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Dear Adam,

Re: UK Action Plan in accordance with MoP-7 Decision VII/8S

We write further to our helpful meeting last week to discuss the process for drawing up the UK's Action Plan (**'the Plan'**) in accordance with the above decision. During that meeting we undertook to provide you with information we thought helpful to you and colleagues in the Devolved Administrations in drafting the Plan.

To recap, Decision VII/8S (**'the Decision'**) requests that the UK (*inter alia*):

• Ensures that the allocation of costs in all court procedures subject to Article 9, including private nuisance claims, is fair and equitable and not prohibitively expensive; and

• Submits a plan of action, including a time schedule, to the Committee by 1 July 2022 regarding the implementation of the recommendations in paragraphs 2, 4, 6 and 8 of Decision VII/8S.

We set out below the issues we believe the Action Plan must address to meet the 1 October 2024 deadline by which all the recommendations in the Decision must be fully met.

General comments

We appreciate the UK is drafting the Plan during a period in which elections will be held throughout the UK. This will undoubtedly throw up some timing challenges, but we would hope the government will build in sufficient time to consult stakeholders on the draft Plan before submission to the Compliance Committee on 1 July 2022 in line with section A of the Information note by the Aarhus Convention Compliance Committee[1] (**'the Information Note'**).

Secondly, we believe that recommendations regarding prohibitive expense require fundamental changes to the legislative framework (as covered by section B of the Information Note) in all the Devolved Administrations (**'DA'**). There are some issues for which the remedy is obvious including, for example, amendments to legislation to bring private nuisance and other qualifying claims into the scope of costs protection. There are others for which the solution could be multifarious. This includes

[1] Available here

(for example in England) changes to the Aarhus costs regime in CPR 45, which in our view requires revision in order to meet numerous concerns around (*inter alia*) cap variation, the provision of financial information and the position regarding appeals. Where appropriate, we suggest the phased Plan builds in sufficient time for early public consultation in order to meet the 1 October 2024 deadline (which would serve the purpose intended by the promised review of the ECPR).

We recognise this means it will not always be possible to include specific recommendations in response to each recommendation as requested in section C of the Information Note. Nonetheless, the Plan is intended to be a practical planning tool and we therefore urge the DAs to provide sufficient information under each recommendation to enable stakeholders to understand what is being proposed and the timeframe in which the necessary steps will be taken.

We set out below our concerns in reach to each DA. References to paragraph numbers are to the Compliance Committee's ('**the Committee'**) Report on compliance submitted to MOP-7 here.

England

- **Type and eligibility of claims covered** – the Committee concludes the UK is not in compliance because some environmental claims (including private law claims such as private nuisance) are not covered by the Environmental Costs Protection Regime ('**ECPR**') (paragraph 11). The Committee also notes the position regarding the application of costs caps to Unincorporated Associations ('**UA**') and individuals representing them is unclear (paragraphs 12-13). To achieve compliance, we believe it is necessary to include all environmental claims within the scope of the ECPR and to clarify that UAs and those representing them benefit from the cap applying to individuals (subject to any revisions made to the ECPR regarding the Aarhus caps – see below).

- **Variation of costs caps** – the Committee expresses concern about the lack of examples in which the default costs caps have been varied downwards and notes that the levels of the default costs caps of £5,000 (individuals) and £10,000 (other) can only be acceptable if variation downwards is not only theoretically available but can be predictably relied upon in practice. The Committee notes that the relatively high proportion of cases in which defendants sought an increase in the costs cap may create a deterrent effect and, as such, the UK fails to demonstrate that the rules and practice relating to variation of costs caps provide a clear and consistent framework guaranteeing that costs will be fair, equitable and not prohibitively expensive (paragraphs 14-33).

  While the original (2013) ECPR, in which the caps were fixed for the duration of the first instance proceedings provided clarity and certainty, we believe the Northern Ireland approach – in which default caps can only be varied downwards and the reciprocal cap can only be varied upwards – represents a significant improvement on the current regime in England and Wales. However, there may be additional refinements to the regime on which views could be invited (e.g. clarifying the position on appeals). We therefore recommend the Ministry of Justice undertakes a consultation to identify further helpful refinements to the regime in an early phase of the Plan.

