EJNI Consultation Response: Access to Environmental Justice in Northern Ireland 2025

Consultation Details: Access to Justice in relation to the Aarhus Convention - A Call for Evidence from the Department of Justice, NI, Friday 20 December 2024 - Friday 28 February 2025.

Available at: https://www.justice-ni.gov.uk/consultations/call-evidence-aarhus

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1. Summary

1.1. This call for evidence seeks input in relation to the UKs Compliance with the access to justice provisions of the Aarhus Convention[1] contained in Article 9 of that Convention.

1.2. The consultation questions focus on three net issues raised by the Aarhus Convention Compliance Committee (a UN implementation mechanism established under the Aarhus Convention) decisions in relation to Northern Ireland's justice system:

- The compliance of current costs protection arrangements with the Article 9(3) and (4) of the Aarhus Convention that justice should not be prohibitively expensive, and that access to justice should be fair, equitable, timely. The net issues focussed on in relation to cost protection are:
    - Effectiveness of the Costs Protection (Aarhus) Regulations 2013 as amended by the 2017 Regulations provide,
    - Appeals and the costs cap
    - Shared Costs Caps
    - Cross Undertakings in Damages
    - Costs of Interveners
- Inclusion of private nuisance cases within the costs protection provisions.
- Time periods for taking judicial review.

Input is provided on these issues and the proposed approaches below under "**Consultation Issues**".

1.3 However, the consultation ignores a number of other issues is also raised by the Aarhus Convention Compliance Committee in the area of access to justice and Article 9 of the Aarhus Convention. These include issues related to third party appeals, and fairness in appeals procedures.

These issues are addressed below under the heading "**Additional Issues Highlighted by the ACCC**".

1.4 Further there are outstanding issues in relation to access to justice which have not yet been the subject of a substantive complaint to the Aarhus Convention Compliance Committee but which have been identified by expert analysis and reports to be implementation failures in relations to the Convention. These are briefly outlined in the section '**Additional Issues'** below.

[1] The Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters 1998 UNECE, hereinafter 'the Aarhus Convention 'UN Treaty Series No. 2161 pg. 447, available at https://treaties.un.org/doc/Treaties/1998/06/19980625%2008-35%20AM/Ch_XXVII_13p.pdf

1.5 While the opening of this consultation is very welcome, it is disappointing that the approach being taken here is to ignore any breaches that have not been the subject of substantive findings by the ACCC. EJNI strongly encourages the Department of Justice to consider other clear breaches of the Convention's provisions, over and above those cited in the consultation document.

2. The Aarhus Convention Effects in Northern Ireland

2.1 The Aarhus Convention is an international environmental human rights treaty that was signed and ratified by the UK and all the other EU member States, in addition to another 20 countries across the UNECE region. The EU is also a party to the Convention in its own right. There are currently 47 parties to the Convention. The Convention seeks to protect the human right to a clean and healthy environment and has the objective of guaranteeing a high level of environmental protection.

2.2 The Convention is binding on the UK as a full party to the Convention, and as a human rights Convention it is subject to certain customary norms of international law such as the principle of non-regression and progressive realisation. Additionally, the findings of the Aarhus Convention Compliance Committee, once approved at the Meeting of the Parties, and the decisions of the Meetings of the Parties are legally binding on the UK as a matter of international law.[2]

2.3 Due to its nature as a mixed agreement it has been held by the Court of Justice of the European Union that it forms part of the body of EU law and has been held by the CJEU as being capable of having direct effect where the conditions for direct effect are met (Case C-240/09 Brown Bears No. 1).[3] Where the conditions for direct effect are not met, such as in the case of Article 9(3), the Convention is still capable of producing binding effects on Member States due to what is known as the "interpretative obligation" arising out of the status of the Convention as a mixed agreement, the alignment of the objectives of the Convention of a high level of environmental protection, the objectives of the EU Treaties in Article 19(1) TEU and Article 191 TFEU. Also, it aligns with Article 37 of the Charter of Fundamental Rights of the European Union, guaranteeing a high level of environmental protection, Article 41 of the CFR guaranteeing the right to good administration, and Article 47 of the Charter guaranteeing effective judicial protection.[4]

[2] The Non-Compliance Mechanism Under the Aarhus Convention as 'Soft' Enforcement of International Environmental Law: Not So Soft After All! Elena Fasoli & Alastair McGlone, Netherlands International Environmental Law Review 2018 https://doi.org/10.1007/s40802-018-0102-0

[3] Case C-240/09 Brown Bears, see paras 28 – 28 https://curia.europa.eu/juris/document/document.jsf?docid=80235&doclang=EN

[4] See discussion of these principles and rules in the Commission Notice on Access to Justice 2017 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0818(02)

2.4 The EU implementations of the Aarhus Convention's access to justice rules via the Public Participation Directive, the EIA Directive, the SEA Directive, the IED Directive, the Habitats Directive among others, and their meaning and effect as pronounced by the CJEU are still relevant and in some cases binding via several pathways in respect of Northern Ireland due to the particular legal arrangements put in place as a result of Brexit, as well as the pre-existing Constitutional architecture.

