**HART ANNUAL JUDICIAL REVIEW CONFERENCE**

**13 December 2013**

# ENVIRONMENTAL JUDICIAL REVIEW UPDATE

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## Protective costs orders

1. The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention")[1] is now playing an increasingly important role in all litigation concerning environmental matters. One of its key impacts, which may transform the ability of the public and environmental NGOs in particular to litigate environmental questions, is its affect on the potential costs of those proceedings.

2. The Courts may make protective costs pursuant to Rules 3.19-3.21 of the CPR and have been doing so in judicial review since the *CPAG case* in 1999.[2] However, as set out in paragraph 1 of the relevant practice direction, such orders will only be made "in exceptional circumstances" and are in any event, discretionary. The governing principles were laid down by the Court of Appeal in the *Corner House case* in 2005.[3] Those principles restricted PCOs to cases where: (1) the issue is of public importance, (2) the public interest requires the issue to be resolved and (3) the claimant has no private interest in the case, (4) it is fair just and reasonable to make the order, having regard to the financial resources of the parties and the amount of costs that are likely to be involved and (5) if the Order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing. Accordingly, not only is such an order discretionary, it requires the Claimant to establish need and public interest, and precludes such an order being made where the Claimant had any private interest in the outcome. Further,

[1] The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was adopted on 25 June 1998 in the Danish city of Aarhus (Århus) at the Fourth Ministerial Conference as part of the "Environment for Europe" process. It entered into force on 30 October 2001. (For recent up-dates and the follow-up process please have a look at the UNECE Convention website.) The United Kingdom acceded on 23 February 2005 and the European Union on 17 February 2005. The Convention now has 39 signatories and 44 parties.

[2] R v Lord Chancellor Ex p Child Poverty Action Group [1999] 1 WLR 347.

[3] R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192, [2005] 1 WLR 2600.

it is up to the Court to decide any conditions on which to grant such an order. It follows that PCOs under Part 3 of the CPR are very much within the discretionary power of the Court. Whilst the *Corner House* criteria were modified in relation to environmental claims as a result of Aarhus,[4] these modifications were not sufficient to meet the affordable cost requirements of Article 9. As explained below, all these factors led the CJEU in Case C-260/11 *Edwards v Environment Agency* [2013] 1 WLR 2914 and Advocate General Kokott in *Commission v United Kingdom*, Opinion of 12 September 2013 (judgment pending) to hold that PCOs do not meet the affordable cost requirements of Aarhus (as implemented in EU law).

3. Since April this year a new rule has entered into force, which caps the costs of 'environmental' judicial review claims ("Aarhus cases"). In such cases, Rule 45 (Part VII) CPR, which I have set out in Annex 1 to this paper, now provides claimants with protection against being subject to Defendant's costs (see Rule 45.43(1)) in excess of £5000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person; and in all other cases, £10,000.

4. The Defendant is also protected against having to pay excessive costs, and where ordered to pay costs cannot be required to pay more than £35,000. However, Advocate General Kokott, in Case 530/11 *Commission v United Kingdom*, has stated her view that protection for the Defendant cannot be merited in the case of challenges under Article 10a of the EIA Directive and Article 15a of the IPPC Directive since the protection of the Claimant is merely a step towards the provision of equality of arms vis-à-vis the State. She did not however, rule out some protection for the Defendant but considered that it had to be assessed on an individual case basis so as to prevent the Defendant from being incentivised into inflating the Claimant's costs, so as to increase the financial risk for the Claimant in bringing the case. As she said:

> "By their very nature, these are challenges to decisions taken by public bodies, that is so say development consents given to projects following an environmental impact assessment or permits for certain industrial activities granted under the integrated approach.
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> 74. In actions brought <u>against public bodies</u>, no true equality exists from the outset as those bodies generally have much greater resources at their disposal than the persons covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive. To that extent, therefore, a one-way protective costs order is simply an initial step towards establishing equality of arms.
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> 75. Furthermore, actions of that kind ultimately involve an interest common to both parties, namely, ensuring that the law is upheld. A public body which is unsuccessful

[4] See *Morgan and Baker v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, paragraph 47(ii) (relaxed the criterion of 'private interest'); *R (Garner) v Elmbridge Borough Council* [2010] EWCA 1006 and *R (Buglife) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209 (provided that the public interest and public importance criteria will be met where a case falls within Article 9 of Aarhus).

> in proceedings before a court because its decision under challenge proves to be unlawful does not deserve protection in relation to litigation costs comparable to that afforded to an applicant. It was, of course, the public body's own unlawful act that prompted the action to be brought.
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> 76. Finally, under the Aarhus Convention particular emphasis is placed on the public interest in upholding the law. (45) That interest prohibits, at least in the proceedings covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive, detriment to an instrument such as the conditional fee agreement which can help an applicant to avoid prohibitive costs for his own representation.
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> 77. Moreover, that objective of the Aarhus Convention serves to refute the argument of the United Kingdom in relation to the limited resources of the relevant authorities. It is admittedly the case that funds spent by the authorities on legal proceedings cannot be used to fulfil their primary tasks. However, the Convention accepts this. That is also appropriate since the judicial enforcement of environmental law or the risk of a legal challenge forces the authorities to exercise particular care in applying the law in this area.
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> 78. This of course does not mean that public bodies should be afforded no costs protection. There is no reason to impose an obligation on those bodies to pay success-related fees of the opposing party's lawyers that considerably exceed the standard fees payable where no conditional fee agreement applies. Thus, in the name of procedural equality of arms, in actions against public bodies too the possibility of making an 'asymmetrical' reciprocal protective costs order that caps the risk in terms of costs for both parties but allows all the same for a reasonable success fee cannot be entirely rejected.
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> 79. However, the order must not provide an incentive to the public body – which is endowed with greater financial resources – to widen unnecessarily the subject-matter of the dispute such as to increase the applicant's own legal costs to the point that they exceed considerably the level at which costs have been capped. Therefore, what constitutes a reasonable success fee can only be determined in the circumstances of an individual case.
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> 80. Consequently, the United Kingdom has failed to fulfil its obligations under Articles 3(7) and 4(4) of Directive 2003/35 by reason of the fact that in proceedings covered by those provisions the courts may order reciprocal costs protection which prevents the costs of a reasonable success fee for the representation of the persons and associations covered by those provisions from being imposed upon the opposing party if the action is successful."

5. If the Court follows her Opinion, there will therefore have to be some amendment of the capping at £35,000 of the claimant's costs.

6. These new capping rules apply without any need for any application under Part 23 or any decision of the Court; they apply as of right. All that the claimant has to do is state that the claim is an 'Aarhus case' in the claim form and provided the Defendant does not contest that (and the claim is not obviously other than an 'Aarhus case') the capping rules will apply.

7. However, there is no obligation for the capping rules to apply and the claimant can state that it does not wish them to. A business with large sums at stake might well prefer the rules not to

apply so as to be able to recover a greater proportion of its costs from the Defendant if ultimately successful in the litigation (although that will obviously change if the Court upholds AG Kokott's view, as set out above). In this regard, the potentially significant legal fees incurred by commercial entities when litigating environmental judicial review as compared with the relatively modest costs charged by public authority Defendants, will of course be relevant to the risk assessment.

8. Unsurprisingly, the rules do not provide for a Defendant to seek the application of the capping rules. It is however, open to the Defendant to contest that the claim is an Aarhus case, such that the capping rules should not apply. If it wishes to do that it must state that in its acknowledgement of service form and explain its grounds. The Court will then, at the earliest opportunity, determine this preliminary dispute: CPR 45.44(2). In relation to this issue too, the Claimant is relatively protected since Rule 45.44(3) provides that there will normally be no order as to costs if the Defendant succeeds in showing that the claim is not an 'Aarhus case'. Again this is much more favourable than the PCO regime, in relation to which the Court of Appeal in *Corner House* stated that the Claimant would be liable for costs of normally no more than £2,500 in relation to a failed application for a PCO.

9. By contrast, if the Defendant fails in its contention that the claim is not an Aarhus case, the court "will normally order it pay the claimant's costs of those proceedings on the indemnity basis" and these may be excess of the £35,000 prescribed by Rule 45.43, as set out in the practice direction: Rule 45.44(3)(b). Thus the Defendant is at a much greater risk of having indemnity costs awarded against it than it is if opposing a PCO, in which case, according to the Guidelines laid down by the Court of Appeal in relation to PCOs in the *Corner House* case, indemnity costs will only be awarded against the Defendant is the PCO is resisted 'unmeritoriously'.

**Aarhus claims for the purposes of CPR 45 do not meet the requirements of Article 9 of Aarhus**

10. CPR 45.41 was apparently intended to give effect to the Aarhus requirement that environmental litigation as provided in Article 9 is not prohibitively expensive. However, the cost capping rule is expressly restricted to judicial review, and judicial review is only of decisions that are subject to the provisions of Aarhus. Rule 45.41 provides:

> "(2) In this Section, 'Aarhus Convention claim' means a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject.

11. Accordingly, the cost capping mechanism in Rule 45 will not apply to statutory appeals or civil proceedings, such as nuisance. The consequence is that the wider right of access to a court procedure that is not prohibitively expensive, as provided in Article 9 of Aarhus is not fully implemented by CPR 45. As explained below, this has led to modification of the approach to protective costs orders under CPR 3.

12. Article 9 of Aarhus provides for a right to an independent review in relation to a refusal to provide information pursuant to a request under Article 4 of Aarhus. This must be 'free of charge or inexpensive'. In addition, Article 9(2) provides for a right to challenge decisions in respect of which an individual had a right of participation under Article 6 of Aarhus: Article 9(2) and decisions acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment: Article 9(3). Article 9(4) provides that in relation to each of these entitlements to access to court and/or an independent tribunal the costs must not be prohibitively expensive. In so far as relevant Article 9 provides:

> 2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
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> (a) Having a sufficient interest or, alternatively,
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> (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.
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> ....
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> 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.
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> 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.

