Title: Cost protection in environmental claims
IA No: MoJ 026/2016

RPC Reference No: N/A
Lead department or agency: Ministry of Justice
Other departments or agencies: N/A

Impact Assessment (IA)

Date: 22/09/2016

Stage: Response

Source of intervention: Domestic

Type of measure: Secondary legislation

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Summary: Intervention and Options

RPC Opinion: N/A

Cost of Preferred (or more likely) Option				
Total Net Present Value	**Business Net Present Value**	**Net cost to business per year** (EANDCB in 2014 prices)	**One-In, Three-Out**	**Business Impact Target Status**
£0.00m	N/A	N/A	Not in scope	N/A

What is the problem under consideration? Why is government intervention necessary?

The UK is required to make sure that the costs of bringing certain environmental challenges are not 'prohibitively expensive'[1]. It has assessed the current Environmental Costs Protection Regime ('ECPR') in England and Wales in the light of recent case law, both at a European and a national level. The government considers that there is scope for introducing measured adjustments to the current regime within the framework of the relevant EU Directives and case law. Any changes to the rules of court must be made by secondary legislation.

What are the policy objectives and the intended effects?

Building on the 2013 ECPR, the policy objectives are to provide greater flexibility and clarity of scope within the current regime to reflect recent developments in case law. In this way the policy should ensure the right balance between ensuring 'the public can bring challenges which are not prohibitively expensive to relevant decisions falling within the scope of the relevant EU Directives, while discouraging unmeritorious claims which cause unreasonable costs and delays to development projects.

[1] As a result of the amendments made by the EU Public Participation Directive (2003/35/EC) which have now been incorporated into recast versions of the Industrial Emissions Directive (2010/75/EU) and the EIA Directive (2011/92/EU) ('the relevant EU Directives') and being a Party to the United Nations Economic Commission for Europe (UNECE) Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0: Do nothing. This is a modelling scenario under which the 2013 ECPR continues to apply without any adjustments.

Option 1-9: Amend the 2013 ECPR by:

- expanding the coverage of the current ECPR
- clarifying practices which might be considered unclear
- allowing cost caps to be varied
- changing the basis on which costs are assessed for defendants who incorrectly contest that a case is an Aarhus Convention claim (changing from the indemnity to the standard basis)

Adopting options 1-9 is preferred since it will continue to allow the public to bring challenges which are not prohibitively expensive to relevant environmental decisions while reducing the potential for unmeritorious challenges to be brought.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date: 03/2019**				
Does implementation go beyond minimum EU requirements?		No		
Are any of these organisations in scope?	**Micro** No	**Small** No	**Medium** No	**Large** No
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)		**Traded:** N/A	**Non-traded:** N/A	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: _____ Date: _____

Summary: Analysis & Evidence

Policy Option 1-9

Description: Costs protection in environmental claims

FULL ECONOMIC ASSESSMENT

Price Base Year 2016	PV Base Year 2016	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: £ -	High: £ -	Best Estimate: £0

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	£ -	N/A	£ -	**£ -**
High	£ -		£ -	**£ -**
Best Estimate	£0.00m		£0.036m	**£0.304m**

Description and scale of key monetised costs by 'main affected groups'

The total estimated monetised costs to defendants of options 1-9 might be in the region of £40,000 per year. This is because option 1 would extend costs protection to relevant Section 288 Town and Country Planning Act 1990 (TCPA) statutory reviews, Section 289 TCPA statutory appeals and Section 65 Planning (Listed Buildings and Conservation Areas) Act 1990 statutory appeals engaging EU law.

Other key non-monetised costs by 'main affected groups'

Claimants: Option 5- defendants who unsuccessfully contest whether a case is an Aarhus Convention claim being ordered to pay costs on a standard basis instead of an indemnity basis. Option 2- if the claimant's costs cap is increased and the claimant loses the case or the defendant's costs cap is decreased and the claimant wins the case.

Defendants: Option 2- if the defendant's costs cap is increased or the claimant's decreased. Option 1, 2 and 9 - More judicial reviews (JRs), statutory reviews, statutory appeals and appeals to the Court of Appeal may be brought under the relevant sections due to the expansion of costs protection and possibility to vary costs caps.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	£ -	N/A	£ -	**£ -**
High	£ -		£ -	**£ -**
Best Estimate	£0.00m		£0.036m	**£0.304m**

Description and scale of key monetised benefits by 'main affected groups'

The total estimated monetised benefits to claimants of options 1-9 might be in the region of £40,000 per year. This is because option 1 would extend costs protection to relevant Section 288 TCPA statutory reviews, Section 289 TCPA statutory appeals and Section 65 Planning (Listed Buildings and Conservation Areas) Act 1990 statutory appeals engaging EU law, and option 9 would extend costs protection to appeals to the Court of Appeal.

Other key non-monetised benefits by 'main affected groups'

Claimants: Option 2 - if the defendant's costs cap is increased and the claimant wins the case or the claimant's costs cap is decreased and the claimant loses the case.

Defendants: Option 5 - defendants who unsuccessfully contest whether a case is an Aarhus Convention claim being ordered to pay costs on a standard basis instead of an indemnity basis, and option 2, if the claimant's costs cap is increased or the defendants decreased. Unmeritorious JRs may be discouraged as a result of the possibility to vary costs caps. Legal Service Providers: Option 2 - legal service providers who bring legally aided claims may benefit if the defendant's costs cap is increased because they would be able to claim more costs from the defendant in successful challenges.

Key assumptions/sensitivities/risks	**Discount rate**	3.5%

In making our assessment, we have assumed that:

- The number of cases affected by and the costs/benefits resulting from the proposals are minimal.
- Case volumes will not change (for the purposes of illustration; in practice volumes may increase if costs protection renders court action more attractive to would-be claimants)
- The court will be able to determine the appropriate levels of costs protection where an adjustment to the default cost cap is assessed to be valid; and
- The number of LAA supported cases will not change as a result of the proposals.