2.5 Northern Ireland is bound by certain remaining EU law obligations that implemented the provisions of the Convention as implemented domestically. These include the Water Framework Directive, the Strategic Environmental Assessment Directive and the Environmental Impact Assessment Directive, all of which contain access to justice clauses. These are retained in force under the European Union (Withdrawal) Act 2018[5] as amended that keeps all EU law in force as a default, except where repealed by the REUL Act 2024[6].

2.6 Additionally, there are provisions of the Windsor Framework[7] which is part of the agreement that governs the relationship between the UK and EU post-Brexit. Under this agreement certain scheduled pieces of EU environmental legislation are subject to a dynamic alignment or keeping pace obligation e.g. the Industrial Emissions Directions.

2.7 Other pieces of legislation are required to be maintained to the level of protection that pertained at Brexit date, under Article 2 of the Windsor Framework[8] under which certain EU obligations, including those relevant to the Aarhus Convention, must be kept in place. This is because under Article 2 of the Windsor Framework there can be no diminution of the rights, safeguards and equalities guaranteed by the 1998 Peace Agreement, including the ECHR rights and Aarhus rights, which bound the UK at the date of Brexit. These protections are given domestic legislative teeth through legislation amending[9] the Northern Ireland Act 1998.[10] As a result, compliance with the Conventions' provisions is a matter of domestic law, retained and binding EU law, as well as international law binding on the UK and NI Governments.[11]

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[5] European Union (Withdrawal) Act 2018 available at https://www.legislation.gov.uk/ukpga/2018/16/contents

[6] Retained EU Law (Revocation and Reform) Act 2023 https://www.legislation.gov.uk/ukpga/2023/28/contents

[7] Windsor Political Declaration by the European Commission and the Government of the United Kingdom of 27 February 2023, available at Windsor Political Declaration by the European Commission and the Government of the United Kingdom of 27 February 2023; EU Commission (2023) The Windsor Framework, available at: https://commission.europa.eu/strategy-and-policy/relations-united-kingdom/eu-uk-withdrawal-agreement/windsor-framework_en .

[8] See House of Commons Research Report (2023) Northern Ireland Protocol: The Windsor Framework, House of Commons Library, available at: https://commonslibrary.parliament.uk/research-briefings/cbp-9736/

[9] European Union (Withdrawal Agreement) Act 2020, Schedule 3, https://www.legislation.gov.uk/ukpga/2020/1/schedule/3

[10] Northern Ireland Act 1998 https://www.legislation.gov.uk/ukpga/1998/47/contents .

[11] For more see: Frantziou, E., Craig, S., (2022) Understanding the implications of article 2 of the Northern Ireland Protocol in the context of EU case law developments, 73 NILQ S2, 65 – 88. Available at https://nilq.qub.ac.uk/index.php/nilq/article/view/1059/868; Hervey, T., (2022) Brexit, Health and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol, NIHRC. Available at https://nihrc.org/publication/detail/brexit-health-

2.8 Recent decisions by the European Court of Human Rights are relevant here as they indicate that when fundamental rights like the right to home and family life under Article 8 are engaged, or the right to health under Article 2, Aarhus rights are also protected, such as the right to participate in decision making on environmental issues where the decision may have an impact on Article 8 or Article 2 rights. Examples of this can be seen in cases like Lopez Ostra. In the case of Kilmasenniorinnen, climate change impacted on the applicants' right to health and as such the ECHR recognised that they had access to justice entitlements arising from the Aarhus Convention to challenge State failure, where the States actions were insufficient to safeguard their right to health by adequately tackling climate emissions. These rights are engaged by Article 2 of the Windsor Framework and given domestic effect by the amendments made to the Northern Ireland Act 1998 which gives domestic effect to provisions of the Windsor Framework/The Northern Ireland Protocol. Therefore, they form part of the corpus of law that the State and the Courts must have regard to when articulating or adjudicating on Aarhus rights. ECHR rights are also rendered effective at domestic level by arrangements under the 1998 Peace Agreement, specifically the Human Rights Act 1998 and the Northern Ireland Act 1998.

3 Key Context

3.1 There are a number of assumptions that appear to underly the approach to this consultation, and in order for our responses below to be understood fully, it is necessary to present some key context material addressing the background context in which these rules operate. For example, the consultation presents the situation in relation to access to justice in a very positive light, with a narrative of consistent improvement and proactive State responsiveness to the requirements of CJEU and ACCC findings of non-compliance. It reads as framed from the point of view of balancing already well supported access to justice rights against legitimate considerations regarding the administration of justice which it appears to suggest would be undermined supporting access to justice fully for all cases where it is required. This framing is misleading and inappropriate to the context, as can been seen from the long timeframes between findings and reforms, and from the

and-its-potential-impact-on-article-2-of-the-ireland-northern-ireland-protocol; Lock, T., Dobbs, M., Lynch Shally, K., (2024) The Windsor Framework – guarantees, gaps and governance 75 NILQ, 3, 433 – 442, available at https://nilq.qub.ac.uk/index.php/nilq/article/view/1152/948; Lock, T., Frantziou, E., Deb, A., (2024) The Interaction between the EU Charter of Fundamental Rights and General Principles with the Windsor Framework, NIHRC Report. Available at https://nihrc.org/assets/uploads/publications/EU-Charter-of-Fundamental-Rights-Research-Report.pdf; Dobbs, M., Hough, A., Kelleher, O., Whitten, L., (2024) Non-diminution, dynamic alignment and cooperation: exploring the potential of the Windsor Framework to protect the environment, 75 NILQ No. 3, 550 – 583. Available at https://nilq.qub.ac.uk/index.php/nilq/article/view/1126/952; Brennan, C., Brennan, C., Dobbs, M., Hough, A., Kelleher, O., Whitten, L., (2025) The Environment, Human Rights and the Windsor Framework, NIHRC Report, Forthcoming June 2025.

fact that reforms that were introduced did not actually fully address the findings made. Even now, the findings in relation to costs made over ten years ago have still not been addressed.

