

**The Influence of Aarhus on Domestic and
EU Law - Access to justice:**

A chronology

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<u>DATE</u>	<u>EVENT</u>
25 June 1998	<p>The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“the Aarhus Convention”) adopted. Article 9 deals with “Access to Justice”:</p> <p>“1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.</p> <p>In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.</p> <p>2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned</p> <p>(a) Having a sufficient interest or, alternatively,</p> <p>(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.</p> <p>What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.</p> <p>The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse</p>

	<p>to judicial review procedures, where such a requirement exists under national law.</p> <p>3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.</p> <p>4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.</p> <p>5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”</p> <p>Signed by UK and EU.</p>
30 October 2001	The Aarhus Convention enters into force.
26 May 2003	<p>Date of Directive 2003/35/EC of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (“the PP Directive”).</p> <p>This inserts into what were then Directive 85/337/EEC (“the EIA Directive”) and Directive 96/61/EC (“the IPPC Directive”) Articles 10a¹</p>

¹ Article 10a

“Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

	and 15a ² respectively which transpose Articles 9(2)(3) and (4) of the Aarhus Convention. The recitals say that the PP Directive aims to align EU law in certain regards with the Aarhus Convention.
2003	<p>COM 2003/0624 Commission Proposal for a Directive on access to justice in environmental matters:</p> <p>“1. General considerations</p> <p>This proposal for a directive on access to justice in environmental matters covers a double objective. Firstly, it will contribute to the implementation of the UN/ECE Convention on Access to information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter named Aarhus Convention). Secondly, it will fulfil some shortcomings in controlling the application of environmental law.</p> <p>The Aarhus Convention, signed by the European Community and its Member States in 25 June 1998, consists of three pillars. The first pillar grants the public the right of access to environmental information. The second grants the right to take part in decision-making processes. Finally, the third pillar grants the public access to justice, i.e. the right to recourse to administrative or judicial procedures to dispute acts and omissions of private persons and public authorities violating the provisions of environmental law. Contributing to the implementation of the Aarhus Convention, two directives have been adopted: Directive 2003/4/EC of the</p>

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.”

² Article 15a

“Access to justice

Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

- (a) having a sufficient interest, or alternatively,
- (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(14) shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.”

	<p>European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC ...</p> <p>3.1. Objectives of the action proposed in relation to the obligations of the Community</p> <p>By signing the Aarhus Convention, the Community demonstrated its commitment to improving the effectiveness of its environmental policy primarily increasing public awareness and participation in the decision making process. As a result of the signature and in order to ratify the Convention, the Community is obliged to align its legislation to the requirements of that Convention. In line with this, the ratification of the Aarhus Convention is a political priority for the Commission.</p> <p>The obligations imposed on the European Community by the signature of the Aarhus Convention justify by themselves a legally binding instrument on the issue "access to justice in environmental matters". The Community will only be able to fulfil these obligations if it is able to ensure that citizens and non-governmental organisations have the required access to justice as far as the Community law is concerned. To be able to grant these rights in a uniform way throughout the European Union, the Community has to set out a common minimum framework that applies to all Member States.</p> <p>Furthermore, under Article 2 of the EC Treaty, a Community task is the promotion of a high level of environmental protection and quality improvement. According to Article 175(1) of the EC Treaty, the European Community is competent to act as is necessary to ensure the achievement of the objectives of Article 174 of the EC Treaty. Thus, the Community has developed a considerable <i>acquis</i> in the environmental field. It is also the Community task to create the conditions to ensure that this <i>acquis</i> is being applied, and hence to enact the necessary procedural provisions.</p> <p>This proposed directive aims at a better enforcement of environmental law in order to fulfil the existing shortcomings. Better access to justice in environmental matters for representative groups advocating environmental protection will have numerous positive effects, the most significant being a general improvement of the practical application of environmental law. In practice, access to justice is likely to be sought only as a last resort, hence contributing to the enforcement of environmental law. Given that, environmental law will have its desired effects only if its enforcement is guaranteed throughout the whole Union, it is absolutely crucial to ensure that the observance of environmental law can be reviewed in court ..."</p> <p>Not pursued.</p>
15 October 2004	First mention of Article 9 of the Aarhus Convention in domestic jurisprudence in an addendum to the judgment of the Court of Appeal in

	<i>R (Burkett) v Hammersmith and Fulham LBC</i> [2005] C.P. Rep. 11 ³ .
February 2005	The UK and the EC ratify the Aarhus Convention
1 March 2005	Judgment of the Court of Appeal in <i>R (Corner House Research) v. Secretary of State for Trade and Industry</i> [2005] 1 WLR 2600 – beginning of the modern law on PCOs.
December 2005	WWF-UK (later to become one of the constituent bodies of CAJE) lodged a formal complaint with the European Commission regarding the UK's failure to comply with the Aarhus Convention so far as it is given effect by the PP Directive.
October 2007	Notice by the Commission to the UK Government relating to alleged failure to comply with its obligations under Arts. 3(7) and 4(4) of the PP Directive. The notice relates to costs in environmental cases and the requirement for a cross-undertaking in damages for an interim injunction in such cases.
15 November 2007	Court of Appeal in <i>R (Davey) v Aylesbury Vale District Council</i> [2008] 1 W.L.R. 878 laying down principles relevant to costs at the permission stage in judicial review cites Article 9 of the Aarhus Convention.
April 2008	In a letter to CAJE the Commission expressed their particular concern at “the failure by the United Kingdom to provide details showing that review procedures provided for under Articles 3(7) and 4(4) of the Directive are ‘fair, equitable, timely and <i>not prohibitively expensive</i> ” (emphasis in original).
May 2008	<i>Ensuring access to environmental justice in England and Wales - Report of the Working Group on Access to Environmental Justice</i> (“the Sullivan Report”) concludes that the current principles concerning costs and the potential

³ “75. A recent study of the environmental justice system (“Environmental Justice: a report by the Environmental Justice Project”, sponsored by the Environmental Law Foundation and others) recorded the concern of many respondents that the current costs regime “precludes compliance with the Aarhus Convention”. It also reported, in the context of public civil law, the view of practitioners that the very limited profit yielded by environmental cases has led to little interest in the subject by lawyers “save for a few concerned and interested individuals”. It made a number of recommendations, including changes to the costs rules, and the formation of a new environmental court or tribunal.

76. if the figures revealed by this case were in any sense typical of the costs reasonably incurred in litigating such cases up to the highest level, very serious questions would be raised as to the possibility of ever living up to the Aarhus ideals within our present legal system. ...

77. Equally disturbing, perhaps, is the fact that this large expenditure on Mrs Burkett’s behalf has not, as far as we know, yielded any practical benefit to her or her neighbours.

...

80. We would strongly welcome a broader study of this difficult issue, with the support of the relevant government departments, the professions and the Legal Services Commission. However, it is important that such a study should be conducted in the real world, and should look at the issue not only from the point of view of the lawyers involved, but also taking account of the likely practical benefits to their clients and the public. It may be thought desirable to include in such a study certain issues that relate to a quite different contemporary concern (which did not arise on the present appeal), namely that an unprotected claimant in such a case, if unsuccessful in a public interest challenge, may have to pay very heavy legal costs to the successful defendant, and that this may be a potent factor in deterring litigation directed towards protecting the environment from harm.”

	<p>exposure to costs in judicial review proceedings in England and Wales inhibit compliance with the requirements of Aarhus.</p> <p>Recommends that a bespoke approach to PCOs be adopted in environmental cases to which Aarhus applies. For a case falling within the terms of Aarhus and where a PCO is sought, the overarching requirement must be for a PCO that secures compliance with Aarhus. Conditions relating to the requirement of general public importance and no private interest that might still be applicable to PCOs in other types of cases but which are inconsistent with Aarhus would not apply.</p> <p>“Unless more is done, and the Court's approach to costs is altered so as to recognise that there is a public interest in securing compliance with environmental law, it will only be a matter of time before the United Kingdom is taken to task for failing to live up to its obligations under Aarhus.”</p>
1 July 2008	In <i>R (Compton) v Wiltshire Primary Care Trust</i> [2009] 1 W.L.R. 1436 Court of Appeal revisit <i>Corner House</i> criteria in a non-environmental case but in so doing cite the Sullivan Report and the Aarhus Convention: see paras. 19 and 20 ⁴ .
4 November 2008	Judgment of the Court of Appeal in <i>R. (Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp</i> [2009] C.P. Rep. 8: see paras. 16 – 17 and 23 citing Aarhus and the Sullivan Report.
2 March 2009	Judgment of the Court of Appeal in <i>Morgan and Baker v Hinton Organics (Wessex) Ltd</i> [2009] C.P. Rep. 26:

⁴ The Court said:

“19 We were also shown a report, *Access to Justice in Environmental Cases*, from a working group on access to environmental justice (chaired by Sullivan J) published as recently as 9 May 2008. The main concern of that report was with the question whether the current approach of the courts in relation to costs was compliant with the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (25 June 1998), concerned with access to justice in environmental matters, and its conclusion is that they are not. In appendix 3 of the report what is termed the “exceptionality test” is addressed in these terms, at para 2:

“In [the *Corner House* case], the Court of Appeal accepted that PCOs should only be granted in ‘exceptional’ cases. But it now seems this ‘exceptionality’ test is being applied so as to set too high a threshold for deciding (for example) ‘general public importance’, thus overly restricting the availability of PCOs in environmental cases. For example, in a recent case [*Bullmore's* case], the implicit approach taken in the High Court and confirmed in the Court of Appeal was that there really should only be a handful of PCO cases in total every year. Such an approach if generally adopted would ensure that the PCO jurisdiction made no significant contribution to remedying the access to justice deficit it was intended to deal with, including in the environmental field. Unless the exceptionality criterion is eased, PCOs cannot be used in any significant way to assist compliance with [the Aarhus Convention].”

20 Mr Havers stresses that this report is concerned with environmental issues and that is obviously right, but the thrust of appendix 3 is to suggest the courts should generally consider their approach to PCOs so that there will be compliance with the Aarhus Convention obligation, and it would seem less than satisfactory to carve out different rules where environmental issues are involved as compared with other serious issues.”