13. CPR 45.41 purports to restrict itself to 'Aarhus cases' but then defines this as 'judicial review claims'. As is clear from Article 9(3) the Convention, cases covered by Aarhus are far wider than judicial review and include any litigation regarding environmental law, whether based on issues arising out of non-compliance with matters covered by Articles 4 or 6 of Aarhus or out of purely national provisions, including presumably private nuisance law. In any of these cases

Article 9 requires the State to ensure that litigation is affordable. This obligation has led the Court to modify the rules for protective costs orders provided for in CPR Rule 3, as explained below.[5]

14. It is notable in that respect that when introducing the new cost capping rules for judicial review, the Ministry of Justice was clearly aware that statutory appeal procedure or other review procedures were likely also to need some kind of costs capping measures in order to ensure compliance by the United Kingdom with its Convention obligations. In its consultation response introducing the measures, the Ministry of Justice recognised that:

> "there are some concerns about costs in statutory procedures of various kinds (including some statutory appeal and statutory review procedures). However, further work is needed to identify whether and, if so, 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… The Government is therefore looking into these issues and, where necessary, will bring forward proposals separately, so as not to delay establishment of the scheme for environment judicial review cases."

15. The position in s288 Town and Country Planning Act 1990 applications has now been considered in the *R (Venn) v Secretary of State for Communities and Local Government* [2013] EWHC 3546 (Admin). In that case, the Local Authority refused planning permission for a dwelling to be constructed in the garden of another house, but planning permission was subsequently granted by the Inspector on appeal. The Claimant, seeking to challenge the decision to grant permission on the basis that development plan policies against garden development had not been adequately considered, sought a protective costs order limiting her total costs liability to £1000. Lang J refused to apply Rule 45.41 holding that applications under section 288, whilst raising similar issues, are not claims for judicial review.

16. In that regard, she rejected the submission that in light of the Opinion of the Advocate General Kokott in *Commission v United Kingdom* Case C-530/11 of 12 September 2013, in which she expressed the view that the United Kingdom had failed to implement the costs provisions of Aarhus properly,[6] the Court should apply the principle in *Marleasing* [1990] ECR 1-4135 so as

[5] In this regard, it should be noted that prior to the adoption of the cost capping measures in Rule 45, the Courts modified the rules set out by the Court of Appeal in *Corner House* in the context of environmental claims in an attempt to bring the UK into compliance with Aarhus: see *Morgan and Baker v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, paragraph 47(ii) (relaxed the criterion of 'private interest'); *R (Garner) v Elmbridge Borough Council* [2010] EWCA 1006 and *R (Buglife) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209 (provided that the public interest and public importance criteria will be met where a case falls within Article 9 of Aarhus). This was nevertheless criticised as inadequate by AG Kokott in Case C-530/11 *Commission v UK*, as explained below.

[6] As implemented in EU law through Articles 3(7) and 4(4) of Directive 2003/35 which introduced the prohibition of prohibitively expensive costs in Article 10a of the EIA Directive and Article 15a of the IPPC Directive.

to read the costs cap in CPR 45 as applicable to procedures other than judicial review, including appeals under section 288 of the TCPA 1990/Part 8 CPR. The Judge refused to do so on the basis that there had been no ruling of that the exclusion of such procedure from CPR 45 was unlawful and further, that *Commission v UK* concerned different legal measures in which the Aarhus protections had been incorporated, namely the participation directive 2005/35/EC, the EIA directive 85/337/EC and the integrated pollution prevention and control directive 2008/1/EC, all of which now contained a provision on costs so as to ensure their compliance with Article 9 of Aarhus and none of which were at issue in the case before her.

17. The Judge considered, however, that she could give effect to the United Kingdom's obligations under Aarhus by providing for a PCO pursuant to CPR 3. This was despite the fact that AG Kokott in C-530/11 had specifically rejected this mechanism as adequate. Her criticism related to the discretionary nature of PCOs. As she stated at paragraphs 46-47 of her Opinion, Aarhus required the Courts to be under an obligation to grant such PCO. She stated:

> "...national courts must be placed under <u>an unambiguous obligation</u> to exercise their discretion with the objective of ensuring adequate costs protection in the proceedings at issue.
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> 47. The discretion afforded to the courts in the United Kingdom in issuing a protective costs order does not meet those requirements. Its exercise is intended to determine whether by way of exception in an individual case it would be inequitable or unfair to adhere to the general principle that no protection exists in relation to costs. A fundamental obligation to observe the objective of ensuring costs protection in the proceedings concerned is, on the other hand, not apparent."

18. Further, the AG considered that the modification of the *Corner House* criteria for PCOs in the case of environmental litigation, as set out in cases such as cases *Morgan and Baker v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, paragraph 47(ii) and *R (on the application of Garner) v Elmbridge Borough Council and Others* [2010] EWCA Civ 1006, paragraph 50, were not sufficient: §§48-49 Opinion, and did not comply with the requirements of the Court in Case C‑260/11 *Edwards v Environment Agency* [2013] 1 WLR 2914, in particular the way 'public interest' was assessed in deciding whether to grant a PCO, the fact that a PCO was precluded if the Claimant had any private interest in the outcome and had financial capacity to pay, the obligation being that regardless of the person's own financial capacity, the costs must not be unreasonable. The Advocate General stated:

> "The problems with the criteria applied in the United Kingdom begin with the consideration given to the public and private interest in pursuing the litigation. The Court too requires consideration to be given to those interests, but the United Kingdom

concedes that prior to the judgment in *Garner* they were not taken into consideration in the manner required.[7] ...

53. A further incompatibility with the requirement for costs protection is the fact that the very existence of a private interest in the outcome of the case precludes the issue of protective costs order. Although the Court also requires consideration of an interest of that kind, costs protection is not to be precluded by it. Instead, an individual is to be protected also when enforcing his own rights conferred by European Union law.

54. Although the judgment in *Morgan* – seemingly in an obiter dictum – indicates that this criterion should be applied flexibly, it is clear that, in this respect, at least considerable uncertainty prevails.

55. The requirement of costs protection is also infringed if an applicant's capacity to pay, in other words, the lack of proof of inadequate financial resources, operates to preclude protection. Instead, the correct position is that litigation costs may not exceed the personal financial resources of the person concerned and that, in objective terms, that is to say, regardless of the person's own financial capacity, they must not be unreasonable. In other words, even applicants with the capacity to pay may not be exposed to the risk of excessive or prohibitive costs and, in the case of applicants with limited financial means, objectively reasonable risks in terms of costs must in certain circumstances be reduced further.

56. Finally, the Court has rejected the ruling out of costs protection on the ground that an applicant will probably not be deterred by the risk in terms of costs. However, according to *Corner House*, such a risk that he will be deterred is a further condition for the issue of a protective costs order.

57. Consequently, the United Kingdom has failed to fulfil its obligations under Articles 3(7) and 4(4) of Directive 2003/35 by reason of the fact that the courts' discretion to grant costs protection is not tied to the objective of costs protection and the criteria to be applied in that connection are incompatible with those provisions."

19. Lang J in *Venn* agreed that a failure to apply policies on protecting gardens from development raised 'environmental matters' within the meaning of the Convention. Accordingly, she considered it necessary to relax the criteria laid down by the Court of Appeal in *Corner House* for protective costs orders to give effect to the requirement of Article 9 of the Aarhus Convention that environmental litigation not be prohibitively expensive and granted the Claimant a protective costs order capping her potential costs liability to £3,500. In so holding, she had regard to the findings of the CJEU in *Edwards.* As she stated at paragraph 37 of her judgment:

> "Art. 9.4 of the Convention requires that access to justice shall not be "prohibitively expensive". This provision was recently considered by the European Court of Justice in *Edwards v Environment Agency* [2013] 1 WLR 2914 which held that the costs of proceedings must neither exceed the financial resources of the person concerned, nor appear to be objectively unreasonable. In making its assessment, the Court must consider the situation of the parties; what is at stake for the claimant and the protection

[7] After *Garner*, any 'Aarhus' matter was deemed to be in the public interest.

> of the environment; whether the claimant has a reasonable prospect of success; the complexity of the relevant law and procedure; and the existence of a national legal aid scheme or costs protection scheme. The fact that a claimant has not been deterred from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him."

20. Interestingly, the Scottish Court of Session adopted a very different approach in *Newton Mearns Residents Flood Prevention Group for Cheviot Drive v East Renfrewshire Council* [2013] CSIH 70 the Court of Session (Inner House, Extra Division). In that case a protective expenses order ("PEO") was sought by an unincorporated association representing local residents who were seeking to protect their homes from flood damage. The PEO was sought in the context of an application for judicial review to quash: (i) the grant planning permission for the construction of a number of houses on a greenfield site; and (ii) a decision to confirm as fulfilled a condition concerning drainage arrangements which had been imposed when planning permission was granted.

21. The refusal of the PEO was upheld on the basis that it did not satisfy the requirement of general public importance. Accordingly, the Court of Session did not follow the approach of the English Court of Appeal in *R (on the application of Garner) v Elmbridge Borough Council and Others* [2010] EWCA Civ 1006, namely that any 'Aarhus matter' was necessarily 'in the public interest'. Nor did the Court follow the CJEU judgment in *Edwards*. Further, for the purposes of the application of the cost capping rules equivalent to those provided by CPR 45 (Chapter 58 of the rules of the Court of Session), the Court took a highly restrictive approach to the meaning of 'Aarhus' matters (apparently on the basis of a concession by the petitioner) accepting that they must concern challenges to an act or omission to which the public participation Directive 2011/92/EC applies. The Court stated:

> "8 There was no dispute before the Lord Ordinary as to the competency of his making an order of the sort sought by the petitioner. However, having summarised the factual background as set out in the petition, the Lord Ordinary, noted that as the petition did not contain a challenge to a decision, act or omission to which the public participation provisions of what is now Directive 2011/92/EU of the European Parliament and Council (the codification of Council Directive 85/337/EEC as amended by Directive 2003/35/EC requiring member states to give effect to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) applied, the recently enacted provisions of Chapter 58A of the Rules (*) of the Court of Session were not relevant to this application for a PEO. A different position is taken at statement 7 of the petition but before the Lord Ordinary that was departed from by the petitioner (as is confirmed in the petitioner's note of argument in this court). It therefore came to be agreed among the parties that the application fell to be determined by reference to what the Lord Ordinary referred to as the "common law criteria"."

22. The judgment of the CJEU in Case C-530/11 is awaited.

**Standing**

23. Baroness Hale in her speech at the 2013 Public Law Project conference made the point that whilst it must be a good thing for people to take part in the enforcement of law, allowing any old busybody to bring proceedings (which will delay perfectly governmental activity) must be a bad thing. However, as she noted "[d]istinguishing between busy bodies and champions is almost as difficult as distinguishing between terrorists and freedom fighters" and that a better means or preventing unmeritorious actions was to focus not on who was bringing the action but on the merits of the action itself. As she said: "[t]here are better ways of nipping unmeritorious claims in the bud than too restrictive an approach to standing." This must be particularly so in the environmental field where environmental activists can be found fighting wind-farms to protect ospreys; who there is the freedom fighter?[8]

24. Aarhus specifically protects the right to standing of environmental NGOs. That however, is not the limit of the obligation it imposes in relation to standing; the purpose behind Aarhus is to give the public wide access to justice in the environmental field. Thus, whilst standing requirements under Article 9 of Aarhus (the access to justice provisions) are expressly stated to be questions for national law, this is subject to the condition that those requirements are consistent with "the objective of giving the public concerned wide access to justice within the scope of this Convention": Article 9(2)(b).

