Ministry of Justice

COST PROTECTION IN ENVIRONMENTAL CLAIMS

THE CONSULTATION ON ENVIRONMENTAL COSTS PROTECTION REGIME IN ENGLAND AND WALES AND NEXT STEPS.

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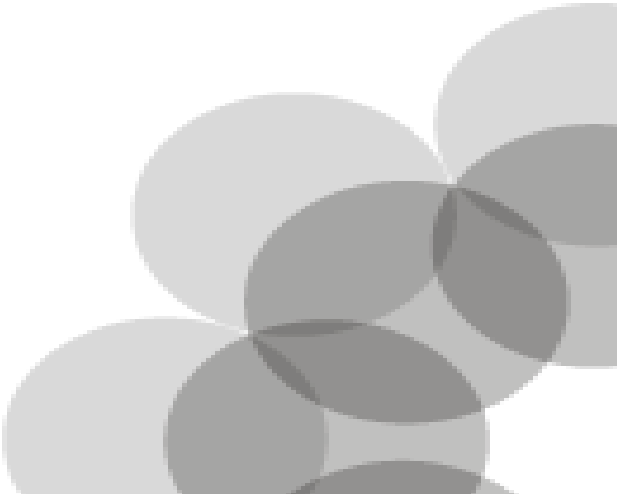

BACKGROUND

- Current costs protection rules for environmental claims came into force in England and Wales in April 2013.
- Costs rules were established in response to obligations under the Aarhus Convention and Public Participation Directive.
- The current costs rules provide a simple fixed costs recoverable system for relevant cases at first instance.
- The amount recoverable from the claimant is capped at £5,000 for individuals and £10,000 for organisations. The costs recoverable from the defendant is capped at £35,000.
- The amounts reflected costs awards being made by the courts.

WHY IS THE GOVERNMENT PROPOSING TO MAKE CHANGES TO THE RULES?

The proposals to amend the Environmental Costs Protection Regime in England and Wales have arisen as a result of developments in case law:

- The judgment of the Court of Justice of the European Union (CJEU) in case C-260/11 *Edwards v. Environment Agency* [2013].
- The subsequent judgment of the United Kingdom Supreme Court in the same case: *R (Edwards) v. Environment Agency* (No 2) [2014].
- The judgment of the CJEU in case C-530/11 *European Commission v. UK* [2014].

WHAT DID THOSE JUDGMENTS DO?

The CJEU'S judgment in the *Edwards* case clarified what is meant by the EU law requirement that the costs of certain environmental cases should not be "prohibitively expensive".

- It set out principles, which were subsequently reiterated by the UK Supreme Court regarding the approach to determining what level of costs in any case would be "prohibitively expensive".
- It held that the test of what is prohibitively expensive is not purely subjective: the cost of proceedings must not exceed the financial resources of the person concerned and, in addition, the cost must not appear to be objectively unreasonable.
- The judgment suggested that, in meeting the not "prohibitively expensive" requirement, the English and Welsh rules could be more flexible than the current Environmental Cost Protection Regime provides.

The CJEU's judgment in *European Commission v UK* found that the costs regimes for environmental judicial review cases which had been in place in the UK in 2010 had not properly implemented the not "prohibitively expensive" requirement. The CJEU was assessing the position before the UK Jurisdictions' costs regimes were revised in 2013.

WHAT CHANGES ARE PROPOSED?

The proposals include:

- Extending the regime so it applies to certain statutory reviews which engage the relevant EU Directives as well as judicial reviews.

- Clarifying the types of claimant eligible for costs protection under the regime by introducing the term “member of the public” to align with the use of the terms “the public” and “the public concerned” in both EU law and the Aarhus Convention.

- Allowing the courts to tailor the level of costs protection to take account of claimants’ financial means and the circumstances of the case, which they would do by applying the principles from the *Edwards* cases.

WHAT CHANGES ARE PROPOSED TO THE CURRENT RULES (Cont.)

- Requiring claimants seeking costs protection to disclose financial resources, including third party funding, in order that the principles from the *Edwards* cases could be applied.

- Changing the basis on which the costs of defendants' unsuccessful challenges to claimants' assertions of entitlement of costs protection are assessed.

- Clarifying that a separate cap applies to each claimant or defendant in cases with multiple claimants or defendants.

- Clarifying other factors, including the regard to the combined financial resource when there are multiple claimants, which a court is to take into consideration when considering a cross-undertaking in damages for an interim injunction.

ADDITIONAL QUESTIONS POSED IN THE CONSULTATION PAPER

In addition to the proposed changes, the consultation also sought views on what other changes to rules might be considered. They included:

- Whether cost protection should be granted only if permission to apply for a judicial or statutory review has been given.
- Whether the level of the default costs caps should be altered or a range of default costs caps introduced.
- Whether the regime should be extended to other types of challenges and if so what they might be.

NEXT STEPS

- Grateful to respondents for taking the time to respond and many responses had detailed comments and proposals.

- Just under 300 responses were received which are in the process of being analysed and will be considered by Ministers before they take decisions on whether to change the rules.

- Clearance will be sought across government for any changes before a final response is published.

NEXT STEPS (Cont.)

- If the government decides to make changes to the rules, those changes would not necessarily be in the same form as the proposed rules in the consultation document, not least because responses to the consultation will first be taken into account.

- The Government would ask the Civil Procedure Rules Committee (CPRC) an advisory non-departmental public body to consider and make any necessary amendments to the rules.

- We anticipate that the earliest any proposals will be put to the CPRC will be at their October meeting, this is subject to the necessary clearances being obtained.

ANY QUESTIONS OR COMMENTS?