	<p>“47 It may be helpful at this point to draw together some of the threads of the discussion, without attempting definitive conclusions:</p> <p>i) The requirement of the convention that costs should not be “prohibitively expensive” should be taken as applying to the total potential liability of claimants, including the threat of adverse costs orders.</p> <p>ii) Certain EU Directives (not applicable in this case) have incorporated Aarhus principles, and thus given them direct effect in domestic law. In those cases, in the light of the Advocate-General's opinion in the Irish cases, the court's discretion may not be regarded as adequate implementation of the rule against prohibitive costs. Some more specific modification of the rules may need to be considered.</p> <p>iii) With that possible exception, the rules of the CPR relating to the award of costs remain effective, including the ordinary “loser pays” rule and the principles governing the court's discretion to depart from it. The principles of the convention are at most a matter to which the court may have regard in exercising its discretion.</p> <p>iv) This court has not encouraged the development of separate principles for “environmental” cases (whether defined by reference to the convention or otherwise). In particular the principles governing the grant of Protective Costs Orders apply alike to environmental and other public interest cases. The <i>Corner House</i> statement of those principles must now be regarded as settled as far as this court is concerned, but to be applied “flexibly”. Further development or refinement is a matter for legislation or the Rules Committee.</p> <p>v) The Jackson review provides an opportunity for considering the Aarhus principles in the context of the system for costs as a whole. Modifications of the present rules in the light of that report are likely to be matters for Parliament or the Civil Procedure Rules Committee. Even if we were otherwise attracted by Mr Wolfe's invitation (on behalf of CAJE) to provide guidelines on the operation of the Aarhus Convention, this would not be the right time to do so.</p> <p>vi) Apart from the issues of costs, the convention requires remedies to be “adequate and effective” and “fair, equitable, timely”. The variety and lack of coherence of jurisdictional routes currently available to potential litigants may arguably be seen as additional obstacles in the way of achieving these objectives.”</p>
<p>May 2009</p>	<p>Jackson LJ publishes <i>Review of Civil Litigation Costs: Preliminary Report</i>. See chapters 35 and 36 which refer at length to Aarhus.</p> <p>“As our costs rules now stand, on one view England and Wales are not complying with the provisions of the Aarhus Convention, to which the UK has voluntarily signed up.”</p>
<p>16 July 2009</p>	<p>Judgment of CJEU in Case C-427/07 <i>Commission v Ireland</i> [2009] E.C.R. I-6277 holding that compliance with the “not prohibitively expensive</p>

	<p>requirement” under the PP Directive cannot be achieved by an after the event discretion not to award costs⁵. The CJEU said:</p> <p>“92. As regards ... the costs of proceedings, it is clear from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, that the procedures established in the context of those provisions must not be prohibitively expensive. That covers only the costs arising from participation in such procedures. Such a condition does not prevent the courts from making an order for costs provided that the amount of those costs complies with that requirement.</p> <p>93. Although it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts.</p> <p>94. That mere practice which cannot, by definition, be certain, in the light of the requirements laid down by the settled case-law of the Court, cited in paragraphs 54 and 55 of this judgment, cannot be regarded as valid implementation of the obligations arising from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35.”</p> <p>In <i>Ireland</i> the Commission argued that criterion of “substantial interest” required for seeking judicial review was also submitted to be stricter than that of “sufficient interest” in the PP Directive. At para. 82 the CJEU stated:</p> <p>“... Member States must ensure that, in accordance with the relevant national legal system, members of the public concerned having a sufficient interest, or alternatively, maintaining the impairment of a right, where the administrative procedural law of a Member State requires this as a precondition, have access to a review procedure under the conditions specified in those provisions, and must determine what constitutes a sufficient interest and impairment of a right consistently with the objective</p>
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⁵ In *Commission v Ireland*, the CJEU concluded:

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	<p>of giving the public concerned wide access to justice.”</p> <p>At para. 83, the CJEU noted that Ireland had adopted provisions under which the right of access to justice in this area “depends directly” on the applicants’ interest. At para. 84, the Court stated:</p> <p>“... there is no need to ascertain whether the criterion of substantial interest as applied and interpreted by the Irish courts corresponds to the sufficient interest referred to in Directive 2003/35 [which inserted article 10a into Directive 85/337] as that would lead to calling into question the quality of the transposition having regard, in particular, to the competence of the Member States recognised by that directive to determine what constitutes a sufficient interest consistently with the objective which that directive pursues.”</p> <p>Under Irish law, the applicant must prove a peculiar and personal interest of significant weight which is affected by or connected with the development in question (<i>Harding v Cork County Council</i> [2008] IECS 27). When considering that test, Kokott A.G. stated:</p> <p>“66. Under Directive 2003/35, that is to say under the first sentence of the third paragraph of art.10a of the EIA Directive and the first sentence of the third paragraph of art.15a of Directive 96/61, the Member States are to determine what constitutes a sufficient interest and impairment of a right. This is admittedly to be done consistently with the objective of giving the public concerned wide access to justice. However, an even more restrictive access rule is also possible, namely the requirement to maintain the impairment of a right. The directive thus leaves it to the Member States to define “sufficient interest”, without laying down any mandatory minimum standard.</p> <p>...</p> <p>69. However, in order to determine what constitutes sufficient interest to bring an action, a balance must necessarily be struck. Effective enforcement of the law militates in favour of wide access to the courts. On the other hand, it is possible that many court actions are unnecessary because the law has not been infringed. Unnecessary actions not only burden the courts, but also in some cases adversely affect projects, whose implementation can be delayed. Factors such as an increasing amount of legislation or a growing litigiousness of citizens, but also a change in environmental conditions, can affect the outcome of that balancing exercise. Accordingly, it cannot be automatically inferred from more generous access to the courts that was previously available that a more restrictive approach would be incompatible with the objective of wide access.”</p> <p>The CJEU found Irish law to be compatible with the PP Directive on the issue of standing.</p>
15 October 2009	<p>Decision of CJEU in Case C-263/08 <i>Djurgården-Lilla Vartans Miljöskyddsforening v Stockholms Kommun genom dess Marknämnd</i> [2009] E.C.R. I-9967 (“the Stockholm case”). The Municipality of Stockholm concluded a contract with a private company to construct a tunnel through the hills in Northern Djurgården to house electricity cable. The Environmental Chamber of the District Court of Stockholm</p>

(miljödomstolen vid Stockholms tingsrätt) granted development consent to carry out the works. The Djurgården environmental association (Djurgården-Lilla Värtans Miljöskyddsförening) sought to appeal against that decision, but the action was held to be inadmissible, on the basis that it did not fulfil the condition set down in the relevant national law, which required an environmental association to have 2,000 members to be entitled to appeal. The Djurgården environmental association appealed and a reference was made to the CJEU, asking inter alia, (i) whether Art. 10a of the EIA Directive implied that members of the public concerned were to have access to a review procedure to challenge a granting of development consent even where they had had an opportunity to participate in the decision-making procedure; and (ii) whether Member States were permitted, under the Directive, to allow small local environmental associations to participate in the decision-making procedure but to have no right of access to a review procedure to challenge the decision subsequently taken.

The CJEU held that "members of the public concerned, within the meaning of art.1(2) and 10a of Directive 85/337 , must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views" (para. 39) and that the EIA Directive "precludes a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive solely to environmental protection associations which have at least 2,000 members" (para. 52). The CJEU said:

"44 As regards non-governmental organisations which promote environmental protection, art.1(2) of Directive 85/337 , read in conjunction with art.10a thereof, requires that those organisations "meeting any requirements under national law" are to be regarded either as having "sufficient interest" or as having a right which is capable of being impaired by projects falling within the scope of that directive.

45 While it is true that art.10a of Directive 85/337 , by its reference to art.1(2) thereof, leaves to national legislatures the task of determining the conditions which may be required in order for a non-governmental organisation which promotes environmental protection to have a right of appeal under the conditions set out above, the national rules thus established must, first, ensure "wide access to justice" and, secondly, render effective the provisions of Directive 85/337 on judicial remedies. Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts.

46 From that point of view, a national law may require that such an association, which intends to challenge a project covered by Directive 85/337 through legal proceedings, has as its object the protection of nature and the environment.

47 Furthermore, it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, the number of

	<p>members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope.</p> <p>48 In that connection, it must be stated that, although Directive 85/337 provides that members of the public concerned who have a sufficient interest in challenging projects or have rights which may be impaired by projects are to have the right to challenge the decision which authorises it, that directive in no way permits access to review procedures to be limited on the ground that the persons concerned have already been able to express their views in the participatory phase of the decision-making procedure established by art.6(4) thereof.</p> <p>49 Thus, the fact relied on by the Kingdom of Sweden, that the national rules offer extensive opportunities to participate at an early stage in the procedure in drawing up the decision relating to a project is no justification for the fact that judicial remedies against the decision adopted at the end of that procedure are available only under very restrictive conditions.</p> <p>50 Furthermore, Directive 85/337 does not exclusively concern projects on a regional or national scale, but also projects more limited in size which locally based associations are better placed to deal with. As the Advocate General notes, in point 78 of her Opinion, the rule of the Swedish legislation at issue is such as to deprive local associations of any judicial remedy.</p> <p>51 The Swedish Government, which acknowledges that at present only two associations have at least 2,000 members and thereby satisfy the condition laid down in para.13 of Ch.16 of the Environment Act, has in fact submitted that local associations could contact one of those two associations and ask them to bring an appeal. However, that possibility in itself is not capable of satisfying the requirements of Directive 85/337 as, first, the associations entitled to bring an appeal might not have the same interest in projects of limited size and, secondly, they would be likely to receive numerous requests of that kind which would have to be dealt with selectively on the basis of criteria which would not be subject to review. Finally, such a system would give rise, by its very nature, to a filtering of appeals directly contrary to the spirit of the directive which, as stated in para.33 of this judgment, is intended to implement the Aarhus Convention.”</p>
<p>6 January 2010</p>	<p>Decision in <i>Forbes v Aberdeenshire Council</i> Court of Session (Outer House), [2010] CSOH 1; [2010] Env. L.R. 36</p> <p>“11 Although, for the purposes of domestic law, the Aarhus Convention has only the status of an international treaty, the provisions of which have not yet been formally incorporated into national law, its provisions are not irrelevant. They may be relied upon before and indirectly enforced by, inter alia , this court which should have regard to them where an issue of access to justice in relation to an environmental matter arises. In the course of his submissions Mr O'Neill, referred to <i>Morgan v Hinton Organics (Wessex) Limited</i> 2009 Env LR 30 CA per Carnwath L J at para 19-49 and <i>R v Lyons</i>, 2003 1 AC 976 . He also referred to T Petitioner 1997 SLT 724 per Lord Hope at 733-4. Mr O'Neill relied on these authorities for a submission to the effect that the fact of</p>