The main risks are that:

- Some claims might be discouraged even though they are meritorious; this could have potential negative impacts on the environment (but our analysis is that this risk is minimal because of the continued availability of costs protection in meritorious cases and the ability to increase the level of costs protection in appropriate cases).
- More legal challenges may be brought as a result of extending the regime to certain reviews under statute, although costs cap variation may discourage unmeritorious challenges due to possible higher claimant exposure.
- The proportion of additional claims which are successful are similar to the proportion of current claims that are successful.

BUSINESS ASSESSMENT (Options 1-9)

Direct impact on business (Equivalent Annual) £m:			**Score for Business Impact Target (qualifying provisions only) £m:**
Costs: N/A	**Benefits: N/A**	**Net: N/A**	N/A

Evidence Base (for summary sheets)

Background

1. The current environmental costs protection regime (ECPR) for relevant environmental judicial review (JR) cases in England and Wales was established to address the requirement that the costs of bringing certain environmental challenges are not 'prohibitively expensive' arising under the EU Public Participation Directive (2003/35/EC) and the United Nations Economic Commission for Europe (UNECE) Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention).
2. The Aarhus Convention requires parties to the Convention to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters. In particular, it requires parties to ensure the public have access to a procedure to challenge decisions subject to the public participation procedures (Article 9(2) of the Convention) and to challenge contraventions of national law relating to the environment (Article 9(3) of the Convention) and specifies that those court procedures should, amongst other things, not be 'prohibitively expensive'.
3. The Article 9(2) Convention requirements have been implemented in EU law through the Public Participation Directive. The Public Participation Directive did this by amending the Environmental Impact Assessment Directive (EIA Directive) and Integrated Pollution Prevention and Control Directive (hereafter 'the relevant Directives'). The relevant amendments made by the Public Participation Directive were subsequently incorporated into recast versions of the Industrial Emissions Directive (2010/75/EU) and the EIA Directive (2011/92/EU).

Current Situation

4. The current ECPR in England and Wales, introduced on 1st April 2013, provides for a costs regime of fixed 'costs caps' for relevant environmental JR cases at first instance. Costs protection is subject to the possibility of the claimant opting out or the court determining that the claim does not fall within the scope of the ECPR following a challenge by the defendant. These rules apply only to relevant environmental JRs and not to other forms of review established by statute.

5. The regime involves a fixed asymmetric costs cap structure, whereby the defendant, if the claim fails, may recover no more than a prescribed amount of costs from the claimant. The amount recoverable from the claimant is capped at £5,000 where the claimant is an individual and £10,000 in other cases (for example where the claimant is a non-governmental organisation (NGO)). If the claim succeeds, the claimant may recover no more than a prescribed amount of costs from the defendant. The amount recoverable from the defendant is capped at £35,000. The costs protection applies to costs incurred at any stage of the claim.

Problem under consideration

6. The government has made an assessment of the current ECPR and considers that there is scope for introducing measured adjustments to the current regime within the framework of the relevant EU Directives. This follows developments in case law since the regime was introduced in April 2013.

Policy objectives

7. Building on the 2013 ECPR, the policy objectives are: to provide greater flexibility and clarity of scope within the current regime, by making sure that the rules reflect developments in case law; to make sure the public can bring challenges which are not prohibitively expensive to relevant decisions falling within the scope of the relevant EU Directives; and to discourage unmeritorious claims which cause unreasonable costs and delays to development projects.

Economic rationale for intervention

8. The conventional economic rationale for government intervention is to correct market failures, to correct existing institutional distortions ("government failures") or for equity (fairness) reasons. The proposed options confer equity benefits.

9. First, there is a concern that the current intervention may encourage unmeritorious JRs. The regime could be improved so that costs protection can be varied in appropriate cases, reducing the likelihood of encouraging unmeritorious claims. This would improve efficiency in the process and for development projects, which may otherwise face unreasonable costs or delays.

10. Second, allowing costs protection to be varied would provide a more equitable system for the public. The ECPR provides the public with certainty that adverse costs orders made against them will not make their claim prohibitively expensive.

Policy options considered

11. This Impact Assessment (IA) identifies both monetised and non-monetised impacts with the aim of understanding what the net impact on society might be from implementing the options described below. The policy intention is to implement all of these proposals but, for the purposes of this assessment, each of options 1-9 has been assessed in isolation and compared with option 0 – the 'do nothing'/baseline option.

Option 0) Do nothing. Maintain the current costs protection regime.

Option 1) Extend the types of case for which costs protection is available to include certain statutory reviews and appeals which engage the relevant EU Directives.

Option 2) Allow the courts to vary the level of cost caps, based in part on the claimant's financial circumstances.

Option 3) Require that it should be 'exceptional' to vary the costs cap to give a claimant more protection.

Option 4) Require claimants seeking costs protection to disclose relevant financial resources, taking account of third party funding.

Option 5) Change the basis on which the costs of defendants' unsuccessful challenges to claimants' assertions of entitlement to costs protection are assessed.

Option 6) Clarify factors, including the regard to the combined financial resource when there are multiple claimants, which a court is to take into consideration when assessing a cross-undertaking in damages for an interim injunction.

Option 7) Make it clearer that the ECPR can only be used by claimants who require costs protection because of EU law or the Aarhus Convention.

Option 8) Clarify that a separate cap applies to each claimant or defendant in cases with multiple claimants or defendants.

Option 9) Introducing more certainty that appropriate claimants will have grants of costs protection in appropriate cases in the Court of Appeal, and inviting the Supreme Court to amend its rules to do likewise.