25. Article 9(2) of Aarhus provides that standing (or sufficient interest) shall be a matter for national law, save that NGOs are deemed to have sufficient interest:[9]

> 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.
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> 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 to judicial review procedures, where such a requirement exists under national law.

[8] See Draft Findings of ACCC/C/2012/68 regarding compliance of the United Kingdom and the European Union with the Aarhus Convention.

[9] Article 2(5) provides: "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

26. Accordingly, in relation to the review rights provided for in Article 10(a) of Directive 85/337 (which was one part of the EU implementation of Aarhus), the CJEU held in Case C- 115/09 *Bund fur Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierrun Arnsberg* (judgment of 12 May 2011) that NGOs could not be precluded from contesting a decision authorising a project likely to have significant effects on the environment for the purposes of Article 1(1) of Directive 85/337.

27. The Government in its recent judicial review consultation (6 September – 1 November 2013) accepts that the requirements of EU law and the Aarhus Convention would mean that cases which raised environmental issues would need to be approached differently. [10] NGOs which campaign for environmental protection are guaranteed rights of standing under the Convention and EU law; they are deemed to have a sufficient interest.

28. In *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51, Mr. Walton claimed to be a person aggrieved by the proposed scheme of the Aberdeen bypass. The Inner House doubted whether he qualified either as a person aggrieved or as someone with standing to bring judicial review as he did not live near the proposed road and would not be directly affected by it. This was not accepted by the Supreme Court. Lord Reid, confirming his approach in *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868, adopted the test for sufficient interest of "an interest sufficient to justify him bringing an application", which as Lord Hope said, included someone "acting in the public interest", not just someone individually directly affected. In that regard, Lord Hope noted the inability of wildlife to protect itself:

> "152....Take, for example, the risk that a route used by an osprey as it moved to and from a favourite fishing loch will be impeded by the proposed erection of a cluster or wind turbines...The osprey has no means of [challenging the proposed development] on its own behalf, any more than any other wild creature. It is interests are to be protected someone has to be allowed to speak up on its behalf"

29. Whilst it would normally be an NGO or statutory body charged with protecting these interests, Lord Hope recognised the limits on what such bodies could do and considered that there was a role for individuals in bringing actions in the public interest. As Lord Reid agreed:

> "94. ...There may ... be cases in which an individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no one was able to bring proceedings to challenge it."

[10] https://consult.justice.gov.uk/digital-communications/judicial-review, §73.

30. Significantly, rules of standing in relation to challenges to acts of the EU institutions prevent such actions. The test of direct and individual concern laid down in the *Plaumann* case has meant that challenges to acts by the Council and Commission have simply been ruled out on admissibility grounds; only when a decision is literally directed at an individual (and of no wider application) can a litigant establish "individual" concern under Article 263 TFEU. Thus, natural or legal persons can only satisfy the condition of individual concern if the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed: *Plaumann v Commission*; Case C-298/00 P *Italy v Commission* [2004] ECR I-4087, paragraph 36; and Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' v Commission* [2011] ECR I-4727, paragraph 52.

31. The Court has been highly resistant to altering this test whatever the interests concerned, continuing to invoke the *Plaumann* test, such as in the case of *Greenpeace v Commission* (Case T-585/93), where the CFI held that the test applied irrespective of the interest affected. The CFI further held that the applicant associations did not 'adduce any special circumstances to demonstrate the individual interests of their members as opposed to any other person' who was residing, or who might in the future reside, in the areas affected by the impugned decision. Only 'special circumstances such as the role played by an association in a procedure which led to the adoption of an act' may justify granting standing to 'an association whose members are not directly and individually concerned'. But even where such a role has been shown, the Court has ruled the application inadmissible for lack of standing: Case C-355/08 *WWF v Commission and Council* Order 5 May 2009 (WWF member of standing committee with statutory role in adoption of fish TACs (total allowable catches) not sufficient to render WWF individually concerned). In addition, the Court held that in so far as WWF may have been individually concerned it could only raise complaints in relation to its procedural rights rather than the substantive illegality of the measure itself; thus, if it had standing, its standing was limited to complaining about breach of its own procedural rights.

32. Following that case Client Earth made a complaint to the Aarhus Compliance Committee regarding the EU rules of standing and in particular, the test of individual concern. The allegation was of a general failure by the EU to comply with the provisions of the Convention on access to justice in environmental matters, reference being made to a number of decisions by the EU Courts, including *WWF-UK v Council of European Union; European Environmental Bureau (EEB) and Stichting Natuur en Milieu v Commission of the European Communities (EEB Cases); Região autónoma dos Açores v Council (Azores Case);* and *Stichting Natuur en*

*Milieu* and *Pesticides Action Network Europe v Commission*. The Compliance Committee considered the test of 'individual concern' that was applied by the Court was unnecessarily narrow and breached the requirements of Article 9 of the Aarhus Convention:

> "86. ..It is clear to the Committee that TEC article 230, paragraph 4, on which the ECJ has based its strict position on standing, is drafted in a way that could be interpreted so as to provide standing for qualified individuals and civil society organizations in a way that would meet the standard of article 9, paragraph 3, of the Convention. Yet, the cases referred to by the communicant reveal that, to be individually concerned, according to the ECJ, the legal situation of the person must be affected because of a factual situation that differentiates him or her from all other persons. Thus, persons cannot be individually concerned if the decision or regulation takes effect by virtue of an objective legal or factual situation. The consequences of applying the *Plaumann* test to environmental and health issues is that in effect no member of the public is ever able to challenge a decision or a regulation in such case before the ECJ.
>
> 87. Without having to analyse further in detail all the cases referred to, it is clear to the Committee that this jurisprudence established by the ECJ is too strict to meet the criteria of the Convention. While the WWF-UK case was initiated after the entry into force of the Convention for the Party concerned, for the reasons stated in paragraph 63, the Committee decides not to make a specific finding on whether the decision of the EU Courts in the WWF-UK case amounted to non-compliance with the Convention (and accordingly does not examine whether the contested EU regulation on fishery in the WWF-UK case is as such a challengeable act under article 9 or the Convention). Yet, the Committee considers with regret that the EU Courts, despite the entry into force of the Convention, did not account for the fact that the Convention had entered into force and whether that should make a difference in its interpretation and application of TEC article 234....
>
> 97. While the Committee is not convinced that the Party concerned fails to comply with the Convention, given the evidence before it, it considers that a new direction of the jurisprudence of the EU Courts should be established in order to ensure compliance with the Convention.

33. The amendment by the Treaty of Lisbon to alter the standing test in Article 263, removing the 'individual concern' test in relation to regulatory acts has not assisted in widening standing rules, regulatory acts having been interpreted narrowly. In its recent judgment in Case C-585/11 P *Inuit Tapiriit Kanatami and Others v European Parliament, Council of the European Union, Kingdom of the Netherlands, European Commission* of 3 October 2013, the Court upheld the inadmissibility decision of the Court of First instance, holding that the applicants did not have standing to seek the annulment of a Regulation limiting the circumstances in which the marketing of seal products was permitted. The Court considered that a regulatory act should be an act of general application which is not a legislative act.

**Legislation as a 'decision' under Aarhus, such that Articles 6 (public participation) and 9 (review rights) apply.**

34. On 28 June 2013 the Aarhus Compliance Committee issues its findings in ACCC/C/2011/61 concerning Crossrail and held that the primary legislation providing for Crossrail was a 'decision' under Article 6 of Aarhus, such that the consequent rights of public participation and information applied. Further, that the access to justice provisions in Article 9 also applied. However, the Committee did not find a violation of the latter on the basis that it was unable on the facts to determine the extent to which judicial remedies lay in relation to 'hybrid bills'. The Committee stated:

> "52. The Committee first examines the nature of the hybrid bill and whether it falls under article 6 or article 8 of the Convention. As already established in previous findings, this must be determined on a contextual basis, taking into account the legal effects of the act, while its label under the domestic law of the Party concerned is not decisive (cf. findings concerning Belgium, ECE/MP.PP/C.1/2006/4/Add.2/, para. 29; European Community ACCC/C/2006/17, ECE/MP.PP/C.1/2008/5/Add.10, 2 May 2008, para. 42).
>
> 53. The legal effect of the Crossrail Act, following the hybrid bill procedure, is the authorization of a project, the Crossrail. The Act is processed as a "hybrid bill" because of the magnitude of the project, affecting national interests in general. Had it been an executive regulation or an act introducing legislative changes applicable to all, it would have been processed following the public bill process. As such, it does not fall under article 8 of the Convention, because, while the system of the Party concerned, recognizing the impact of such large project for the national policies, including transport, economy, employment, etc., opts for a procedure that passes through Parliament, the act ultimately permits a specific activity. Therefore, the Act is a decision falling under article 6 of the Convention.
>
> 54. In this respect, the Committee also notes that the hybrid bill process is a process under the Parliament, the body that traditionally manifests the legislative powers in a democratic state. Article 2, paragraph 2, of the Convention, excludes from the definition of a public authority "bodies or institutions acting in a … legislative capacity". In the present case, however, the Parliament is no longer "acting" in a legislative capacity, but rather as the "public authority" authorizing a project. The fact that the Party concerned has in place an integrated procedure for "hybrid bills" in order for the Government to secure all powers and consents necessary for the authorization of major projects, instead of having fragmented procedures going through a number of different public authorities, central and/or regional, does not change the nature of the act as a decision permitting the project. The Committee observes that if all large-scale projects were subject to parliamentary authorizations procedure and evoked article 2, paragraph 2, of the Convention, then there is a risk that important projects would never be subject to the public participation requirements of the Convention and this would run counter its objectives.
>
> 55. The project concerns the construction of a high-frequency railway, from east to west, across London and with connections to the underground rail network. The legislation of the Party concerned (Standing Order 27A) requires for environmental impact assessment procedure and the deposit of an Environmental Statement. Therefore, the project is an activity under article 6, paragraph 1(a), in conjunction with paragraph 20 of the annex to the Convention.