	<p>the Aarhus Convention being an international treaty to which not only the UK but the EU are signatories, it should affect the interpretation of ambiguous statutory provisions and the interpretation of the common law so as to arrive at a result which does not place the United Kingdom in breach of what has been agreed to internationally. I accept that submission.”</p>
14 January 2010	<p>Review of Civil Litigation Costs: Final Report (“the Jackson Report”) published. Recommends “qualified one way costs shifting” in all judicial review cases.</p> <p>Recommends a rule in <u>all</u> judicial reviews (not just environmental) that costs ordered against the claimant shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including the financial resources of all the parties to the proceedings and their conduct in connection with the dispute to which the proceedings relate.</p> <p>“Qualified one way costs shifting would ensure compliance with the Aarhus Convention in relation to environmental judicial review claims. Also, judicial review proceedings have the benefit of a “permission” stage, which filters out unmeritorious cases (thus reducing the need for two way costs shifting as a deterrent)”.</p> <p>See chapters 30 and 31.</p>
16 April 2010	<p><i>R (Badger Trust) v The Welsh Ministers</i> [2010] EWHC 768 (Admin) per Lloyd Jones J.:</p> <p>“ ... in <i>Morgan v Hinton Organics (Wessex) Limited</i> [2009] EWCA Civ. 107 Carnwath L.J. delivering the judgment of the Court of Appeal observed with regard to the Aarhus Convention : “For the purposes of domestic law, the Convention has the status of an international treaty, not directly incorporated. Thus its provisions cannot be directly applied by domestic courts, but may be taken into account in resolving ambiguities in legislation intended to give it effect...” (at para 22).</p> <p>119 Contrary to the submission of Mr. Corner on behalf of the Defendants, I do not consider that this principle of interpretation is limited to situations in which the legislation under consideration is intended to implement a treaty into domestic law. Nevertheless, this principle does have certain limitations.”</p>
24 May 2010	<p>Decision of Court of Appeal in <i>Ashton v Secretary of State for Communities and Local Government and Coin Street Community Builders Ltd</i> [2011] 1 P. & C.R. 5</p> <p>The appellant was a local resident whose property was affected by the development. He was a member of the Waterloo Community Development Group (“WCDG”). He did not make any representations to the local authority or at the public inquiry. He stated that he had asked WCDG to make representations on his behalf. The Court of Appeal rejected his s. 288 challenge on the merits but went on to consider whether he would in any event have been a “person aggrieved”. Pill LJ in his</p>

judgment considered Article 10a of the EIA Directive, the Stockholm case and *Commission v Ireland*. He concluded:

“53 The following principles may be extracted from the authorities and applied when considering whether a person is aggrieved within the meaning of s.288 of the 1990 Act:

1. Wide access to the courts is required under s.288 (art.10a , *N’Jie*).

2. Normally, participation in the planning process which led to the decision sought to be challenged is required. What is sufficient participation will depend on the opportunities available and the steps taken (*Eco-Energy , Lardner*).

3. There may be situations in which failure to participate is not a bar (*Cumming* , cited in *Lardner*).

4. A further factor to be considered is the nature and weight of the person’s substantive interest and the extent to which it is prejudiced (*N’Jie* and *Lardner*). The sufficiency of the interest must be considered (art.10a).

5. This factor is to be assessed objectively. There is a difference between feeling aggrieved and being aggrieved (*Lardner*).

6. What might otherwise be a sufficient interest may not be sufficient if acquired for the purpose of establishing a status under s.288 (*Morbaine*).

7. The participation factor and the interest factor may be interrelated in that it may not be possible to assess the extent of the person’s interest if he has not participated in the planning procedures (*Lardner*).

8. While recognising the need for wide access to the courts, weight may be given, when assessing the prior participation required, and the interests relied on, to the public interest in the implementation of projects and the delay involved in judicial proceedings (A.G. Kokott in *Ireland*).

54 I do not consider that the appellant had standing under s.288 to bring the present claim. His participation in the planning process was insufficient in the circumstances to acquire standing. He was not an objector to the proposal in any formal sense and did not make representations, either oral or written, at the properly constituted Public Inquiry. Mere attendance at parts of the hearing and membership of WCDG, which has not brought proceedings in this court, were insufficient. I agree with the judge’s conclusion set out at [32] above.

55 Moreover, the absence of representations before or at the Inquiry about the loss of amenity at his property, either personally or by WCDG, deprived CSCB and the local planning authority of the opportunity to test the extent of the alleged loss and to call evidence in response. That being so, the Inspector, the fact-finding tribunal, was not in a position to assess the extent of the loss and whether it amounts to a sufficient interest. This Court cannot make good that deficiency.

56 I make no finding as to whether the appellant would also fail under the interest limb of the test, though it appears to me likely that he would do so. A major project, approved following proper public consultation and a Public Inquiry, should not readily be challengeable on this or other grounds on the basis of a grievance about amenity such as the appellant’s appears to be. What is a sufficient interest will always be a question of fact and degree.

	<p>That reinforces the need to place the facts relied on before the decision maker during the planning process.”</p>
<p>29 July 2010</p>	<p>Decision of Court of Appeal in <i>R (Garner) v. Elmbridge Borough Council</i> [2011] 1 Costs L.R. 48, judgment not handed down until 8 September 2010.</p> <p>In <i>Garner</i> the Court of Appeal granted a PCO in connection with a judicial review challenge to the grant of planning permission for the redevelopment of Hampton Court Station and adjoining land. The challenged decision was one to which the EIA Directive applied. The claimant applied for a PCO, submitting a witness statement which stated that if a PCO was not granted he would have to withdraw from the proceedings. Nicol J refused the application on grounds including, inter alia, that there was insufficient evidence regarding the claimant’s financial resources for the Court to tell whether the proceedings would be “prohibitively expensive” (see para. 18 of the Court of Appeal’s judgment). Allowing the claimant’s appeal, Sullivan LJ (with whom Lloyd and Richards LJ agreed) held:</p> <p style="padding-left: 40px;">“42. This raises an important issue of principle. Should the question whether the procedure is or is not prohibitively expensive be decided on an “objective” basis by reference to the ability of an “ordinary” member of the public to meet the potential liability for costs, or should it be decided on a “subjective” basis by reference to the means of the particular claimant, or upon some combination of the two bases?</p> <p style="padding-left: 40px;">...</p> <p style="padding-left: 40px;">46. Whether or not the proper approach to the “not prohibitively expensive requirement under Article 10a” should be a wholly objective one, I am satisfied that a purely subjective approach, as was applied by Nicol J, is not consistent with the objectives underlying the directive. Even if it is either permissible or necessary to have some regard to the financial circumstances of the individual claimant, the underlying purpose of the directive to ensure that members of the public concerned having a sufficient interest should have access to a review procedure which is not prohibitively expensive would be frustrated if the court was entitled to consider the matter solely by reference to the means of the claimant who happened to come forward, without having to consider whether the potential costs would be prohibitively expensive for an ordinary member of “the public concerned”.</p> <p style="padding-left: 40px;">47. In the present case there was evidence that without a PCO the liability and costs of an unsuccessful appellant was likely to be prohibitively expensive to anyone of “ordinary” means. Although, in the event, Mr Bartlett did not award costs at the refusal of permission to apply for judicial review stage, the costs claimed by the respondent and the second interested party at that preliminary stage, when the matter was simply being considered on the papers and before there had been any hearing, had reached nearly £15,000.</p> <p style="padding-left: 40px;">48. Following the hearing before Nicol J the respondent applied for, and was awarded, £3,000 costs. It must be remembered that that was a hearing simply to determine whether there should be a PCO. At that hearing the two interested parties did not ask for their costs, but they did not give any undertaking that they would not be claiming their costs at the rolled up hearing which would</p>

	<p>be considering the substantive issue over one and a half days.</p> <p>49. There was no evidence before the judge to suggest that the appellant's solicitor's estimate of a likely costs liability of £60,000 plus VAT if the case was not straightforward was an overestimate. If anything, the sum that was claimed by the respondent and the second interested party for their acknowledgements of service alone suggested that this figure was an underestimate. This was not a straightforward case, as evidenced by the refusal of permission to apply for judicial review, the participation of two interested parties in addition to the appellant and the respondent, the agreement that there should be a rolled up hearing and the fact that that hearing was listed not for one day but for one and a half days. Even though an unsuccessful claimant would not as a general rule be ordered to pay two sets of costs, the possibility that the appellant might have to pay all or part of the costs of one or both of the two interested parties, as well as the costs of the respondent, could not be ruled out. Clearly, the second interested party considered that there was a real prospect that it might be awarded its costs. That, after all, was the reason why it objected to the grant of a PCO. The fact that such an award might not be made as an exercise of judicial discretion was insufficiently certain for the purposes of Article 10a (see <i>Commission v Ireland</i>).</p> <p>50. Against that background, as a matter of common sense, most "ordinary" members of the public, and very many who are much more fortunately placed, would be deterred from proceeding by a potential costs liability, including VAT, that totalled well over double the gross national average wage for a full time employee (slightly less than £25,500 pa). There is a further aspect to the purely subjective approach which may well have the effect of deterring members of the public from challenging the lawfulness of environmental decisions contrary to the underlying purposes of the directive.</p> <p>51. Mr Macaulay said that he was unwilling to undergo a means test in a public forum. Applicants for public funding from the Legal Services Commission have to disclose details of their means to the Legal Services Commission, but they do so in a private process; they do not have to disclose details of their means and personal affairs, for example who has an interest in the house in which they are living, how much it is worth et cetera, to the opposing parties or to the court, in documents which are publicly available and which will be discussed, unless the judge orders otherwise, in an open forum. The possibility that the judge might, as an exercise of judicial discretion, order that the public should be excluded while such details were considered would not provide the requisite degree of assurance that an individual's private financial affairs would not be exposed to public gaze if he dared to challenge an environmental decision.</p> <p>52. The more intrusive the investigation into the means of those who seek PCOs and the more detail that is required of them, the more likely it is that there will be a chilling effect on the willingness of ordinary members of the public (who need the protection that a PCO would afford) to challenge the lawfulness of environmental decisions.</p> <p>53. For these reasons, the judge's approach to the prohibitively expensive issue in this case, while it was wholly consistent with</p>
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	<p>Corner House principles, was not consistent with Article 10a. On the evidence before him, including evidence as to the costs that had already been incurred and the claimant's solicitor's estimates of potential costs, a PCO was necessary if these proceedings were not to be prohibitively expensive."</p> <p>Also in <i>Garner</i> the Court said:</p> <p>"Turning then to the two grounds on which Nicol J refused a PCO, I accept the claimant's submission that in an article 10a case there is no justification for the application of the issues of "general public importance"/"public interest requiring resolution of those issues" in the Corner House conditions. Both the Aarhus Convention and the Directive are based on the premise that it is in the public interest that there should be effective public participation in the decision-making process in significant environmental cases (those cases that are covered by the EIA and IPPC Directives); and an important component of that public participation is that the public should be able to ensure, through an effective review procedure that is not prohibitively expensive, that such important environmental decisions are lawfully taken. In summary, under EU law it is a matter of general public importance that those environmental decisions subject to the Directive are taken in a lawful manner, and, if there is an issue as to that, the general public interest does require that that issue be resolved in an effective review process. The Corner House principles are judge-made law and in accordance with the <i>Marleasing</i> principle (<i>Marleasing SA v La Comercial Internacional de Alimentación SA</i> (Case C-106/89) [1990] ECR I-4135) those judge-made rules for PCOs must be interpreted and applied in such a way as to secure conformity with the Directive."</p>
<p>6 September 2010</p>	<p>Working Group on Access to Environmental Justice publish update report supporting a modified version of the qualified one way costs shifting recommended in the Jackson Report. Propose that CPR Part 44 is amended to include the following provision:</p> <p>"44.X An unsuccessful Claimant in a claim for judicial review shall not be ordered to pay the costs of any other party other than where the Claimant has acted unreasonably in bringing or conducting the proceedings."</p>
<p>16 September 2010</p>	<p>Decision in <i>R (Coedbach Action Team Ltd) v. Secretary of State for Energy and Climate Change</i> [2010] EWHC 2312 (Admin), Wyn Williams J on an application for a PCO by a private limited company which had brought a judicial review challenge to the Secretary of State's grant of consent under s.36 of the Electricity Act 1989 for a biomass fuelled power station. Neither the claimant company nor the local residents who lay behind it adduced any evidence as to their assets or financial position generally, but stated they would have no option but to withdraw from the proceedings if a PCO was not granted (see paras. 18-21 of the judgment). One of the residents described himself as "not fabulously wealthy". Wyn Williams J dismissed the application on two grounds, one of which was that the proceedings would not be "prohibitively expensive" absent a PCO. As to this he held at paras. 36-37:</p>

