

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

**Second 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 since the Committee's first progress review

2. By letter of 20 October 2015, the secretariat sent the Committee's first progress review on the implementation of decision V/9n to the Party concerned together with a reminder of the request by the Meeting of the Parties to provide its second progress report to the Committee by 31 October 2015, and at the latest by 31 December 2015, on the measures taken and the results achieved thus far in implementation of the recommendations set out in decision V/9n.

3. On 13 November 2015 the Party concerned provided its second progress report on the implementation of decision V/9n.

4. At the Committee's request, on 27 November 2015 the secretariat forwarded the Party concerned's second 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 18 December 2015.

5. Comments were received from the communicants of communications ACCC/C/2010/53 on 8 December 2016, ACCC/C/2008/33 (Mr. Robert Latimer) on 18 December 2015, ACCC/C/2008/33 (Client Earth) on 18 December 2015, ACCC/C/2012/68 on 12 January 2016. Comments were also received from observers, Royal Society for the Protection of Birds (RSPB), Friends of the Earth, Friends of the Earth (Scotland) and C & J Black Solicitors on 17 December 2015 and Richard Buxton Environmental and Public Law on 18 December 2015.

6. At its fifty-second meeting (Geneva, 8-11 March 2016), the Committee reviewed the implementation of decision V/9n in open session with the participation of the Party concerned, communicants and observers by audio-conference. Following the discussion in open session, the Committee commenced the preparation of its second progress review on the implementation of decision V/9n in closed session.

7. On 13 April 2016, the secretariat invited the Party concerned to submit the comments made during the open session at the Committee's fifty-second meeting in writing, together with response to the questions posed during the open session, by 27 April 2016. The Party concerned provided its response to the questions on 29 April 2016. The

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>.

communicants and observers were given one week to comment on the replies provided by the Party concerned.

8. Comments were received from the communicant of communications ACCC/C/2011/64 and ACCC/C/2011/65 on 6 May 2016, the communicant of communication ACCC/C/2012/68 on 7 and 16 May 2016 and observers, RSPB, Friends of the Earth, Friends of the Earth (Scotland), C & J Black Solicitors on 6 May 2016.

9. After taking into account the information received, the Committee adopted its second progress review through its electronic decision-making procedure on 24 February 2017 and requested the secretariat to forward 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, ACCC/C/2011/64, ACCC/C/2011/65 and ACCC/C/2012/68 as well as the observers who had registered their interest to participate in the follow-up to decision V/9n.

Party concerned's second progress report

10. With respect to the recommendations set out in paragraph 8(a) and (d) of decision V/9n, in its second progress report submitted on 13 November 2015, the Party concerned reported the following:

- In England and Wales, as a part of the review following the Court of Justice of the European Union's judgment in *European Commission v United Kingdom* (Case C-530/11), the Government, on 17 September 2015, launched a public consultation on proposals to adjust the costs protection regime in the Civil Procedure Rules (CPR) for relevant environmental challenges. Annex A of the consultation paper set out the proposed amendments to the Civil Procedure Rules.² The consultation closed on 10 December 2015 and the outcomes of the consultation, including the Government's next steps, would be published following consideration of all responses to the consultation. In summary, the government proposals set out in the consultation would:

(a) Extend the types of case for which costs protection is available beyond judicial reviews to include statutory reviews and certain statutory appeals which engage the relevant EU Directives. This would extend the scope of the definition of "Aarhus Convention claim" in the Civil Procedure Rules. It will continue to be for the court to decide whether a case falls within the definition, if disputed by the defendant;

(b) Amend the current fixed costs cap approach to costs protection (where the same cap automatically applies in every case, regardless of the claimant's financial means) to allow courts to vary the level of costs caps in individual cases to take account of the circumstances of the case and the characteristics of the parties. It is proposed that costs would be set at a default level, but any party could apply to vary their own or another party's costs cap. The court would be required to ensure any variation would not make the costs prohibitively expensive. When considering the concept of "prohibitively expensive", the court would apply the approach set out in *Edwards v Environment Agency* (Case C-260/11) (and reiterated

² See https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/supporting_documents/costprotectioninenvironmentalclaimsonconsultationpaper.pdf

by the Supreme Court in *R (Edwards) v Environment Agency* (No. 2) [2013] UKSC 78);

(c) Clarify the factors that the court should use to assess whether a cross-undertaking in damages for an interim injunction would make continuing with a claim prohibitively expensive. When considering this, the court would apply the approach from the *Edwards* cases;

(d) Ensure a clearer alignment between the wording of the rules and the obligations arising under the relevant EU Directive and the Aarhus Convention by making it clearer that the costs protection regime applies to claimants who are "members of the public";

(e) Clarify how costs caps are applied in cases with multiple claimants or defendants, so it is clear that a separate cap applies to each claimant or defendant;

The consultation also sought views on the level at which the default costs caps should be set; whether claimants, in line with the approach taken in non-environmental judicial reviews, should only receive costs protection once permission to apply for judicial or statutory review had been given; and whether there could be additional types of cases to which the environmental costs protection regime should be extended.

- The Scottish Government had reviewed Scotland's expenses protection regime and had put proposals to the Scottish Civil Justice Council (SCJC) (an independent body responsible for creating and amending the rules of court), which would involve:
 - (a) Extending the scope of the court rules to make it possible to apply for a Protective Expenses Order (PEO) in judicial reviews and statutory appeals engaging article 9, paragraphs 1 and 3, of the Convention as well as article 9, paragraph 2;
 - (b) Modifying the categories of person eligible to apply for such orders, and the conditions regarding standing, in line with the Convention.

The above proposals were submitted to the SCJC and considered in September 2015. The SCJC members were content with the proposed recommendations and agreed that amendments to the court rules be prepared for the meeting in November 2015. The SCJC also agreed that a small working group be established with a remit to consider the practical operation of the rules on PEOs. That group had not yet been established.

- The information regarding the Northern Ireland was repeated from the Party concerned's first progress report, namely Northern Ireland was reviewing its cost scheme for Aarhus cases as set out in the Costs Protection (Aarhus Convention) Regulations 2013. The regulations presently provide cost protection for applicants in statutory reviews as well as judicial reviews to the High Court of decisions within the scope of the Convention. As part of the review, consideration was being given to making similar changes to the cost regime in Northern Ireland as are proposed for England and Wales. The review was expected to be completed soon.

11. With regard to the recommendation set out in paragraph 8(b) of decision V/9n, the Party concerned referred the Committee to paragraphs 17 to 20 of its first progress report.

12. With respect to the recommendation set out in paragraph 8(c) of decision V/9n, the Party concerned reported that:

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- In England and Wales, 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. CPR 54.5(1) provides that an application for permission to apply for judicial review must be made promptly and, in any event, within three months from the date when grounds for the application first arose. In practice, following the *Uniplex* decision, courts will not apply the “promptly” limit and will regard the point at which time starts to run for challenging a decision or action as being the date of the decision or action or its communication, and of a continuing omission or other continuing state of affairs as being when the claimant knew or ought to have known that there were grounds for challenge. The reference to “promptly” no longer applies in relation to judicial reviews relating to decisions under planning legislation. Changes to CPR 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. Similarly, the time limit for bringing judicial review of a procurement decision was shortened to thirty days from July 2013.
 - With respect to Scotland, on 22 September 2015, the new procedures for judicial review contained in section 89 of the Courts Reform (Scotland) Act 2015 entered into force. The new procedural rules (SSI 2015/228) update the terminology and set out a new form of application for judicial review. The new procedures apply to all cases including environmental appeals. There would be a transitional provision until 22 December 2015 for cases whose grounds first arose before 22 September 2015. As a result of these changes there is now a three month time limit for bringing an application for judicial review. However, there is no additional requirement that a case be brought “promptly”. There is also now a requirement for permission to proceed, which is intended to filter out unarguable cases.
 - Concerning Northern Ireland, on 22 June 2015, the Department of Justice launched a consultation on a proposal to change the time limits for bringing a judicial review. Following the *Uniplex* case, the “promptly” requirement is now disapplied by the courts in judicial review cases brought on European Union grounds. In its consultation, the Department of Justice proposed to remove the requirement for all judicial review cases. The consultation closed on 14 September 2015 and the Department was considering the responses received and its proposed way forward.

13. With respect to the recommendation set out in paragraph 9 of decision V/9n, the Party concerned referred to paragraph 31 of its first progress report.

14. In its reply of 19 April 2016 to the questions posed during the open session at the Committee’s fifty-second meeting, the Party concerned noted that the proposals set out in the consultations did not represent the government’s finalised policy in this area and the purpose of a consultation was to seek the views of relevant stakeholders. It stated it was carefully considering the responses received, including those from the communicants, and these would be taken into account in finalising the proposals.