56. It is noted, that processes similar to the hybrid bill process, under a different label, exist under the jurisdictions of other Parties to the Convention (see e.g. the recent jurisprudence of the Court of Justice of the EU concerning Belgium; Boxus v. Région Wallonne, C-128/09 [2012] and Solvay v. Région Wallonne, C-182/10 [2012]). While such processes are a reasonable way for Governments to deal with permitting large projects of significant national and also transboundary impact (e.g. the Channel Tunnel), the Committee underlines that the process adopting projects by such means still have to be considered within the provisions of the Aarhus Convention, and thus that the Party concerned has to ensure adequate opportunities for public participation. Although the Party concerned refers in the case of the Crossrail Act to a "specific legislative act", the Committee holds that the process adopting the Crossrail Act by means of a hybrid bill falls within the scope of article 6 of the Aarhus Convention as it serves as a decision to permit a specific activity.

Public participation – public notice (art. 6, para. 2)

57. As a project under article 6, paragraph 1(a), in conjunction with paragraph 20 of the annex, the public participation provisions of article 6 apply.

...

59. With regard to the public notice, the Committee notes that information about the project and the elements of article 6, paragraph 2, of the Convention were available for the public early on during the permitting procedure, on the Internet (web site of the developer and the Parliament; the press; and the information centers along the project). The number of petitions objecting to the project, including to the demolition of buildings, shows that members of the public were adequately informed. Therefore, the Committee finds that the Party concerned did not fail to comply with article 6, paragraph 2, of the Convention.

Access to review procedures (art. 9, para. 2)

60. Article 9, paragraph 2, of the Convention requires Parties to ensure access to procedures for review of decisions, acts and omissions subject to article 6. This provision addresses standing, as well as the scope of review, that should comprise the substantive and procedural legality of the act. To comply with the Convention, the Party concerned must ensure that within its domestic legal system all criteria required under article 9, paragraph 2, of the Convention, also those extending beyond the EU law and the 1998 Human Rights Act, are met in regard to hybrid bills processes.

61. The Committee examines in particular the scope of the review procedures after the adoption of the Crossrail Act (or any act adopted further to Hybrid Bill procedure authorizing a specific activity). In the case of the Crossrail Act no such challenge was brought before a court of law. Thus, the Committee is not in position to determine whether the legal remedies available under the law of the Party concerned would have enabled members of the public concerned to challenge the Crossrail Act as required under article 9, paragraph 2, of the Convention.

## IV. Conclusions and recommendations

62. Having considered the above, the Committee concludes that by adopting the Cross Rail Act through the hybrid bill process the Party concerned was not in non-compliance with article 6 paragraph 2. Furthermore, the Committee holds that due to

> the lack of sufficient information about the practice on legal remedies concerning hybrid bills, the Party concerned is not in non-compliance with article 9, paragraph 2, of the Convention.

**Time limits**

35. From 1 July 2013, the time limit in judicial review Planning Act challenges became 6 weeks. This brings it into line with statutory appeals under s288 TCPA 1990 and s118 Planning Act 2008 (JR) and s113 PCPA 2004 (JR).

36. This brings clarity to what was previously a very uncertain position. In *Finn-Kelcey v Milton Keynes* [2009] Env LR 17, the Court decision to refuse permission to bring judicial review in relation to a challenge to a windfarm when it had been brought at the end of the three month period was upheld by the Court of Appeal; the application had not been sufficiently prompt. In Case C-406/08 *Uniplex* [2010] ECR I-00817 the CJEU,[11] in the context of public procurement, said that the 'promptness' requirement was insufficiently certain to comply with 'effectiveness principle' in EU law.

37. Subsequently, in *R (Buglife) v Medway Council* [2011] EWHC 746 (Admin),[12] the Court accepted that any proceedings involving any "Community" claim had to allow for a three month period for the application to be lodged; such applications could not be refused on the basis that they were made within this period but not 'promptly'. In *Berky v Newport City Council* [2012] EWCA Civ 378 however, the Court of Appeal in obiter comments threw doubt on whether that approach was correct in the context of planning. The EU challenge related to the means by which the decision was taken that an EIA was not necessary. The challenge was brought right at the end of the three month period from the date planning permission had been granted without any pre-action letter having been written and with the building of the development already having started. It was noted that the actual decision challenged had taken place in January 2010 and the judicial review had not been commenced until April 2011. The Court noted that the application of a strict three month time period from planning permission "gives rise to manifest inconveniences, both forensic and practical" in the planning field. Interestingly, one of the factors that the Court took into account was the potential for commercial blackmail. It stated at paragraph 67:

> "If the objector in the present case had been not a citizens group but another supermarket operator, seeking to avoid competition for its own local store, under the approach in *Uniplex* as extended to this case it would have been entirely open to

[11] Confirmed in Commission v Ireland [2010] PTSR 1403.
[12] See also *R (U and Partners) (East Anglia Ltd) v Broads Authority* [2011] EWHC 1824.

> Morrisons business rival to have announced in January 2010 that it objected to the screening opinion, but that it would not reveal whether it was going to bring proceedings until two months and thirty days had elapsed from the date of the subsequent planning permission. The opportunity for commercial blackmail does not need to be emphasised."

38. However, Buxton and Moor-Bick LJJ both considered (in contrast to Carnwarth LJ) that no distinction could be drawn between the discretionary power to grant relief under section 31 of the Senior Courts Act and the discretion to grant permission under rule 54; in both cases EU law required a fixed period in order to comply with the principles of legal certainty and effectiveness. Nevertheless, the Court held that it did not need to resolve the issue of whether the principle of effectiveness was complied with in the specific case because of the lack of merits of the case: §§ 43, 52, 77.

**Environmental information**

39. In Case C-515/11 *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland* (18 July 2013) the CJEU considered Article 2(2) of Directive 2003/4 on public access to environmental information, which defines the term 'public authority' as "government or other public administration, including public advisory bodies, at national, regional or local level" but also provides that "Member States may provide that this definition shall not include bodies or institutions when acting in a ... legislative capacity. ...".

40. The CJEU was asked to decide whether the second subparagraph of Article 2(2) of Directive 2003/4/EC] meant that bodies and institutions carrying out activities relating to legislation can be excluded from the term "public authority" in their entirety.

41. The CJEU held that the first sentence of the second subparagraph of Article 2(2) did not allow Member States to preclude 'bodies or institutions acting in a ... legislative capacity' as public authorities from the obligation to provide access to the environmental information "when they prepare and adopt normative regulations which are of a lower rank than a law." The CJEU relied on the Aarhus Convention in reaching this decision:

> "31 As regards the aims of the directive, only the smooth running of the process for the adoption of legislation and the particular characteristics of the legislative process which ensure that the public is usually adequately informed justify the fact that those bodies acting in a legislative capacity or participating in the legislative process should be exempt from the obligations to provide information imposed by that directive.
>
> 32 That interpretation is supported by the wording and the scheme of the Aarhus Convention, in the light of which Directive 2003/4 must be interpreted (see, by analogy, Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* [2011] ECR I-3673, paragraph 41).

> 33 The Aarhus Convention distinguishes between the rules for legislative acts and those for regulatory acts. Thus, while the second sentence of Article 2(2) of that convention allows Party States to refuse access to documents held by the public authorities acting in a 'legislative capacity', Article 8 thereof, by contrast, requires them to promote effective public participation during the 'preparation of executive regulations'."

42. Accordingly, only when acting in relation to the adoption of primary legislative acts, could the obligation to provide information be excluded.

43. In *R (Evans) v Her Majesty's Attorney General and the Information Commissioner* [2013] EWHC 1960, a journalist was refused disclosure of communications passing between the Prince of Wales and various government departments. The Information Commissioner upheld the Government's refusal to disclose the information on the basis that it would constitute an actionable breach of confidence and the public interest was not sufficient to justify disclosure. However, the Upper Tribunal concluded that a category of the information sought, "advocacy correspondence", could not lawfully be withheld under the terms of the Act and the Environmental Information Regulations 2004. The correspondence was still not disclosed and the Attorney General issued a certificate stating that he had formed the opinion, on reasonable grounds, that there was no failure to comply with the Act or the Regulations. He attributed great weight to the convention that the heir to the throne should be educated in the business of government to prepare him for kingship, and concluded that the advocacy correspondence fell within that convention.

44. The journalist argued that the Attorney General should not interfere with the tribunal's findings of fact without fresh evidence or some other compelling reason. Further, that the executive override provisions of s53 were incompatible with Directive 2003/4 Article 6. The Divisional Court rejected these arguments holding that whilst the Act provided a general right of access to information, subject to specified absolute or qualified exemptions and decisions of a public authority could be scrutinised by the Information Commissioner, a specialist body, and then, on appeal, by a specialist tribunal with further potential resort to the courts on a point of law, at any stage the relevant minister could intervene to deploy the power conferred by s53. This was an executive veto of a judicial decision, which therefore necessary called for close scrutiny. In particular, the veto was not final; the reference to "reasonable grounds" in s53 clearly imported the availability of challenge by way of judicial review. The words "reasonable grounds" meant just that, they did not mean "Wednesbury unreasonableness" (see paras 24, 79-85, 89-90 of judgment).

45. The Attorney General's decision to exercise the veto was based on the arguments that had not prevailed before the Upper Tribunal. However, this did not mean that the decision was unreasonable. Disagreement with a rational decision could be rational. There was no need for

the person exercising the veto to form the view on reasonable grounds that the decision which he proposed to override was itself unreasonable or flawed. The Attorney General's statement demonstrated "reasonable grounds". The reasons expressed as to where the balance of public interest lay were proper, rational and cogent (paras 108-115).

46. Article 6(2) of the Directive imposed an additional requirement on Member States to follow a review procedure consistent with Article 6(1). This could be met in a case under s53 by the courts having the power to review the reasonableness of the grounds given by the accountable person in issuing the certificate, which would necessarily and integrally involve a review of the original decision. Judicial review was consistent with the Aarhus Convention 1998 Article 9(4). It was flexible, enabling an appropriate intensity of review where such intensity was called for.

**The requirements of review for the purposes of Article 9(4) Aarhus Convention**

47. The view in *R (Evans) v Her Majesty's Attorney General and the Information Commissioner* [2013] EWHC 1960 that judicial review was sufficient to meet the requirements of Article 9(4) of Aarhus followed the earlier view of the Court of Appeal (February 2013) in *R (Evans) v Her Majesty's Attorney General* [2013] EWCA Civ 114, [2013] JPL 1027 that that was the case. In that case, the claimant sought permission to appeal against the refusal of the deputy judge to give him permission to apply for judicial review of a screening direction made by the secretary of state. The secretary of state had decided in his screening decision that a proposed development was not likely to have significant effects on the environment.