“36. I have also reached the conclusion, although with much greater hesitation, that these proceedings are not prohibitively expensive. On the basis of *Garner* it is necessary for me to consider whether the potential costs of the litigation would be prohibitively expensive for an ordinary member of "the public concerned". Mr Kimblin did not suggest that the ordinary member of the public concerned was always a single individual. In my judgment it must be that a category of member of the public for these purposes is a limited company. The difficulty is that while one can make a reasonable assessment of the ordinary individual person - by reference, for example, to average wages or property owning status or the like, those objective indicators simply do not exist in the same way in relation to limited companies. My experience suggests that many limited companies would not regard an overall costs bill in the region of £70,000 as prohibitively expensive in relation to litigation about which they felt strongly. If one looks beyond the limited company to its members there must be literally thousands of companies - even private limited companies - in which approximately 25 people have an interest. I would not anticipate that each of those individuals would regard a potential outlay of about £3,000 each as prohibitively expensive in relation to litigation which was of importance to them

37. In *Garner* Sullivan LJ left open whether it was permissible to have regard to the personal circumstances of the particular claimant. He did not determine that issue definitively but, in my judgment, the tenor of what he says tends to support the view that some regard should be paid to the individual circumstances of a claimant. There is nothing in the evidence in this case which persuades me that these proceedings are prohibitively expensive for the Claimant or, in context perhaps more importantly, the individuals who have an interest in the activities of the Claimant.”

Coedbach was a limited company formed by local residents as a response to a proposal to build two biomass power stations in Wales which Coedbach was opposing. There were ongoing appeals in respect of those proposals. Meanwhile the Secretary of State granted consent under the Electricity Act 1989 for a biomass power station in England and directed that planning permission be deemed to be granted under the Town and Country Planning Act 1990 s. 90(2). Coedbach did not object to the applications for consent and played no part in the process until it issued an application for permission to apply for judicial review of that decision out of a concern that the decision might influence the decisions in respect of the Welsh proposals. The issue of standing arose in the context of the PCO application, and Coedbach’s attempt to rely on the Aarhus Convention:

“29 I accept the submissions made on behalf of the defendant and Interested Party that the claimant is not a member of the public concerned and it is not a person having a sufficient interest. The claimant is a limited company whose aims and objects are made clear, unequivocally, in its Memorandum of Association. Its aim is to protect a particular local environment. The claimant played no part in the decision-making process leading to the grant of the consents to the Interested Party. But for the coincidence that the planning appeals with which the claimant is concerned were in

	<p>progress at a time when the defendant's decision was made it is clear, in my judgment, that the claimant would have shown no interest in challenging the lawfulness of the defendant's decision. The claimant readily accepts that its sole purpose in challenging the defendant's decision is to prevent it becoming material to the decisions to be made in the planning appeals in which the claimant is an objector.</p> <p>30 During the course of the hearing there was some debate as to the status and/or relevance of the defendant's decision in the planning appeals. I accept the submission of Mr Maurici that the defendant's decision can be no more than a material consideration. It cannot be said, as was suggested by Mr Kimblin, that part of the reasoning of the defendant in support of his decision constitutes an expression of the defendant's policy which would be binding upon an Inspector appointed by the Welsh Ministers to conduct the planning appeals in *82 which the claimant appears as an objector. Even if the defendant's decision is treated as a material consideration by the Inspector considering the appeals I infer that it will be but one of a host of factors which will be considered. Mr Kimblin did not suggest before me that the acceptance of the defendant's decision as a material consideration would be, in effect, determinative of the planning appeals.</p> <p>31 In any event it must be borne in mind when assessing whether the claimant has a sufficient interest for the purposes of the Directive that if the defendant's decision is treated as a material consideration and if the appeals are allowed the claimant has the ability to challenge those decisions under s 288 Town and Country Planning Act 1990.</p> <p>32 Mr Maurici prays in aid the claimant's ability to challenge any successful appeals under s 288 as a free standing reason why the defendant's decision in these proceedings should not be the subject of judicial review. He may be right. In my judgment, however, the existence of this "alternative remedy" is also relevant, at least in the context of a case such as the present, in assessing whether the claimant is a member of the public concerned having a sufficient interest for the purposes of the Directive. I do not accept that this alternative remedy is illusory. It is illusory only if the claimant so conducts its affairs that it has no funds to mount a challenge under s 288 . That is a matter of choice for the claimant. In my judgment the existence of the right to challenge any decisions in the appellate process which are adverse to the claimant's objectives is a factor which militates against the conclusion that the claimant is a member of the public concerned having a sufficient interest when challenging the defendant's decision.</p> <p>33 I have reached the clear conclusion that the claimant is not a member of the public concerned for the purposes of the Directive. That being so the Directive is not material to my decision upon whether or not to grant a protective costs order.</p> <p>34 I should make two further points in this context for completeness. Mr Kimblin acknowledges that the claimant can bring itself within the Directive only if it establishes that it has a sufficient interest. It cannot, for example, assert that it is maintaining the impairment of a right; further, Mr Kimblin does not suggest that the claimant brings itself within the Directive because it is a nongovernmental organisation falling within the</p>
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	provisions of Article 1(2)."
21 - 24 September 2010	<p>At its twenty ninth meeting the Aarhus Compliance Committee finalised the draft findings in relation to the Port of Tyne complaint, ACCC/C/2008/33 and two other UK complaints.</p> <p><i>Port of Tyne:</i></p> <p>On costs:</p> <p>"129. The Committee considers that the "costs follow the event rule", contained in rule 44.3(2) of the Civil Procedure Rules, is not inherently objectionable under the Convention, although the compatibility of this rule with the Convention depends on the outcome in each specific case and the existence of a clear rule that prevents prohibitively expensive procedures. In this context, the Committee considers whether the effects of "costs follow the event rule" can be softened by legal aid, CFAs and PCOs as well as by the considerable discretionary powers that the courts have in interpreting and applying the relevant law. At this stage, however, at least four potential problems emerge with regard to the legal system of E&W. First, the "general public importance", "no private interest" and "in exceptional circumstances" criteria applied when considering the granting of PCOs. Second, the limiting effects of (i) the costs for a claimant if a PCO is applied for and not granted and (ii) PCOs that cap the costs of both parties. Third, the potential effect of cross-undertakings in damages on the costs incurred by a claimant. Fourth, the fact that in determining the allocation of costs in a given case, the public interest nature of the environmental claims under consideration is not in and of itself given sufficient consideration.</p> <p>130. While the courts in E&W have applied a flexible approach to Corner House criteria when considering the granting of PCOs, including the "general public importance", "no private interest" and "exceptional circumstances" criteria, they have also indicated that, given the ruling in Corner House, there are limits to this flexible approach. The Committee notes the numerous calls by judges suggesting that the Civil Procedure Rules Committee take legislative action in respect of PCOs, also in view of the Convention (see paragraph 102 above). These calls have to date not resulted in amendment of the Civil Procedure Rules so as to ensure that all cases within the scope of article 9 of the Aarhus Convention are accorded the standards set by the Convention. The Convention, amongst other things, requires its Parties to 'provide adequate and effective remedies' which shall be 'fair, equitable [...] and not prohibitively expensive'. The Committee endorses the calls by the judiciary and suggests that the Party concerned amend the Civil Procedure Rules in the light of the standards set by the Convention.</p> <p>131. Within such considerations the Committee finds that the Party concerned should also consider the cost that may be incurred by a claimant in those cases where a PCO is applied for but not granted, as suggested in Appendix 3 to the Sullivan Report.¹⁰² The Committee endorses this recommendation.</p> <p>132. The Committee also notes the limiting effect of reciprocal cost caps ...</p>

134. Moreover, in accordance with its findings in ACCC/C/2008/23 (UK) and ACCC/C/2008/27 (UK), the Committee considers that in legal proceedings within the scope of article 9 of the Convention, the public interest nature of the environmental claims under consideration does not seem to be given sufficient consideration in the apportioning of costs by the courts.

135. The Committee concludes that despite the various measures available to address prohibitive costs, taken together they do not ensure that the costs remain at a level which meets the requirements under the Convention. At this stage, the Committee considers that the considerable discretion of the courts of E&W in deciding the costs, without any clear legally binding direction from the legislature or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty regarding the costs to be faced where claimants are legitimately pursuing environmental concerns that involve the public interest. The Committee also notes the Court of Appeal's judgment in *Morgan v. Hinton Organics*, which held that the principles of the Convention are "at most" a factor which it "may" (not must) take into account, "along with a number of other factors, such as fairness to the defendant". The Committee in this respect notes that 'fairness' in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant.

134. In the light of the above, the Committee concludes that the Party concerned has not adequately implemented its obligation in article 9, paragraph 4, to ensure that the procedures subject to article 9 are not prohibitively expensive. In addition, the Committee finds that the system as a whole is not such as "to remove or reduce financial [...] barriers to access to justice", as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider."

On cross-undertakings:

"Cross-undertakings for damages regarding interim injunctions
69. The communicants contend that courts in England and Wales generally require claimants seeking an interim injunction to protect the relevant environmental interest pending the substantive trial to provide a "cross-undertaking" in damages before an injunction will be granted. The communicants and CAJE submit that the potential requirement to give a cross-undertaking for damages means that injunctive relief may not be available without risking prohibitive expense to claimants as required under article 9, paragraph 4, of the Convention.

70. The Party concerned submits that the manner in which its courts approach the granting of interim relief does not give rise to non-compliance with article 9, paragraph 4, of the Convention. It submits that there are very good reasons why, in general, a crossundertaking in damages is required. It points to the fact that granting interim relief can have severely adverse consequences for individuals and other private parties who have the benefit of the measure under challenge. Moreover, it points out that there is no set rule requiring a cross-undertaking and that its courts have wide discretion to adopt the course which seems most likely to minimize the risk of an unjust result. The courts have jurisdiction

to, and do, grant interim relief despite the absence of a cross-undertaking in damages, having regard to the public importance of the issues raised.

71. The Party concerned also submits that in the typical case of a challenge to a planning permission, the mere bringing of proceedings (even without seeking interim relief) in the majority of cases acts as a stay on the proposed development. This is because if the developer builds in the face of a challenge to his permit, he does so at his own risk of having to later remove it

...