12. The Government's preferred option is to implement options 1-9, as this best meets the policy objectives.

Affected stakeholder groups, organisations and sectors

13. The following groups are expected to be affected by the proposals:

- Claimants – individuals, environmental Non-Governmental Organisations, businesses and third sector organisations.
- Defendants – primarily public sector organisations/bodies.
- Her Majesty's Courts and Tribunals Service (HMCTS) – administers the Administrative Court and the Planning Court (which form part of the High Court of Justice) and Court of Appeal in England and Wales.
- Legal service providers.

- Legal Aid Agency (LAA) – responsible for managing the legal aid fund. Eligible claimants may have their fees paid by their legal representatives who reclaim the money from the LAA.
- Third parties – such as businesses and individuals involved in relevant projects (i.e. commercial developers and contractors on infrastructure projects).

Costs and benefits

14. IAs attempt to quantify in monetary terms as many of the costs and benefits resulting from operational or policy options. They also include aspects that cannot sensibly or proportionally be monetised, such as the value to the whole of society of the options under consideration as well as any wider changes in equity and fairness.

15. In this case a more qualitative assessment has been provided as it has not been possible to quantify all of the costs and benefits, although an indication of these has been provided wherever possible. The key data and assumptions underpinning this assessment have also been highlighted for each option under consideration.

16. Where possible, the data in this IA has been taken from published sources or from internal MoJ and HMCTS management information. However, and to provide a clearer picture of the impacts of these proposals, this information has been supplemented by two internal MoJ file reviews: one on Aarhus JR claims covering the period April 2013 to May 2015; and another on other relevant environmental reviews covering the period July 2013 to August 2015.

17. Given the nature of the options, and to make the analysis easier to follow, we have divided our assessment of the costs and benefits of the proposed options into two parts. The first covers options 1-5 while the second assesses options 6-9.

Option 0 – Do Nothing. Maintain the current environmental costs protection regime.

Description

18. The baseline option assumes there will be no change to the current ECPR introduced in April 2013. Under this option, there exists a higher risk than under other options that claims would be used as a relatively low-risk way of delaying infrastructure projects even where the case is weak.

19. Because this “do nothing” option is compared against itself, its costs and benefits are necessarily zero, as its Net Present Value (NPV).

Option 1-9 – Introduce all the proposals outlined in the consultation document.

Description, Data and Assumptions

Option 1. Extend the types of case for which costs protection is available to include certain statutory reviews and appeals which engage the relevant EU Directives.

20. Option 1 would extend the types of case for which costs protection is available beyond JRs to include certain statutory reviews and statutory appeals which engage the relevant EU Directives. These would include some statutory reviews under Section 288 of the Town and Country Planning Act 1990 (TCPA) and certain statutory appeals under sections 289(1) and (2) of the TCPA and section 65 (1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 which engage the relevant EU Directives (being cases which fall within Article 9 (2) of the Aarhus Convention).

21. Between July 2013 and August 2015 a total of 333 applications under Section 288 of the TCPA were received by the Administrative Court[1]. Around 50% of these reached the substantive hearing stage, where a total of 30 cases (around 10%) were successful for the claimant. Based on indications from the Department for Communities and Local Government (DCLG) we estimate that around 5-10% of

1 Internal MoJ case file review between July 2013 and August 2015

these initial applications would fall under the relevant EU Directives and therefore would become eligible for costs protection.

22. DCLG indicate that the costs to them of defending a challenge to a planning decision under Section 288 TCPA in the High Court are in the region of £10,000-£20,000; and that a claimant's expenditure is generally significantly greater – anywhere from £20,000-£50,000 in costs[2]. Costs will be much higher at the substantive hearing than the permission stage.

23. Over the same period, 100 applications under section 289 (1) and (2) of the TCPA were received[3]. A total of 6 (around 5%) of these were successful for the claimant where the substantive decision was allowed. We assume around 5-10% of the initial applications would be eligible for costs protection.

24. Assuming similar costs to those for a Section 288 TCPA statutory review, we therefore estimate that defending a challenge to a planning decision under section 289 TCPA in the High Court would cost a defendant in the region of £10,000-£20,000 while the claimant's costs are likely to be somewhere between £20,000-£50,000. Costs will be much higher at the substantive hearing than the permission stage.

25. No applications under section 65 (1) of the Planning (Listed Building Conservation Areas) Act 1990 were received during this period[4]. Because this indicated that such appeals are rare, we assume that the impact of the options in this IA would be minimal. Therefore, we exclude them from the analysis which follows.

26. We also assume that the number of LAA supported cases will not change as a result of the proposals.

Option 2. Allow the courts to vary the level of cost caps, based in part on the claimant's financial circumstances.

27. Amending the current fixed costs cap approach to costs protection (where the same caps apply automatically in every case) would allow the courts to vary the level of costs cap in individual cases to take account of the claimant's financial resources and the circumstances of the case.

28. The proposed changes would allow scope for the defendant's and claimant's costs caps to be varied where the court is satisfied that, without such variation, the costs of the proceedings would be 'prohibitively expensive' for the claimant or where the claimant's financial resources and the circumstances of the case allow costs caps at different levels.

29. Between April 2013 and May 2015, 293 JR claimants sought to apply the ECPR, of which 8% were successful at substantive hearing stage[5]. 40% were unsuccessful at permission stage and a further 16% were unsuccessful at substantive hearing stage. To assess this option we assume that:

- Treasury Solicitor's Department's (now the Government Legal Department) initial illustrative assumption is that a defendant's expenditure is between £8,000 and £25,000 for non-immigration and asylum JRs[6]. We assume similar costs for environmental JRs. However, only up to £5000 in adverse costs is paid by unsuccessful individual claimants and up to £10,000 by unsuccessful organisations;
- That the proportion of environmental JRs which are legally aided is the same as the approximately 30% of all JRs which are legally aided[7];
- The number of LAA cases will not change as a result of the proposals;
- Based on the views of HMCTS, that the cost to the courts of an application to vary the costs cap will be negligible; and

2 A response from DCLG to MoJ regarding the proposed changes to the Aarhus Convention costs rules, in which they provided rough estimate figures.