3.2 The UK acceded to the Aarhus Convention in 2005, twenty years ago, but had Aarhus access to justice obligations via EU law since 2001 in the case of plans and programs (SEA Directive), and 2003 (Public Participation Directive) in respect of planning and permitting. Edwards, a key CJEU decision on costs and access to justice, was handed down in 2013. There have been regular findings by the ACCC against the UK including in relation to Northern Ireland since 2010. Also, access to justice is a basic constitutional/fundamental right, the right to which predates all these rule sets in UK/NI law. Across this entire span of legal initiatives and interventions, the environment in Northern Ireland and the UK has continued to decline for all indicators.

3.3 It is also important to remember that the right set articulated in the Aarhus Convention represents a basic floor of fundamental fair procedures and democratic norms for functioning rule of law and democracy, and it has never been more important to protect and implement the rights guaranteed by the Convention. Any balancing exercise conducted that seeks to limit individual fundamental human rights like access to justice must be subject to a proportionality analysis and any such limitations therefore need to be justified by strong evidence that the issues purportedly addressed by such limitations do in fact exist.

3.4 The idea that not all breaches of legal rights should find a remedy in the Courts because of the cost to the State is one which runs contrary to the Constitutional traditions of the UK and Northern Ireland and to the idea of a well-functioning and healthy rule of law. Further the idea that which breaches of rights are allowed adjudication before the Courts should depend on the financial or socio-economic status of the injured party or complainant also runs contrary to the idea of a well-functioning democracy in which equality principles actually function. However, this idea is articulated in the consultation document. This represent a violation of the rule of law, the State's obligations under democratic and human rights norms, and the Constitutional and common law principles governing the justice system in Northern Ireland. It is also the case that the idea that supporting broad access to justice will lead to collapse of the administration of justice is not one that is born out by the evidence.

3.5 It also needs to be made clear that supporting (including financial) every person in their right to vindicate their legal rights before the Courts does not mean allowing vexatious litigation and legal abuse. There are already mechanisms in place to prevent this, including the procedural rules of the Courts allowing cases to be dismissed for being vexatious or disclosing no proper cause of action. The requirement to demonstrate breach of a legal right or in the case of NGOs, breach of domestic environmental law, ensures that disputes not appropriate to the Courts will not be possible to

issue. Providing full access to legal advisors would also ensure proper filtration of cases coming before the courts by the legal professionals involved who must have regard to their professional duty to the court (as well as their reputational need) to uphold the administration of justice by not engaging in abuse of process, waste the courts time with vexatious or baseless cases and not to mislead the court.

3.6 Unfortunately, as can be seen from the ACCC findings, the CJEU judgments and the expert repots referred to above, the UK and Northern Ireland's performance in regards to its environmental democracy obligations has not been satisfactory to date. The State has consistently failed to protect and vindicate environmental human rights in Northern Ireland.

3.7 These discussions of environmental justice must also be contextualised against the great need for access to environmental justice arising from the consistent failure to protect Northern Ireland's environment. The lack of an adequate regulatory framework for environmental governance has been highlighted regularly by campaigners, NGOs, experts and journalists with frightening regularity.[12] The consequences of this complete failure to address environmental governance in any serious way are now clearly visible in the many high profile environmental crises that plague Northern Ireland such as the ecological collapse of Lough Neagh, Ireland's biggest lake, the largest illegal dump in Europe[13] being situated in Northern Ireland in an SAC of the River Foyle, the cross-border illegal animal waste scandal,[14] the renewable heat incentives scandal and the recent collapse of the inquiry into the permitting of the Dalradian Goldmine due to failures to honour transboundary public consultation obligations, to name but a few issues.

3.8 The lack of proper regulatory mechanisms, and an independent environmental regulator, means that the role of environmental regulator has effectively fallen back on NGOs and the public, who must try to use the Courts to protect Northern Ireland's environment. The current regimes are restrictive based on an idea of a division of labour that does not exist in Northern Ireland – that the

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[12] E.g. see Brennan, C. (2016) 'The Enforcement of Waste Regulation in Northern Ireland: Deterrence, Dumping and the Dynamics of Devolution' Journal of Environmental Law (28)3, 471-496; Brennan, C., Dobbs, M. and Gravey, V., (2019) 'Out of the Frying Pan, Into the Fire? Environmental Governance Vulnerabilities in Post-Brexit Northern Ireland', (2019) 21(2) Environmental Law Review 84; Hough, A. (2019). The Potential of the Good Friday Agreement to Enhance post-Brexit Environmental Governance on the island of Ireland. Irish Planning and Environmental Law Journal (2), 55-65. Retrieved 03 02, 2022
Macrory, R. (2018, September 24). Environmental law in the United Kingdom post Brexit. ERA Forum. doi:https://doi.org/10.1007/s12027-018-0531-6; Purdy, R., Hjerp, P., (2016) Environmental Governance in Northern Ireland available at https://ejni.net/wp-content/uploads/2019/06/Ecocentric-Report-Final-NI-26-1-2016.pdf .

