

EXPLANATORY MEMORANDUM TO

The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017

2017 No. 27

1. Introduction

- 1.1. This Explanatory Memorandum has been prepared by the Department of Justice to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.
- 1.2. The Statutory Rule is made under section 2(2) of the European Communities Act 1972 and is subject to the negative resolution procedure.

2. Purpose

- 2.1. The Statutory Rule amends the Costs Protection (Aarhus Convention) (Northern Ireland) Regulations 2013 (the 2013 Regulations). It makes changes in the following areas;
- 2.2. Level of costs protection: the usual rule in civil cases is that the party that loses must pay the costs of the winning party. The 2013 Regulations provide that, in certain environmental cases, the amount of costs an applicant challenging an environmental decision has to pay to the other side if unsuccessful are capped at £5,000 where the applicant is an individual and at £10,000 in all other cases. Where an applicant wins, the 2013 Regulations provide that the costs that can be recovered from the other party (the respondent public authority) are capped at £35,000.
- 2.3. The Statutory Rule amends the 2013 Regulations to provide that, if an applicant loses, the maximum amount of costs that can be recovered from it will continue to be capped at current levels but be capable of being lowered if necessary to avoid prohibitive expense to the applicant. It provides that, if an applicant wins, the amount of costs that can be recovered by it from the respondent can be increased from the current cap of £35,000, again if this is necessary to avoid prohibitive expense to the applicant.
- 2.4. The Statutory Rule provides that, in deciding whether a cap is prohibitively expensive, the court should have regard to certain case law principles which, amongst other things, include taking into account an applicant's financial means.
- 2.5. Costs on appeal: the Statutory Rule applies a separate cap to appeals in Aarhus Convention cases. This is set at the same levels as are applied to first instances cases and the court is provided with the same flexibility to vary the caps on appeal as the lower court.
- 2.6. Eligibility for costs protection: the Statutory Rule makes it clear (as was always intended) that only applicants that are members of the public (and not public bodies) are entitled to costs protection under the 2013 Regulations.

- 2.7. Interim injunctions: The Statutory Rule amends the 2013 Regulations to direct the court to apply certain case law principles when considering whether or not to require a undertaking in an application for an interim injunction in an Aarhus Convention case. It also amends the 2013 Regulations to make it clear that the provision they contain on undertakings only apply to an applicant for an interim injunction who is a member of the public (and to not public bodies).

3. Background

- 3.1. EU law requires that the costs of bringing a court challenge to certain decisions affecting the environment must not be prohibitively expensive. The requirement stems from the Aarhus Convention (a United Nations Convention on environmental rights to which the UK and EU are a party) . A scheme to ensure that the relevant court proceedings are not prohibitively expensive is contained in the 2013 Regulations. Similar schemes apply elsewhere in the UK.
- 3.2. In 2014, the European Court decided that the costs regime for environmental cases which had been in place in the UK prior to 2013 had not properly implemented the prohibitive expense requirement.

4. Consultation

- 4.1. A 12 week public consultation closed on 17 February 2016. There were 10 responses to the consultation. A summary of those responses along with revised proposals was then published on 27 September 2016.

5. Equality Impact

- 5.1. Equality implications were considered during the development of the Statutory Rule and no equality issues were identified. An Equality Impact Assessment was not, therefore, considered necessary.

6. Regulatory Impact

- 6.1. A Regulatory Impact Assessment of the Statutory Rule has been carried out and is available at <http://www.justice-ni.gov.uk/publications/costs-protection-environmental-cases-summary> of responses. It found that its overall impact on applicants from the third and business sectors is likely to be favourable (albeit limited given the small number of relevant cases in Northern Ireland).

7. Financial Implications

- 7.1. The Statutory Rule may give rise to increased costs for Departments (as the respondents in the relevant cases). The impact is not, however, expected to be significant given the low number of cases likely to be affected.

8. Section 24 of the Northern Ireland Act 1998

- 8.1. The Department is satisfied that no issues arise regarding section 24 of the Northern Ireland Act 1998.

9. EU Implications

- 9.1. The Statutory Rule will ensure continued full compliance with EU obligations.

10. Parity or Replicatory Measure

- 10.1. Amendments are being made to the costs protection scheme that applies in England and Wales.

11. Additional Information

- 11.1. Not applicable.