15. With respect to the reason for amending the definition of an Aarhus Convention claim in CPR 45.41(2) to claims brought by “a member of the public”, the Party concerned stated that the current costs protection regime did not specify the types of claimant eligible for costs protection. It noted that it did however allow individuals and organisations including non-government organisations (NGOs) to apply for and receive costs protection. The Party concerned stated that the intention of the amendment was not to move away from that principle but to ensure a clearer alignment between the wording of the CPR and the

definitions used in EU law and the Aarhus Convention. The Party concerned referred to paragraphs 28-31 of the consultation paper which set out the reasons for the changes in more detail, inter alia:

“28. ... Under the Aarhus Convention, costs protection clearly only applies to persons who are members of the public, as defined in the Convention itself (see below).

....

30. Article 2 of the Aarhus Convention contains the following definitions relevant to the term “member of the public”:

“The public” means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups; “The public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

31. ... Whether a particular claimant is or is not a member of the public would, in a case where entitlement to costs protection under the Environmental Costs Protection Regime was contested, be a matter for the court to decide, having regard to any further guidance from future case law in this area. The proposed amendments are intended to make it clearer that, as was always intended and as the Government in fact maintains is the correct position under the current rules, eligibility for costs protection under the regime is based not only on the nature of the claim but also on the nature of the individual or body which would benefit from that costs protection.”

The Party concerned stated that the draft rules were not intended to exclude claims brought by more than one person, and include provisions that expressly provide for this type of case (see paras. 46 and 53 of the consultation paper).

16. Concerning the proposal that the costs protection regime for environmental claims would be contingent on a claimant first being granted permission to pursue a claim before the court, the Party concerned stated that the consultation paper had only sought views on the possibility of limiting costs protection to cases where permission to apply for judicial review or statutory review had been given and there were no firm proposals in this regard. The question arose because this was the approach adopted in relation to costs protection in other areas. The Party concerned stated that it was aware that additional factors applied in relation to Aarhus cases and, if it were to consider proceeding on this basis, it would carefully consider the potential impact in terms of prohibitive expense as well as the responses of consultees on this question.

17. With respect to the consequences for costs protection in environmental cases of the 2015 amendments to sections 84(2), 85, 86 and 87 of the Criminal Justice and Courts Act, the Party concerned stated that none of the provisions listed had negative consequences for the availability or nature of costs protection in environmental cases.

18. Regarding the question put to it during the open session at the Committee’s fifty-second meeting by Client Earth as to costs protection for other court procedures that may be subject to article 9, such as proceedings for private nuisance, the Party concerned stated that a number of the respondents to the Government’s 2015 consultation had suggested extending the environmental costs protection regime further than currently proposed, including to private nuisance claims. The Party concerned stated that it was currently considering the responses received and that it would be sensible to wait until the outcome of the consultation before considering the issue of private nuisance further.

Comments from communicants and observers on the Party's second progress report

Communicant of communication ACCC/C/2008/33 (Client Earth)

19. Client Earth, a communicant of communication ACCC/C/2008/33, stated that the Party concerned failed to implement the recommendation in paragraph 8(a) of decision V/9n because the changes proposed in the consultation paper would re-introduce measures that the Compliance Committee and courts have already found to be prohibitively expensive. In addition, it failed to implement paragraph 8(b) of decision V/9n because the proposed changes would increase financial barriers for all claimants wishing to bring a public law challenge. The Party concerned also failed to implement paragraph 8(d) because the proposed changes, including the requirement for multiple claimants to contribute to cross-undertakings for damages, failed to address its longstanding non-compliance with article 9, paragraph 4, of the Convention. Furthermore, the proposed changes to the CPR in England and Wales would make it more difficult for citizens to challenge public authorities in environmental cases.

20. Client Earth stated that the proposed changes, if implemented in their current form, would furthermore amend the definition of an Aarhus Convention claim in CPR 45.41(2) to mean claims brought by "a member of the public", instead of "members of the public" and "the public concerned"; the communicant submitted that the term "public" should be defined by reference to the Convention. The proposed changes would also extend environmental costs protection to statutory reviews of decisions, acts and omissions falling within article 9, paragraph 2, of the Convention but not "acts or omissions" falling within article 9, paragraph 3 of the Convention. The proposed changes would also make environmental costs protection contingent on a claimant first being granted permission to pursue a claim before the court. This would introduce uncertainty for claimants who would not be able to assess the financial risk of bringing a claim until the court had determined the issue of permission. In addition, the proposed changes would remove all costs protection in cases where permission was not granted, regardless of the claimant's financial resources.

21. Client Earth submitted that the proposed changes would remove the certainty of the standard costs caps and introduce "hybrid" cost caps, at increased levels of £10,000 and £20,000 for an individual claimant and groups of claimants respectively and also reduce the reciprocal cost cap to £25,000 for public authorities. These caps could be further increased or decreased by the court. The proposed changes would require environmental costs protection to be withheld unless the claimant files with the court, and serves on the defendant, a schedule of its financial resources, including any support a third party has provided or is likely to provide. Client Earth submitted that this will deter citizens and the associations and organizations that they belong to and support, from bringing proceedings. Moreover, the proposal would apply separate cost caps to each individual claimant in the same case, which will increase complexity. Client Earth referred to the Committee's findings on communication ACCC/C/2008/27 where the final adverse costs award of £39,454 had been divided between five claimants; Client Earth submitted that the Committee had found that the manner of allocating costs on that basis was unfair, within the meaning of article 9, paragraph 4, of the Convention.

22. Client Earth stated that the proposed changes would remove the deterrent of indemnity costs for public authorities that challenge the status of a claim as an "Aarhus claim". Defendants might be more willing to challenge the status of an Aarhus claim, if the current risk of having to meet an indemnity costs order is replaced with standard costs. The proposed changes would also require the court to take into account the financial contributions made by third parties when assessing the level of damages to be set when

asking for a cross-undertaking, with the implication that the third party might be called upon to contribute to a future award of damages if the claim was unsuccessful. Client Earth submitted that in cases where there was a high risk of irreparable damage being caused to the environment, interim relief should be ordered without the requirement for a cross-undertaking for damages.

23. Client Earth also noted that section 84 of the 2015 Criminal Justice and Court Act had amended section 31 of the Senior Courts Act 1981 to the effect that where it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred then the court must refuse to grant permission; or grant relief or a monetary award on an application for judicial review. It is open to the court to disregard this requirement if it is appropriate to do so for reasons of exceptional public interest. Client Earth submitted that this amendment has made it more difficult and uncertain for claimants seeking to bring a challenge on procedural grounds and will therefore deter such claims.

24. Client Earth also noted that the Party concerned did not address the lack of financial assistance available to environmental claimants in its second progress report.

Communicant of communication ACCC/C/2008/33 (Mr. Robert Latimer)

25. Mr. Robert Latimer, one of the communicants of communication ACCC/C/2008/33 supported the views expressed by the RSPB, Friends of the Earth, Friends of the Earth (Scotland) and C & J Black Solicitors (see paras. 54 onwards below). He also submitted further comments which were not directly related to the implementation of decision V/9n.

Communicant of communication ACCC/C/2010/53

26. The Traffic Subcommittee of the Moray Feu Residents Association, the communicant of communication ACCC/C/2010/53, welcomed the new provisions in Scotland's Rules of the Court of Session (RCS 58A) that restricted liability for other parties' expenses to £5000 if an unsuccessful applicant had been awarded a Protective Expenses Order before applying for a judicial review in an environmental case. The communicant also welcomed the prior test for prospect of success. It submitted however that the imposition of a three month time limit on applying for judicial review strongly favours the developer in environmental cases, as does the fact that the developer has a right of appeal but objectors do not.

Communicant of communication ACCC/C/2012/68

27. With respect to public participation in decision-making, Christine Metcalfe, the communicant of communication ACCC/C/2012/68, stated that the problem faced by citizens of the Party concerned, and especially those residing in Scotland, is that whilst public participation takes place to a degree via consultations and access to information requests, the results and suggestions made are rarely taken up. Essentially public participation is a "box ticking" exercise and little if anything, improves. Access to information requests can be lengthy and time consuming with government agencies often taking way beyond the time permitted for replies. The communicant did not directly comment on the Party concerned's implementation of paragraph 9 of decision V/9n.

28. Regarding the plans to reform Chapter 58A of Scotland's Rules of the Court of Session, Ms. Metcalfe cited from recent commentary asserting that these reforms are intended to foreclose access to environmental justice for all but the wealthiest individuals

and communities.³ The cited commentary asserts that the government was making very carefully worded changes to the definitions which the courts of the Party concerned use in their interpretation of the public's rights under the Convention. First, with respect to what is "environmental law", the Department of Justice narrowly interprets the Aarhus Convention's cost requirements as applying only to the European Union's directives on environmental matters and not to the Party concerned's specific planning, heritage or conservation law even where that involves the environment. Second, concerning the definition of what constitutes a "member of the public", the Department of Justice takes that to mean a single person - not a collection of people. That could exclude local and national groups from launching actions on behalf of their members. And while currently the costs cap of £5,000 or £10,000 applies irrespective of how many people bring a case, in future it would be £5,000 or £10,000 per person involved - significantly raising the costs to a community bringing a joint case.