48. The Court rejected the claim that the secretary of state had failed to take a precautionary approach. Most significantly however, it rejected the argument that where an Aarhus complaint arose, the Wednesbury test was inadequate. The Court made clear that decisions of the compliance committee, whilst worthy of respect, were not binding on English courts. In any event, it rejected the contention that the Compliance Committee had in the *Port of Tyne communication* (ACCC/C/2008/33) held that the Wednesbury approach was impermissible. Further, it noted that the cases of *Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321, [2012] Env LR 22 and *R (on the application of Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869, [2013] PTSR 406 (regarding screening decisions) had been decided after the Compliance Committee expressed its concern but in neither case did the court consider that such concern called into question the existing Wednesbury approach. Furthermore the ECJ had endorsed that approach in *Commission of the European Communities v United Kingdom* (C-508/03) [2006] QB 764 . The question for the Secretary of State when making a screening direction was a question of

fact, which could not be subjected to a test of proportionality (paras 33, 35, 37-39). The Court stated:

> "130 … Article 9.1 in general terms, so far as concerns requests under Article 4 (access to environmental information), requires "access to a review procedure" by an independent and impartial body established by law. That generality of approach is reflected in Article 6.2 of the Directive itself.
>
> 131 It is true that Article 9.2 of the Aarhus Convention requires access to such a body "to challenge the substantive and procedural legality of any decision": albeit that is dealing specifically with requests under Article 6 (public participation in decisions on specific activities) and such language is not in fact deployed in Article 9.1 of the Aarhus Convention. It is also true that the Implementation Guide to the Aarhus Convention (2013 ed. At p.199) asserts that the entitlement to challenge the "substantive and procedural legality" is "implicit" in Article 9.1 also; and the 2011 Recommendations of the Implementation Committee had indicated concern as to whether a judicial review procedure, of the model adopted under the law of England and Wales, meet the standards of review said to be required by the Aarhus Convention with regard to substantive legality. But the point was tentatively put by the Implementation Committee: and there was, at all events, no finding that the United Kingdom was in non-compliance with Article 9 of the Aarhus Convention (see paragraph 127). Moreover, while the Implementation Guide itself may properly be taken into account, it is not binding: any more than are the views of the Implementation Committee.
>
> ....Judicial review is a procedure consistent with the requirements of Article 9.4 of the Aarhus Convention . It is a flexible procedure, enabling an appropriate intensity of review where such intensity of review is called for: see also the analogous reasoning of the Court of Appeal in *T-Mobile (UK) Ltd v Office of Communications* [2009] 1 WLR 1565; [2008] EWCA Civ 1373 (a competition case dealing with Directive 2002/21/EC ). In the present kind of case, close scrutiny by the court is called for: and such close scrutiny of the reasons given for the accountable person's opinion must require – and has here required – a close scrutiny by the court of the initial decision to withhold. Indeed, if there were substantive or procedural illegality or irregularity in the original decision such a review by the court, under section 53 , should reveal it. In my view, that amply complies with the requirements of Article 6.2 of the Directive."

**Damages and legitimate expectation**

49. In *The Gas and Electricity Markets Authority v Infinis (Re-Gen) Limited* [2013] EWCA Civ the appellant appealed against a decision ([2011] EWHC 1873 (Admin)) that its refusal of accreditation for a Renewables Obligation Certificate (ROC) for power stations owned and operated by the respondents (X) was unlawful.

50. Under the Electricity Act 1989 and relevant SIs, electricity suppliers were required to enter into arrangements to secure electricity from non-fossil fuel sources. If they did so, they could obtain a ROC, if they did not, they would be liable to a charge. X had sought accreditation for two generating stations fuelled by landfill gas. GEMA refused to grant the ROC on the basis that the relevant generating stations were excluded generating stations. Judicial review was sought on the basis that that decision was unlawful. Damages were sought by way of just satisfaction

under the Human Rights Act 1998 s8 in respect of the violation of their rights under the European Convention on Human Rights 1950 Protocol 1 Article 1. The judge accepted that by the time X had applied for accreditation the statutory exclusion under Article 6(3) and Article 6(4) of the 2006 Order and Article 21 of the 2009 Order did not apply and the authority had been wrong to conclude that it did, such that the ROC should have been granted. Consequently, the applicant had been deprived of a valuable economic benefit since the refusal to accredit their generating stations and grant ROCs meant that they had suffered a clear and calculable financial loss, and they were awarded damages by way of just satisfaction in respect of the monetary value of the ROCs which should have been issued earlier, based on the principle of *restitutio in integrum*.

51. The Court of Appeal rejected the authority's argument that even if the decision to refuse accreditation had been unlawful, there had been no breach of Protocol 1 Article 1 because X's claim to be accredited was not sufficiently established to amount to a "possession", and that the judge had erred by failing to distinguish between the role that compensation played in human rights cases and cases of breach of statutory duty. The Claimant had a legitimate expectation of the right to accreditation under the statutory scheme. A legal provision or a legal act such a judicial decision sufficed in giving a party an entitlement to some pecuniary benefit. X had been wrongly deprived of a pecuniary benefit to which they were entitled by statute. Where the breach of a Convention right had clearly caused significant pecuniary loss, that would usually be assessed and awarded, *Anufrijeva v Southwark* LBC [2003] EWCA Civ 1406, [2004] QB 1124 applied. Since the amount of the Claimant's lost "benefit" was readily calculable, *restitutio in integrum* was manifestly appropriate and the judge had been entitled to assess X's damages on that basis (paras 25, 27).

**Habitats and protected species**

52. In *R (on the application of Christopher Prideaux) v Buckinghamshire County Council & FCC Environment UK LTD* [2013] EWHC 1054 (Admin); [2013] Env LR 32: [2013] PTSR D39 of 29 April 2013, the Claimant applied for judicial review of the grant of planning permission for the development of an "energy from waste" recovery facility in Buckinghamshire. That application was refused on the basis that the local planning authority had given sufficient consideration to ecological issues, including the effect of the development on protected species, and had complied with Directive 92/43, the Conservation of Habitats and Species Regulations 2010, and relevant national policy. The local authority believed that there was an urgent need for the facility under its waste planning strategy. The site was intended to take all waste produced in Buckinghamshire to convert into energy, thus diverting it from landfill. The environmental statement addressed the likely ecological impact and the appropriate mitigation,

including the fact that derogation licences would be required under the Conservation of Habitats and Species Regulations 2010 for the demolition of a building where protected species were roosting. Licensing conditions were considered met.

53. After planning permission had been granted, derogation licences were obtained from Natural England, its initial objections having been mitigated. P's objections to the development were largely ecological. The issues were whether the local authority had failed to: (i) comply with Directive 92/43 and the Regulations; (ii) apply relevant national policy on nature conservation in the National Planning Policy Framework; and (iii) provide adequate reasons for the grant of planning permission.

54. The Court held that:

    a. Under reg 9(5) of the Regulations, a local authority had to have regard to the requirements of the Directive in so far as they might be affected by a planning permission decision. It was the function of Natural England, as an executive, non-departmental public body responsible to the secretary of state, to enforce compliance with the Directive by prosecuting those who committed offences contrary to its provisions. Regulation 9(5) did not require a planning authority to carry out the assessment that Natural England had to make, so the lawfulness of the local authority's acts was not to be tested by imposing upon it a duty that was not its own, *R (on the application of Morge) v Hampshire CC* [2011] UKSC 2, [2011] 1 WLR 268 applied and *R (on the application of Woolley) v Cheshire East BC* [2009] EWHC 1227 (Admin), [2010] Env LR 5 doubted. In the instant case, the local authority had discharged its duty under reg 9(5) in accordance with the approach indicated in Morge. It had, in fact, satisfied the more burdensome remit envisaged by *R (on the application of Morge) v Hampshire* and *Woolley*, even though neither of those authorities was any longer good law. [MSOffice1]The likely effect on protected species had been dealt with in detail and alternative routes for the access roads considered. The officers' reports were pragmatic and evidenced the right approach.

    P had relied heavily on guidance in the European Commission's guidance document that derogation was to be a "last resort" and that competent national authorities should select a development option that would ensure the best protection of species. However, that guidance was not the law. Article 16 of the Directive did not provide that a licence had to be refused if there was an alternative mode of development with no foreseeable impact, or an impact less harmful, on protected species. Any such provision would produce very odd results. In any event, the Commission guidance made it clear that

there were other considerations besides protected species. Judging what might be a satisfactory alternative in a particular case required a focus on what was sought to be achieved through the derogation, and on the likely effects of the works on the species in question. In light of the advice it had been given and the absence of ongoing objection from Natural England, the local authority had been entitled, if not bound, to conclude that the derogation tests were at least likely to be met (see paras 85-86, 93-105, 112-123).

b. Assessing the nature, extent and acceptability of the effects of a development on the environment was a task for the planning authorities, not for the court. The local authority had been entitled to rely on the ecological analysis presented to it, and to give significant weight to the views of Natural England. If the latter had been uneasy about the mitigation proposals, it would have persisted in its objection. The local authority's conclusions were entirely reasonable and congruent with national policy (paras 130-131, 135-137, 144-157). Under the Town and Country Planning (Development Management Procedure) (England) Order 2010 Article 31, the local authority had to provide in its decision notice a summary of the relevant policies in the development plan. It did not have to list the provisions of the Directive, the Habitats Regulations or the national policy framework that it had considered. The summary reasons given were terse, but lawful (paras 164-165-168).

55. In *R (on the application of Mid Counties Co-operative LTD) v Forest of Dean District Council & Trilogy Developments Ltd* [2013] EWHC 1908 (Admin) the claimant co-operative applied for judicial review of the defendant local authority's decision to grant outline planning permission to the interested party property developer for a large out-of-town retail store. The Claimant operated a supermarket in the town centre. The local authority had accepted the recommendation in a planning officers' report to grant permission subject to the Developer's undertakings regarding contributions towards regeneration of the town centre. The local authority recognised the harmful impact on the town centre contrary to the National Planning Policy Framework, but concluded that the contributions offered in mitigation were sufficient to outweigh that policy objection. A 1999 application for permission for a large retail store had been refused, despite support from the local authority, on the basis that there was no need for a development of such capacity and that the impact on the town centre was not outweighed by the potential benefits. The officers' report made limited reference to the 1999 decision. M's proposal to extend its town centre store was not mentioned in the report.