- **Schedule of claimant's financial resources and hearings on applications to vary costs caps** – the Committee concludes there is a risk potential claimants will be dissuaded from bringing a JR because their financial circumstances will be provided to the defendant and may be discussed in open court (paragraphs 34-44). It is also a practical burden that makes filing a claim harder, and in certain cases can prove to be entirely unnecessary. This includes situations in which a defendant has indicated it will not so apply or where the objective factors all point to a variation being

prohibitively expensive due to the importance of the case for the environment and there being no personal interest in its outcome. We recommend the requirement on claimants to provide a schedule of financial resources when making an application for JR is removed.

- **Costs for procedures with multiple claimants** – the Committee concludes there is no basis for the rule requiring separate costs caps for each claimant (particularly where claimants make the same legal arguments on the same factual basis) and that it is not undesirable for claimants to be able to share the costs burden for challenges within scope of the Convention (paragraphs 45-47). We recommend the reinstatement of the original (2013) rules that there is one default cap per claim, not one cap per claimant. In situations where claims are joined, claimants should each be able to recover their costs under a separate reciprocal cost cap where successful.

- **Costs relating to the determination of an Aarhus claim** – the Committee finds it unfair that claimants do not recover their full costs in the case of an unsuccessful challenge (paragraphs 51-55). Prior to February 2017, defendants who unsuccessfully challenged that a claim was an Aarhus claim were required to pay "indemnity costs" to claimants regarding that challenge. Since February 2017, defendants are required to pay the claimants' costs regarding the challenge on the "standard" basis, which is lower. We recommend the pre-2017 position is reinstated.

- **Costs protection on appeal** – the Committee finds the lack of any cost caps in CPR 52.19A fails to ensure sufficient clarity or costs protection for claimants in appeals regarding Aarhus claims. The Committee recommends that costs to be ordered on appeal, including any possible costs caps that may be introduced into CPR 52.19A, must recognize that the requirement not to be prohibitively expensive applies to the proceedings as a whole, encompassing all stages of the procedure (paragraphs 56-62). We believe there is merit in introducing a rule confirming the default cap expressly covers the adverse costs of all proceedings (subject to other helpful suggestions that may arise from consultation).

- **Cross-undertakings for damages** - the Committee notes the 2017 CPR amendments do not provide clarity to applicants seeking interim injunctions as to: (a) whether a cross-undertaking will be required, and (b) if a cross-undertaking is required, what its level will be, which fails to meet the requirement in Article 3(1) of the Convention for a clear, transparent and consistent framework to implement the provisions of the Convention (paragraphs 63-67). We ask the MoJ to address the Committee's request to provide up-to-date data on: (a) the number of Aarhus claims in which an interim injunction was sought; (b) whether a cross-undertaking was required; and (c) if so, the amount required in order to determine whether the requirements of the Convention are being fulfilled. Our initial view on this issue (subject to further information as above) is that where a default cap is already in place or will be set (i.e. prohibitive expense has already been delineated), there should be no requirement for a cross undertaking.

- **Costs orders against or in favour of interveners** – the Committee finds the UK has met the requirements of paragraphs 2(a), (b) and (d) and 4 of decision VI/8k with respect to interveners who intervene against the claimant in England and Wales. The Committee also recommends that members of the public who join proceedings as interveners in support of the claimant are also entitled to benefit from the Convention's requirement that proceedings must not be prohibitively expensive (paragraphs 70-78). We request relevant amendments to section 87 of the Criminal Justice and Courts Act 2015 and Part 45 CPR in order to effect this requirement.

In addition to the above points, we have raised two further issues with the Compliance Committee in relation to Article 9(4) and prohibitive expense:

- **Cap variation and Interested Parties** – in the recent case of *R (Bertoncini) v London Borough of Hammersmith and Fulham and Kendall Massey*[2], the judge found that an IP has standing to apply for a variation of the default cap. In this case, the judge maintained a modified default cap of £20,000 and ordered the claimant to pay costs totalling £16,991 (of which £12,000 were to be paid to the IP).