29. The commentary cited by Ms. Metcalfe asserted that perhaps the most chilling part of the Party concerned's proposals would be the timing for when costs protection is granted to those bringing a case, i.e. in contrast to the current situation, the public would first need to succeed with getting leave to appeal before they would be told if they can have costs protection. That would mean that those bringing the action, if they fail to get leave, might be sued by the opposing party for their full costs in defending the application – the risk of which may effectively prevent anyone without means from bringing even a well-founded case before court.

30. Ms. Metcalfe noted that Chapter 58A was most recently considered by the Inner House of the Court of Session (Scotland's Appeal Court) in *Gibson v Scottish Ministers* on 10 February 2016⁴ and in *John Muir Trust v Scottish Ministers* on 29 April 2016. The Court came to very different decisions in each case. Ms. Metcalfe submitted that the full Court's Opinion in *Gibson v Scottish Ministers* and the dissenting Opinion of Lord Drummond Young in *John Muir Trust v Scottish Ministers* correctly applied the Convention.

31. In *Gibson v Scottish Ministers*, the Court held:

[54] ...we agree with counsel for the petitioner that the test is not the petitioner's ability to pay, but whether it is reasonable, in all the circumstances, that he should be required to do so. The focus of the Aarhus Convention, the 2011 Directive and the authorities to which we have referred is the protection of the environment, and the removal of unreasonable financial barriers which may act as a disincentive to members of the public (whether individuals or organisations) from playing an active role in protecting and improving the quality of the environment. (emphasis added)

...

[63] Having regard to all the information before us about the petitioner's individual financial circumstances we are satisfied by applying the subjective test that the proceedings are prohibitively expensive for the applicant. It follows that we must make a PEO.

...

[66] We have rehearsed the importance of what is at stake for the protection of the environment. Essentially, this appears to fall into three parts - impact on the Dark Sky Park, impact on the Dark Sky Observatory, and impact on the

³ Paul Mobbs, "UK Government attacks public right to environmental justice", *The Ecologist*, 30 November 2015, http://www.theecologist.org/essays/2986484/uk_government_attacks_public_right_to_environmental_justice.html

⁴ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=4f8106a7-8980-69d2-b500-ff0000d74aa7>

designed landscape of the Craigengillan Estate. Concerns about these issues have not been confined to the petitioner; they were referred to in the objections on behalf of South Ayrshire Council and East Ayrshire Council and we note that there were 4,723 objections to the application. As Advocate General Kokott observed, the environment cannot defend itself, but needs to be represented by concerned citizens or organisations acting in the public interest. We are persuaded that the petitioner may properly be described as one of these concerned citizens.

...

[69] Having regard to all of these factors, and to the fact that it is not disputed that the likely total costs of these proceedings may exceed £170,000, in applying the objective test we are satisfied that the proceedings are prohibitively expensive.

32. Ms. Metcalfe submitted that the above case was consistent with the Convention and was thus a helpful example for the Committee to assess whether or not the Party concerned complied with the Convention in Scotland. The communicant emphasised that it was not the applicant's ability to pay which was the issue, but whether it was reasonable in all the circumstances judging the matter both subjectively and objectively, that he or she should have do so.

33. Ms. Metcalfe also referred the Committee to the Court of Session's decision in *John Muir Trust v Scottish Ministers*. In contrast to the unanimous decision in *Gibson v Scottish Ministers*, the Court in *John Muir Trust* was divided, with the majority against the grant of a Protected Expenses Order. Ms. Metcalfe claimed that the majority's opinion was largely focused on the John Muir Trust's ability to pay in the circumstances and that this was not the approach envisaged by the Convention.

34. With respect to the information provided in paragraph 15 above concerning the eligible claimant, Ms. Metcalfe stated that the Party concerned's response seemed to say that, at one hand, that there was no intention to narrow the definition of "eligible claimant" yet on the other to bestow on the Court a power to exclude a case based on the nature of the claimant.⁵

35. Concerning the information provided in paragraph 16 above, Ms. Metcalfe claimed that in Scotland, following Chapter 58A, the Court had discretion to apply the protective expense order provisions retrospectively so as to cover the initial application(s). It was therefore at the Court's discretion to grant the order retrospectively in meritorious cases and to refuse it in cases which were refused permission because they lack merit.⁶

Communicant of communications ACCC/C/2011/64 and ACCC/C/2011/65

36. In the comments provided on 6 May 2016, the communicant of communications ACCC/C/2011/64 and ACCC/C/2011/65, Terence Ewing, shared the other communicants and observers' concerns at the Party concerned's delayed response to the consultation regarding costs in environmental cases.

37. Mr. Ewing supported the extension of the costs protection provisions to both statutory planning review and private nuisance cases.

⁵ Comments of 7 May 2016.

⁶ Comments of 7 May 2016.

38. Mr. Ewing claimed that the provisions of the Criminal Justice and Courts Act 2015, namely sections 85 and 86 (disclosure of financial information) and section 87 (costs against interveners), were in breach of article 9 of the Convention. He claimed that section 87 sought to impose disproportionate barriers to environmental justice regarding third party interveners such as environmental organisations. It would also impose an impossible burden on the court to determine whether or not the outcome would have been the same if the procedural irregularities and breaches had not occurred.

39. With respect to the amendment to CPR 54.12 (7) and the (then proposed) amendment to CPR 52.15 (1A) concerning judicial review,⁷ Mr. Ewing stated that the Party concerned's reply of 29 April 2016 did not deal with this issue, whereby a judge now had the power to certify an application for permission for judicial review as being "totally without merit", which resulted in a claimant not being able to renew a refusal of permission to an oral hearing. Mr. Ewing also stated that if an application for permission was made to the Court of Appeal, it was considered on the papers if there had been a finding that the application was "totally without merit". Mr. Ewing submitted that these provisions breached article 9 of the Convention.

Observer (Richard Buxton Environmental and Public Law)

40. Richard Buxton Environmental and Public Law, a law firm that had represented the communicants of communications ACCC/C/2008/23 and ACCC/C/2013/86, stated that it considers that the Party concerned's second progress report takes it a step further away from compliance with the Convention. Richard Buxton submitted that, overall, the Party concerned's proposals do not reflect a bona fide attempt to implement the Convention and it invited the Committee to consider its own submissions of 9 December 2015 to the Ministry of Justice regarding the then-ongoing consultation on costs protection in environmental claims. As a preliminary point, Richard Buxton asserted that the way in which the government had gone about the costs consultation, namely the consultation on general costs provisions for judicial review closing on 16 September 2015 and the consultation on costs in environmental claims opening on 17 September 2015, was procedurally unfair, and given the overlap between the two, they should have been run together.

41. Richard Buxton submitted that the Party concerned's proposals introduce an extraordinary and wholly unnecessary level of uncertainty and complexity, whereas simplicity is a cornerstone of appropriate implementation so that people can know where they stand and exercise their rights with certainty.

42. Richard Buxton also submitted that, in assessing "prohibitively expensive", it is essential to appreciate not only the costs to opponents to which a claimant is exposed, but also own-side costs. It is not right to rely on conditional fee agreements as a mechanism for providing access to justice, as the system is simply unsustainable, and even where legal advisors work on reduced rates or partial or whole conditional fee agreements, a claimant's costs for other expenses, e.g. court fees, are still significant.

43. With respect to the proposed revised definition for an "Aarhus Convention claim", Richard Buxton submitted that while it is encouraging that the Party concerned is seeking to include some statutory review procedures within the definition, the proposed definition only seeks to allow statutory review of decisions that fall within article 9, paragraph 2 of the Convention, thereby omitting claims under article 9, paragraphs 1 and 3 of the

⁷ <https://www.judiciary.gov.uk/wp-content/uploads/2016/05/appeals-to-the-coa-proposed-amendments-to-cpr-cprc-outline.pdf>

Convention. Richard Buxton submitted that there is no justification for such a restriction – an “Aarhus Convention claim” should be what its title suggests. At least three problems will arise with the proposed scheme. First, it will create uncertainty in cases where one party claims a European Union directive applies and the other party disputes that. Secondly, some types of statutory review do not appear to be included, e.g. those under section 113 of the Planning and Compulsory Purchase Act 2004. Thirdly, while it is clear that the proposal will apply to cases involving the EIA and IPPC Directives, they would not apply to cases involving the Habitats or SEA Directives.

44. Regarding the proposed changes to the wordings of the CPR and Practice Directions which would limit costs protection to individual natural persons, Richard Buxton submitted that the proposed changes are too restrictive and go against the purpose of the Convention, which is clearly not limited to the sense normally connoted in English, i.e. individual natural persons.

