**Annex C - the implications of the CJEU’s judgment for the jurisdictions of the UK**

**England/Wales**

**Adverse Costs**

The CJEU holds that the cost of proceedings must not exceed the financial resources of the person concerned, nor must they be ‘objectively unreasonable’. Although the judgment states that the assessment as to costs cannot be based exclusively on the estimated financial resources of an ‘average’ applicant (i.e. an exclusively objective approach) the concept of the “average applicant” (or “average person”) is important because it provides a way of assessing what is “unreasonable”.

One could also ask whether the figures of 5k (individuals) and 10k (groups) currently mooted in England and Wales are ‘objectively unreasonable’. They are certainly at the very upper limit of what could be considered acceptable. It must also be recalled that they do not operate in isolation, but exist over and above the requirement to pay one’s own legal costs (and note the judgment reinforces that the prohibitive nature of costs must be assessed “as a whole, taking into account all the costs borne by the party concerned”).

It is important to consider medians here - not numerical averages (which is highly distorted by the small number of very high earners). See, for example:

<http://www.telegraph.co.uk/finance/personalfinance/consumertips/household-bills/9223646/Disposable-income-falls-to-three-year-low.html>

Then, very recently: “The latest Asda Income Tracker showed that family spending power fell by £10 a week in March, which left the average UK family with £144 of weekly disposable income once all their bills and taxes had been paid – 6.5 per cent down from the same time last year.”

So even at £5,000 that is 35 weeks of disposable income - can that really be described as “reasonable”?

Accordingly, CAJE argues there must be scope to argue the ‘objectively reasonable’ figure down when a claimant is patently of limited means (and we note that such provision already exists in the Scottish proposals). We would also argue that the figure of 10k for all groups is also questionable given the recognition of the role of eNGOs in environmental protection in both the Convention and the judgment (e.g. paras 35, 39, 42 46).

**Scope**

The judgment is silent on scope, but CAJE would argue that statutory appeals falling within the scope of the Convention should be formally encompassed within the new regime (as is being proposed by the Department of Justice in Northern Ireland). CAJE also believes that costs protection should apply to private law environmental cases.

**Cross-cap**

The judgment does not specifically address reciprocal caps, but it does confirm that the prohibitive nature of costs must be assessed “as a whole, taking into account all the costs borne by the party concerned”. We continue to be concerned that lawyers are prevented from running environmental cases because the cross-cap makes them uneconomic. We remain of the view that cross-caps have no basis in the Convention, however, if they were to be retained we refer to proposals in Scotland enabling petitioners to apply to raise the 30k cross-cap. In this respect, we note the judgment recognises the complexity of the law as a factor in making an assessment as to what is prohibitively expensive (para 42).

**Appeals**

The judgment confirms that the assessment as to what is prohibitively expensive applies to all stages of the case. The proposal to limit costs protection to the end of the first instance proceedings is therefore insufficient.

**Injunctive relief**

The CJEU judgment says nothing about injunctive relief, but it does confirm that the prohibitive nature of costs must be assessed “as a whole, taking into account all the costs borne by the party concerned”, thus encompassing any requirement for cross-undertakings in damages.

**Scotland**

**Adverse costs**

Scotland currently proposes to have just one figure of 5k for individuals and environmental NGOs. The CJEU judgment confirms the objective of the EU legislature as giving the public concerned ‘wide access to justice’ to enable them to play an active part in protecting and improving the quality of the environment. Furthermore, it references the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, and to the principle of effectiveness (paras 31-33). CAJE believes the 5k limit should therefore extend beyond individuals and eNGOs to civil society groups more generally.

Proposals in Scotland currently allow for petitioners to apply to lower the 5k figure ‘in the interests of certainty and flexibility’ and to raise the 30k cross-cap on cause shown. This more appropriately reflects the subjective element of the assessment as embodied in the CJEU judgment, i.e. the need to ensure that the cost of the proceedings does not exceed the financial resources of the person concerned. This possibility should be extended to other parts of the UK.

**Scope**

Proposals in Scotland currently only apply to cases falling within the remit of the PPD. A failure to extend these proposals to other environmental JRs/statutory appeals/ private law cases will prevent UK compliance with the Aarhus Convention.

**Cross-cap**

Scotland’s proposals currently allow for petitioners to apply for an increase in the 30k cross-cap on cause shown (see above). This more appropriately reflects the need to ensure that the cost of proceedings do not exceed the financial resources of the person concerned.

**Appeals**

There will apparently be provision in the rules regarding appeals. However, as there will be different costs considerations on appeal to those at first instance, it will be for the judge to set out the appropriate costs limit(s), having regard to the costs decisions in the lower court. The CJEU judgment confirms, however, that the assessment as to what is prohibitively expensive applies to all stages of the case.

**Injunctive relief**

The Scottish proposals currently make no provision for injunctive relief.

**Northern Ireland**

Adverse Costs, cross-cap, appeals and injunctive relief – the situation is broadly as it is in England and Wales (with the exception of VAT on adverse costs liability).

**Scope**

The Government in Northern Ireland is currently proposing to include statutory appeals falling within the scope of the Convention. This is to be welcomed.