[13] Environment Ireland (2023) Lough Neagh: An Ecological Catastrophe https://www.environmentireland.ie/lough-neagh-an-ecological-catastrophe/#:~:text=Affecting%20the%20source%20of%20around,to%20an%20acceptable%20water%20quality; Doran J., (2023) Mobuoy dump: Millions spent making polluted site safe
13 September 2023 https://www.bbc.com/news/uk-northern-ireland-66789885

[14] Noteworthy (2022) Suspected false documents and illegal dumping, The Journal, available at https://www.thejournal.ie/factory-farm-pt2-teagasc-long-read-5801687-Jul2022/

State is the proper regulator of environmental harms and goods, and that people should only use the courts for environmental redress in exceptional circumstance. This is exacerbated by the backdrop of the triple planetary crisis of pollution, global warming and biodiversity loss which works synergistically with local pollution and environmental governance failures to create a recipe for ecological disasters in Northern Ireland. For example, Lough Neagh's very visible ecological collapse arose through a combination of unregulated nutrient pollution, unregulated extractivism of the lake bed and the rising global temperatures which created the perfect storm for eutrophication.

3.9 This widespread ecological crises in Northern Ireland means that the State needs rethink "received wisdom" about the administration of justice in the area of the environment, such as the views articulated in the consultation document that claims should be limited to avoid excessive burdens on the courts, or that the interests of justice absolutely require that time limits provide public bodies with certainty in decision making by providing short and clear cut-off dates for challenge. These positions incorrectly balance hypothetical collective rights against individual fundamental human rights to health and to private and family life. Access to court should be available to all people to defend their property and health against damage by pollution, and this should not be predicated on financial circumstances or socio-economic status, as this entrenches the harms caused by social inequality. If the justice system would not be able to cope if every person who had a genuine need for redress was actually able to seek it, then the problem is one of under-resourcing of the courts system and infrastructure. The under-resourcing of the Courts in Northern Ireland is well documented and longstanding.[15] Financial barriers are being used as a way to control access to justice to buffer the under-resourced courts system. The existence of fundamental human rights should never be predicated on socio-economic status, which they are under current arrangements which offer only limited measures to address the cost of environmental justice, and the fact that costs protection is limited only to judicial review claims and does not extend to private law claims such as nuisance and other tort law claims.

3.10 The assumption that if access to justice was broadened the 'floodgates' would open is and the courts would be inundated with claims they cannot deal with is not evidence based. There is however quantifiable evidence from the UK, Ireland and other jurisdictions that actually vindicating Aarhus rights does not in fact result in large increases in complaints and claims. The evidence for this is extensive and set out below.

[15] Irish Legal News (2023) Northern Ireland legal profession warns of looming 'catastrophe for access to justice' available at https://www.irishlegal.com/articles/northern-ireland-legal-professions-warn-of-looming-catastrophe-for-access-to-justice

3.11 The fact is that for a long time the discussion around access to justice and the administration of justice has been allowed to be framed by a series of non-evidence-based assumptions which are incorrect, and these assumptions have been allowed to be weighed as a counter-balance to actual fundamental human rights. As a result, the State has failed utterly to protect Northern Irelands environment, and to vindicate people's fundamental human rights like the right to health, and in particular their right to be able to seek remedy and redress for damage to the environment and their health. The State systems as they are currently set up have allowed Northern Ireland to become the 'Wild West' of environmental regulation with serious and adverse consequences for people and place.

3.12 The impacts of these environmental governance and ecological failings are not only felt by Northern Ireland's people and environment. They have far reaching transboundary consequences that threaten the health and wellbeing of the people of the entire island of Ireland. Ireland is a single biogeographic unit, and as such its habitats, air, watercourses and human populations are intrinsically linked irrespective of political borders. The impact of ecological collapse and environmental governance failures in Northern Ireland also impacts the fundamental rights of persons in Ireland.

3.13 Therefore, this consultation occurs at a crucial point for Northern Ireland's environment, for its people and for the whole island of Ireland.

3 The Consultation Issues:

Effectiveness of the Costs Protection Regulations

Question 1: How effective are the Costs Protection Regulations in ensuring that Aarhus Convention cases are not prohibitively expensive to bring?

Question 2: Please provide data on the number of Aarhus claims in which you have been involved since February 2017 and their outcomes.

Question 3: Please provide data on the impact, if any, of the Covid-19 pandemic on the number of Aarhus claims in which you have been involved.

Answer to Questions 1- 3:

The Costs Protection Regulations 2013[16] and 2017[17] set up a regime where costs are limited in the following ways:

Applicants maximum exposure is €5000 for individuals and €10,000 for organisations, with discretion in the court to vary this downward.

Defendants maximum exposure is €35,000, with court discretion to vary this upward where required to fulfil the 'not prohibitively expensive requirement'.