3 Internal MoJ case file review between July 2013 and August 2015

4 Internal MoJ case file review between July 2013 and August 2015

5 Internal MoJ case file review of Aarhus JRs between April 2013 and May 2015

6 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277808/reform-judicial-review-rpc-ia.pdf

7 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277808/reform-judicial-review-rpc-ia.pdf

- The court will be able to determine the appropriate levels of costs protection where an adjustment to the default costs cap is assessed to be valid.

30. Research by Bondy, Platt and Sunkin using costs data from July 2010 and February 2012 suggests that between 35% and 65% of non-legally aided claimants in JRs would be affected by a change in the defendant's costs cap from £35,000[8]. This research also suggests that for legally aided and non-legally aided cases combined between 20% and 50% of all claimants in JRs would be affected by a change in the defendant's cost cap. Between 30% and 45% of legally aided claimants would be affected by a change in the defendant's cost cap.

Option 3. Require that it should be 'exceptional' to vary the costs cap to give a claimant more protection.

31. This option would require that it should be "exceptional" to vary the costs caps to give a claimant more costs protection (e.g. lowering a claimant's costs cap). Under the proposal, and before lowering a claimant's costs cap or increasing a defendants costs cap, the court would have to be satisfied that the case were 'exceptional' because, without the variation, the costs of the proceedings would be 'prohibitively expensive' for the claimant, having regard to the principles from the *Edwards*[9] case.

Option 4. Require claimants seeking costs protection to disclose relevant financial resources, taking account of third party funding

32. This option would require claimants seeking costs protection to provide certain information about their financial resources, taking account of third party funding, at time of application, by filing at the court, and by serving on the defendant, a schedule of their financial resources.

Option 5. Change the basis on which the costs of defendants' unsuccessful challenges to claimants' assertions of entitlement to costs protection are assessed.

33. At present where a defendant wrongly asserts that a case is not an Aarhus Convention claim, costs are normally awarded against it on the indemnity basis. This means that, in assessing the amount of costs, the court generally resolves any doubt which it may have as to whether the costs were reasonably incurred or reasonable in amount in favour of the claimant with the onus on the defendant to show that they were unreasonable. Costs ordered on an indemnity basis can be a deterrent against unreasonable conduct by one of the parties resulting in additional costs to the other party. This may mean the costs the defendant is ordered to pay may be greater than those ordered under the standard basis.

34. This option would introduce changes in relation to the basis on which costs of defendants' challenges to claimants' assertions that they are entitled to costs protection under the regime assessed. On the proposed standard basis the court would normally allow the claimant to recover reasonable and proportionate costs.

35. Of the 293 Aarhus JRs between April 2013 and May 2015 the defendant challenged their status in around 15% of cases[10]. In around 25% of those challenges cases the court decided that the case was Aarhus. In these cases, around 5 per year, the defendant would most likely have to pay costs on the current default indemnity basis.

Option 6. Clarify factors, including the regard to the combined financial resource when there are multiple claimants, which a court is to take into consideration when assessing a cross-undertaking in damages for an interim injunction.

8 Bondy V, Platt L, Sunkin M (2015). The Value and Effects of Judicial Review. The Nature of Claims, their Outcomes and Consequences. London: Public Law Project. Out of the 197 cases: 31% of JRs cost claimants between £25,000 and £49,000, 20% of JRs cost claimants over £50,000. Out of the 56 non-legal aid cases: 36% of JRs cost claimants between £25,000 and £49,000, 29% of JRs cost claimants over £50,000. Out of the 141 legal aid cases: 28% of JRs cost claimants between £25,000 and £40,000, 17% of JRs cost claimants over £50,000.

9 The principles are that the costs of the proceedings must not exceed the financial resources of the claimant and must not appear to be objectively unreasonable, having regards to certain specified factors.

10 Internal MoJ case file review of Aarhus JRs between April 2013 and May 2015.

36. A cross-undertaking in damages is a promise given by the claimant to pay damages subsequently due to the defendant or a third party as compensation if the interim injunction obtained by the claimant turns out not to have been justified. Whilst a JR or review under statute which engages the ECPR will be against the public authority that made the relevant decision, where a claimant seeks an interim injunction it will generally be to prevent the third-party developer from taking a certain action. The purpose of the cross-undertaking in damages is to make sure that the third-party can be compensated if an injunction is awarded and subsequently turns out not to have been justified.

37. There is already a requirement for a court which is determining whether to require a cross-undertaking in an ECPR case to have regard to the need not to make the claim prohibitively expensive for the claimant. The option would require the court to apply the *Edwards* criteria when considering this question of prohibitive expense in this context. This option should ensure greater clarity and transparency to both claimants and defendants regarding the factors which a court is to take into consideration in these cases.

38. Between April 2013 and May 2015 there were 12 applications for an interim injunction, of which eight were granted and two orders for cross-undertakings were given[11].

Option 7. Make it clearer that the ECPR can only be used by claimants who require costs protection because of EU law or the Aarhus Convention.

39. This option would ensure a clearer alignment between the wording of the rules and the obligations arising from the relevant EU Directives by making it clearer that the costs protection regime applies to claimants who require costs protection because of the relevant EU Directives.

Option 8. Clarify that a separate cap applies to each claimant or defendant in cases with multiple claimants or defendants

40. This option would clarify how costs caps are applied in cases with multiple claimants or multiple defendants, so it is clearer that a separate cap applies to each claimant or defendant. Aarhus Convention claims are sometimes brought by a number of different claimants or against a number of different defendants. The proposed amendment would make it clearer that a separate costs cap should be applied in these cases to each individual party. This would remove any uncertainty encountered by claimants in the relevant cases as to their potential costs liability in this regard.

Option 9. Introducing more certainty that appropriate claimants will have grants of costs protection in appropriate cases in the Court of Appeal, and inviting the Supreme Court to amend its rules to do likewise.