Cross-undertaking as to damages regarding interim injunctions

108. The general rule that the giving of a cross-undertaking for damages by the claimant is a prerequisite for the grant of an interim injunction was noted by the House of Lords in the 1975 decision of *American Cyanamid Co v. Ethicon Ltd.* The House of Lords recognized, however, that when deciding whether to grant an interim injunction in an individual case, there may be special factors that should be taken into account.

109. Courts in England and Wales have granted interim injunctions without a cross-undertaking for damages having been given; there have also been cases in which the injunctive relief was refused due to the fact that the claimant was not in a position to provide a cross-undertaking in damages. Judges enjoy a considerable amount of discretion as to whether a cross-undertaking for damages is required for the grant of an interim injunction.

...

133. A particular issue before the Committee are the costs associated with requests for injunctive relief. Under the law of England and Wales, courts may, and usually do, require claimants to give cross-undertakings in damages. As shown, for example, by the Sullivan Report, this may entail potential liabilities of several thousands, if not several hundreds of thousands of pounds. This leads to the situation where injunctive relief is not pursued, because of the high costs at risk, where the claimant is legitimately pursuing environmental concerns that involve the public interest. Such effects would amount to prohibitively expensive procedures that are not in compliance with article 9, paragraph 4."

On delay rules in judicial review:

"138. The Committee finds that the three-month requirement specified in CPR rule 54.5 (1) is not as such problematic under the Convention, also in comparison with the time limits applicable in other Parties to the Convention. However, the Committee considers that the courts in England and Wales have considerable discretion in reducing the time limits by interpreting the requirement under the same provision that an application for a judicial review be filed "promptly" (see paras. 113-116). This may result in a claim for judicial review not being lodged promptly even if brought within the three-month period. The Committee also considers that the courts in England and Wales, in exercising their judicial discretion, apply various moments at which a time may start to run, depending on the circumstances of the case (see para. 117). The justification for discretion regarding time limits for

judicial review, the Party concerned submits, is constituted by the public interest considerations which generally are at stake in such cases. While the Committee accepts that a balance needs to be assured between the interests at stake, it also considers that this approach entails significant uncertainty for the claimant. The Committee finds that in the interest of fairness and legal certainty it is necessary to (i) set a clear minimum time limit within which a claim should be brought, and (ii) time limits should start to run from the date on which a claimant knew, or ought to have known of the act, or omission, at stake.

139. As was pointed out with regard to the costs of procedures (see para. 134 above), the Party concerned cannot rely on judicial discretion of the courts to ensure that the rules for timing of judicial review applications meet the requirements of article 9, paragraph 4. On the contrary, reliance on such discretion has resulted in inadequate implementation of article 9, paragraph 4. The Committee finds that by failing to establish clear time limits within which claims may be brought and to set a clear and consistent point at which time starts to run, i.e., the date on which a claimant knew, or ought to have known of the act, or omission, at stake, the Party concerned has failed to comply with the requirement in article 9, paragraph 4, that procedures subject to article 9 be fair and equitable.”

On the scope of judicial review:

“123. Article 9, paragraph 2, of the Convention addresses both substantive and procedural legality. Hence, the Party concerned has to ensure that members of the public have access to a review procedure before a court of law and/or another independent body established by law which can review both the substantive and procedural legality of decisions, acts and omissions in appropriate cases.

124. Article 9, paragraph 3, of the Convention, as opposed to article 9, paragraph 2, of the Convention, does not explicitly refer to either substantive or procedural legality. Instead it refers to “acts or omissions [...] which contravene its national law relating to the environment”. Clearly, the issue to be considered in such a review procedure is whether the act or omission in question contravened any provision – be it substantive or procedural – in national law relating to the environment.

125. The Committee finds that the Party concerned allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to article 9, paragraphs 2 and 3, of the Convention, including, inter alia, for material error of fact; error of law; regard to irrelevant considerations and failure to have regard to relevant considerations; jurisdictional error; and on the grounds of *Wednesbury* unreasonableness (see paras. 87–89 above). The Committee, however, is not convinced that the Party concerned, despite the above-mentioned challengeable aspects, meets the standards for review required by the Convention as regards substantive legality. In this context, the Committee notes for example the criticisms by the House of Lords, and the European Court of Human Rights, of the very high threshold for review imposed by the *Wednesbury* test.

	<p>126. The Committee considers that the application of a “proportionality principle” by the courts in England and Wales could provide an adequate standard of review in cases within the scope of the Aarhus Convention. A proportionality test requires a public authority to provide evidence that the act or decision pursued justifies the limitation of the right at stake, is connected to the aim(s) which that act or decision seeks to achieve and that the means used to limit the right at stake are no more than necessary to attain the aim(s) of the act or decision at stake. While a proportionality principle in cases within the scope of the Aarhus Convention may go a long way towards providing for a review of substantive and procedural legality, the Party concerned must make sure that such a principle does not generally or prima facie exclude any issue of substantive legality from a review.</p> <p>127. Given its findings in paragraphs 125 and 126 above, the Committee expresses concern regarding the availability of appropriate judicial or administrative procedures, as required by article 9, paragraphs 2 and 3, of the Convention, in which the substantive legality of decisions, acts or omissions within the scope of the Convention can be subjected to review under the law of England and Wales. However, based on the information before it in the context of the current communication, the Committee does not go so far as to find the Party concerned to be in non-compliance with article 9, paragraphs 2 or 3, of the Convention.”</p> <p>In the Cultra Residents’ Association case (ACCC/C/2008/27) in relation to the expansion of Belfast City Airport, the Aarhus Compliance Committee found that an order for the claimant to pay £39,454 following the dismissal of its claim for judicial review was prohibitively expensive in contrast in the Morgan case (ACCC/2008/23) the Committee held that an adverse costs order of £5,130 was not prohibitively expensive</p>
<p>15 November 2010</p>	<p>MoJ publish for consultation its proposals for the implementation of the Jackson Report.</p>
<p>24 November 2010</p>	<p>Consultation published by MoJ in respect of cross-undertakings in damages in environmental judicial reviews:</p> <p>“Taking these into account, we suggest that the court should, if the application meets the other criteria for granting an interim injunction, grant an interim injunction in judicial review proceedings without a cross-undertaking for damages (or alternatively accept an undertaking to refrain from action from the defendant without a cross-undertaking for damages from the claimant) where:</p> <p>the Environmental Impact Assessment Directive (85/337), as amended by the Public Participation Directive (2003/35), is engaged and,</p> <p>if an injunction were not granted:</p> <p>a final judgment in the matter would be impossible to enforce because the factual basis of the proceedings will have been eroded and bringing the case on quickly for trial would not resolve the problem;</p> <p>significant environmental damage would be caused; and</p> <p>the claimant would probably and reasonably discontinue proceedings or the application for an interim injunction if a cross-</p>

	<p>undertaking in damages was required.”</p> <p>Lord Justice Sullivan’s Working Group have responded to these proposals. Disappointment was expressed that the proposals would only apply to PP Directive cases. The response continued:</p> <p>“We welcome the proposal to dispense with the requirement for a cross-undertaking in damages in certain circumstances, however, we foresee significant problems with the present wording of paragraph 39, including:</p> <p>(a) “A final judgment in the matter would be impossible to enforce because the factual basis of the proceedings will have been eroded and bringing the case on quickly for trial would not resolve the problem” – in our view this sets the bar very high. This would only really catch cases where the damage done would be entirely irreversible (e.g. the outright destruction of a protected area, for example) and not those cases where the damage could (but would be unlikely in practice) to be reversed by the court if the case succeeded. Thus, for example, if the challenge is to a landfill consent then, in theory, waste placed without permission in a landfill during the litigation could later be removed but the court is likely to be reluctant to order that and it is questionable whether it would cross the “impossibility” threshold.</p> <p>(b) “Significant environmental damage would be caused” – the qualification “significant” would need explanation to ensure a consistency of approach; factors to be taken into account would need to include the reversibility of the damage (including, in particular, whether the court or other decision-maker would be likely to require its reversal in the event that the claim was successful), the scale of the damage, whether it relates to something (an area, a species, etc) that has special protection (e.g. under planning policies or the law).</p> <p>(c) “The claimant would probably and reasonably discontinue proceedings or the application for an interim injunction if a cross-undertaking in damages was required” – the issue here is how will the court decide whether a claimant is acting reasonably? Unless, as seems unlikely, the court would simply accept the claimant's statement to that effect, it is inevitable that judges will [be] drawn into a detailed means assessment as to what a claimant can afford in each particular case. In our view, this could lead to significant uncertainty and further unhelpful satellite litigation.</p> <ul style="list-style-type: none"> • To conclude, while we welcome the MoJ’s decision to consult on this issue, we do not believe these proposals address the access to justice deficits in the present judicial system. This is primarily because: (a) they will not apply to all environmental civil claims as required by EU law and the Aarhus Convention; and (b) the requirements set out in paragraph 39 create insufficient certainty to comply with the judgment of the ECJ in Case C-427/07. In our view they could also lead to costly and time-consuming satellite litigation.
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	<ul style="list-style-type: none"> • Our first report recommended that the requirement for a cross-undertaking in damages should be dispensed with in environmental cases where the court is satisfied that an injunction is required to prevent significant environmental damage and to preserve the factual basis of the proceedings (see paragraph 82). In this eventuality, it is incumbent on the court to ensure that the case is heard “promptly”. We continue to support this approach. However, we would stress that in view of the small number of cases in which interim relief is likely to be sought (being, as it is, a sub-section of environmental cases) “promptly” means hearing the case literally within a few weeks.”
<p>15 December 2010</p>	<p>Decision of the Supreme Court in <i>R. (Edwards) v Environment Agency</i> [2011] 1 W.L.R. 79.</p> <p>Mr Edwards sought judicial review of the decision of the first defendant to issue a permit for the operation of cement works in Rugby. The claim was dismissed and he appealed to the Court of Appeal. On the final day of the appeal, however, he withdrew his instructions from his solicitors and counsel. Mrs Pallikaropoulos, who was present in court and had been closely involved in a public campaign against the permit on environmental grounds, was then added to the proceedings, with her liability for costs capped at £2,000. The appeal was dismissed and costs of £2,000 were awarded against her. On receiving leave to appeal to the House of Lords, she applied for a PCO, limiting her liability for costs. She relied on the PP Directive and Aarhus (the case concerned the EIA and IPPC Directives and so was within the scope of the PP Directive). She declined to provide any information about her means. The application was rejected. In so doing the House of Lords observed that they did “not accept that information about the applicant's means, about the identity and means of any who she represents and about the position generally in the absence of any special order, are or should be regarded as immaterial”. Mrs Pallikaropoulos proceeded with the appeal, which was dismissed. She contended that there should be no order as to costs but the House of Lords ordered that she pay the costs of the appeal. Following the transfer of the jurisdiction of the House of Lords to the Supreme Court, the detailed assessment of the defendants' costs fell to be carried out by two costs officers, pursuant to rule 49 of the Supreme Court Rules 2009. On the hearing of preliminary issues, the costs officers held that compliance with the PP Directive was a relevant factor for them to take into account on the detailed assessment of costs in cases to which the PP Directive applied and that, in deciding what costs it was reasonable for the defendants to obtain, they would disallow any costs which they considered to be prohibitively expensive, that was costs which would reasonably prevent an ordinary member of the public from embarking on the proceedings. The defendants applied for a review of that decision, pursuant to rule 53 of the 2009 Rules, and the single justice referred the application to a panel of five justices Lord Hope delivering the judgment of the Panel having quoted paras. 42 and 46 of Sullivan LJ’s judgment in <i>Garner</i> said (emphasis added):</p> <p>“31 The importance that is to be attached to Sullivan LJ's observations in <i>R (Garner) v Elmbridge Borough Council</i> gathers strength when they are viewed in the light of the proposal in para 4.5 of Chapter 30 of the Jackson Review of Civil Litigation Costs</p>