In the case of an appeal the appeal court has the same powers as the trial judge. The appeal court can also vary the decision of the trial court if necessary

EJNI has not to date engaged in litigation so we cannot provide direct data on questions 2 & 3. However, the available data shows that since the introduction of the new costs rules there has not been a massive increase in environmental litigation.

Data is limited, but any data gathered in countries which broadened their standing rights as a result of the introduction of the Aarhus Convention does not support the contention that broader standing leads to those rights being abused or misused, for example studies from the UK[18] and Germany show no or only modest increases in the amount of environmental litigation in the years following introduction of Aarhus rights via legislation in those Member States. This is also evident from Irish statistics, which show that the level of judicial review on environmental grounds has remained relatively steady since ratification of the Convention in 2012. Irish statistics on judicial review actions are not usually provided broken down into environmental and non-environmental cases but in general the category into which they would fall (High Court Judicial Reviews initiated) has remained relatively steady at between 500-600 cases initiated per year since 2012, with 558 cases initiated 2012, 588 in 2013, 558 in 2020 and 614 in 2021) despite a general media and political consensus that it has led to an increase in vexatious litigation delaying projects. Similarly, at EU level, the impact assessment (pg. 224 of the Final Study) for amendment of the Aarhus Regulation in 2021 estimated that there would be a negligible increase in use of complaint mechanisms if standing rights were broadened (and showed that only 5% of currently challengeable EU acts had been challenged between 2006-2018). Also, most jurisdictions and mechanisms (including the ACCC) have mechanisms for filtering our vexatious or frivolous complaints at an early stage.

[16] The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 ("the Costs Protection Regulations") for Northern Ireland, NI SI No.81 of 2013, https://www.legislation.gov.uk/nisr/2013/81

[17] The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017, NI SI No. of 2017 https://www.legislation.gov.uk/nisr/2017/27/made

[18] Friends of the Earth (2020) A Pillar of Justice available at https://policy.friendsoftheearth.uk/sites/default/files/documents/2020-01/A Pillar of Justice_.pdf

There is no data available suggesting that broadening access to justice results in a very large increase in cases. The above data also shows that the broadening of standing and lessening of costs barriers are not factors in increasing vexatious litigation as is also commonly held. There are no empirical studies ascertaining why this is but there is lots of research data that shows that there are many other barriers to access to justice beyond standing and costs. Some of these include lack of awareness of rights, lack of understanding of how to use the courts system or engage with lawyers. There are also practicalities involved in staging a litigation that are incompatible with the work and family obligations of most people, from time spent gathering material and evidence to establish issues before approaching lawyers, to the expense of paying for expert evidence and legal opinions necessary to ascertain is there is a stateable case, to the time spent in meetings with lawyers, experts and attending court for many days without a hearing or concrete result for many years. For most individual's litigation is not a sustainable hobby that they can engage in at will, and is not compatible with a full-time job, family responsibilities etc. For many NGOs the manpower burden and associated costs are out of reach of their meagre budgets even if they had capacity. In fact, the documented instances of legal abuse that do exist are in the main not taken by individuals but by very well-resourced limited liability companies that engage in SLAPP litigation (Strategic Litigation Against Public Participation) against individuals and NGOs who are attempting to protect the environment or human rights.

Issues evident from the operation of the Costs Rules 2013-2017 highlighted by campaigners are the fact that it leaves applicants in position where they must cover their own costs, which are often far out of reach for most organisations and individuals. This leaves cases "too expensive to win".[19]
The prohibition on contingency fees in Northern Ireland (and limited availability of legal aid means that the applicant is almost always exposed to a risk of costs should they win or lose. In addition, the requirement to bear own costs can still result in cases being prohibitively expensive, with judicial review 'own costs' running into hundreds of thousands of pounds. For example, in ACCC/C/2013/90 the communicant cited own costs of £160,828.63.[20]

As mentioned, there is prohibition by the Law Society NI on solicitors offering 'contingency' or 'no-win, no fee' costs basis for clients (not to be confused with percentage fees which are not allowed in either jurisdiction). Also described as 'no-foal, no fee' arrangements, in this type of agreement a legal professional undertakes the work for the client on the basis that if the case fails the legal professional

[19] Communication to the Compliance Committee 13TH August 2013 https://unece.org/DAM/env/pp/compliance/C2013-90/Correspondence_Communicant/frCommC90_30.08.2013/frCommC90_30.08.2013_Redacted.pdf
[20] EJNI (2024) Demystifying the Costs of Environmental Justice, https://ejni.net/wp-content/uploads/2025/02/EJNI-Costs-Handbook-Dec-2024.pdf

will not charge a fee, relieving the client from the burden of own costs in the event that they lose. It would be expected that the prohibition on such arrangements would impact on ability to obtain representation because, as mentioned above, 'own costs' can still be so very substantial as to represent an unacceptable risk to an individual wishing to take a public interest case.

Appeals and the NPE Requirement

Question 4: Can you provide examples of occasions when appeal costs have proved to be prohibitively expensive to continuing with an appeal in an Aarhus case?

Question 5: Do the Costs Protection Regulations require to be clarified to ensure Aarhus cases that go to appeal are not prohibitively expensive? What are the likely benefits and risks of doing so?