41. The Court of Appeal has a discretion to grant costs protection in appeals, and as a matter of course it uses this to grant costs protection when required by EU law. This option would mean introducing more certainty that appropriate claimants will have grants of costs protection in appropriate cases in the Court of Appeal which engage the relevant EU Directives. We will invite the Supreme Court to make similar provision for their cases.

42. In 2015, the total number of appeals to the Court of Appeal from the Administrative Court, which deals with JRs and reviews under statute, was 240[12]. In the same year there were 1,845 applications and appeals and 4,679 JRs in the Administrative Court[13]. This represents an attrition rate of 96%. Given the already modest numbers of environmental appeals and JRs in scope for this IA, the number affected by option 9 is expected to be small.

11 Internal MoJ case file review of Aarhus JRs between April 2013 and May 2015

12 Ministry of Justice, 1 September 2016. Civil Justice Statistics Quarterly January to March 2016, and The Royal Courts of Justice 2015, Table 3.9. https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2016-and-the-royal-courts-of-justice-2015

13 Ministry of Justice, 1 September 2016. Civil Justice Statistics Quarterly January to March 2016, and The Royal Courts of Justice 2015, Tables 2.1 and 3.31. https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2016-and-the-royal-courts-of-justice-2015

General Assumptions (options 1-9)

43. For the purposes of this IA, we have assumed that the overall volume of legal challenges falling within scope of the regime and therefore benefitting from costs protection would increase, but the possibility of costs cap variation should discourage unmeritorious claims.

44. We also assume that the proportion of successful claims would stay the same.

Costs of Option 1-5

Transitional Costs

45. There may be some one-off familiarisation costs for all affected parties. There might also be some initial satellite litigation to determine how the new provisions would work. These costs are not expected to be significant and have not been quantified.

Ongoing costs

Claimants

Indirect Costs

46. If claimants stand to gain from delay or uncertainty in making public decisions they may lose this benefit to the extent that they are no longer able to lodge a JR. It has not been possible to monetise the aggregate value to claimants of delaying the implementation of public decisions, although this might be assumed to be at least as large as the costs to claimants of pursuing a JR, £5,000 for individuals, £10,000 for organisations plus their own legal costs or otherwise claimants would not bother with such claims.

47. Under option 2, it is unclear to what extent the volume of JRs may fall in response to the possibility that the claimant's costs cap might be increased or the defendant's costs cap might be decreased. Also under option 2, if the costs cap for defendants were lowered, claimants bringing meritorious claims might experience difficulty in obtaining legal representation as, even if successful, the amount the defendant pays might not cover all of the claimant's legal costs. This could adversely impact on access to justice for claimants, particularly those with limited means and have wider, potentially negative, environmental impacts if meritorious claims are discouraged (but our analysis is that this risk is minimal because of the continued availability of costs protection in meritorious cases and the ability to increase the level of costs protection in appropriate cases).

48. Under option 4 some claimants may be dissuaded from bringing an action if they find it intrusive to disclose financial resources. However, for certain claimants this type of information may already be available publicly and it may be the case that an examination of a claimant's means would be conducted on the papers without an oral hearing. Where an oral hearing is considered appropriate existing court procedural rules should mean that, in appropriate cases, any examination of the means of a claimant which involves discussion of sensitive information could take place in private.

Direct Costs

49. Courts already have the discretion to award costs protection for Section 288 TCPA statutory reviews, Section 289 TCPA appeals and Section 65 of the Planning (Listed Buildings and Conservation Areas) Act 1990 appeals, although we have assumed the volume of cases which currently receive discretionary costs protection is negligible. Expanding the scope of the ECPR to relevant cases under option 1 would provide certainty of costs protection in appropriate cases.

50. Using the option 1 assumptions gives a volume of between six and eleven Section 288 TCPA statutory reviews per year (best estimate nine) in which claimants would be affected by option 1. Around 10%, i.e. one case per year, of claimants are successful at the substantive hearing. Claimant costs are between £20,000 and £50,000 with a best estimate of £35,000. This would mean that the average claimant would still recover all their costs although, if their costs were higher than £35,000 they would not by the amount these exceeded £35,000.

51. The same assumptions also suggest there would be between one and four Section 289 TCPA statutory appeals per year (best estimate three) in which claimants would be affected. As only around

5%, less than one case per year on average, are successful at the substantive hearing the costs to claimants of the proposal in regard to this type of statutory appeal are assumed to be negligible.

52. Under option 2 the court would be able to increase a claimant's costs cap of its own volition or on the application of the defendant. Therefore, there would be the potential to increase the costs exposure of some claimants with greater financial resources. However, the court would only be able to increase the claimant's cap if it is satisfied that it will not make the costs 'prohibitively expensive' for the claimant. This safeguard should significantly reduce any adverse impact for claimants.

53. Applying the option 2 assumptions to the Aarhus JR data implies that around 37 Aarhus JR claimants per year have to pay defendant's costs of between £1,000 and £5,000. An increase in the costs cap would be unlikely to impact on these claimants as the vast majority of defendant's costs at permission stage are less than the current £5,000 cap.

54. However, around a further 16% of these claimants were unsuccessful at the substantive hearing stage. Applying the option 2 assumptions provides a volume of around 15 Aarhus JR claimants per year who would be affected. Defendant's costs at this stage are assumed to be between £8,000 and £25,000. Therefore, if any of these claimants have an increase in their costs cap this would lead to an increase in the amount these claimants would have to pay.

55. Under Option 2 the court would be able to lower a defendant's costs cap if it was satisfied that it would not make the costs of proceedings 'prohibitively expensive' for the claimant. Using earlier assumptions, around seven cases per year would initially be in scope, of which, based on costs data, between 35% and 65% (between two and five) of these claimants would be affected by a change in the defendant's costs cap from £35,000.

