however, the same as a clear rule that the costs cap indeed does so.

95. In its report 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.[68] The Committee regrets that the Party concerned has not to date adopted either of the Committee's suggested approaches and invites it to do so as soon as possible, and at the same time to provide clear evidence that the costs cap covers all costs payable to successful parties and interveners, including their court fees.

96. In the light of the above, the Committee finds that while the Party concerned has fulfilled 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.

Issues arising since the 2018 PEO Rules

97. In its second progress review, the Committee examined for the first time issues raised by the communicant ClientEarth and observers RSPB and Friends of the Earth following the 2018 revision of the PEO rules.[69] The Committee considers the developments regarding these issues below.

(a) Definition of "prohibitively expensive"

98. The Committee notes that the definition of "prohibitively expensive" costs in Chapter 58A.1 (3) is based on the criteria set out by the CJEU in the *Edwards* case.[70] The Committee considers that the elements included in this provision are relevant and appropriate, and

[65] Party's second progress report, 30 September 2019, annex H, p. 5.
[66] Party's second progress report, 30 September 2019, para. 40.
[67] Party's final progress report, 30 September 2020, para. 33.
[68] ECE/MP.PP/2017/46, para. 71.
[69] Committee's second progress review, paras. 102-109.
[70] Case C-260/11, *Edwards and Pallikaropoulos v. Environment Agency et al*, ECLI:EU:C:2013:221.

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.

(b) PEO application procedure and costs

99. The Committee welcomes the simplified, written procedure for applying for a PEO introduced through the 2018 amendments.

100. The Committee notes, however, that Chapter 58A.5 (3) (ii) requires the applicant to provide information about the terms on which the applicant is represented.[71] The Party concerned states that this is to enable the court to have the broadest possible understanding of the circumstances of an application and applicants.[72] The Committee 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.

101. Pursuant to Chapter 58A.5 (3) (iv),[73] the applicant must provide an estimate of the expenses of each other party for which the applicant may be liable in the proceedings. The Party concerned states that this is likewise to enable the court to have as broad an understanding as possible of the circumstances of an application.[74] The Committee considers that preparing such an estimate entails additional work (and thus cost) for the applicant. The Committee notes that neither England and Wales or Northern Ireland have such a requirement and it is difficult to see what value it adds, since the other party would surely be better placed to provide its own estimate.

102. Chapter 58A.6[75] 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, for those cases in which a public PEO hearing is held, the Committee is concerned that the absence of confidentiality of financial information may have a deterrent effect on applicants.

103. 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.[76] The Committee considers that this increases certainty for applicants and is thus a positive step towards fulfilling paragraph 2 (a), (b) and (d) of decision VI/8k .

104. While the Committee welcomes many of the changes made to the PEO application procedure, it has concerns regarding the potential chilling effect of the requirement to provide financial information (including with regards the claimant's legal representation). Furthermore, the Committee cannot see why the claimant should be asked to provide estimates of other parties' costs. As such, the Committee, while welcoming the progress made, finds that the Party concerned has not yet fulfilled 2 (a), (b) and (d) of decision VI/8k regarding the application procedure for PEOs in Scotland.

(c) Interveners

105. The Party concerned has confirmed that the costs of interveners are not included in the cost caps and that there is no special provision within the costs regime for interveners.[77]

106. In line with paragraph 77 above, the Committee finds that the failure of the costs caps to cover any costs payable to interveners does not meet the requirements of paragraph 2 (a), (b) and (d) of decision VI/8k.

[71] Party's second progress report, 30 September 2019, annex H, p. 4.
[72] Party's final progress report, 30 September 2020, para. 34.
[73] Party's second progress report, 30 September 2019, annex H, p. 4.
[74] Party's final progress report, 30 September 2020, para. 35.
[75] Party's second progress report, 30 September 2019, annex H, p. 4.
[76] Ibid., annex H, p. 5.
[77] Party's final progress report, 30 September 2019, para. 36.

(d) Court fees

107. The Party concerned reports that the Scottish Government "expects" the costs cap will cover all stages of the procedure and that court fees would be included in the costs regime.[78]

108. The observers suggest that case law indicates that it may not cover court fees and that court fees have increased in recent years.[79]

109. The Committee underlines that court fees must be included within the costs protection regime since it is the entire costs of proceedings that must be considered when ensuring that proceedings are not prohibitively expensive under article 9 (4) of the Convention. While noting that the Party concerned "expects" that costs caps will include court fees, the Committee will require clear evidence to that effect before it can conclude that paragraph 2 (a), (b) and (d) of decision VI/8k have been met in this regard.