The Costs Regulations 2013-2017 address the issue of the costs on appeal. They appear to suggest that the same rules apply on appeal, but this is achieved not by restating the rules for costs in an appeal context, or having one set of rules stated to be applicable to both first instance and appeal. Instead they take an approach of approximation where they have a separate clause covering appeal cases, and broadly and vaguely state that the rules applicable at first instance shall be applied in appeal cases. However, the manner of the drafting is such that this is not immediately obvious, and the creating of a separate clause for appeal cases may give rise to the misconception that different rules can apply at appeal and first instance, which is not permissible under the Aarhus Convention or EU implementation of same.

The CJEU case of Edwards (C-260/11)[21] dealt with this issue and made it clear that the Court cannot deal with costs at appeal stage differently than at first instance. Therefore, ideally the rules would be precisely replicated for appeal court costs, rather than approximated as they are here. The approach of approximation rather than precise restatement.

The Court of Justice stated the principles relevant to assessing compliance with the NPE requirement at paras 46 – 48:

> 46 *It must therefore be held that, where the national court is required to determine, in the context referred to in paragraph 41 of the present judgment, whether judicial proceedings on environmental matters are prohibitively expensive for a claimant, it cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law*

[21] R (Edwards, Pallikaropoulos) v Environment Agency, First Secretary of State, Secretary of State for Environment, Food and Rural Affairs (UK), C-260/11, 13 April 2013 ECLI:EU:C:2013:221 https://curia.europa.eu/juris/document/document.jsf;jsessionid=A8451663CAD8D425F54689D1F508D834?text=&docid=136149&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=15546185

and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.

47 *By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him.*

48 *Lastly, that assessment cannot be conducted according to different criteria depending on whether it is carried out at the conclusion of first-instance proceedings, an appeal or a second appeal.*

Therefore, the costs rules should be redrafted to clarify that the rules at first instance and on appeal are identical, in manner that makes this clear to potential claimants/the general public as well as the Court.

Costs in Private Nuisance Claims

Question 6: Please provide any data or information you hold on the costs involved in pursuing a private nuisance claim with an environmental component.

Question 7: Please provide any experience you have in a case in which costs protection measures were sought for private nuisance claims.

Question 8: Please provide your views on the courts using judicial discretion to determine whether a private nuisance claim should benefit from the Costs Protection Regulations. What are the likely benefits and potential risks of doing so?

Question 9: What particular private nuisance claims should benefit from costs protection under the Aarhus Convention?

Question 10: Please provide your views on mediation or other forms of dispute resolution as a means to resolve private nuisance disputes.

The Aarhus Convention requires costs protections under Article 9(4) to be extended equally to all cases coming within its remit, which for clarity includes:

- Access to justice when access to information rights are not vindicated (Article 9 (1)).
- Access to justice where public participation rights under Article 6 and 7 are not vindicated (Article 9(2)).
- Access to justice where domestic environmental law is breached, without necessity to show proof of harm. (Article 9(3))

Article 9(4) requires access to 'adequate and effective' remedies across all these areas, which should be to be fair, equitable, timely and not prohibitively expensive. Nuisance is an inherently environmental tort, as it relates to interference with the use and enjoyment of land caused by the manner of use of land by another. Land use is a core area of environmental regulation, and impacts from one land onto

another usually travel by an environmental medium like air, water or soil, in the form of environmental pollution of these mediums. Nuisance is therefore the main private law remedy available in cases of pollution and environmental harm.

Article 9(4) specifies that there must be a right to challenge breaches of domestic environmental law by both public and private actors. Judicial review does not enable to public to challenge breaches of domestic law by private operators, such as a private company causing pollution (unless they are carrying out a public function and come within the ambit of the courts supervisory jurisdiction under judicial review).

The failure to extend costs protections to private law cases such as public and private nuisance, and other tort law actions such as negligence, leaves the public without adequate recourse to challenge breaches of the law by private operators.

In cases where private individuals or NGOs wish to challenge breaches by private operators, litigation funding is not usually accessible or a realistic solution,[22] and costs can be extremely high.

The approach of using judicial discretion to determine when cases should fall within a protection is not ideal, and creates uncertainty prior to issuing proceedings and incurring costs as to whether the costs protection will apply.

Cross-undertakings for damages

> frObsVII.8s_RSPB_FoE_ERCS_06.01.2025_annex1_Redacted.pdfQuestion 11: Please provide any data on the number of Aarhus claims in which you have been involved where an interim injunction was sought and whether the issue of a cross-undertaking in damages arose; In particular: the number of Aarhus claims in which an interim injunction was sought; whether a cross-undertaking was required; and (c) if so, the amount required.