45. With respect to the proposal that claimants should be granted costs protection only once permission to apply for judicial or statutory review has given, Richard Buxton submitted that people need certainty and it is essential to know the position at the outset. Without it, individuals and community groups will be reluctant to embark on litigation. The permission stage can be highly contentious and the costs exposure prohibitive, especially if an oral or rolled up hearing is involved, but even when decided just on the papers. In this regard, Richard Buxton provided an example of an acknowledgement of service filed in June 2015, for which £19,989 was claimed but since it was an Aarhus claim, costs protection applied from the outset. It submitted that complete uncertainty as to costs at the permission stage was completely counter to the purpose of access to justice under the Convention.

46. In relation to the proposal to introduce a “hybrid” approach to govern the level of the costs cap, Richard Buxton submitted that the hybrid system would remove the certainty of costs protection and introduce complexity into what should be a straightforward and easy regime. Unnecessarily complicating the provision of costs protection would be contrary to article 9, paragraph 5 of the Convention. To allow defendants and interested parties to apply to vary their costs caps could lead to them making such applications with the view to putting undue costs pressure on a claimant in an attempt to have them withdraw proceedings. Richard Buxton submitted that the Party concerned’s proposals on this point and others are likely to lead to increased disputes about costs and court time and frustrate the purposes of the Convention. It submitted that the combination of the *Garner* decision and the CPR has hugely reduced the time spent on, and costs associated with, arguing about costs in judicial reviews. This should be built upon rather than destroyed. Richard Buxton submitted that there is, however, a problem with the CPR system in England and Wales (as compared to Scotland), in that it is inflexible to cope with people who cannot afford the £5000 cap or when the £35,000 reciprocal costs cap is unfair because the costs are very large. It submitted that there should be scope for these limits to be varied in such cases.

47. Richard Buxton stated that the proposal that the courts should apply the *Edwards* principles to decide whether to vary costs caps would add unnecessary complexity. Requiring an applicant to meet all of the *Edwards* criteria, as well as to submit all financial information about themselves and their fundraising, will add to their own costs causing proceedings to be even more prohibitively expensive. Uncertainty about what the costs cap may turn out to be will have a further chilling effect. Richard Buxton noted that the problem already arises on appeals to the Court of Appeal and Supreme Court, where additional costs caps are usually imposed. It submitted that arguably, doing so is unlawful, given the need to know the position at the outset.

48. Richard Buxton submitted that requiring claimants to file at court and serve on the defendant a schedule of their financial resources at the commencement of proceedings will

have a chilling effect, as recognized by the Court of Appeal in *Garner v Elmbridge*. Further, where continued fundraising will be required it would be wholly impracticable. It would be further complicated where people pledge to cover costs of others and will effectively turn judges into forensic accountants, attempting to work out whether a claimant “can afford” the defendant’s costs. Using costs and scrutiny of a person’s financial means is not the correct way to discourage frivolous claims. In judicial review, there is a permission stage to achieve that aim, and other proceedings use other measures, e.g. active case management.

49. Richard Buxton contended that the proposal to apply the costs caps per person in claims involving multiple claimants or defendants will make proceedings prohibitively expensive. Those seeking costs protection often struggle to meet the costs cap as it currently stands. There is no reason for costs exposure to increase with multiple claimants because the effort involved in defending a claim does not increase with the number of claimants. Richard Buxton submitted that in its findings on communication ACCC/C/2008/27, the Committee had found that apportioning costs among multiple claimants was unfair. Similarly, it is unfair for costs exposure to increase depending on the number of defendants.

50. Richard Buxton submitted that the proposed increase in the cap for applicants to £10,000 and £20,000 will be prohibitively expensive and will contravene article 9, paragraph 4, of the Convention. Applicants often cannot afford the present £5,000 limit and have to rely on fundraising in the community in order to cover just their own costs and expenses, even when their lawyer is working on a conditional fee agreement. Reducing the defendants’ liability to claimants from £35,000 to £25,000 will only further discourage people from bringing proceedings in circumstances where there are reasonable prospects of success. The present cap of £35,000 plus VAT often does not cover the cost of proceedings where a claimant has been successful. Richard Buxton submitted that the Party concerned has put forward no evidence to show that defendant public authorities suffer hardship in paying the current costs cap of £35,000 given the relatively low number of successful claims in judicial review. Reducing the costs cap will however make a significant difference as to whether bringing successful claims is prohibitively expensive.

51. Richard Buxton submitted that, contrary to the proposal by the Party concerned to award costs on the standard basis if a defendant unsuccessfully challenges whether a claim is an Aarhus Convention claim, the costs of that challenge should be awarded to the claimant on an indemnity basis, in addition to the costs cap on the claimant’s recovery.

52. Richard Buxton stated that the environmental costs protection regime should be applicable for all proceedings to which the Convention applies, having regard to the Convention’s wide scope and purpose. It noted that, in addition to the types of statutory reviews proposed for inclusion by the Party concerned (namely, sections 288 and 289(1) and (2) of the Town and Country Planning Act 1990 and section 65(1) of the Planning (Listed Buildings Conservation Areas) Act 1990), other statutory appeals, e.g. section 113 of the Planning and Compulsory Purchase Act 2004, should be included. In addition, claims for damages in fraud cases involving the environment and Case C-244/01 *Kobler* [2003] claims should also be included.

53. With respect to the proposed revisions to Practice Direction 25A, Richard Buxton stated that proposed paragraphs 5.1B(3) would introduce the *Edwards* criteria which were not originally conceived in the context of interim injunctions. The problematic provision relates to consideration of the claimant's or claimants' resources. Individuals, even big NGOs, can practically never either actually cover an undertaking in damages, and/or be properly advised to so. The same goes for multiple claimants.

Article 9, paragraph 4 – “prohibitively expensive”

England and Wales

54. With respect to England and Wales, the observers welcomed the proposal to extend costs protection to certain types of statutory review, however they expressed the following concerns:

- Only a small percentage of statutory review cases would be eligible for costs protection under the new regime. In order for the proposals to be Aarhus-compliant, statutory reviews concerning all matters subject to article 9, paragraphs 2 and 3, of the Convention should be encompassed – as is currently the case in Northern Ireland.
- The proposed amendments to the CPR in Annex A of the consultation paper would confine eligibility for costs protection to “a member of the public”, thus excluding key audiences, including environmental NGOs, from costs protection.
- Currently costs protection applies from the point at which a claimant files a claim in the High Court. However, the Party concerned proposes that costs protection be made contingent on a claimant obtaining permission to proceed with an application for judicial review and certain statutory reviews (as England and Wales has recently introduced a permission stage in statutory reviews). This would remove advance certainty as to costs exposure.
- It is proposed that costs be set at a default level (doubling the current level of £5,000 for an individual and £10,000 for other applicants, to £10,000 and £20,000 respectively) but that, at any time thereafter, any party, including the Court of its own motion, could apply to vary their own or another party’s costs cap. This will conflict with the requirement for certainty with regard to costs exposure. Moreover, the proposal to increase the caps to £10,000 and £20,000 have no evidential basis and do not satisfy the requirement for costs to be objectively reasonable.
- Proposals obliging claimants to submit a schedule of financial resources identifying third party financial support for judicial review are unjustified and unworkable, and may result in names and addresses of children and vulnerable people being made available.
- The present caps of £5,000 and £10,000 currently apply no matter how many individuals or groups bring a case to court. The Party concerned proposes that in cases brought by more than one individual or group, separate costs caps will apply to each of them, making the total costs liability much higher.
- It is currently onerous for defendants to challenge the status of a claim as an Aarhus claim because an unsuccessful challenge attracts an award of costs on an indemnity basis. The proposals seek to introduce the imposition of costs on a standard basis following an unsuccessful challenge to the status of a claim. This will encourage defendants to challenge claims, thus prompting costly and time-consuming satellite litigation.
- The proposals regarding interim relief include requiring applications for an injunction to be made by “a member of the public”, the introduction of a subjective element to decisions on cross-undertakings in damages and a

requirement for the court to have regard to the combined financial resources of multiple claimants when making decisions about cross-undertakings in damages. Although Practice Direction 25A does not currently require the court to require the claimant to give a cross-undertaking in damages in Aarhus claims, claimants are still being required to do so in 50-83% of cases in which such relief is sought. The observers assert that there is no basis for the process of obtaining relief to be made more difficult than it currently is and that this proposal will take the Party concerned further into non-compliance with the Aarhus Convention.