56. As a **purely illustrative example** of variation in costs caps, if in 10% of these cases, (i.e. 7 cases over 10 years) which were not legally aided, the defendant were to have their costs cap lowered from £35,000 to £30,000, then between two and five of the claimants would each lose £5,000, giving a total of between £10,000 and £25,000 over a 10 year period.

57. Option 3 would have no costs to claimants as it would still allow their costs cap to be lowered in appropriate cases. Lowering the costs cap is currently not an option. Likewise option 4 would have no direct costs to claimants on its own although the greater transparency of financial resources may lead to a claimant's costs cap being increased or prevent a defendant's costs cap from being decreased (option 2), where it is clear that the claimant has enough financial resource to not make the case 'prohibitively expensive'. The effects of a variation in the costs cap are considered under option 2.

58. Under option 5 if costs were assessed on the standard basis, the costs awarded against the defendant might be lower which could adversely impact on claimants. Data suggests this is five cases per year. However, the risks of an award of costs (irrespective of its basis) could still act as a sufficient deterrent to any spurious claims by defendants[14]. Furthermore, the proposed change would not prevent a court from making an indemnity costs order against a defendant if it considered it appropriate.

Defendants

Indirect Costs

59. Under option 1 it is unclear to what extent the relevant statutory reviews and appeals could increase as a result of any behavioural responses to increased availability of costs protection. However, the permission stage for relevant statutory reviews may mitigate this if unmeritorious applications are filtered out at a stage where defendant costs are expected to be lower.

60. It is also unclear under option 2 to what extent the volume of JRs may increase as a result of any behavioural responses to the possibility to decrease the costs cap for claimants or an increase in the costs cap of the defendant. Nevertheless, option 3 requires that it should be 'exceptional' to lower a claimant's costs cap. Furthermore, the court would continue to apply the same criteria in its decisions on granting permission and, thereby, filter out unmeritorious applications at an early stage. The overall effect is therefore likely to be small.

[14] Internal MoJ case file review of Aarhus JRs between April 2013 and May 2015

Direct Costs

61. For option 1, applying the assumptions set out previously to the statutory review data provides a volume of between six and eleven (best estimate nine) relevant statutory reviews per year in which defendants would be affected by option 1[15]. This is because claimants do not currently pay defendants' costs in legally aided cases so the introduction of a cost cap would not affect the claimants and defendants in such cases.

62. Applying the option 1 assumptions provides a volume of four non-legally aided Section 288 TCPA statutory reviews which would reach the substantive hearing stage per year of which up to one case per year would be successful for the claimant. This means in around three cases per year the claimant is unsuccessful at substantive hearing stage and would pay defendant's costs. Average defendant's costs in such statutory reviews are usually between £10,000 and £20,000; with a best estimate of £15,000. Under option 1 the defendants in the three cases would receive £5,000 each instead of £15,000 giving total costs to defendants of around £30,000[16], based on the assumption that all claimants are individuals.

63. Around one relevant Section 269 TCPA statutory appeal per year reaches the substantive hearing stage, at which point 0 appeals per year are successful for the claimant. Assuming costs of around £10,000 to £20,000 to defendants, with a best estimate of £15,000, gives a total cost to defendants of around £10,000[17] due to the costs cap reducing the amount the one claimant unsuccessful at substantive hearing stage pays the defendants from £15,000 to £5,000, based on the assumption that all the claimants are individuals (see footnote 18 regarding organisations).

64. Under option 2, there would be a cost to defendants if the claimant's costs cap is lowered from the current default level. However option 3 specifies that it should be 'exceptional' to lower the costs cap (where necessary to avoid prohibitive expense). Therefore, it is unlikely that defendants will see a significant increase in cost from this part of the proposal.

65. Option 2 would also allow a defendant's costs cap to be increased; this would apply in both legally aided and non-legally aided cases. Around 11 Aarhus JRs per year would initially be in scope to be affected by an increase in the defendants costs cap. Applying the costs data indicates that between 20% and 50% (2 and 6) of these cases would be affected by a change in the defendant's costs cap from £35,000.

66. As a **purely illustrative example** of variation in costs caps, if in 10% of Aarhus JRs, (i.e. 11 cases over 10 years) which are assumed not to be legally aided, the defendant was to have their costs cap increased from £35,000 to £40,000, then defendants would have to pay between two to six claimants an additional £5,000, giving a total of between £10,000 and £30,000 over 10 years.

67. Option 4 has no direct costs to defendants on its own. However, transparency of financial resources could lead to a claimant's costs cap being lowered or prevent a defendant's costs cap from being lowered (option 2) if it is clear that this is necessary to avoid proceedings being 'prohibitively expensive' for the claimant. The effects of a variation in the costs cap are considered under option 2.

68. Under option 5 there would be no direct costs to defendants.

HMCTS

69. Under option 2 and 4 the possibility to vary costs caps and the need to provide financial information may increase the workload of the court. The costs of reviewing and amending application forms, guidance and legal documents to account for the procedural rule changes are expected to be minimal.

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[15] Internal MoJ case file review between July 20136 and August 2015

[16] (4 cases at substantive hearing-1 successful case at substantive hearing)*(£15,000 current cost that unsuccessful claimants have to pay defendants-£5000 new cost that unsuccessful individual claimants have to pay defendants). If all the claimants were organisations then the £5,000 would be replaced with £10,000 in the calculation as the cost cap for organisations is £10,000.

[17] (1 case at substantive hearing – 0 successful cases at substantive hearing)*(£15,000 current cost unsuccessful claimants pay defendants - £5,000 new cost unsuccessful individual claimants pay defendants). If all the claimants were organisations then the £5,000 would be replaced with £10,000 in the calculation as the cost cap for organisations is £10,000.