56. The Court granted the application, holding:

a. The adverse impact on the town centre had to be considered by the local authority as a separate and free-standing matter. The statements in the officers' report relating to the mitigation offered being sufficient to off-set the harm were inaccurate. In addition, there was no analysis, merely assertions, of the mitigation of harm. The local authority's reliance on studies it had commissioned, which it recognised did not consider the impact of an out-of-town-centre supermarket on the town centre, was misplaced. It was highly material that the studies did not address the effect on the town centre, given the very substantial impact. That was exactly the point which had been addressed in the 1999 decision. It was not clear from the officers' report that there was any clear reasoning on the basis of need to distinguish the instant decision from the 1999 decision. There had been no proper analysis of the 1999 decision in the report. The overall effect of the report had significantly misled the committee about material matters, which were not corrected before the relevant decision was taken

b. Relevant questions had not been asked and no adequate reasons had been given to justify the opinion that the mitigation offered was satisfactory to off-set the harm. With regard to the alleged breach of reg 122(2), there were contributions that could properly be said to be directly related to the development insofar as they were capable of encouraging some customers to shop in the main town centre shopping centre. However, the s106 obligations were not "necessary to make the development acceptable in planning terms" so as to "constitute a reason for granting planning permission". There was therefore a breach of reg 122(2)(a), but no breach of reg 122(2)(b) (paras 28).

57. In *Matthew Champion v (1) North Norfolk District Council (2) Natural England* [2013] EWHC 1065 (Admin) the claimant applied for judicial review of the first defendant local authority's grant of planning permission for the erection of two silos, a lorry park and ancillary development at a site near a river. The river was a Site of Special Scientific Interest and was a designated EU Special Area of Conservation. There were concerns that the development would pollute the river. Ecological and flood risk assessments were carried out and there was consultation by the local authority with the second defendant nature conservation body. Mitigation measures designed to ensure that pollutants would not enter the river were proposed. No Environmental Impact Assessments (EIA) or Habitats Appropriate Assessments were carried out. N responded to the application for planning permission as a statutory consultee and stated that, given the mitigation measures, there would not be a likely significant effect on the river. Planning permission was granted subject to conditions.

58. The Court granted the application in part, holding that:

a. When considering whether the test for an assessment was triggered, the relevant authority could take into account the remedial measures submitted as part of the proposal, *Gillespie v First Secretary of State* [2003] EWCA Civ 400, [2003] Env LR 30 followed. The decision about whether an EIA or appropriate assessment was required was one for the local authority subject to the irrationality test, *R (on the application of Dicken) v Aylesbury Vale DC* [2007] EWCA Civ 851, [2008] Env LR 20 followed. The local authority had legal power pursuant to the Local Government Act 2000 and the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 to decide that it was not necessary to obtain an appropriate assessment or an EIA as that decision was conducive or incidental to the grant of planning permission. There were a number of matters which could be relied on for coming to the conclusion that there was no risk of pollutants entering the river. The nature conservation body, the Environment Agency and the local authority were satisfied that there was no relevant risk. However there were a number of matters which pointed the other way. The decision by the local authority's development control committee not to have an appropriate assessment or an EIA would have been a rational and reasonable conclusion but the committee also imposed conditions in case pollutants did enter the river which suggested that the committee considered that there was such a risk. The local authority could not rationally adopt both positions at once. The committee would have to decide whether it considered that there was no relevant risk of pollutants entering the river. If so, it could grant planning permission but would not be entitled to impose those conditions. If there was such a risk, the committee would have to require an appropriate assessment and an EIA to be obtained. The local authority's decision was quashed (see paras 40-41, 114-122 of judgment).

59. In *Shadwell Estates Ltd v Breckland District Council & Pigeon (Thetford) Ltd* [2013] EWHC 12 (Admin) there were no public law deficiencies in a local authority's adoption of an area action plan confirming the designation of an area for strategic urban expansion. A sustainability appraisal and assessments under the Environmental Assessment of Plans and Programmes Regulations 2004 and the Conservation of Habitats and Species Regulations 2010, relating to the presence of stone curlews in the area, had been adequate.

60. The claimant challenged the defendant local authority's decision to adopt the Thetford Area Action Plan (TAAP). The local authority's core strategy had identified the need for urban expansion to Thetford. The local authority's sustainability appraisal, strategic environmental assessment and assessment under the Conservation of Habitats and Species Regulations 2010 for that core strategy had not been challenged and were supported by Natural England and the

RSPB. The proposed TAAP confirmed the designation of an area north-east of the town as a strategic urban extension on which 5,000 houses were to be built. The interested party, a development company, promoted a planning application to build on that land. There was a public examination of the TAAP at which an inspector considered the effect of development on stone curlews, which were a protected species present in a special protection area (SPA) to the south-east of Thetford. None of the areas allocated for development were within 1,500 metres of the SPA's boundary. The inspector found that the local authority had carried out an adequate sustainability appraisal and strategic assessment pursuant to the Planning and Compulsory Purchase Act 2004 s19 and that the TAAP was, accordingly, sound. The local authority subsequently adopted the TAAP. S, which owned an agricultural and equine estate close to the town, challenged that decision under s113 of the Act.

61. The Claimant argued that the local authority had failed to carry out an adequate sustainability appraisal and strategic environmental assessment in compliance with s19(5)(b) of the Act and various provisions of the Environmental Assessment of Plans and Programmes Regulations 2004; the inspector had erred in finding that the TAAP satisfied s19 and that it was sound; the local authority's assessment breached reg 61 of the 2010 Regulations because it had not taken account of evidence that built development could adversely affect the nesting density of stone curlews up to a distance of 2,500 metres.

62. The Court rejected the application holding:

    a. The local authority's sustainability appraisal had made numerous references to biodiversity issues, impacts on stone curlews, and alternative sites. The local authority had not been required to provide a comprehensive assessment of the body of evidence about stone curlew activity, notwithstanding the quality of the evidence. Under reg 12(3)(d) of the 2004 Regulations, the information required in that assessment was that which was reasonable, taking account of the need to avoid duplication. Assessments had already been undertaken for the core strategy which had the strong support of Natural England, which was a statutory consultee whose views had to be given considerable weight, *R (on the application of Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin), [2008] 2 P & CR 16 applied. The local authority's approach was also supported by the RSPB, which was an important and expert interest group, who had not considered that further assessment work was necessary before a decision could be made about the TAAP. The local authority's appraisal and environmental impact assessment was, accordingly, adequate (see paras 72, 80-81, 83, 85 of judgment).

b. Given that conclusion, on the material before the inspector, his finding that the TAAP satisfied the Act and was sound was open to him (para 86).

c. In order to succeed on its third ground of challenge, S had to produce credible evidence of a real risk to the integrity of the *SPA, R (on the application of Boggis) v Natural England* [2009] EWCA Civ 1061, [2010] 1 All ER 159 applied. The difficulty with its contention that the proposed development could affect stone curlews' nesting density up to a distance of 2,500 metres was that the 1,500 metre distance had not been challenged when the core strategy was being considered. No one had argued that a more precautionary approach was necessary. The 1,500 metre distance was endorsed by Natural England and the RSPB: it had been adopted in the core strategy, and the core strategy was no longer challengeable. No new evidence had been produced which undermined the validity of the 1,500 metre distance (paras 90-91).

**SEA challenges to policy – pre-consent attempts to stop proposals**

63. In *Heard v (1) Broadland District Council (2) South Norfolk District Council (3) Norwich City Council* (2012) [2012] EWHC 344 (Admin), the claimant challenged the defendant local authorities' adoption of their Joint Core Strategy (JCS). The JCS was a development plan document created under the Planning and Compulsory Purchase Act 2004 for the local authorities' areas. In order to meet its statutory obligation to conform with the regional spatial strategy, the JCS had to provide for stipulated levels of growth in development, but it was for the JCS to decide where that should take place. The Claimant was a resident in an area earmarked for major growth in the JCS. He challenged the JCS under s113 of the Act.

64. H contended that the JCS was unlawful because, pursuant to Directive 2001/42, it was subject to a Strategic Environmental Assessment (SEA). The SEA undertaken by the local authorities did not comply with their obligation to explain their reasons for selecting certain reasonable alternatives and examine those reasonable alternatives in the same depth as the preferred option which had emerged. The local authorities submitted that the work they had done was sufficient for those purposes. H argued that the SEA was also unlawful since it had not assessed the impact of a proposed new highway, the Northern Distribution Road (NDR), or that of alternatives to it. The local authorities contended that the NDR had been adequately assessed by the relevant highway authority, and that although the JCS in some ways supported the NDR, it was not for them to assess it or consider alternatives to it. The local authorities submitted that, were H's challenges to succeed, the Court should nevertheless exercise its discretion under s113 against

the grant of any relief since H had not been prejudiced by any procedural failings and his preferred alternative option of no urban growth was unrealistic and they had substantially complied with the Directive.

65. The Court held:

a. The JCS had been the subject of frequent public consultation and the preferred option had been properly assessed. A number of alternatives had also been assessed. However, it was not easy to discern how the local authorities had answered the essential factual contention at the heart of H's submissions, namely that the outline reasons for the selection of alternatives at any particular stage had not been given clearly. There had been a sustainability appraisal, but no discussion, in so far as was required by the Directive, of why the preferred options came to be chosen; nor was there any analysis on a comparable basis, in so far as required by the Directive, of the preferred option and selected reasonable alternatives. There was no express requirement in the Directive that alternatives be appraised to the same level as the preferred option, but the aim of the Directive was more obviously met by, and was best interpreted as requiring, an equal examination of the alternatives which it was reasonable to select for examination alongside whatever even at the outset might be the preferred option. It was part of the purpose of that process to test whether what might start out as the preferred option remained that way after a fair and public analysis of what a local authority regarded as reasonable alternatives. Such an equal appraisal had not been accorded to the alternatives referred to in the sustainability appraisal. If that was because only one option had been selected, it highlighted the need for, and absence in the instant case of, reasons for the selection of no alternatives as reasonable. That process had not been adopted, and H succeeded on his first ground (see paras 56-57, 71-72 of judgment).

b. The proposing or planning of the NDR was not within the remit of the JCS; it was for the highway authority to plan and promote the NDR through its plans. The NDR was outside the local authorities' legal competence. It had, in any event, been subject to environmental assessment and the time for challenges to it was long past. It was not the function of the JCS to remedy any deficiencies in earlier assessments undertaken for the purposes of other plans. Accordingly, the Claimant’s second ground of challenge failed (paras 77, 82-83).

c. The court declined to exercise its discretion to refuse relief. There had been a series of failings in relation to the local authorities' obligations under the Directive. Whilst they might be right that the option of no growth in the Claimant’s local area was unrealistic,

the local authorities had not substantially complied with the Directive. Section 113 of the Act gave a wide variety of powers, short of quashing the whole JCS and starting again, which could be exercised, and the court invited submissions on the precise form of appropriate relief in the light of those powers (paras 86-87).