(e) Legal Aid

110. The observers 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 £7,000 on legal aid is unrealistic to run a complex judicial review procedure.[80]

111. The Party concerned reports that the Scottish Government consulted on legal aid reform in 2019 and intends to introduce a Bill in the first session of the next Parliament on this issue.[81]

112. The Committee invites the Party concerned to provide the text of the relevant legislative provisions at any early stage in the next intersessional period for its consideration.

Final remarks regarding Scotland

113. Based on the foregoing, the Committee concludes that 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 in Scotland. The Committee however concludes that the Party concerned has not yet met the requirements of paragraphs 2 (a), (b) and (d) with respect to Scotland as regards the other matters examined in paragraphs 83-112 above.

Northern Ireland

114. The Committee identifies the following issues requiring its attention:

(a) Type of claims covered;

(b) Cross-undertakings for damages.

115. 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.[82] It however also notes their concern that the Regulations do not explicitly make clear that the requirement that proceedings under article 9 are not prohibitively expensive applies to the costs of the full procedure, and not just for each particular instance. On this point, the Committee underlines that, as for England and Wales (see para. 60 above), the costs to be ordered on appeal, including any possible costs caps, must recognize that the requirement not to be prohibitively expensive applies to the procedure *as a whole*, encompassing all stages of the procedure.

[78] Ibid., paras. 33 and 37.
[79] Comments on Party's final progress report by observers RSPB, Friends of the Earth, Friends of the Earth Scotland and Environmental Rights Centre for Scotland, 29 October 2020, paras. 26 and 33.
[80] Ibid.
[81] Party's final progress report, 30 September 2020, para. 39.
[82] 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.

Type of claims covered

116. The Party concerned has confirmed that the costs protection regime in Northern Ireland still does not cover private law claims[83] and that while there are no current plans to do so, this will be kept under review.[84]

117. The Committee finds that, by excluding private law claims from the scope of costs protection, the Party concerned has not yet fulfilled paragraphs 2 (a), (b) and (d) of decision VI/8k regarding the type of claims covered in Northern Ireland.

Cross-undertakings for damages

118. The Party concerned confirms that the costs protection regime in Northern Ireland remains similar to that in England and Wales as regards cross-undertakings for damages. It states that it does not have evidence on cross-undertakings for damages as it does not record when applications for injunctions are sought. It indicates that it will explore the practicalities of its courts recording this information.[85]

119. The Committee has previously stated that the uncertainty related to cross-undertakings fails to meet the requirement in article 3 (1) for a clear, transparent and consistent framework to implement the Convention's provisions.[86] However, based on the lack of data before the Committee, it is not clear whether the courts in Northern Ireland still in practice require cross-undertakings for damages when an injunction is sought in an Aarhus claim or not.

120. The Committee thus invites the Party concerned, in its progress reports in the next intersessional period, to provide up-to-date data on: (a) the number of Aarhus claims in which an interim injunction was sought; (b) the number of those cases in which a cross-undertaking was required; and (c) the level of cross-undertaking required in each case.

121. In the absence of the above information, the Committee finds that the Party concerned has not yet demonstrated that it has fulfilled paragraphs 2 (a), (b) and (d) of decision VI/8k as regards cross-undertakings for damages in Northern Ireland.

Concluding remarks regarding Ireland

122. Based on the foregoing, the Committee finds that the Party concerned has not yet met the requirements of paragraphs 2 (a), (b) and (d) of decision VI/8k with respect to Northern Ireland.

Paragraph 2 (c) of decision VI/8k

123. To fulfil paragraph 2 (c) 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 "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."

124. The Party concerned reports that, following the amendment of Rule 4 of Order 53 of the Court of Judicature which entered into effect on 8 January 2018, the "promptitude" requirement is no longer applicable in Northern Ireland 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".[87] 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.[88]

[83] Party's second progress report, 30 September 2019, para. 41.
[84] Party's final progress report, 30 September 2020, para. 41.
[85] Ibid., para. 42.
[86] ECE/MP.PP/2017/46, para. 91.
[87] Party's second progress report, 30 September 2019, para. 42 and annex I, pp. 1-2.
[88] Ibid., para. 43.