55. The observers also added that the second progress report of the Party concerned failed to mention recent legislative developments under the Criminal Justice and Courts Act 2015 that have adversely impacted on the Party concerned's compliance with the Aarhus Convention:

- As of 13 April 2015, section 84(2) of the Criminal Justice and Courts Act requires the court to refuse permission for a judicial review to proceed (or a remedy) where it considers that it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained about had not occurred, unless the court considers it appropriate to grant permission or a remedy for reasons of exceptional public interest and certifies that this is the case.
- In July 2015, the Party concerned consulted on proposals regarding sections 85 and 86 of the Act (the consultation closed 15 September 2015) which would require judicial review applicants to provide the court with information about the financing of the application so that the court can consider whether to order costs to be paid by potential funders identified in that information. The observers submitted that this would create profound difficulties for charity funding, both threatening the funding available to charities and reducing the ability of charities to seek judicial review.
- As of 13 April 2015, section 87 of the Act amends the costs position of those who apply for permission to intervene in a judicial review in the High Court or Court of Appeal. The courts can now make costs orders against or in favour of interveners under their general discretion in relation to costs. Section 87 establishes two presumptions that the court must follow unless there are exceptional circumstances: (i) Interveners should bear their own costs and a party to the judicial review cannot be required to pay an intervener's costs unless exceptional circumstances make this appropriate; and (ii) If a party applies to the court asking it to order an intervener to pay that party's costs arising from the intervention, unless there are exceptional circumstances, the court must make such an order if one of certain specified conditions are met, including if the intervener has acted in substance as the sole or principal applicant, defendant, appellant or respondent.

56. In the comments submitted on 6 May 2016, the observers noted that the Ministry of Justice had indicated that a response to the consultation would be published within 12 weeks of the deadline (i.e. on or around 8th March 2016), but to date no response had been published. The observers claimed that this delay was distinctly unhelpful as it was causing practitioners and potential claimants concern about the continuing certainty with regard to costs protection.

57. The observers referred to the information provided by the Party concerned in paragraph 17 above concerning sections 85 and 86 of the Criminal Justice and Courts Act and claimed that these proposals would deter people from bringing cases for fear that their

personal financial details would be in the public domain. They added that where a group of residents, who by definition lived in a community, were applicants, they would not wish their neighbours to have that degree of insight into their personal financial affairs. The observers noted that in no other civil proceedings before the Courts did the litigants have to declare their financial resources to the Court and to the other side - save in those rare cases where there were real and objective concerns that the other party would be unable to pay costs if they lose. The observers claimed that the applicants in environmental cases would now be treated markedly less favourably under a regime that was supposed to enable access to justice. With respect to the section 84 of the Criminal Justice and Courts Act (paragraph 17), the observers stated that while it did not introduce further barriers in relation to prohibitive expense, it presented an additional basis on which a case could not be progressed – even when it was recognised that an unlawful decision had been made. The observers claimed that they had examples of cases which had not been brought for this reason and contended that it rendered the process of judicial review unfair, if not prohibitively expensive. The observers also claimed that section 87 of the Criminal Justice and Courts Act would act as a deterrent to parties considering intervening in cases, which was contrary to the spirit of the Convention. The observers noted that no evidence was produced by the Party concerned in relation to the potential impact of the provisions of the Criminal Justice and Courts Act 2015 before they had become law, and it was unclear whether the Party concerned had made any attempt to assess their effect.

Scotland

58. With respect to Scotland, the observers noted that the PEO regime limiting costs liability to £5,000 presently only applies to individuals and NGOs promoting environmental protection – community groups and similar bodies are not eligible – and are limited to judicial and statutory review cases within the scope of the EU’s Public Participation Directive. However, as noted in the Party concerned’s second progress report, the proposal to extend the scope of the PEO regime to cover cases falling under article 9, paragraphs 1 and 3, of the Convention and to modify the categories of persons eligible for a PEO were just recently published. There were no consultations on the proposed changes. The observers welcomed that, under the proposal, the scope of the ability to apply for a PEO would be more closely aligned with the Convention and that the expansion of categories of persons eligible to apply for PEO would include members of the public, and members of the public concerned, mirroring the language used in the Convention. The observers noted that the current rules exclude community groups from applying for a PEO, and stressed that the definitions of the members of the public and members of the public concerned in the Aarhus Convention Implementation Guide are broad and certainly include community groups, and this should be reflected in the new rules.

59. The observers also stated that because the rules apply only to cases taken in the Court of Session, applications for PEOs cannot be made in cases regarding noise nuisance or other environmental nuisances in the Sheriff Court. Regarding cases taken in the Court of Session, applications for PEOs must be made quickly after the case is raised and in addition to detailed financial information, an applicant has to be ready to argue the substantive issues (one of the criteria for determining whether a PEO is made is consideration by the court as to whether an application has “no real prospect of success”). These pressures of time, particularly if individuals are attempting to raise funds, are likely to mean that few solicitors are willing to take on such cases given the risks if the solicitors are unable to carry out intensive work at relatively short notice.

60. The observers also reiterated their submission on the first second report regarding the necessity of the removal of regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 in order to ensure compliance with article 9, paragraph 4, of the Convention and the

unrealistic cap of £7,000 on the expenses that could be covered by legal aid in a judicial review proceeding.⁸

Northern Ireland

61. With respect to Northern Ireland, the observers stated that the Costs Protection (Aarhus Convention) Regulations 2013 only address High Court and Court of Appeal cases. Objections to grants of planning permission can be brought by the applicant only to the High Court while the developer can appeal (with much less expense) a refusal of planning permission, or the imposition of conditions, to the Planning Appeals Commission. The observers also submitted that legal aid is rarely available to assist with funding environmental cases in the High Court, as the Legal Services Agency will apply the “group interest” rule and refuse assistance.

62. The observers noted that the 2013 Regulations have had an immediate and beneficial impact in Northern Ireland since their introduction. However, there are still a number of concerns. Under the 2013 Regulations, a losing party will have to pay its own costs (e.g. £30,000 own costs), plus £5,000 or £10,000 depending on its status plus VAT (20%). The 2013 Regulations impose an automatic cross cap of £35,000 plus VAT - meaning that the successful applicant cannot recover more than this from an unsuccessful respondent public authority. The cross cap has an arbitrary and unfair impact in larger cases and fails the test of objectivity set in the *Edwards* case. In addition, in Northern Ireland, applicants will have to fund the shortfall, as conditional fee arrangements are unlawful.⁹

63. The observers also noted that a consultation on a proposal to review the 2013 Regulations was launched by the Department of Justice and would run until 20 January 2016. The proposed changes would require applicants to file sworn evidence of their financial means and any support received from a third party; the observer submitted that this would undoubtedly have a major chilling effect on applicants. The costs caps will apply by default but it is proposed that these can be varied on application or by the Court at any time, so long as that does not make the costs prohibitively expensive for a party. Taken with mandatory disclosure of financial means it is foreseeable that this will end up being used to put pressure on applicants. Furthermore, the notion that the costs caps can be varied at “any time” severely undermines the need for predictability for applicants at the outset of the case. Moreover, it is proposed that the cap will be cumulative for each party. The observers submitted that the outcomes will be arbitrary and unfair and may lead to artificial practices in the framing of challenges.

64. The observers also stated that the proposal to define those able to benefit from costs protection as “members of the public” should include environmental NGOs, charities and not-for-profit entities as well as individuals. The consultation paper introduces a subjective test along with a multifactorial objective test where “the importance of what is at stake for the environment” appears as the fifth consideration. The observers stated that taken together these will tend to make the outcome of an application sufficiently uncertain and thus no-one will be able to afford the costs risks involved.

Time limits

65. With respect to time limits in England and Wales, the observers recalled that in July 2013, CPR 54.4 had been amended to reduce the time limits for planning judicial reviews to six weeks, in line with statutory planning appeals. The time limit for bringing judicial

⁸ See Committee’s first progress review, para. 15.

⁹ See judgment C-530/11 of the EU Court of Justice, paragraph 60.

review of a procurement decision was shortened to 30 days at the same time. The observers reported that the six week time limit in England and Wales is preventing individuals and groups from challenging planning decisions. The effect of this time limit is that compliance with the Pre-Action Protocol (PAP) within the timeframe is often impossible. As such, claimants will often be required to file a claim without knowing the basis of their claim, and therefore their claim's strength. The reality is that if a community group is not already formed, organized, funded and legally advised, then it is unlikely to be able to mount a legal challenge in time. The thirty day time limit for bringing a judicial review of a procurement decision is exceptionally challenging. The observers stated that that deadline should be extended so that the PAP procedure could be fully complied with thereby avoiding claimants having to issue proceedings pre-emptively when those proceedings may otherwise not have been progressed. The observers submitted that for the now rare cases in which public funding may be available, the problem is compounded as claimants must lodge proceedings pre-emptively in order to meet the statutory limit without knowing whether their application for public funding will be accepted.

66. Concerning Northern Ireland, the observers submitted that the six-week deadline for lodging judicial reviews in decisions made under planning legislation results in similar difficulties for claimants.

III. Considerations and evaluation by the Committee

67. 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) Its rules regarding the time frame for the bringing of applications for judicial review have been further reviewed to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework;
- (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.

68. In its first progress review, which reviewed the Party concerned's first progress report and the comments received from communicants and observers on that report, the Committee invited the Party concerned, either 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.