	<p>(December 2009) as to environmental judicial review cases that the costs ordered against the claimant should not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, and the entirely different proposal in para 30 of the Update Report of the Sullivan Working Group (August 2010) that an unsuccessful claimant in a claim for judicial review should not be ordered to pay the costs of any other party other than where the claimant has acted unreasonably in bringing or conducting the proceedings. They have to be viewed too in the light of the conclusion of the Aarhus Convention Compliance Committee which was communicated by letter dated 18 October 2010 that, in legal proceedings in the UK within the scope of article 9 of the Convention, the public interest nature of the environmental claims under consideration does not seem to have been given sufficient consideration in the apportioning of costs by the courts and that despite the various measures available to address prohibitive costs, taken together they do not ensure that the costs remain at a level which meets the requirements of the Convention: see paras 134-135. It is clear that the test which the court must apply to ensure that the proceedings are not prohibitively expensive remains in a state of uncertainty. The balance seems to lie in favour of the objective approach, but this has yet to be finally determined.”</p> <p>The Supreme Court referred to the CJEU these questions:</p> <p>“1. How should a national court approach the question of awards of costs against a member of the public who is an unsuccessful claimant in an environmental claim, having regard to the requirements of Article 9(4) of the Aarhus Convention, as implemented by Article 10a of the EIA Directive and Article 15a of the IPPC Directive?</p> <p>2. Should the question whether the cost of the litigation is or is not ‘prohibitively expensive’ within the meaning of Article 9(4) of the Aarhus Convention as implemented by the directives be decided on an objective basis (by reference, for example, to the ability of an ‘ordinary’ member of the public to meet the potential liability for costs), or should it be decided on a subjective basis (by reference to the means of the particular claimant) or upon some combination of these two bases?</p> <p>3. Is this entirely a matter for the national law of the Member State subject only to achieving the result laid down by the directives, namely that the proceedings in question are not ‘prohibitively expensive’?</p> <p>4. In considering whether proceedings are, or are not, ‘prohibitively expensive’, is it relevant that the claimant has not in fact been deterred from bringing or continuing with the proceedings?</p> <p>5. Is a different approach to these issues permissible at the stage of (i) an appeal or (ii) a second appeal from that which requires to be taken at first instance?”</p>
6 January 2011	<p>The Industrial Emissions Directive (2010/75/EU) comes into force, replacing the IPPC Directive. Article 9 of the Aarhus Convention now given effect by Article 25.</p>

<p>20 January 2011</p>	<p>Lord Stewart in the Outer House of the Court of Session delivered his Opinion in the case of <i>Road Sense v. Scottish Ministers</i> [2011] CSOH 10. He reviewed the provisions of the Aarhus Convention and PP Directive, the Jackson report and the two Sullivan reports (noting the shift in position between the two Sullivan reports), and the <i>Commission v. Ireland</i>, <i>Garner</i> and <i>Edwards</i> cases. The Opinion describes the CJEU in <i>Commission v. Ireland</i> as ruling “that after-the-event modification [of the amount of expenses payable by an unsuccessful party] is not Article 10a compliant for the reason that it does not have the specificity, precision and clarity required to satisfy the need for legal certainty: a directive intended to confer rights on individuals must be implemented in such a way that the persons concerned are enabled to ascertain the full extent of their rights”; and that “A supplementary argument is that uncertainty as to the expenses outcome is in itself a powerful disincentive to participation, a state of affairs which is not consistent with the purposes of the legislation”. In the circumstances, Lord Stewart agreed that the court was bound to make a Protective Expenses Order (equivalent to a PCO). In considering the level at which the order should limit liability, Lord Stewart reviewed the Aarhus Convention Implementation Guide, commenting that it did not appear to suggest that the “expenses follow success” rule is in conflict with Convention Article 9(4) and Article 10a of the EIA Directive. He further noted (paragraph 40) that Article 3(8) of the Aarhus Convention “expressly contemplates that national courts will, acting within the Convention, award “reasonable costs” against claimants”, and that the Advocate General in <i>Commission v. Ireland</i> had also made this point. He took the view that “The qualifier “reasonable” tends to signal that the circumstances of the particular case must be taken into account”, and that “in the terminology of <i>Garner</i>, taking the particular circumstances into account would be classed as a “subjective approach”.” He went on to note (paragraphs 41-42) that the debate was “whether Article 10A permits courts to approach matters on a case-by-case basis by reference to the particular circumstances”; that the Court of Appeal favoured a “quasi-systemic approach ... based on what “the ordinary member of the public” might be able to afford”; and that Article 3(8) was not referred to in <i>Garner</i>. He declined, in the light of Article 3(8) of the Convention in particular, to follow the Court of Appeal in <i>Garner</i> on this issue.</p> <p>The discussion by Lord Stewart in the <i>Road Sense</i> case of the <i>Ireland</i> case (above) is instructive. He said:</p> <p>“14 Scottish courts do have a discretionary power, exercisable after the event, to modify the amount of expenses payable by an unsuccessful party including the power to modify to nil. The European Court of Justice has ruled that after-the-event modification is not Article 10a compliant for the reason that it does not have the specificity, precision and clarity required to satisfy the need for legal certainty: a directive intended to confer rights on individuals must be implemented in such a way that the persons concerned are enabled to ascertain the full extent of their rights [<i>Commission v Ireland</i> C-427/07, 16 Jul 2009, [2010] Env L R 8 at §§ 2, 54, 55, 77-79, 92-94.] A supplementary argument is that uncertainty as to the expenses outcome is in itself a powerful disincentive to participation, a state of affairs which is not consistent with the purposes of the legislation. When the Aarhus Treaty was laid before Parliament for ratification in 2005, the</p>
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	<p>Foreign and Commonwealth Office stated: ‘Changes are required to the Scottish justice system, as a result of the Convention's requirements on access to justice’ [Aarhus Treaty , Miscellaneous No 15 (2000) Cm 4736, Treaty Series No 24 (2005) Cm 6586, revised Explanatory Memorandum (Jan 2005).]</p> <p>15 England & Wales has for some time had a before-the-event Protective Costs Order [PCO] regime for public interest litigation in general by which the risk of an adverse costs order can be limited in advance [The Corner House Principles supra]. The Aarhus Convention Compliance Committee has identified shortcomings in this regime [Findings of Aarhus Convention Compliance Committee, ACCC/C/2008/33, 24 Sep communicated on 18 Oct 2010, §§ 128-136.] In addition, by Letter of Formal Notice to the UK Government in October 2007 the European Commission alleged failure to comply with inter alia Article 3(7) of Directive 2003/35/EC which inserted Article 10a into the EIA Directive 85/337/EEC . On 18 March 2010 the Commission issued a Reasoned Opinion. The process is ongoing and may lead, as in the case of Ireland, to compliance proceedings under Article 226 EC.</p> <p>16 The Aarhus Convention Compliance Committee has taken notice of the recommendations of the Scottish Civil Courts Review [Findings of Aarhus Convention Compliance Committee supra § 15.] The Review addresses Aarhus Convention compliance and makes recommendations about ‘Protective Expenses Orders’ [Scottish Civil Courts Review , Vol 2, ch 12, §§ 61, 70-78.] On 10 May 2010 the Court of Session Rules Council noted that the Commission's Reasoned Opinion had been issued [supra] and resolved that compliance measures should be progressed in early course. An Act of Sederunt in draft form was tabled at the Rules Council Meeting of 11 October 2010. The draft Act of Sederunt would, if given effect to, introduce a new Chapter 23A of the Rules of the Court of Session entitled ‘Protective Expenses Orders in Environmental Cases.’ The new Chapter 23A would apply to public authority decisions which are subject to the Public Participation Directive.</p> <p>17 Given that dealing with the expenses after the event is not an option, that PEOs have been identified as the way forward and that parties are agreed that I can make such an order, I shall make a PEO.”</p>
25 January 2011	<p>Rix L.J. decision in <i>R (Dullingham Parish Council) v East Cambridgeshire District Council</i> [2011] EWCA Civ 204. He said at para. 19 “[i]t is also clear from the most up-to-date decision in <i>Garner</i> that, subject to the necessary exception that has to be made in cases covered by the EIA and IPPC directives, the jurisprudence of this court governing protective costs orders even in environmental cases within the Aarhus Convention is that they have to meet the general conditions applicable to this court’s jurisprudence”</p>
8 March 2011	<p>The CJEU gave its decision in C-240/09 <i>Lesoochránárske Zoskupenie VLK</i>, called the “Brown Bear case” in which it concluded, in relation to Article 9(3) of the Aarhus Convention and questions of standing, that while Article 9(3) did not have direct effect, it was for the national court “to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus</p>

Convention". A Slovakian association which had the objective of protection of the environment, applied to the Slovakian Ministry of the Environment to be a party to administrative proceedings relating to the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas, or the use of chemical substances in such areas. This was rejected and this was challenged in the Courts. In those proceedings the Court made a reference to the CJEU as to the effect of art.9(3) of the Aarhus Convention. The CJEU held that it had jurisdiction to interpret Art. 9(3) of the Convention. In this regard it noted that the PP Directive does not cover fully the implementation of the obligations resulting from Art. 9(3) of the Aarhus Convention and that, consequently, its Member States are responsible for the performance of these obligations. However, it found, it cannot be inferred that the dispute in the main proceedings does not fall within the scope of EU law because a specific issue which has not yet been subject to EU legislation may fall within the scope of EU law if it relates to a field covered in large measure by it. The CJEU held:

"45. It must be held that the provisions of Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals. Since only members of the public who meet the criteria, if any, laid down by national law are entitled to exercise the rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure.

46. However, it must be observed that those provisions, although drafted in broad terms, are intended to ensure effective environmental protection.

47. In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case (see, in particular, Case C-268/06 *Impact* [2008] ECR I2483, paragraphs 44 and 45).