125. Based on the information before it at the time of its second progress review, the Committee indicated that, in the absence of evidence to the contrary in the meantime, it would report to the seventh session of the Meeting of the Parties that the Party concerned had fulfilled paragraph 2 (c) of decision VI/8k with respect to time limits for judicial review in Northern Ireland.[89] Since its second progress review, the Committee now better understands that it is indeed only in cases in which the "caselaw of the CJEU is applicable" will time run from when the applicant knew or ought to have known of an alleged illegality. The Committee points out that the scope of article 9 of the Convention is obviously not limited only to cases in which the "caselaw of the CJEU is applicable".

126. The Committee recalls its findings on communication ACCC/C/2008/33, from which the recommendation in paragraph 2 (c) of decision VI/8k stems. In those findings, the Committee held that:

> by failing to establish clear time limits within which claims may be brought and to set a clear and consistent point at which time starts to run, i.e., *the date on which a claimant knew, or ought to have known of the act, or omission, at stake*, the Party concerned has failed to comply with the requirement in article 9, paragraph 4, that procedures subject to article 9 be fair and equitable.[90]

127. Based on the foregoing, the Committee, while welcoming the removal of the "promptitude" requirement in Northern Ireland, finds that since the Party concerned has not yet taken the necessary measures to ensure that time limits for bringing an application for judicial review in all cases within the scope of article 9 of the Convention start to run from the date on which the claimant knew, or ought to have known of the act, or omission, at stake, the Party concerned has not yet met the requirements of paragraph 2 (c) of decision VI/8k.

Paragraph 2 (e) of decision VI/8k

128. To fulfil paragraph 2 (e) 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 "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".

129. In its first progress review, the Committee noted that new European Union legislation was expected to be in place by the end of 2018 which would require each European Union member State to submit an integrated national energy and climate plan (NECP) by the end of 2018. Once in place, the NECP would supersede the NREAP. The Committee accordingly invited the Party concerned in its second progress report to provide relevant evidence to demonstrate that it met the requirements of article 7 of the Convention in the preparation of its NECP.[91]

130. In its second progress report the Party concerned reported on the public consultations carried out in the context of adoption of its draft NECP.[92]

131. The Committee 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. The Committee notes that it has no evidence before it to indicate that the public participation carried out during the preparation of the NECP failed to meet the requirements of article 7 of the Convention.

132. The Committee also notes that the Party concerned is no longer part of the European Union. The Party concerned will accordingly not prepare any plans of a similar nature to the NREAP or the NECP under European Union law in the future.

[89] Committee's second progress review, 6 March 2020, para. 121.
[90] ECE/MP.PP/C.1/2010/6/Add.3, para. 139, emphasis added.
[91] Committee's first progress review, 24 February 2019, para. 105.
[92] Party's second progress report, 30 September 2019, para. 44.

133. Based on the foregoing, since the Party concerned is no longer part of the European Union, the Committee finds that the recommendation in paragraph 2 (e) in decision VI/8k is no longer applicable.

Paragraph 6 of decision VI/8k

134. To fulfil 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.

135. The Party concerned reports that it "continues to consider the recommendation in paragraph 6 of decision VI/8k"[93] and that "the current view is that [the review of the CPR in England and Wales] is the most appropriate vehicle with which to consider the scope of the ECPR with respect to private nuisance claims".[94] The Party concerned however does not report on any practical or legislative measures it has taken to date to fulfil paragraph 6 of decision VI/8k.

136. The communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86 confirm that the Party concerned has failed to take any action to address its non-compliance.[95]

137. The Committee expresses its concern at the Party concerned's apparent failure to have made any concrete progress on this matter since the sixth session of the Meeting of the Parties. The Committee also points out that paragraph 6 of decision VI/8k applies to all jurisdictions of the Party concerned and not just England and Wales.

138. Given the above, the Committee finds that the Party concerned has not yet met the requirements of paragraph 6 of decision VI/8k, nor demonstrated any progress in that direction.

IV. Conclusions

139. The Committee's conclusions on the Party concerned's progress in implementing paragraphs 2, 4, 6 and 8 of decision VI/8k are contained in Part II of the report, document ECE/MP.PP/2021/60.

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[93] Ibid., para. 45.
[94] Party's final progress report, 30 September 2020, para. 43.
[95] Comments on the Party's final progress report by the communicants of ACCC/C/2013/85 and ACCC/C/2013/86, 15 October 2020, p. 1.