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

70. The Committee also welcomes the comments on the Party concerned’s implementation of decision V/9n received from communicants and observers (see paras. 19-66 above).

Paragraphs 3 of decision V/9n – provision of raw data

71. With respect to paragraph 3 of decision V/9n, the Committee notes that no further information has been provided by the Party concerned, communicants or observers since the comments of the communicant of communication ACCC/C/2010/53 noted at paragraph 21 of the Committee’s first progress review. The Committee accordingly presumes that, in the absence of information to the contrary, the Party concerned continues to release 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

72. Regarding the recommendations set out in paragraph 8(a), (b) and (d) of decision V/9n, the Committee’s evaluation of the legislation currently in force, and the implementation thereof, accords with the conclusions of its first progress review on the implementation of decision V/9n, and before that, its report to the fifth session of the Meeting of Parties on the implementation of decision IV/9i.¹⁰

73. In that regard, the Committee welcomes the information provided by the Party concerned that it is continuing to review the rules providing for cost protection for claimants in cases under the Aarhus Convention throughout the United Kingdom. Based on the information before it, the Committee considers that except for the 2015 amendments to sections 84(2), 85, 86 and 87 of the Criminal Justice and Courts Act (see paras. 17, 23, 38, 55 and 57 above), the legislation in force and its implementation has not changed since the

¹⁰ ECE/MP.PP/2014/23

adoption in 2013 of the rules providing for costs protection in cases related to the Convention. The Committee further notes that the Party concerned's second progress report, and the comments of the communicants and observers on that report, for the most part focus on the Party concerned's proposals to amend the costs protection regimes. As the Party concerned has emphasised, these proposals do not represent its finalised policy in this area. However, given the close relationship between the proposals currently being considered by the Party concerned and the matters the Committee must examine when reviewing the Party's progress to implement decision V/9n, the Committee considers it appropriate and timely to provide its observations on these proposals to the extent that they are directly relevant to the requirements of decision V/9n. In this way, the Committee's observations may be of assistance to the Party concerned in the context of its ongoing review of the cost protection rules for claimants in cases subject to article 9 of the Convention and, accordingly, its implementation of decision V/9n.

England and Wales

74. With respect to England and Wales, the Committee welcomes the information by the Party concerned about the public consultations on proposals to adjust the costs protection regime in the Civil Procedure Rules (CPR) for Aarhus Convention cases, following the Court of Justice of the EU's judgment in *European Commission v United Kingdom* (Case C-530/11), and the communicants and observers' comments on these proposals. The Committee examines below the specific aspects of these proposals which it finds most relevant for the requirements of decision V/9n.

Protective costs orders under the Civil Procedure Rules

75. Since 1 April 2013, Practice Direction 45 to the CPR provides for a protective costs order (PCO) in "Aarhus Convention claims" of £5,000 where the claimant is an individual and £10,000 for the NGOs, with a "cross cap" for the liability of the defendant for a successful claimant's costs of £35,000.¹¹ An "Aarhus Convention claim" is defined as a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the Convention; it does not apply to statutory review.¹² With respect to the proposals subject to public consultations in 2015, the Committee makes the following observations:

Types of claims covered

76. The proposed amendment to the CPR would change the definition of "Aarhus Convention claim" to apply, in addition to judicial review of any decision, act and omission of a body exercising public functions within the scope of article 9 of the Convention, to statutory reviews within the scope of article 9, paragraph 2 of the Convention. The Committee notes that the cost protection regime under the CPR would accordingly be extended to statutory reviews falling within article 9 paragraph 2 of the Convention, but it would still not apply to statutory review within the scope of article 9, paragraph 3 of the Convention nor to private law claims.

77. The Committee considers that the proposed extension of the costs protection regime to statutory reviews falling within article 9, paragraph 2, of the Convention would be a positive step towards fulfilling paragraph 8 (a), (b) and (d) of decision V/9n. However, as the Committee pointed out at paragraph 44 of its report to the fifth session of the Meeting

¹¹ See <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs/practice-direction-45-fixed-costs>.

¹² See CPR 45.41, paragraph 2.

of the Parties,¹³ the requirement in article 9, paragraph 4, that procedures not be prohibitively expensive applies to all procedures within the scope of paragraphs 1, 2 and 3 of that article. Therefore, while a step forward, the proposed amendment would not be sufficient to meet paragraph 8 (a), (b) and (d) of decision V/9n.

Eligibility for costs protection

78. The Party concerned's 2015 consultation paper proposes that the eligibility for cost protection be amended to apply to a claimant "who is a member of the public". Taking into account the broad definition of the term "public" in article 2, paragraph 4, of the Convention, the Committee considers that such a proposal, if interpreted in conformity with the Convention, should not preclude the compliance of the Party concerned with either paragraph 8(a), (b) and (d) of decision V/9n or with the Convention in general.

79. However, the Committee also notes the concerns expressed by communicants and observers that such a provision may be interpreted restrictively (see paras. 20, 28 and 54 above). In particular, they submit that the singular form used in the proposed wording "a claimant... who is a member of the public" could be applied in practice so that only single individuals (natural persons), but not legal persons (e.g. NGOs) or groups (multiple claimants) would be eligible for the cost protection. The Committee points out that such an interpretation would not be in compliance with the Convention. The Committee thus invites the Party concerned to either insert an express provision that would make clear that the proposed wording will cover all members of the public within the scope of article 2, paragraph 4 of the Convention or otherwise reconsider this proposal.

Levels of the costs caps

80. The current Civil Procedure Rules establish a fixed costs cap for "Aarhus claims" for individual claimants of £5,000 and for all other claimants of £10,000. The 2015 proposal, if adopted, would allow the courts, either upon the application by a party to the proceedings or at their own discretion,¹⁴ to vary the default level of cost protection (with the possibility of complete removal of the cap), taking into account both subjective and objective criteria concerning the applicant and the case in line with the approach set out in the CJEU judgment in *Edwards v Environment Agency*. The court would be required to ensure that any such variation would not make the costs prohibitively expensive for the claimant. In addition, the 2015 proposal would clarify that, in the case of multiple claimants or defendants, a separate cap applies to each of them. The Party concerned also proposes to increase the "default" caps to £10,000 for an individual and £20,000 for other claimants, including NGOs, and to reduce the "cross-cap" to £25,000.

81. In its report to the fifth session of the Meeting of Parties to the Convention,¹⁵ the Committee expressed concern that the current cost caps of £5000 and £10,000 may be prohibitively expensive for many individuals and organizations. 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 meeting the requirements set out in paragraph 8(a), (b) and (d) of decision V/9n.

82. However, the Committee notes that paragraph 39 of the Party concerned's consultation paper states that it would be exceptional for claimants to require more costs protection than is provided by the default costs caps; the court would have to be satisfied that the case was exceptional because, without the variation, the costs of the proceedings

¹³ ECE/MP.PP/2014/23.

¹⁴ See para. 54 above.

¹⁵ Para. 47.

would be ‘prohibitively expensive’ for the claimant.¹⁶ In the light of the above statement, the Committee considers that would seem probable that the proposal to enable the cost caps to be varied may be more often used to increase, rather than decrease, the caps. If so, this would further reduce the Party concerned’s compliance with the requirements of article 9, paragraph 4 of the Convention and paragraph 8(a), (b) and (d) of decision V/9n.

83. The Committee considers that, if this proposal were introduced, the resulting uncertainty concerning the actual level of the cap in any particular case may also be contrary to the requirement in article 3, paragraph 1 of the Convention to establish a clear, transparent and consistent framework to implement the provisions of the Convention, including article 9, paragraph 4. In that respect, the Committee also notes that the proposal, if adopted, would likely increase the possibility of satellite applications to vary the cross caps, and such satellite proceedings would potentially result in further costs and uncertainty for claimants.

Schedule of claimant’s financial resources

84. The Party concerned’s 2015 consultation paper proposes that, to be eligible for the cost protection, a claimant would have to provide the court with “a schedule of financial resources”, so that the court could apply “subjective criteria” to find out what level of costs would be prohibitive for a claimant. The schedule of financial resources would be required to disclose any financial support which third parties had provided to the claimant or were likely to provide in the future. The Committee notes that the phrase “support likely to be provided in the future” is vague and ambiguous. Moreover, the Committee considers that the proposed requirement for any financial support from a third party to be disclosed may further limit the financial resources available to members of the public, as not all persons who may have otherwise been willing to provide financial support to the claimant’s claim may wish to have either the fact of their support, or the amount of that support, declared publicly. The Committee thus considers that the Party concerned’s proposal would add a further financial barrier to claimants seeking to bring claims within the scope of article 9, and thus would further reduce the Party concerned’s compliance with the requirements of article 9, paragraph 4 of the Convention and paragraph 8(a), (b) and (d) of decision V/9n.