66. In R *(on the application of Abdul Wakil (t/a orya textiles) & ors) v Hammersmith & Fulham London Borough Council & Orion Shepherd's Bush Ltd* [2012] EWHC 1411 the claimants (W) successfully applied for judicial review of the defendant local planning authority's decision to produce and adopt a purported supplementary planning document (SPD).

67. W, who were all members of ethnic minority groups, owned various retail premises adjoining a market. In December 2009, the local authority had produced a planning brief to guide the intended enhancement of the market and surrounding area. A public consultation took place in October 2010 and on October 27, the local authority issued the SPD setting out its development plans.

68. W contended that the decision to issue the SPD was flawed by (1) failures in the consultation procedure; (2) the fact that the disputed document was not, in substance, an SPD within the Town and Country Planning (Local Development) (England) Regulations 2004 but was, pursuant to reg 6(2), an area action plan and therefore, under reg 7, was a development plan document (DPD) which should have been subjected before its adoption to a different procedure involving independent assessment and approval by the relevant secretary of state; (3) the failure, whether the document was a DPD or an SPD, to consider whether it should be subject to a sustainability appraisal and/or a strategic environmental assessment pursuant to the Environmental Assessment of Plans and Programmes Regulations 2004; (4) the local authority's failure to comply with its then duty under the Race Relations Act 1976 s71 to have due regard to the need to eliminate unlawful discrimination and victimisation and/or to promote equality of opportunity and good relations between persons of different racial groups.

69. The Court, granting the application, held that:

    a. Public consultation had to be undertaken at a time when proposals were at a formative stage and giving those consulted adequate time to give intelligent consideration and respond, *R v North and East Devon HA ex p Coughlan* [2001] QB 213 followed. Although W had been omitted from participation in an independent survey conducted in December 2009, that inadvertent failure did not infect the consultation process since, by the time the local authority took its decision in October 2010, W had had ample

opportunity to make their views known and had done so. The first ground of challenge therefore failed (see paras 35, 72-73 of judgment).

b. The question whether a certain planning document satisfied all the conditions identified in a statutory document concerned the application of fact to legal requirements and, as such, was a matter where the Court had to make a judgment: the court was not limited to reviewing a decision made by a local authority subject only to intervention on Wednesbury grounds, *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983 applied. The court had to be cautious before concluding that the local authority had erred in characterising a document as an SPD on the basis that the conditions in reg 6(2) were not satisfied. However, where the whole thrust, tenor and organisation of the document concerned the transformation of the market and identified it as an area of significant change, the local authority had erred in failing to characterise the document as an area action plan. That being so, the statutory scheme required that it should have been subject to the procedure required for a DPD. Since it had not been, the adoption of the document was procedurally flawed and unlawful (paras 81-82, 89-90).

c. Regardless of whether the document was an SPD or a DPD, it was procedurally necessary for the local authority to have made a determination under reg 9(1) of the Environmental Assessment Regulations on whether or not the planned development was likely to have significant environmental effects, and to act on the outcome of that determination either by carrying out an environmental assessment or not being required to do so. The failure to make a determination under reg 9(1) rendered the decision to adopt the document unlawful (paras 96-97, 99).

d. Since a full, comprehensive, objective and conscientious Equalities Impact Assessment had been conducted by the local authority, W's challenge on the basis of the Act failed (para 102). W's delay in bringing the claim, if there was any, had not caused the local authority sufficient detriment so that it would be appropriate to refuse W relief. The decision to adopt the document in October 2010 was, accordingly, quashed (paras 109-110).

70. In *HS2 Action Alliance Ltd (2) Buckinghamshire County Council & ors (3) Heathrow Hub Ltd v Secretary of State for Transport* [2013] EWCA Civ 920 three groups of claimants (X) appealed, or sought permission to appeal, against the dismissal of their complaints about the implementation and route of a national high speed rail network known as "HS2". The appeal was dismissed. The case is now before the Supreme Court.

71. The respondent secretary of state had issued a Command Paper and a next steps document (DNS) outlining the proposal strategy. X had made 10 challenges in judicial review proceedings, which had been largely dismissed. The first rejected claim concerned grounds 1 and 3, which related to the application of Directive 2001/42 (SEAD) and Directive 2011/92 (EIAD); the second concerned grounds 5(a), 5(b) and 8(b), which related to the lawfulness of the consultation process; the third concerned grounds 6 and 7(a), which attacked the lawfulness of the decision to proceed with HS2 on public sector equality duty and irrationality grounds.

72. The Court held, Lord Justice Sullivan dissenting in relation to ground 1 that:

    a. The crucial question concerning ground 1 was whether the DNS document was "a plan or programme" within the scope of SEAD which "set the framework for future development consent". The Judge below, relying on authorities from the European Court of Justice, had held that it was not. His reason was that Parliament was free to disagree with it, and it could not, therefore, have a sufficiently potent effect on decision-making. As stated by the Advocate General in *Terre Wallonne ASBL v Region Wallonne* (C-105/09) , a plan or programme which set the framework was not required to determine conclusively the factors of the project that were likely to have an environmental effect or whether development consent was to be given; it was only required to influence. Guidance as to the required degree of such influence was given in Terre Wallone and *in Inter-Environnement Bruxelles ASBL v Region de Bruxelles-Capitale* (C-567/10) [2012] 2 CMLR 30. Those authorities suggested that such influence had to be a legal influence, which had been intended to have a real effect on whether development consent was given and, if so, on what terms. The judge below had correctly captured the essence of "legal influence" by defining it as something which narrowed the discretion which the decision-maker would otherwise enjoy. The decision-maker might not be legally obliged to follow the plan but, in order to be regarded as within the scope of SEAD, there had to be cogent evidence that there was a real likelihood that the plan would influence the decision, *Terry Wallone* considered and Bruxelles-Capitale applied. The DNS had no legal influence on Parliament and could not therefore amount to a "plan or programme" which "set the framework for future development consent" (see paras 34-40, 48-52, 55-60 of judgment). Such a construction did not mean that there was a gap in the environmental protection that SEAD was intended to secure, nor did it involve any incompatibility with the Aarhus Convention 2001 (paras 45-46, 62-63). It was unnecessary to consider whether the Command Paper was an "administrative decision" under which the DNS was "required" within the meaning of Article 2(a) of SEAD (paras 65-71). With regard to

ground 3, the Parliamentary hybrid bill process, in which the principle of a bill would be established at the Second Reading stage, was compliant with the public participation objectives in Article 6 of EIAD (paras 74-83).

b. Permission to appeal was refused in relation to grounds 5(a) and 8(b); full route details were not required to be disclosed in order to make the consultation process lawful (paras 84-88, 109-120). In relation to ground 5(b), the Secretary of State's failure to re-consult a consortium of local authorities after obtaining further reports on their "optimised alternative" to HS2 did not make the consultation unfair or unlawful (paras 95-96, 102-108).

c. Permission to appeal was also refused in relation to grounds 6 and 7(a) (paras 121-143).

d. (per Sullivan LJ) SEAD was applicable to the DNS document because the document was a "plan or programme", which met the requirements of Article 2(a). Adopting the secretary of state's approach to the meaning of "set the framework for future development consent" would enable Member States to choose a project as the "best option" at an early stage and to ensure that that project came through at the later stage, by pursuing it through a legislative process without having carried out a strategic environmental assessment of the "reasonable alternatives". There was insufficient guidance in the European jurisdiction as to the meaning in SEAD of "set the framework". It was necessary to refer to the European Court the question whether the fact that a Member State chose to adopt a process of granting development consent for a major project having a significant environmental impact by way of an act of national legislation was sufficient, of itself, to place the Government's adoption of its plan or programme outside the scope of the protection of the SEAD (paras 146-188).

**Pollution**

73. In *R (on the application of Client Earth) v Secretary of State for the Environment Food and Rural Affairs* [2013] UKSC 25. In this case the Supreme Court referred to the European Court of Justice questions concerning the time limits applicable to the United Kingdom's obligation under Directive 2008/50 not to exceed limit values in respect of nitrogen dioxide. Client Earth appealed against a decision ([2012] EWCA Civ 897, [2013] Env LR 4) on the interpretation of Directive 2008/50 Article 22.

74. Article 13 of the Directive required Member States to ensure that limit values for nitrogen dioxide should not be exceeded from January 1, 2010. Article 22 provided as follows:

> "Where, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide ... cannot be achieved by the deadlines specified ..., a Member State may postpone those deadlines by a maximum of five years for that particular zone or agglomeration, on condition that an air quality plan is established in accordance with [art.23] for the zone or agglomeration to which the postponement would apply (para.1) ... Member States shall notify the Commission where, in their view, paragraphs 1 or 2 are applicable, and shall communicate the air quality plan referred to in paragraph 1 including all relevant information necessary for the Commission to assess whether or not the relevant conditions are satisfied".

75. Article 23 provided as follows:

> "Where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value ... In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible" (sic).

76. The Secretary of State accepted that the United Kingdom was in breach of Article 13 in relation to certain zones and that for certain zones it had not produced plans showing conformity by 2015; it was asserted, however, that for those zones compliance within that timetable was not realistically possible, owing to circumstances beyond the UK's control and unforeseen in 2008. The parties disagreed about the effect of Articles 22 and 23. The European Commission had stated as follows in a letter to C: "The Commission would have some considerable concerns if [Article 23] were seen to be a way of allowing Member States to circumvent the requirements of [Article 22]. Article 22 ... was introduced in order to afford Member States additional time for compliance for up to a maximum of 5 years, on condition that an air quality plan is established in accordance with [Article 23] and communicated to the Commission for assessment. It is only under these conditions that Member States can be afforded additional time for compliance and [Article 23] itself cannot be relied upon to further extend this clearly prescribed and limited time extension clause".

77. The Court granted a declaration that the UK was in breach of Article 13. Such an order was appropriate both as a formal statement of the legal position and to make clear that, regardless of arguments about the effect of arts 22 and 23, the way was open to immediate enforcement action at national or European level (see para.37 of judgment).