- **Costs for procedures with multiple defendants** – in *CPRE Kent v Secretary of State for Communities and Local Government*[3] the Supreme Court clarified the costs position for unsuccessful claimants in JRs and statutory reviews involving multiple defendants. When permission is refused, a claimant may now be liable to pay the costs of more than one defendant and/or Interested Party ('**IP**') to prepare and file an Acknowledgement of Service and summary grounds. It is not necessary to show 'exceptional' or 'special' circumstances apply, although costs must be reasonable and proportionate. We pointed out the effect of this judgment was immediate, with an IP in one case immediately seeking costs of just under £24,000 for simply preparing the Acknowledgment of Service ('**AoS**') and Summary Grounds of Resistance "*per CPRE Kent v Secretary of State for Communities and Local Government [2021] UKSC 36".* Permission was subsequently refused. The judge fixed the costs cap at £10,000, ordering the costs of preparing the AoS be paid by the claimant to the defendant in the sum of £8,900.00 and by the claimant to the IP in the sum of £1,100.00.

The immediate effect of the Supreme Court judgment in *CPRE Kent* is two-fold: (i) IPs will be emboldened to submit excessive estimates of costs at an early stage in the proceedings; and (ii) the court will, in such cases, now routinely order costs up to the full level of the default Aarhus caps at the permission stage (and that's assuming that the default costs caps are not varied upwards). This position is exacerbated by the position following *Bertoncini* in that IPs can now not only request their costs at the permission stage, but they can also apply for the cap to be varied upwards to accommodate excessive costs estimates. The Aarhus caps are intended to limit the level of adverse costs exposure throughout the duration of a case to ensure the proceedings are not prohibitively expensive for the claimant. The possibility that sums well in excess of the default Aarhus cap can be ordered at an early stage will have a "chilling effect" on potential claimants and therefore further undermine the UK's ability to comply with Article 9(4) of the Convention. We request amendments to CPR 45 to address these concerns.

Scotland

While the Scottish Government appears to consider itself in compliance with Article 9(4) of the Convention, the Committee's draft report confirms that this is not the case. As mentioned above, the Committee has provided reasoned conclusions and recommendations for the UK to bring itself back into compliance with Article 9(4) of the Convention for over a decade. We urge the Scottish

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2 *R (Bertoncini) v London Borough of Hammersmith and Fulham and Kendall Massey* CO/3213/2019 [2020] EWHC

3 *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36 (30 July 2021)

Government to engage with the Committee's thoughtful deliberations and take immediate steps to bring itself into compliance with the Convention.

In common with the Ministry of Justice in England and Wales, the Scottish Government has not undertaken a review of the costs regime for Aarhus cases. This has resulted in a piecemeal approach, including the replication of certain flaws in the English/Welsh regime, in particular the adoption of arbitrary figures for adverse costs liability and the cross cap.

The Protected Expenses Order ('**PEO**') regime is fundamentally flawed in failing to recognise that the actual costs incurred by an unsuccessful petitioner are not limited to the £5,000 default cap (which is rarely reduced in practice and can be prohibitively expensive in itself for some claimants) on adverse costs liability, but also include their own legal costs (which the PEO system assumes routinely total £30,000 but are often significantly higher – thus making the process prohibitively expensive in practice).

As such we consider there is a need to review and overhaul the costs regime in its entirety. In doing so consideration must be given to the overall costs faced by an Aarhus litigant – including their own costs should they lose the case – with options including introducing one-way cost shifting, exemption from court fees, and the reform of legal aid for Aarhus cases. Furthermore, steps should be taken to address the costs and liability faced by Aarhus third party interveners to remove the chilling effect. Detailed recommendations are set out below.

- **Introduction of qualified one-way costs shifting for Aarhus cases** – the PEO regime does not fully address the problems created by the loser pays rule and requires to be replaced. We note that the arguments made by the Scottish Government for the recent introduction of qualified one-way cost shifting ('**QOCS**') in personal injury cases – namely the imbalance of power and resources between parties involved in litigation - would equally apply to all Aarhus claims. We request that the Action Plan includes a commitment to replace the PEO regime with QOCS for Aarhus cases.