Costs protection depending on a permission to apply

85. At paragraph 45 of its report to the fifth session of the Meeting of Parties, the Committee welcomed the Party concerned’s confirmation that the current costs caps apply to all costs incurred up until the end of the first instance, including any costs incurred prior to the grant of permission to apply and in satellite proceedings at the first instance. In its report, the Committee invited the Party concerned to provide a clear direction either in the CPR or the accompanying guidance to that effect.

86. However - in contrast to the current costs protection regime which applies from the outset, including the permission stage - under the Party concerned’s 2015 proposals, claimants would only receive cost protection once permission to apply has been granted. As acknowledged by the Party concerned at paragraph 33 of the consultation paper,¹⁷ there is a risk that this approach would increase uncertainty for claimants who could not know at the time of commencing their case if they will be eligible for costs protection. Moreover, as also acknowledged by the Party concerned in that paragraph, if permission was not granted, there would be no cap on the claimant’s liability to pay the defendant’s costs. The Committee considers that this fact in itself could well deter claimants from bringing a

¹⁶ https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/supporting_documents/costprotectioninenvironmentalclaimsonconsultationpaper.pdf

¹⁷ Ibid.

claim, and if so, would clearly not comply with the requirements of article 9, paragraph 4 of the Convention and paragraphs 8(a), (b) and (d) of decision V/9n. In this respect, the Committee recalls paragraph 75 of its findings on communication ACCC/C/2008/77 (United Kingdom), in which it considered that, after the claimant had been ordered to pay a prohibitive sum of costs for merely the permission stage, the claimant's decision not to continue with its proceedings for fear of facing even higher costs was entirely understandable.

Costs relating to determination of claim being an Aarhus claim

87. At paragraph 46 of its report to the fifth session of the Meeting of Parties, the Committee welcomed the inclusion in the CPR of a rule that if a defendant is not successful in challenging the claimant's assertion that the claim is an Aarhus claim, the court will normally order the defendant to pay the claimant's costs regarding that challenge on an indemnity basis. The 2015 proposals would amend this rule to the effect that defendants who unsuccessfully challenged the status of the claim as an Aarhus claim would normally be ordered to pay the costs of those satellite proceedings on the standard basis. The Committee considers that, by decreasing defendants' potential costs exposure, this proposal would likely increase the likelihood of such challenges, and as a result, increase rather than decrease the potential costs and uncertainty for claimants in proceedings subject to article 9 of the Convention, in contrast to the requirements of paragraphs 8(a), (b) and (d) of decision V/9n.

Cross-undertakings for damages

88. The Party concerned's 2015 proposals would, if implemented, amend the conditions in Practice Direction 25A 5.1B for issuing injunctions to prevent environmental damage in Aarhus Convention claims so as to require the court, when assessing whether a cross-undertaking in damages would make continuing with a claim 'prohibitively expensive', to take into account subjective and objective criteria in line with the approach set out in the CJEU judgment in *Edwards v Environment Agency* (para. 10 above). In addition, the court would be required to have regard to any financial support which any person has provided or is likely to provide to the claimant.

89. The Committee recalls that at paragraph 54 of its report to the fifth session of the Meeting of the Parties, it regretted that while the changes to the CPR in force since April 2013 were generally a positive step, they were not sufficient to fully meet the requirement in article 3, paragraph 1 for a clear, transparent and consistent framework to implement the Convention. In particular, the provisions' reliance on judicial discretion does not provide certainty as to whether (a) the applicant will be required to give a cross-undertaking or not; (b) if a cross-undertaking is required, what the level of the undertaking will be; and (c) how the court should determine what would be "prohibitively expensive for the applicant". The Committee considers that the Party concerned's 2015 proposals [would potentially further increase][not remove, and may even increase] the uncertainty concerning what the court will determine to be "prohibitively expensive for the applicant". The Committee thus considers that the 2015 proposals would, if implemented, not meet the requirement in article 3, paragraph 1 of the Convention for a clear, transparent and consistent framework. In this regard, the Committee recalls that in paragraph 54 of its report to the fifth session of the Meeting of the Parties it also stated:

While recognizing it is ultimately for the Party concerned to decide how to implement this provision in its national law, the Committee notes that the simplest way to ensure compliance may be to provide that, when interim relief is sought in an Aarhus claim, no cross-undertaking will be required. Then the sole question for the judge is whether the injunctive relief sought is itself appropriate.

Amendments regarding interveners and potential funders of litigation

90. According to the section 87 Criminal Justice and Courts Act, as amended of 13 April 2015, the High Court or Court of Appeal can make a costs order against or in favour of an intervener under the Court's general discretion in relation to costs. Pursuant to section 87 as amended, if a party applies to the Court asking it to order an intervener to pay that party's costs arising from the intervention, unless there are exceptional circumstances, the Court must make such an order if one of certain specified conditions are met. The Committee considers that this provision may deter members of the public, including environmental NGOs, from acting as interveners in litigation concerning claims within the scope of the Convention.

91. In July 2015, the Party concerned consulted on proposals to amend sections 85 and 86 of the Criminal Justice and Courts Act to require judicial review applicants to provide the court with information about the financing of the application so that the Court can consider whether to order costs to be paid by potential funders identified in that information. The Committee considers that if such a proposal is adopted and applied with respect to claims within the scope of the Convention, it may reduce the ability of potential claimants, including NGOs, to gather funding for judicial review, as potential supporters may be put off by the risk that they may have to subsequently pay legal costs if the case is unsuccessful.

Concluding remarks - England and Wales

92. The Committee concludes that except for the 2015 amendments to the Criminal Justice and Courts Act (see paras. 17, 23, 38, 55 and 57 above), there have been no changes in the legislation in force in England and Wales relevant to meeting the requirements of decision V/9n since the adoption of that decision. The Committee, therefore, draws the Party concerned's attention to the conclusions of the Committee's report to the fifth session of the Meeting of Parties as well as its first progress review on the implementation of decision V/9n.

93. As for the 2015 proposals to amend the CPR, the Committee finds that, with the exception of the proposal to broaden the scope of "Aarhus claims" to include statutory appeals falling within article 9, paragraph 2, of the Convention, all proposed amendments would increase rather than decrease uncertainty and risk of prohibitive costs for claimants. With respect to the proposal to broaden the scope of "Aarhus claims" to include statutory appeals subject to article 9, paragraph 2, the Committee reiterates that the requirement that procedures not be prohibitively expensive applies to all procedures within the scope of paragraphs 1, 2 and 3 of article 9, and not only paragraph 2. Therefore, while a step forward, the proposed amendment would not be sufficient to meet paragraph 8 (a), (b) and (d) of decision V/9n (see para. 77 above).

94. The Committee accordingly finds that the Party concerned has not yet fulfilled the requirements of decision V/9n paragraph 8(a), (b) and (d) with respect to England and Wales.

95. The Committee invites the Party concerned, together with its third progress report or otherwise by 1 April 2017, to report on the outcomes of England and Wales cross-government review, together with any other actions it has by then taken, or proposes to take, 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

96. The Committee has not been provided with any information on any changes to the legislation in force for Scotland relevant to meeting the requirements of decision V/9n since the adoption of the decision.

97. The Committee welcomes the information provided by the Party concerned on the current review by the Scottish Civil Justice Council (SCJC) of the costs protection regime as set out in the Court of Session Rules, including the proposed extension to the range of proceedings in which it is possible to apply for a Protective Expenses Order (PEO) and the categories of person eligible to apply for such orders. However, the Committee expresses its concern that, according to the observers¹⁸, the public was not consulted on the proposed changes.

Protective Expense Orders under the Court of Session Rules

98. Chapter 58A of the Scottish Court of Session Rules, as in force since 1 April 2013, provides for a PEO of £5,000, with a cross-cap of £30,000 on the respondent's liability to pay the costs of a successful applicant. The Court may, on cause being shown by the applicant, further lower the level of the PEO or raise the level of the cross-cap. In order to grant a PEO, the Court must be satisfied that the proceedings would be prohibitively expensive for the applicant, which is considered to be the case if the applicant could not reasonably proceed with the proceedings in the absence of a PEO. The communicant of communication ACCC/C/2012/68 put before the Committee two cases in which these provisions have recently been interpreted by the Inner House of the Court of Session – the Scottish Appeal Court, namely *Gibson v Scottish Ministers* and *John Muir Trust v Scottish Ministers* (see paras. 30-33 above).

99. In *Gibson v Scottish Ministers*, the Court held that when considering whether the proceedings would be prohibitively expensive for the applicant, the test is not the petitioner's ability to pay, but whether it is reasonable, in all the circumstances, that he or she should be required to do so. In that respect, the Court mentioned as a relevant aspect the fact that as the environment cannot defend itself, it needs to be represented by concerned citizens or organisations acting in the public interest.

100. In contrast, in *John Muir Trust v Scottish Ministers* the majority of the Court refused to grant a PEO to the applicant, apparently on the basis of the ability of the applicant to pay the costs.