48. On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (*Impact*, paragraph 46 and the case-law cited).

49. Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

50. It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.

	<p>51. Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law (see, to that effect, Case C-432/05 <i>Unibet</i> [2007] ECR I2271, paragraph 44, and Impact, paragraph 54).</p> <p>52. In those circumstances, the answer to the first and second questions referred is that Article 9(3) of the Aarhus Convention does not have direct effect in EU law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.”</p>
6 April 2011	The Commission announces infraction proceedings against the UK in respect of costs in environmental cases and also the requirement for cross-undertakings for interim injunctions ⁶ .
14 April 2011	ACC finds in ACCC/C/2008/32 that CJEU case-law on standing test (“direct and individual concern”) for challenging EU decisions,

⁶ See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/439&format=HTML>

“High costs preventing legal challenges

Under European law, citizens have a right to know about the impact of industrial pollution, and about the potential impact projects may have on the environment, and a right to challenge such decisions. Directive 2003/35/EC on public participation in the drawing up of plans relating to the environment explicitly states that such challenges must not be prohibitively expensive. The Commission is concerned that in the United Kingdom legal proceedings can prove too costly, and that the potential financial consequences of losing such challenges prevents NGOs and individuals from bringing cases against public bodies.

In the United Kingdom, "protective costs orders" can be granted to limit the amount a public authority can recover from a challenger at the end of the case. But the Commission is concerned about the lack of clear rules for granting such orders, and at their discretionary and unpredictable nature, which is not in line with the requirements of the Directive. Although such orders are now granted more frequently than in the past, it is still the norm in UK litigation for the losing party to pay the winning party's costs.

The Commission is also concerned that under UK law applicants for interim measures and injunctions suspending work on projects have to provide a "cross undertaking in damages", promising to pay damages if the injunction turns out to be unfounded. This puts applications for such orders beyond the reach of most applicants, although such orders can be essential to protect sites from environmental damage whilst litigation is ongoing.

In reply to previous letters from the Commission (see IP/10/312), UK authorities had agreed to amend their legislation, and new draft rules have been discussed with the Commission on numerous occasions. But as a year has passed since the reasoned opinion was sent and no legislative provisions are in place, the case is being referred to the Court.”

	instruments etc. too narrow and in breach of Art. 9(2) of the Aarhus Convention.
12 May 2011	<i>R (Evans) v The Lord Chancellor and Secretary of State for Justice</i> [2011] EWHC 1146 (Admin). Discussion of Aarhus in context of amendments to the Legal Services Commission Funding Code introduced on 1 April 2010 pursuant to ss.8 and 9 of the Access to Justice Act 1999. The effect of the amendments was that a public interest challenge by way of judicial review, where the claimant stands to gain no direct benefit for himself or herself, is ineligible for public funding through the Legal Services Commission unless the claim promotes real benefit for the environment. The exception was provided because of the Aarhus Convention.
12 May 2011	<p>Decision of the CJEU in Case C-115/09 <i>Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein -Westfalen eV v Bezirksregierung Arnsberg</i>. In that case Trianel – the intervener in the main proceedings – intended to construct and operate a coal-fired power station in Lünen. The power station was within eight kilometers of five areas designated as special areas of conservation within the meaning of the Habitats Directive. Friends of the Earth initiated proceedings for the annulment of consents granted for the power station relying on alleged infringements of the provisions transposing into German law the Habitats Directive and, in particular, Article 6 thereof. A reference was made to the CJEU. The issues raised were described thus by the CJEU:</p> <p>“35 By its first two questions ... the referring court asks essentially whether Article 10a of Directive 85/337 precludes legislation which does not permit non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of [the EIA Directive] to rely before the courts, in an action contesting a decision authorising projects likely to have ‘significant effects on the environment’ for the purposes of Article 1(1) of Directive [the EIA Directive], on the infringement of a rule which protects only the interests of the general public and not the interests of individuals. The referring court also asks the Court whether Article 10a of [the EIA Directive] precludes such legislation in general or only in so far as it does not permit an organisation of that nature to rely before the courts on particular provisions of environment law, whether of Community or purely national origin.</p> <p>36 It emerges from the order for reference that the question is justified by the fact that the applicable national legislation makes the admissibility of an action such as that brought by the applicant in the main proceedings conditional upon the applicant showing that the administrative decision contested impairs an individual right which, under national law, can be categorised as an individual public-law right.”</p> <p>The CJEU held that:</p> <p>“45 ... although the national legislature is entitled to confine to individual public-law rights the rights whose infringement may be relied on by an individual in legal proceedings contesting one of the decisions, acts or omissions referred to in Article 10a of [the EIA Directive], such a limitation cannot be applied as such to</p>

	<p>environmental protection organisations without disregarding the objectives of the last sentence of the third paragraph of Article 10a of [the EIA Directive].</p> <p>46 If, as is clear from that provision, those organisations must be able to rely on the same rights as individuals, it would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness if such organisations were not also allowed to rely on the impairment of rules of EU environment law solely on the ground that those rules protect the public interest. As the dispute in the main proceedings shows, that very largely deprives those organisations of the possibility of verifying compliance with the rules of that branch of law, which, for the most part, address the public interest and not merely the protection of the interests of individuals as such.</p> <p>47 It follows first that the concept of ‘impairment of a right’ cannot depend on conditions which only other physical or legal persons can fulfil, such as the condition of being a more or less close neighbour of an installation or of suffering in one way or another the effects of the installation’s operation.</p> <p>48 It follows more generally that the last sentence of the third paragraph of Article 10a of [the EIA Directive] must be read as meaning that the ‘rights capable of being impaired’ which the environmental protection organisations are supposed to enjoy must necessarily include the rules of national law implementing EU environment law and the rules of EU environment law having direct effect ...</p> <p>59. ... non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, can derive from the last sentence of the third paragraph of Article 10a of [the EIA Directive] a right to rely before the courts, in an action contesting a decision authorising projects ‘likely to have significant effects on the environment’ for the purposes of Article 1(1) of [the EIA Directive], on the infringement of the rules of national law flowing from Article 6 of the Habitats Directive, even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals, national procedural law does not permit this.”</p>
18 October 2011	<p>CJEU decision in Case C-128/09 <i>Boxus v Region Wallonne</i> [2012] C.E.C. 414; [2012] Env. L.R. 14. Holding that Art.2(2) of the Aarhus Convention, read together with arts 6 and 9, and Art.1(5) of Directive 85/337 meant that neither the Convention nor the Directive applied to projects adopted by a legislative act satisfying the two conditions identified. For other projects—those adopted either by an act which was not legislative in nature or by a legislative act which did not fulfil those conditions. It followed from the terms of Art. 9(2) of the Aarhus Convention and art. 10a of Directive 85/337 that when a project falling within the scope of art.6 of the Aarhus Convention or of Directive 85/337 is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in art.1(5) of that Directive must be amenable to review, under the national procedural rules, by a court of law or an independent and impartial body established by law.</p>
12 January 2012	<p>Ministry of Justice consultation on protective costs in environmental judicial reviews closed on 12 January 2012 and summarised the main proposals as follows:</p>

	<p>(1) The rules are to apply to judicial review cases falling under the Aarhus Convention, including those matters covered by the PPD. The rules are to apply in relation to all claimants in the same way, regardless of whether the claimant in a particular case is a natural or legal person;</p> <p>(2) A PCO will be obtained by making an application. However, the application need not be supported by grounds and evidence unless an order other than the “default order” (see below) is sought;</p> <p>(3) A PCO will only be granted if permission to apply for judicial review is granted;</p> <p>(4) Applications should normally be made at the same time as the application for permission/in the claim form. It will be decided on by the court when it considers whether to grant permission, and will normally be considered on the papers;</p> <p>(5) The PCO will limit the liability of the claimant to pay the defendant’s costs to £5,000 and also limit the liability of the defendant to pay the claimant’s costs to £30,000;</p> <p>(6) By way of exception the defendant may apply for the cap to be removed - i.e. that there should be no costs capping because the claimant is not in need of costs protection -where information on the claimant’s resources is publicly available. Consultees are also asked for their views on the possibility of allowing the cap to be raised as well as removed. An application to remove the cap may only be on the basis that the claimant has such resources available for litigation that access to justice is not in issue and no costs protection is required. This should be supported by such evidence as is publicly available, as the applicant will not be able to require the claimant to disclose his or her means.</p> <p>(7) Costs of the PCO application will not be payable by either party if the PCO is applied for with default terms and is made in those terms (that is to say, there should be no additional costs element for a “default” application and order).</p>
<p>12 January 2012</p>	<p>Court of Appeal decision in <i>R (Young) v Oxford City Council</i> [2012] EWCA Civ 46, where the appellant applied for a PCO in respect of his appeal against the dismissal of his application for judicial review. The appellant was seeking to challenge the grant of planning permission for the redevelopment of the university campus adjoining his home. His argument was that the local planning authority had failed to have regard to certain relevant planning policies and had failed to take into account the effect of noise from the site.</p> <p>The case was one which the Court of Appeal said did not engage “the additional or qualifying principles considered in <i>R (Garner) v Elmbridge Borough Council</i> [2010] EWCA Civ 1006 and in subsequent cases considering <i>Garner</i> do not apply here. Even though this can broadly be termed an environmental case, it does not engage directly effective provisions of EU law bringing in the obligations imposed on states by the Aarhus Convention; and environmental cases are not otherwise subject to materially different principles from the normal <i>Corner House</i> principles.”</p> <p>Applying the <i>Corner House</i> principles, Richards L.J. refused a PCO: first, the issues raised were not of general public importance and nor did the public interest require that they should be resolved on appeal. The real question was simply whether the relevant local planning policies could have been intended to apply to the very particular circumstances of the case. Moreover, the validity of the planning permission was a matter of local community interest rather than one of general public importance.</p>

	<p>Secondly, the appellant had a very real personal interest in the outcome of the case because his primary ground for bringing proceedings related to the impact of noise on houses adjoining the site, including his own. Although that interest was not fatal to his application it was a factor to be taken into account. Thirdly, the appellant was certainly not of insignificant means and on the evidence available it could not be concluded that he was without the funds to meet costs order against him if he were to lose the appeal. Fourthly, Richards L.J. did not accept the appellant's assertion that in the absence of a protective costs order he would have to abandon his appeal. Finally, although the appellant had been granted a protective costs order in the Administrative Court, the reasons for that hinted at an element of pragmatism rather than any acceptance that the issues were one of general public importance.</p>
16 February 2012	<p>CJEU in Case C-182/10 <i>Solvay and others v Region Wallonne</i> [2012] 2 C.M.L.R. 19 holds that the Aarhus Convention Implementation Guide was to be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the Convention. However, the observations in the Guide had no binding force and did not have the normative effect of the provisions of the Aarhus Convention</p>
February 2012	<p>New consolidated EIA Directive in force, Directive 2011/92/EU – Aarhus Article 9 now transposed by Article 11.</p>
30 April 2012	<p><i>R (Halebank Parish Council) v Halton Borough Council</i> (unreported), where HHJ Raynor QC held that the claimant Parish Council should have a PCO, and that it fell within the definition of the “public” for the purposes of the Aarhus Convention.</p>
9 May 2012	<p>Decision of CA in <i>Barker v Hambleton DC</i> [2012] EWCA Civ 610 [2012] C.P. Rep. 36 on time limits for statutory challenges to Development Plan Documents:</p> <p style="padding-left: 40px;">“The substantive provisions upon which the submission on EU law is based originate with the Aarhus Convention on Access to Information, Public Participation in Decision –Making and Access to Justice in Environmental Matters (25 June 1998). Article 9.3 of the Convention obliges state parties to ensure access to justice. Aarhus requires the provision of “adequate and effective remedies” which are “fair, equitable, timely and not prohibitively expensive”. Although the Aarhus Convention is not an instrument of EU law, the United Kingdom is a state party and the Convention has been approved by the EU (Decision 2005/370). Its provisions do not have direct effect but, in cases concerning matters covered by EU law, a national court is required to interpret domestic procedural rules in accordance with the objectives of Article 9 and the doctrine of effective judicial protection of rights conferred by EU law. The present context concerns a matter covered by EU law because of the European origin of some of the requirements which operate on the promulgation of a development plan document such as the one here ...”</p> <p>But finds Aarhus Convention did not assist appellant.</p>