- **Type of claims covered** – the Committee concludes that the main problem remains that the PEO regime which is contained within Chapter 58A of the Court of Session Rules applies to judicial and statutory reviews but not to private law claims (paragraphs 83-86). If the PEO regime is to be maintained, we urge the Scottish Government to confirm in the Action Plan that it will extend the PEO regime to all other Aarhus cases.

- **Level of cost caps** – the Committee recognises that the introduction of powers under the 2018 PEO rules to vary the default costs cap up or down "on cause shown" introduces legal uncertainty and moves the Party further away from compliance with the Convention. The Committee also highlights that the UK has failed to provide any information since its second progress report on how the caps are being applied in practice (paragraphs 87-92). We remain concerned that the default level of both the cap and the cross cap is arbitrary, and as such does not reflect a realistic assessment of the overall costs faced by an Aarhus petitioner. As such, a review of the cost regime as a whole is urgently needed.

- **Cost protection on appeal** – the Committee concludes that while the UK has met the requirements of paragraphs 2(a), (b) and (d) of decision VI/8k with respect to cost protection in appeals brought by respondents, it has not yet done so with respect to appeals brought by petitioners (paragraphs 93–96). We would, however, also point out that the question as to whether the PEO regime covers court fees and interveners costs is not restricted to costs on appeal (paragraph 94) as they apply

to the overall PEO / costs regime. As such, the key questions the Plan must address are: (i) does the £5,000 cap include liability for the other sides court fees and any interveners costs, and if not how does the party intend to protect Aarhus claimants from these additional expenses; and (ii) does the £30,000 cross-cap also cover court fees and any costs arising from responding to third party interventions and if so is the default set at an appropriate level given the high cost for Aarhus litigants including solicitors and counsel, and court fees (which alone can run into 5 figures).

Issues arising since the revised 2018 PEO Rules

- **PEO application procedures and costs** – the Committee expresses concerns about the requirement for applicants to provide information about the terms on which the applicant is represented (paragraph 100), the requirement to provide an estimate of the expenses of each other party (paragraph 101) and the potential deterrent effect of the absence of confidentiality on applicants (paragraph 102). If the PEO regime is to be maintained, we request that the Action Plan confirms how each of these problematic features will be addressed.

- **Interveners** – the Committee is also concerned that applicants may be exposed to additional costs of interveners and consequently considers that the failure of the caps to be inclusive of any order to pay the costs of interveners does not meet the requirements of 2(a), (b) and (d) decision VI/8k (paragraph 134). Additionally, third-party public interest interveners in judicial reviews at the Court of Session who are not parties may be found liable for other parties' costs: as per Rules of Court 58.19, the question of liability is entirely at the courts' discretion and may remain undetermined until the conclusion of proceedings. Aarhus interveners should be covered by the cost protection regime. The ACCC should clarify this by extending its findings in paragraph 78 of the report (regarding England and Wales) to Scotland. The Scottish Government should address both of these issues in the action plan.

- **Court fees** – the Committee concludes that court fees must be included within the costs protection regime because the requirement to ensure that costs are not prohibitively expensive applies to the costs of the proceedings in their entirety (paragraphs 107-109). We welcome the consideration of an exemption from court fees for Aarhus cases in the Scottish Government's recent consultation on court fees for 2022-2025. We ask for confirmation of the Scottish Government's intention to introduce this exemption in the Action Plan.

- **Legal Aid** – the Committee invites the Scottish Government to provide the text of the relevant provisions of the forthcoming Bill on legal aid for its consideration (paragraph 112). The availability of civil legal aid for Aarhus cases is drastically limited by Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002. We request that the Action Plan includes confirmation that Regulation 15 will be amended to ensure that legal aid is available in public interest litigation – and that civil society organisations (including community groups and NGOs) will be made eligible for such support.