This question is somewhat surprising as it has already been made clear in the CJEU Case Edwards 260/11 that compliance with the Conventions' provisions cannot be judged by success or failure, or application/non-application of measures in individual cases, because this does not capture the cases not taken because of the chilling effect of such rules.[23] Instead rules around access to justice must be

[22] Professor Rachel Mulheron KC, Queen Mary University "A Review of Litigation Funding in England and Wales, A legal literature and empirical study, A Report for the Legal Services Board" (28 March 2024) < A-review-of-litigation-funding.pdf (legalservicesboard.org.uk)>

[23] Additionally, relying on such data can lead into cognitive biases and to some intuitively persuasive but fundamentally false arguments. For example, if responses show a large number of Aarhus cases where interim relief is granted without cross-undertaking in damages then this will be taken by DoJ as evidence that the possibility of cross-undertakings is not a

judged by the compliance of the rules themselves with the provisions of EU law or the Convention.[24] The CJEU made it clear in 2014 that the existence of the possibility of the cross-undertaking in damages constitutes a violation of the NPE requirement because this requires clarity and certainty to function. The fact that rules on costs exposure are unclear can and does have a chilling effect on some applicants seeking relief, and in this case the possibility of being asked to give a cross-undertaking in damages as a precondition to interim relief, and thereby being exposed to costs risk should the case fail on a technical reason later, is going to be a factor applicants and their lawyers will weigh up in deciding whether or not to seek interim relief. Therefore, the information being gathered here about occurrences and practices will not provide a true picture of the actual impact of such a mechanism on access to justice.

It has already been made clear in Commission v UK Case C-530/11[25] that the possibility of being required to give a cross-undertaking in damages violates the certainty requirement for effective, non-prohibitively expensive access to justice. The court made it clear that considerations of property rights cannot be allowed to outweigh the fundamental interests being protected here - vindicating the right of access to justice and protection of the environment. Protection of the environment is a social good which is capable of justifying restriction on the exercise of the right to property.

This is another example where the 'received wisdom' that assumes large amounts of claims taken are vexatious is allowed to inappropriately counterbalance fundamental rights like access to justice and the protection of the environment. This does not meet the requirements of the proportionality test applicable in such cases.

In this case the CJEU stated (paras 70 - 72):

> *"70 As to the United Kingdom's argument that the limiting of cross-undertakings could result in infringement of the right to property, the Court consistently acknowledges that the right to property is not an absolute right, but must be viewed in relation to its social function. Its exercise may therefore be restricted, provided that those restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, disproportionate and intolerable interference, impairing the very substance of the right guaranteed (see, to this effect, Križan and Others, paragraph 113 and the case-law cited). Protection of the environment is one of those objectives and is therefore capable of justifying a restriction on the exercise of the right to property (see, also, to this effect, Križan and Others, paragraph 114 and the case-law cited).*

deterrent. If there are no examples of Aarhus cases where interim relief was sought/granted then this will be taken as evidence there is no demand for interim relief in this category of cases and therefore the cross-undertaking in damages does not need to be reformed.

[24] E.g. see para 47 Edwards, Case C-260/11

[25] Commission v UK, Case C-560/11, ECLI:EU:C:2014:67, 13 Feb 2014, available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=147843&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=26272

71 Consequently, it is also necessary to uphold the Commission's argument that the system of cross-undertakings in respect of the grant of interim relief constitutes an additional element of uncertainty and imprecision so far as concerns compliance with the requirement that proceedings not be prohibitively expensive.

72 In light of all the foregoing, it must be held that, by failing to transpose correctly Articles 3(7) and 4(4) of Directive 2003/35, inasmuch as they provide that the judicial proceedings referred to must not be prohibitively expensive, the United Kingdom has failed to fulfil its obligations under that directive."

Therefore, the cross-undertaking in damages should not be applied in cases relating to the environment.

Shared Costs Cap

3.4. Question 12: Would you support a default shared claimant costs cap, and, if so, what form should that take and should any conditions apply (for example, only where a second claimant is raising the same legal arguments)?

3.5. Question 13: What are the likely potential benefits and risks of a default shared claimant costs cap?

There is no issue in principle that we see with a shared claimant protective costs cap in unsuccessful cases. This is supported by the recommendations in Decision VI/8k (the Compliance Report) which states that for claimants in the same legal proceedings who make the same legal arguments on the same legal or factual basis a shared cost protection regime should be implemented.[26]

Costs orders against or in favour of interveners

3.6. Question 14: Please provide any data on the number of Aarhus claims in which you have been involved where it has been appropriate for interveners to intervene to support claimants and whether there has been uncertainty as to costs liability. Did this uncertainty dissuade an intervener from taking part in the claim?

3.7. Question 15: The ACCC's position is that costs protection should be afforded to interveners during proceedings. Should interveners in support of an Aarhus claim have any additional protection from costs beyond the current position? What are the likely benefits and risks of doing so?

Costs orders should not be made against interveners, as the support of interveners is an enabling factor in supporting the right of access to justice particularly for applicants of limited means. Interveners also support the administration of justice by assisting the court with expert input on niche or technical areas.

[26] ACCC, "Report of the Compliance Committee on Compliance by the United Kingdom of Great Britain and Northern Ireland – Part I, Seventh Session" (18 – 20 October 2021)

Costs for interveners would positively support the rights of interveners and therefore the rights of access to justice and the administration of justice.

Judicial Review Time Limit

3.8. Question 16: What are the likely benefits of changing when the time limit for bringing an Aarhus Convention claim starts to run as suggested by the ACCC?

3.9. Question 17: What are the potential risks of changing when the time limit for bringing an Aarhus Convention claim starts to run as suggested by the ACCC?

3.10. Question 18: If legislative provision was to be made so that the time limit starts when a decision is made public, should 'when a decision is made public' be defined as the date when that decision is published or should this be left open for the courts to determine?

3.11. Question 19: Are there other approaches which could better address the noncompliance finding regarding judicial review time limits in Northern Ireland?