23 August 2012	<p><i>Eaton v Natural England</i> [2012] EWHC 2401 (Admin) where the Court refused permission so that the PCO also had to be refused but said had it arisen he would have refused it for a number of reasons including:</p> <p>“... the level of financial disclosure from Ms Eaton has been unsatisfactory. To begin with she should have filed a full schedule of anticipated costs at the outset. See paragraph 78 of Corner House. Next, it is not clear that BATTLE [the residents group] cannot in fact raise much more than it already has done for costs and with the CFA now in place Ms Eaton should on the face of it have monies available in respect of costs, should she lose. And it is simply not known whether there are other members of BATTLE who can in fact assist with substantially more. See paragraphs 61 and 62 above. She also has a house worth around £500,000 as already noted. Although Ms Eaton says that if the PCO is not made she will have to discontinue, it is difficult for the Court to be sure about that, given the points about her finances made above. I also note that in paragraph 10 of her first WS she raises the alternative prospect of finding a “substitute claimant” (presumably another member of BATTLE). Of course if that happened, and there was otherwise merit in the claim, any issues worth ventilating and any relief obtainable would still be considered by the Court. And on the other side, while RWE is a substantial commercial organisation it is worth noting that NE is not, and has had its own funding from central government very substantially reduced – by some 31%.”</p> <p>The Court also dealt with cross-undertakings:</p> <p>“64 In fact, however, Ms Ring’s key point is that the Court should not require a cross-undertaking as a matter of principle under Aarhus Convention principles. Article 9 provides as follows:</p> <p>“3. In addition ... each Party shall ensure that ... members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.</p> <p>4. In addition ... the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.”</p> <p>65 It is accepted by Ms Ring that these provisions are not of direct effect. But she relies on the fact that they have been incorporated within the 1985 Environmental Assessment Directive by art.10a thereof and as this is an environmental case they are engaged here. I disagree. The EA Directive is concerned with environmental assessments and public participation in the processes connected with them. This is not a case about an alleged breach of that Directive or related domestic provisions concerned with Environmental Impact Assessments. The fact that some of the evidence referred to here arose out of or is contained within RWE’s ES for the purpose of the planning application does not turn this claim into a case governed by EA Directive.</p>

	<p>66 Ms Ring also relies on the decision of the European Court in <i>Lesoochránárske Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky</i> (C-240/09) [2011] 2 C.M.L.R. 43 in which the Court affirmed that art.9(3) did not have direct effect but that in relation to a species protected by the Habitats Directive the national court, in order to ensure effective judicial protection in fields covered by EU environmental law should interpret its national laws in a way which is to the fullest extent possible consistent with art.9(3) 's objectives. The case before it concerned the locus of an environmental organisation to intervene in proceedings to derogate from certain hunting prohibitions. I do not accept that this decision means that the requirement for a cross-undertaking in any case involving the Habitats Directive must be removed.</p> <p>67 I note the recommendation in para. 82 of the Sullivan Report 2008 that the requirement for a cross-undertaking be removed in Aarhus cases where the injunction is required to prevent "significant environmental damage" and "to preserve the factual basis of the proceedings". But first this is not a typical Aarhus case, where for example it is a challenge to planning permission on environmental grounds, secondly, art.10a does not apply, and in any event it cannot be said on the evidence before that between now and a hearing at the end of October, the construction works on site will produce significant environmental damage. Finally, of course, the Sullivan Report deals with recommendations not the current law."</p>
<p>28 August 2012</p>	<p>MoJ publish response to consultation noting that the "majority of respondents both broadly welcome and support the broad thrust of the proposals" but that concerns remained around the detail. It proposes:</p> <p>(1) A fixed recoverable costs regime will apply in all cases where the claimant states in the claim form that the case is an Aarhus case and the reasons why this is so, subject only to the court determining that the case is in fact not an Aarhus case at all. It will not be dependent on permission having been granted;</p> <p>(2) The recoverable costs are proposed to be fixed as follows -</p> <p>(a) the liability of the claimant to pay costs of the defendant will be capped at £5,000 if the claimant is an individual and at £10,000 where the claimant is an organisation; and</p> <p>(b) the liability of the defendant to pay the costs of the claimant will be capped at £35,000.</p> <p>(3) The fixed recoverable costs for both claimant and defendant cannot be challenged, but the fixed costs regime will not apply if the claim is not within the scope of the Aarhus Convention;</p> <p>(4) The rule proposed by Lord Justice Jackson for appeals for cases that have been heard under a fixed costs regime will also apply for appeals in cases brought under the Aarhus costs regime.</p> <p>It was suggested that these proposals were to be put before the Civil Procedure Rule Committee for consideration at the earliest possible opportunity, with the intention that, if possible, the new rules should be included in the body of rule amendments planned for making in December 2012.</p> <p>These proposed changes do not apply to "statutory procedures of various kinds (including some statutory appeal and statutory review procedures" because (it is said) further work is needed to identify whether and if so</p>

	<p>how and to what extent these procedures fall within the scope of the Convention and to identify whether the above approach is the appropriate way forward and, if so, what the impacts might be. For example, it is noted that the permission filter of judicial review is absent in such cases, and they may involve appeals by developers as well as members of the public or NGOs. It also notes that the issues surrounding what application the Convention might have in private law cases are in particular more complex, since (as Lord Justice Jackson noticed in his review) costs protection for one party would potentially have a serious impact on the other party, who might well have very limited resources also. The Government is continuing to look at these issues and proposes to bring forward proposals separately, so as not to delay establishment of the scheme for environmental judicial review.</p>
<p>13 September 2012</p>	<p>CJEU hear oral argument in <i>Edwards</i>.</p>
<p>12 October 2012</p>	<p>SC decision in <i>Walton v Scottish Ministers</i> [2012] UKSC 44; 2012 S.L.T. 1211. Refers to Aarhus Convention and to need to give ACC decisions respect: see paras. 11, 100 and 150. Discussion of “person aggrieved” standing test.</p>
<p>18 October 2012</p>	<p>Advocate-General Kokott’s opinion in <i>Edwards</i>:</p> <p>At [29]-[30] of her opinion, the Advocate General stated:</p> <p>“29. Consequently, it is not only a question of preventing costs which are excessive, that is to say disproportionate to the proceedings, but above all the proceedings may not be so expensive that the costs threaten to prevent them from being conducted. Reasonable but prohibitive costs are a possibility in particular in environmental proceedings relating to large-scale projects, since these may be very burdensome in every respect, for example with regard to the legal, scientific and technical questions raised and the number of parties.</p> <p>30. It is therefore now possible to give a helpful answer to the first and third questions: Under Article 9(4) of the Aarhus Convention, Article 10a of the EIA Directive and Article 15a of the IPPC Directive, it is in principle for the Member States to determine how to avoid the judicial proceedings covered not being conducted on account of their costs. However, those measures must ensure in a sufficiently clear and binding manner that the objectives of the Aarhus Convention are satisfied in each individual case and, at the same time, observe the principles of effectiveness and equivalence and the fundamental rights under EU law.”</p> <p>She also stated:</p> <p>“45. Taking the public interest into account does not, however, rule out the inclusion of any individual interests of claimants. A person who combines extensive individual economic interests with proceedings to enforce environmental law can, as a rule, be expected to bear higher risks in terms of costs than a person who cannot anticipate any economic benefit. The threshold for accepting the existence of prohibitive costs may thus be higher</p>

	<p>where there are individual economic interests. This possibly explains why, in a dispute over odour nuisance between persons who were neighbours, hence a case with a relatively low public interest, the Compliance Committee did not consider a claim of more than GBP 5 000 in respect of part of the costs to be prohibitive.</p> <p>46. Conversely, the presence of individual interests cannot prevent all account being taken of public interests that are also being pursued. For example, the individual interests of a few people affected by an airport project cannot, upon assessment of the permissible costs, justify disregard for the considerable public interest in the case which in any event stems from the fact that the group of those affected is very much wider.</p> <p>47. The prospects of success may also be relevant with regard to the extent of the public interest. A clearly hopeless action is not in the interest of the public, even if it has an interest in the subject-matter of the action in principle.</p> <p>48. As regards the level of permissible costs, it is lastly significant that provisions of the Convention on judicial proceedings are to be interpreted with the aim of ensuring 'wide access to justice'. 'Wide access to justice' is admittedly only expressly mentioned in Article 9(2) of the Convention and the corresponding provisions of the directives in connection with the preconditions for an action relating to a sufficient interest and the impairment of a right. However, Article 9(2) at least makes clear that this is a general objective of the Convention. This principle of interpretation must therefore also apply in determining permissible costs. It would not be compatible with wide access to justice if the considerable risks in terms of cost are, as a rule, liable to prevent proceedings.</p> <p>49. The answer to the second question is therefore that in examining whether costs of proceedings are prohibitive, account must be taken of the objective and subjective circumstances of the case, with the aim of enabling wide access to justice. The insufficient financial capacity of the claimant may not constitute an obstacle to proceedings. It is necessary always, hence including when determining the costs which can be expected of claimants having capacity to pay, to take due account of the public interest in environmental protection in the case at issue."</p>
<p>3 December 2012</p>	<p><i>A5 Alliance's Application for Judicial Review, Re</i> [2012] NIQB 97. Horner J grants PCO of £20,000 where there were roughly 135 persons involved with A5 Alliance that worked out at just over £150 per person. That was not "prohibitively expensive". Judge concludes such a PCO complaint with Aarhus Convention.</p>

James is acting for the Government in the on-going *Edwards* litigation before the Supreme Court and CJEU, see above. He also acted for the Secretaries of State in the *Coedbach* and *Ashton* cases (above). He is also acting for the UK in the infraction proceedings on costs (see above). James has appeared a number of times before the Aarhus Compliance Committee in Geneva.

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