70. The new procedural rules would add a small burden to the operations of HMCTS administrative staff in the Administrative Court. The proposed changes proposed in the consultation would necessitate some extra administrative duties, but this would not be substantial. Schedules of financial resources would accompany the claim form and, where further information is required, this may be added to the papers or passed straight to the judge, depending on the status of the claim and point of receipt.

LAA and Legal Service Providers

Indirect Costs

71. Under all the proposed options, and particularly options 2 and 4, legal service providers may experience reduced levels of business from any reduction in the volume of legal challenges as a result of any behavioural responses to the possibility of increasing the costs cap of the claimant, decreasing that of defendants or from having to disclose financial resources. It has been assumed that the legal service providers will be able to replace any lost business with other work of similar value and therefore would face a zero cost from the proposed options. Furthermore, the continued availability of costs protection in meritorious cases and the ability to increase the level of costs protection in appropriate cases should mitigate the risk of discouraging meritorious claims.

Direct Costs

72. Applying the earlier assumptions, around 40 Aarhus claims per year are legally aided. If a LAA funded claimant wins their case then the claimant's lawyers are paid by the defending party. If a LAA claimant loses a case then the claimant's lawyers are paid by the LAA at LAA rates while the defendant covers their own costs.

73. Under option 2 the court would also be able to lower a defendant's costs cap. However, this reduction would be entirely unsuitable for cases in which the claimant is legally aided.

74. Legally aided cases do not pay any defence costs so option 3 would not affect the LAA, as these are the cases which are 'exceptional'.

75. Option 5 is unlikely to impact LAA as legally aided claimants already have passed means and merit tests. It is therefore unlikely any defendants would challenge if the legally aided claimant is rightfully claiming cost protection.

Third Parties

76. No costs to third parties have been identified from option 1-5.

Benefits of option 1-5

Claimants

Indirect Benefits

77. Under option 1 it is unclear to what extent the volume of the relevant statutory reviews and appeals might increase as a result of any behavioural responses to increased costs protection.

78. If under option 2, the costs cap for defendants were increased this might alleviate the reported difficulties encountered by claimants in obtaining legal representation as even if successful, the amount the defendant pays may not cover all of the claimant's legal costs. This might have indirect positive effects for the environment where the case has merits.

79. Also under option 2 providing the court with the power to increase a defendant's costs cap should act as a deterrent to defendants to expand the scope of a dispute unnecessarily. Expanding the scope of the dispute could lead to an increase in a claimant's costs so that even if they won the case, the amount of costs that might be recovered would not be sufficient to cover their full costs, and might deter the claimants pursuing a claim.

Direct Benefits

80. Using the previously stated assumptions, around four non-legally aided relevant statutory reviews per year reach the substantive hearing stage at which point around 10%, up to one case per year, of all the initial claimants are successful. This means in around three cases per year the claimant would be unsuccessful at substantive hearing stage and would pay defendant's costs. Average defendant's

costs in such statutory reviews are usually between £10,000 and £20,000, with a best estimate of £15,000. Under option 1 the three claimants would pay £5,000 each instead of £15,000 which gives benefits to claimants of around **£30,000**[18], based on the assumption that all the claimants are individuals (see footnote 19 regarding organisations).

81. Around one relevant Section 289 TCPA statutory appeal per year reaches the substantive hearing stage, at which point less than one appeal per year on average is successful for the claimant. Assuming costs of around £10,000 to £20,000 to defendants, with a best estimate of £15,000, gives a benefit to claimants of around £10,000[19]. This is due to the costs cap reducing the amount the one unsuccessful claimant at substantive hearing stage pays the defendants from £15,000 to £5,000, based on the assumption that all the claimants are individuals (see footnote 20 regarding organisations).

82. Applying option 2 assumptions to the Aarhus JR data implies that around 37 Aarhus JR claimants per year would pay defendant's costs of between £1,000 and £5,000. An increase in the costs cap is unlikely to impact on these claimants as the vast majority of defendants' costs at permission stage are less than the current £5,000 cap.

83. However, around a further 16% of claimants were unsuccessful at the substantive hearing stage. Applying the assumptions gives a volume of around 15 of Aarhus JR claimants per year who would be affected. Defendant's costs at this stage are assumed to be between £8,000 and £25,000. Therefore, claimants who have their costs cap lowered to below the amount they currently have to pay would benefit.

84. Under option 2 the court would be able to increase a defendant's costs cap. Using the earlier assumptions, around 7 cases per year would initially be in scope to be affected by an increase in the defendant's costs cap. Applying costs data suggests that between 35% and 65% (2 and 5) of these claimants would be affected by a change in the defendant's costs cap from £35,000.

85. As a **purely illustrative example** of variation in costs caps, if in 10% of these cases, (i.e. seven cases over 10 years) which were not legally aided, the defendant was to have their costs cap increased from £35,000 to £40,000, then between two to five claimants would receive an additional £5,000, giving a total of between £10,000 and £25,000 over a 10 year period.

86. Option 3 specifies that it would be 'exceptional' for the court to lower a claimant's costs cap (where this was necessary to avoid prohibitive expense) so it is expected that the number of cases in which a reduction would be ordered is likely to be small. Nonetheless, the proposal should, in some cases, reduce the financial burden on claimants with limited means.

87. Option 4 has no direct benefits to claimants on its own. However, transparency of financial resources may lead to a claimant's costs cap being lowered or prevent a defendant's costs cap from being lowered (option 2) if this is required to avoid proceedings being 'prohibitively expensive' for the claimant. The effects of a variation in the costs cap are considered under option 2.

88. There are no direct benefits to claimants from option 5.

Defendants

Indirect Benefits

89. Option 5 will provide less risk to defendants from challenging whether an application by claimants falls within the environmental costs protection regime. This would be particularly beneficial as it is unclear to what extent the volume of relevant statutory reviews and appeals may increase as a result of any behavioural responses to increased costs protection, specifically claims to which the ECPR should not apply.