101. Noting the different approaches taken in the above decisions, the Committee points out that the Scottish costs protection system's compliance with article 9, paragraph 4 of the Convention will depend on how Chapter 58A is interpreted by the Scottish Courts and in this regard, the Committee expresses its approval of the approach taken by the Court of Session in *Gibson v Scottish Ministers*. Furthermore, in order to meet the requirement in article 3, paragraph 1 of the Convention, the application of the PEO regime in procedures subject to article 9 of the Convention must be clear, transparent and consistent. In keeping with this requirement, the Committee considers that the PEO default level should be the maximum amount of costs payable by a claimant in proceedings covered by article 9 of the Convention, with the possibility for the Court to lower that amount if the circumstances of the case mean that it is reasonable to do so. If the Party concerned were to demonstrate to the Committee that its case law going forward were in line with the above approach, the Committee would find Chapter 58A of the Scottish Court of Session Rules to be in

¹⁸ RSPB, Friends of the Earth UK, Friends of the Earth Scotland, C&J Black Solicitors.

compliance with article 9, paragraph 4 of the Convention and the requirements of decision V/9n.

Types of claims covered

102. Under the Scottish legislation in force at the time of the Party concerned's second progress review, the PEO regime is limited to judicial and statutory review cases within the scope of the EU's Public Participation Directive. The Committee notes that the proposal subject to the review by the SCJC (para. 10 above), would extend the scope of the PEO applicability to all judicial reviews and statutory appeals engaging article 9, paragraphs 1, 2 and 3 of the Convention. The Committee considers that such a proposal, if implemented, would enhance the compliance of the Scottish costs protection regime with the Convention and decision V/9n. However, since private law claims within the scope of the Convention would still be excluded, it would still not fully meet either the requirements of the Convention or decision V/9n.

Eligibility for costs protection

103. The PEO regime currently in force applies to individuals and NGOs promoting environmental protection. The Committee notes that the proposal subject to review by the SCJC (para. 10 above), would introduce the Convention's definitions of "public" and "public concerned" into the Court of Session Rules. The Committee welcomes this proposal which should make cost protection available to community groups and similar bodies, and by that means improve the compliance of the Party concerned with the Convention and decision V/9n.

Concluding remarks - Scotland

104. The Committee notes that, except for the proposals discussed above, there are no reported changes to the Scottish costs protection regime relevant to meeting the requirements of decision V/9n since the adoption of that decision. The Committee accordingly draws the Party concerned's attention to the conclusions of the Committee's report to the fifth session of the Meeting of Parties as well as its first progress review on the implementation of decision V/9n.

105. The Committee does not have sufficient information before it to be in a position to ascertain the extent to which the case law cited by the communicant of communication ACCC/C/2012/68 in paragraphs 30-33 above is representative of how the Scottish costs protection system is applied in practice. The Committee considers, however, that the decision of the Court in *Gibson v Scottish Ministers* demonstrates that it is possible for the Courts to apply Chapter 58A of the Scottish Court of Session Rules in a manner which complies with the Convention and decision V/9n.

106. As for the 2015 proposals to amend the Scottish Court of Session Rules (paras. 102-103 above), the Committee considers that both the proposed amendments, i.e. with respect to the type of claims covered by the costs protection system and who is eligible to apply for costs protection, would improve the Party concerned's compliance with the Convention and decision V/9n. However, since private law claims within the scope of the Convention would still be excluded from the type of claims covered, that proposal would not fully meet either the requirements of the Convention or decision V/9n.

107. The Committee accordingly finds that the Party concerned has not yet fulfilled the requirements of decision V/9n paragraph 8(a), (b) and (d) with respect to Scotland, but welcomes the steps taken by the Party concerned to date in that direction.

108. The Committee invites the Party concerned, together with its third progress report or otherwise by 1 April 2017, to report on the outcomes of the SCJC's review of Scotland's costs protection regime, together with any other actions it has by then taken, or proposes to

take, to ensure that the allocation of costs in all court procedures in Scotland subject to article 9 of the Convention is fair and equitable and not prohibitively expensive.

Northern Ireland

109. With respect to Northern Ireland, the Committee has not received information that any changes have so far been made to its legal framework relevant to decision V/9n since the adoption of that decision. The Committee notes the information provided by the Party concerned in its second progress report concerning the ongoing review of the Costs Protection (Aarhus Convention) Regulations 2013. The Committee understands that, in the scope of this review, changes similar to those proposed in England and Wales have been proposed for the cost regime in Northern Ireland. The Committee considers its comments on the proposals for England and Wales set out in paragraphs 76-95 above are equally applicable to the context of Northern Ireland, and accordingly invites the Party concerned to take those comments into account in its review of the costs regime in Northern Ireland also.

110. Based on the above, the Committee finds that the Party concerned has not yet fulfilled the requirements of paragraph 8(a), (b) and (d) of decision V/9n with respect to Northern Ireland, but welcomes the steps taken by the Party concerned to date in that direction.

111. The Committee invites the Party concerned, together with its third progress report or otherwise by 1 April 2017, to report on the outcomes of its review of the Costs Protection (Aarhus Convention) Regulations 2013, together with any other actions it has by then taken, or proposes to take, to ensure that the allocation of costs in all court procedures in Northern Ireland subject to article 9 are fair and equitable and not prohibitively expensive.

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

112. With respect to the recommendations set out in paragraph 8(c) and 8(d) of decision V/9n concerning the time limits for bringing applications for judicial review, the Committee welcomes the information provided by the Party concerned, communicants and observers regarding the developments in legislation and case law on this point. In this regard, the Committee notes that the requirement to apply for judicial review “promptly” is no longer part of Scottish law or a requirement for judicial reviews under planning legislation in England and Wales. The Committee further notes that for other judicial review procedures in England and Wales, following the *Uniplex* decision, the courts no longer apply the “promptly” requirement. Likewise, following *Uniplex*, the “promptly requirement” is no longer applied by the courts in Northern Ireland in judicial review cases brought on European Union grounds and that the Department of Justice undertook a consultation process in 2015 on a proposal to remove the requirement for all judicial review cases. The Committee understands that the communicants and observers do not dispute the above developments, but rather express their concern regarding the Party concerned’s decision to shorten the time limits for planning judicial reviews in England, Wales and Northern Ireland to six weeks and for procurement decisions to 30 days, which they submit are both insufficient time-frames.

113. At paragraph 30 of its first progress review on the implementation of decision V/9n, the Committee considered 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 invited the Party concerned 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 Northern Ireland. Noting the Party concerned's 2015 consultation on this issue, the Committee reiterates its invitation to the Party concerned to report on its proposed actions, with accompanying timeline, to abolish the "promptly" requirement for all cases within the scope of article 9 of the Convention in Northern Ireland.

114. With respect to the introduction in England, Wales and Northern Ireland of a six week time limit for bringing an application for judicial review under planning legislation and 30 days for procurement decisions, the Committee considers that these developments are outside the scope of decision V/9n and it thus will not examine the extent to which these timeframes comply with the Convention in the context of its review of decision V/9n.

115. In the light of the above, the Committee finds that the Party concerned has not yet fulfilled the requirements of decision V/9n paragraph 8(c) and (d) with respect to time limits for judicial review in Northern Ireland, but welcomes the steps taken by the Party concerned to date in that direction. The Committee invites the Party concerned, together with its third progress report, to report on the measures it has by then taken or proposes to take to abolish the "promptly" requirement in Northern Ireland for all cases within the scope of article 9 of the Convention.

Paragraph 9 of decision V/9n

116. With respect to paragraph 9 of decision V/9n, the Committee notes that no relevant information has been brought before it. The Committee is therefore not in a position to determine whether or not the Party concerned has fulfilled the requirements of paragraph 9 of decision V/9n.

IV. Conclusions

117. 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.

118. The Committee invites the Party concerned, together with its third progress report or otherwise by 1 April 2017, and taking into account the comments received from communicants and observers on its second progress report summarized above, to report on:

- (a) The outcomes of England and Wales cross-government review, together with any other actions it has by then taken, or proposes to take, 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 Civil Justice Council's review of Scotland's costs protection regime, together with any other actions it has by then taken, or proposes to take, to ensure that the allocation of costs in all court procedures in Scotland subject to article 9 of the Convention is fair and equitable and not prohibitively expensive.
- (c) The outcomes of the review of the costs protection regime contained in Northern Ireland's Costs Protection (Aarhus Convention) Regulations 2013, together with any other actions it has by then taken, or proposes to take, 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) The measures it has by then taken or proposes to take to abolish the “promptly” requirement in Northern Ireland for all cases within the scope of article 9 of the Convention.

119. The Committee informs the Party concerned that all measures necessary to implement decision V/9n must be completed by, and reported upon by no later than 1 April 2017, as that will be the final opportunity for the Party concerned to demonstrate to the Committee that it has fully met the requirements of decision V/9n.