Article 9(4) of the Aarhus Convention requires that access to justice be fair and equitable. In the context of already short time limit of three months for judicial review, it is important that the rules around the running of time are transparent and fair. In this context time should only begin to run from the date at which the decision is published. Otherwise the right of access to justice could be affected by delays in publishing decisions.

There are no risks associated with such a measure, and such rules are common e.g. in Ireland, the time limits for challenging planning decisions run from the time the decision is made known not from the date of the decision. This has not given rise to any issues in that jurisdiction.

On the other hand, the risks of the current rules that time runs from the date of decision and not publication are aptly illustrated in the case of ACCC/C/2015/131 (UK) where the Council did not place the relevant decision on the public register for several months, meaning the applicant was out of time to challenge the relevant decision.

4 Additional Issues

Additional Issues Highlighted by the ACCC

Third Party Rights:

In ACCC/C/2013/90 the ACCC highlighted that the lack of access to administrative appeals for applicants in planning cases (while developers have such a right) constituted a breach of the requirement of fairness under Article 9(4). The ACCC highlighted that

Costs in other statutory claims:

ACCC/C/2016/142 (UK)[27] highlighted the failure to extend the costs protection regime to other statutory claims e.g. in this case the Litter Abatement Act.

Issues highlighted by research:

The Standard of Review

This issue was raised in ACCC/C/2013/90 (UK) but the ACCC declined to deal with it in that case as it was under consideration in a separate case ACCC/C/2017/156 (UK), in which a decision has not yet been issued.

The Aarhus Convention, Article 9(3) requires that the parties provide access to both substantive and procedural review

In the UK and Northern Ireland judicial review has traditionally been largely confined to procedural review of how a tribunal or public body made their decision and not a review of the merits of the decision, in an exercise of deference to the expertise of the original decision maker. Substantive review is available in judicial review but only when certain thresholds/criteria are met, which are variable depending on the context of the case and the rights at issue.

R (on the application of Jones) v Mansfield District Council[28] sets out the established principles for the standard of review:

> "*60. Secondly, as explained by the European Court in Bozen (see Dyson LJ para 31ff) responsibility for the "discretion" given by the Directive to "Member States" is shared by the legislative, administrative and judicial authorities. Having myself raised a doubt on the point, I*

[27] ACCC/C/2016/142 (UK) available at https://unece.org/sites/default/files/2021-10/ECE_MP.PP_C.1_2021_27_E.pdf
[28] R (on the application of Jones) v Mansfield District Council [2003] EWCA Civ 1408

agree with Dyson LJ that, within the statutory framework set by the legislature, determination of "significance" (for Annex II projects) is a matter for the administrative authorities, subject only to judicial review on conventional "Wednesbury" grounds.

61. Quite apart from the legal analysis, that view clearly makes practical sense. It enables an authoritative decision as to the procedure to be made at the outset, without risk of subsequent challenge except on legal grounds. Furthermore, the word "significant" does not lay down a precise legal test. It requires the exercise of judgment, on technical or other planning grounds, and consistency in the exercise of that judgment in different cases. That is a function for which the courts are ill-equipped, but which is well-suited to the familiar role of local planning authorities, under the guidance of the Secretary of State."

The failure to offer both procedural and substantive review represents an outstanding breach of the obligations of the Aarhus Convention and urgently require to be addressed, particularly in the context of lack of independent regulatory oversight of environmental matters in Northern Ireland.

Protecting Environmental defenders

UK Government defines a Strategic Lawsuits Against Public Participation (SLAPP) as a 'legal action typically brought by corporations or individuals with the intention of harassing, intimidating and financially or psychologically exhausting opponents via improper use of the legal system'. SLAPP suits pose a significant threat to environmental defenders, as they are often used to silence or intimidate individuals and organisations who speak out against environmentally harmful activities. These are a significant problem in the UK and Northern Ireland.[29] Legislative action is needed to protect environmental litigants in Northern Ireland. These suits are usually baseless civil claims brought by corporations or government entities against individuals or groups who publicly express concerns about activities that affect the environment.

Consideration should be given to developing Anti-SLAPP legislation. This can provide a legal mechanism for dismissing frivolous lawsuits that are intended to stifle public debate. Such legislation typically includes provisions for:

[29] Report of the UN Special Rapporteur on Environmental Defenders Michel Forst on the UK (2024) https://unece.org/sites/default/files/2024-01/Aarhus_SR_Env_Defenders_statement_following_visit_to_UK_10-12_Jan_2024.pdf .2025 Addressing strategic lawsuits against public participation (SLAPPs): a critical interrogation of legislative, and judicial responses https://www.tandfonline.com/doi/full/10.1080/17577632.2024.2443096#abstract ; House of Commons Research Briefing (2022) Strategic Lawsuits Against Public Participation available at https://researchbriefings.files.parliament.uk/documents/CBP-9962/CBP-9962.pdf

- **Expedited Dismissal:** Providing for expedited review of SLAPP suits to quickly dismiss meritless claims.
- **Cost Shifting:** Shifting the costs of litigation to the plaintiff in cases where the lawsuit is deemed to be a SLAPP suit.
- **Damages and Penalties:** Awarding damages and penalties to the defendant in SLAPP suits to compensate them for the harm caused by the lawsuit.