Northern Ireland

Despite the welcome progress made in relation to the adverse costs protection regime, the Cost Protection Regulations only address part of the affordability problem. They do not address the difficulty an applicant may have in being able to afford their own legal costs in the event that they lose

the case. The absence of Conditional Fee Arrangements and scant provision of legal aid for environmental cases in Northern Ireland make the burden of an applicant's own legal costs prohibitively expensive regardless of any cost capping arrangements. This explains why a significant number of applicants have felt obliged to bring applications to the High Court, in major environmental challenges, without the benefit of any legal representation. Moreover, there is no sign of any public policy initiatives being taken to address this, such as:

- Amending the Legal Aid rules which currently deny assistance where a number of members of the public have a similar interest in objecting to or challenging a policy, project or development with the result that financial assistance from public funds is rarely available to fund environmental legal challenges even where the applicant would otherwise qualify for such assistance;

- Examining the application of the costs indemnity rule in environmental cases. This prevents those acting for successful applicants recovering a fair commercial level of costs from the respondent in successful cases where they have agreed a concessionary level of costs with their clients. Contingency and 'no win no fee' arrangement are unlawful in Northern Ireland;

- Removing certain cases from the jurisdiction of the High Court to less expensive fora. A large number of environmental law issues in this jurisdiction arise in relation to planning decisions. At present objectors, unlike developers, have no right of appeal to the Planning Appeals Commission, which is a specialist forum dealing with such matters. It is also, in general, a less expensive forum than the High Court.

Our detailed comments are set out below:

- **Type of claims covered** – the Committee finds that by excluding private law claims from the scope of costs protection, the Party concerned has not yet fulfilled paragraph 2 (a), (b) and (d) of decision VI/8k regarding the type of claims covered in Northern Ireland (paragraphs 116–117).

- **Cross undertaking for damages** – the Committee notes that the position in Northern Ireland is similar to that in England and Wales, in that the UK does not have evidence on cross-undertakings for damages as it does not record when applications for injunctions are sought. This fails to meet the requirement in Article 3(1) of the Convention for a clear, transparent and consistent framework to implement the Convention's provisions. The UK is invited to provide up-to-date data on: (a) the number of Aarhus claims in which an interim injunction was sought; (b) the number of those cases in which a cross-undertaking was required; and (c) the level of cross-undertaking required in each case and in the absence the above information, concludes that the UK has not yet demonstrated that it has fulfilled paragraph 2 (a), (b) and (d) of decision VI/8k as regards cross-undertakings for damages in Northern Ireland (paragraphs 118–121). It is readily apparent that in the context of many environmental challenges such an undertaking is a major deterrent to applicants. The Court does have a discretion not to require such an undertaking, but potential applicants cannot know until the end of the interim hearing how and if that will be exercised. Regulation 5 of The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, by requiring the Court to consider whether a cross undertaking would make the proceedings prohibitively expensive, simply leaves this a factor to be taken into account by the Court, still leaving a potential applicant uncertain as to the outcome. The Department of Justice has no means of investigating cases not brought on account of such uncertainty – which certainly occurs – to assess its impact.

- **Time limits** – we welcome amendments to paragraph 2(c) of Decision VI/8k concerning the time limits for bringing a public law challenge to the High Court. Order 53 Rule 4(1) of the Court of Judicature Rules (NI) 1980 was amended in 2018 and now reads: "*An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made*". However, the consistent view of the Courts has been that grounds for an application arise when the decision under challenge is formally made. In many (but not all) cases this is a public act but the degree of publicity attending such decisions varies enormously depending on the type of decision and public body involved as does the knowledge required of the affected public to "be on the alert" and/or to "know where to look." Not all decisions are made public (for instance decisions in 2020 by the Department of infrastructure to extend the period for compliance with planning enforcement notices for activities for which, at that time, there was no extant planning consent). Should there be appreciable delay in a potential applicant learning of the decision which leads to a late application then the applicant is dependent on the Court's discretion to extend time.

We hope that these comments are helpful to Defra and their colleagues in the DAs when drawing up the Action Plan prior to consultation with stakeholders.

Please do not hesitate to contact us if you require any further information or clarification in any of the points made in this letter.

With best wishes,

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