78. The Court considered that the other issues raised difficult issues of European law, the determination of which required the guidance of the European Court of Justice in the form of a preliminary ruling. The following questions appeared appropriate: (a) where in a given zone or agglomeration conformity with the limit values for nitrogen dioxide could not be achieved by the deadline of January 1, 2010, whether a Member State was obliged to seek postponement of

the deadline in accordance with Article 22; (b) if so, in what circumstances (if any) might a Member State be relieved of that obligation; (c) if the answer to (a) was no, to what extent (if at all) were the obligations of a Member State which had failed to comply with Article 13, and had not made an application under Article 22, affected by Article 23; (d) in the event of non-compliance with Article 13, and in the absence of an application under Article 22, what (if any) remedies should a national court provide as a matter of European law (paras 38-39).

**Fracking**

79. The High Court has recently held that 'fracking' it amounts to "mineral extraction" within the National Planning Policy Framework. In Europa *Oil & Gas Ltd. V. Secretary of State for Communities and Local Government & Leigh Hill Action Group* (Ouseley J, 25 July 2013) the Claimant applied to quash the Secretary of State's dismissal of an appeal against the refusal of planning permission for a development which involved exploratory drilling for hydrocarbons in the Holmwood Prospect in the Surrey Hills AONB and Green Belt. It involved the construction and use for an estimated 18-week period of a drill site for the drilling of an exploratory borehole. On Appeal the inspector found that there was no alternative site from which to explore the hydrocarbon prospect which lay below a village and that, subject to the overall planning balance, the development was in principle consistent with government policy on exploring onshore oil and gas resources and in the public interest. The evidence was that the probability of finding hydrocarbons was high by industry standards.

80. However, the Inspector found that it did not amount to "mineral extraction" since its purpose was to search for and appraise any hydrocarbons, rather than to exploit them. As a consequence it was "inappropriate development". The harm by way of inappropriateness, together with the additional harm to the Green Belt and AONB, was not clearly outweighed by the benefits of the scheme and therefore the necessary very special circumstances did not exist. Following the publication on 19 July of DCLG's Planning Practice Guidance and the accompanying ministerial statement, the Secretary of State decided not to defend the Inspector's conclusion that exploration fell outside the definition of "mineral extraction". Leith Hill Action Group continued to defend that aspect of the Inspector's decision. Accordingly, this point was effectively conceded.

81. Ouseley J agreed that the term "mineral extraction" in NPPF para 90 covered the exploration and appraisal stages of mineral development. He held that, since the exploitation of a mineral resource was not possible unless that resource had first been identified and appraised, it would be illogical for those initial stages to be subject to a higher hurdle than the exploitation stage. He also held that, in considering whether the proviso in NPPF para 90 that mineral extraction

schemes must "preserve the openness of the Green Belt" and not "conflict with Green Belt purposes" in order to avoid being inappropriate development should be assessed having regard to the fact that any such scheme would involve at least some significant temporary development. Accordingly, the mere presence of significant development in the Green Belt could not be taken to breach that proviso.

82. In the light of these conclusions, Ouseley J held that the Inspector's decision should be quashed since it could not safely be said that absent his misinterpretation of NPPF para 90 his decision would inevitably have been the same. Permission to appeal to the Court of Appeal was granted to the Action Group both on the interpretation of NPPF para 90 and on whether the decision would have been the same but for the Inspector's error of interpretation.

**Annex 1**

**Rule 45 Part 7**

# VII COSTS LIMITS IN AARHUS CONVENTION CLAIMS

## Scope and interpretation

**45.41**

(1) This Section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims.

(2) In this Section, 'Aarhus Convention claim' means a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject.

(Rule 52.9A makes provision in relation to costs of an appeal.)

## Opting out

**45.42** Rules 45.43 to 45.44 do not apply where the claimant –

(a) has not stated in the claim form that the claim is an Aarhus Convention claim; or

(b) has stated in the claim form that –

(i) the claim is not an Aarhus Convention claim, or

(ii) although the claim is an Aarhus Convention claim, the claimant does not wish those rules to apply.

## Limit on costs recoverable from a party in an Aarhus Convention claim

**45.43**

(1) Subject to rule 45.44, a party to an Aarhus Convention claim may not be ordered to pay costs exceeding the amount prescribed in Practice Direction 45.

(2) Practice Direction 45 may prescribe a different amount for the purpose of paragraph (1) according to the nature of the claimant.

## Challenging whether the claim is an Aarhus Convention claim

**45.44**

(1) If the claimant has stated in the claim form that the claim is an Aarhus Convention claim, rule 45.43 will apply unless –

(a) the defendant has in the acknowledgment of service filed in accordance with rule 54.8 –

(i) denied that the claim is an Aarhus Convention claim; and

(ii) set out the defendant's grounds for such denial; and

(b) the court has determined that the claim is not an Aarhus Convention claim.

(2) Where the defendant argues that the claim is not an Aarhus Convention claim, the court will determine that issue at the earliest opportunity.

(3) In any proceedings to determine whether the claim is an Aarhus Convention claim –

(a) if the court holds that the claim is not an Aarhus Convention claim, it will normally make no order for costs in relation to those proceedings;

(b) if the court holds that the claim is an Aarhus Convention claim, it will normally order the defendant to pay the claimant's costs of those proceedings on the indemnity basis, and that order may be enforced notwithstanding that this would increase the costs payable by the defendant beyond the amount prescribed in Practice Direction 45.

Practice direction 45 provides in relation to the cap on costs recoverable:

# SECTION VII – COSTS LIMITS IN AARHUS CONVENTION CLAIMS

## Limit on costs recoverable from a party in an Aarhus Convention claim: Rule 45.43

Where a claimant is ordered to pay costs, the amount specified for the purpose of rule 45.43(1) is –

(a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;

(b) in all other cases, £10,000.

Where a defendant is ordered to pay costs, the amount specified for the purpose of rule 45.43(1) is £35,000.

# III COSTS CAPPING

## Costs capping orders – General

**3.19**

(1) A costs capping order is an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made.

(2) In this rule, 'future costs' means costs incurred in respect of work done after the date of the costs capping order but excluding the amount of any additional liability.

(3) This rule does not apply to protective costs orders.

(4) A costs capping order may be in respect of –

(a) the whole litigation; or

(b) any issues which are ordered to be tried separately.

(5) The court may at any stage of proceedings make a costs capping order against all or any of the parties, if –

(a) it is in the interests of justice to do so;

(b) there is a substantial risk that without such an order costs will be disproportionately incurred; and

(c) it is not satisfied that the risk in subparagraph (b) can be adequately controlled by –

(i) case management directions or orders made under this Part; and

(ii) detailed assessment of costs.

(6) In considering whether to exercise its discretion under this rule, the court will consider all the circumstances of the case, including –

(a) whether there is a substantial imbalance between the financial position of the parties;

(b) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation;

(c) the stage which the proceedings have reached; and

(d) the costs which have been incurred to date and the future costs.

(7) A costs capping order, once made, will limit the costs recoverable by the party subject to the order unless a party successfully applies to vary the order. No such variation will be made unless –

(a) there has been a material and substantial change of circumstances since the date when the order was made; or

(b) there is some other compelling reason why a variation should be made.

## Application for a costs capping order

**3.20** (1) An application for a costs capping order must be made on notice in accordance with Part 23.

(2) The application notice must –

(a) set out –

(i) whether the costs capping order is in respect of the whole of the litigation or a particular issue which is ordered to be tried separately; and

(ii) why a costs capping order should be made; and

(b) be accompanied by a budget setting out –

(i) the costs (and disbursements) incurred by the applicant to date; and

(ii) the costs (and disbursements) which the applicant is likely to incur in the future conduct of the proceedings.

(3) The court may give directions for the determination of the application and such directions may –

(a) direct any party to the proceedings –

(i) to file a schedule of costs in the form set out in paragraph 3 of Practice Direction 3F – Costs capping;

(ii) to file written submissions on all or any part of the issues arising;

(b) fix the date and time estimate of the hearing of the application;

(c) indicate whether the judge hearing the application will sit with an assessor at the hearing of the application; and

(d) include any further directions as the court sees fit.

## Application to vary a costs capping order

**3.21** An application to vary a costs capping order must be made by application notice pursuant to Part 23.

# This Practice Direction supplements Section III of CPR Part 3

# SECTION I – GENERAL RULES ABOUT COSTS CAPPING

## When to make an application

**1.1** The court will make a costs capping order only in exceptional circumstances.

**1.2** An application for a costs capping order must be made as soon as possible, preferably before or at the first case management hearing or shortly afterwards. The stage which the proceedings have reached at the time of the application will be one of the factors the court will consider when deciding whether to make a costs capping order.

## Costs budget

**2** The budget required by rule 3.20 must be in the form of Precedent H annexed to this Practice Direction.

## Schedule of costs

**3** The schedule of costs referred to in rule 3.20(3) –

(a) must set out –

(i) each sub-heading as it appears in the applicant's budget (column 1);

(ii) alongside each sub-heading, the amount claimed by the applicant in the applicant's budget (column 2); and

(iii) alongside the figures referred to in subparagraph (ii) the amount that the respondent proposes should be allowed under each sub-heading (column 3); and

(b) must be supported by a statement of truth.

## Assessing the quantum of the costs cap

**4.1** When assessing the quantum of a costs cap, the court will take into account the factors detailed in rule 44.5 and the relevant provisions supporting that rule in the Practice Direction supplementing Part 44. When considering a party's budget of the costs they are likely to incur in the future conduct of the proceedings, the court may also take into account a reasonable allowance on costs for contingencies.

# SECTION II – COSTS CAPPING IN RELATION TO TRUST FUNDS

## Costs capping orders in relation to trust funds

**5.1** In this Section, 'trust fund' means property which is the subject of a trust, and includes the estate of a deceased person.

**5.2** This Section contains additional provisions to enable –

(a) the parties to consider whether to apply for; and

(b) the court to consider whether to make of its own initiative,

a costs capping order in proceedings relating to trust funds.

**5.3** This Section supplements rules 3.19 to 3.21 and Section I of this Practice Direction.

**5.4** Any party to such proceedings who intends to apply for an order for the payment of costs out of the trust fund must file and serve on all other parties written notice of that intention together with a budget of the costs likely to be incurred by that party.

**5.5** The documents mentioned in paragraph 5.4 must be filed and served –

(a) in a Part 7 claim, with the first statement of case; and

(b) in a Part 8 claim, with the evidence (or, if a defendant does not intend to serve and file evidence, with the acknowledgement of service).

**5.6** When proceedings first come before the court for directions the court may make a costs capping order of its own initiative whether or not any party has applied for such an order.