Direct Benefits

[18] (4 cases at substantive hearing-1 successful case at substantive hearing)*(£15,000 current cost that unsuccessful claimants have to pay defendants-£5000 new cost that unsuccessful individual claimants have to pay defendants). If all the claimants were organisations then the £5,000 would be replaced with £10,000 in the calculation as the cost cap for organisations is £10,000.

[19] (1 case at substantive hearing – 0 successful cases at substantive hearing)*(£15,000 current cost unsuccessful claimants pay defendants - £5,000 new cost unsuccessful individual claimants pay defendants). If all the claimants were organisations then the £5,000 would be replaced with £10,000 in the calculation as the cost cap for organisations is £10,000.

90. Under option 1 defendants may not have to pay both legally aided and non-legally aided claimant's full costs if the claimant is successful due to the defendant's costs cap. Applying the earlier assumptions suggests that in around 10% of relevant statutory reviews, i.e. one case per year, claimants are successful at the substantive hearing. Claimant costs are between £20,000 and £50,000 with a best estimate of £35,000. This would mean that the defendant still has to pay all the claimant's costs, if the claimant's costs were higher than £35,000 then the defendant would still only have to pay £35,000.

91. Applying the same assumptions suggests between two and five section 289 TCPA statutory appeals per year (best estimate four) would be affected. As only around 5%, less than one case per year on average, are successful at the substantive hearing the benefits to defendants of the proposal in regard to this type of statutory appeal are likely to be negligible.

92. Under option 2 the court would be able to decrease a defendant's costs cap if it were satisfied that it would not make the cost of proceedings 'prohibitively expensive' for the claimant, although this would be entirely unsuitable for legally aided cases. Using the earlier assumptions, around seven cases per year would initially be in scope. Costs data indicated that between 35% and 65% (two and five) of these claimants would be affected by a change in the defendant's costs cap.

93. As a **purely illustrative example** if in 10% of these Aarhus JRs, (i.e. seven cases over 10 years) which are all not legally aided, the defendant were to have their costs cap lowered from £35,000 to £30,000, then in between two and five cases the defendant would have to pay each of the claimants £5,000 less, giving a total of between £10,000 and £25,000 over a 10 year period.

94. Under option 2 the court would also be able to increase a claimant's costs cap of its own motion or on the application of the defendant. It would be entirely unsuitable to increase the cost cap of a legally aided claimant. Therefore, applying assumptions previously stated provides a volume of 37 claimants per year which would pay defendant's costs of between £1,000 and £5,000. An increase in the costs cap would be unlikely to affect defendants in these cases as the vast majority of defendants' costs at permission stage are less than the current £5,000 cap.

95. However, around 15 claimants per year who are unsuccessful at substantive hearing stage would be affected. Defendant's costs at this stage are assumed to be between £8,000 and £25,000. Therefore, if any of these claimants have an increase in their costs cap this would increase in the amount defendants receive.

96. There would be no benefits to defendants under option 3. If a claimant's costs cap is decreased there is a potential cost to the defendant, therefore option 3 reduces the potential for this cost to be realised by stating that a claimant's costs cap is only reduced in 'exceptional' cases and where required to avoid prohibitive expense. Option 4 would also not have any direct benefits to defendants on its own, although the greater transparency of financial resources may lead to a claimant's costs cap being increased or prevent a defendant's costs cap from being increased (option 2), if it was clear that the claimant has enough financial resource (and the other factors were satisfied) for this change to not make the case 'prohibitively expensive' for the claimant. The effects of a variation in the costs cap are considered under option 2.

97. Option 5 would remove the punitive approach that is currently applied to defendants who unsuccessfully challenge whether the claimant is entitled to costs protection. Defendants currently unsuccessfully challenge around 5 cases per year. Costs charged on a standard basis are likely to result in savings to the public purse arising from a reduction in the court costs they are required to pay. However due to the low volume of cases, it is not envisaged that these savings would be significant.

HMCTS

98. Under option 2 power of the court to increase a defendant's costs cap should act as a deterrent to defendants expanding the scope of a dispute unnecessarily and should thereby avoid unwieldy litigation which could impact favourably on court resources. It should be noted, however, the court will not be able to increase the defendant's costs cap if this would be 'prohibitively expensive' for the claimant.

LAA and Legal Service Providers

Indirect Benefits

99. Under the proposals, and particularly options 1 and 2, legal service providers may experience increased levels of business from any increase in the volume of legal challenges. This increase may come as a result of a behavioural response to the possibility of lowering the costs cap of claimant, lowering that of defendants or from extending costs protection to the relevant statutory reviews and appeals.

Direct Benefits

100. Applying earlier assumptions, around 40 Aarhus claims per year are legally aided. If a LAA claimant wins their case then the claimant's lawyers are paid by the defending party. If a LAA claimant loses a case then the claimant's lawyers are paid by the LAA at LAA rates while the defendant covers their own costs.

101. Legally aided cases do not pay any defence costs so option 1 and 3 would not affect the LAA. This also applies to option 2 as the claimants would not be affected by the option to have a lower costs cap as the costs cap is not currently paid.

102. Under option 2 the court would also be able to increase a defendant's costs cap. Using the earlier assumptions, around three legally aided cases per year would initially be in scope to be affected. Costs data indicates that between 20% and 45% of these legally aided claimants would be affected by a change in the defendant's costs cap from £35,000.

2.89 As a **purely illustrative example** of a variation in costs cap, if in 10% of these legally aided cases, i.e. three cases over 10 years, the defendant had their costs cap increased from £35,000 to £40,000, then in around one case would the defendant have to pay the legally aided claimant, and therefore the legal service provider, £5,000 more, giving a total of around £5,000 over the 10 year period. It would be the legal service provider for the legally aided claimant that receives this increase.

Third Parties

103. No benefits to third parties have been identified from option 1-5.

Costs of Option 6-9

Ongoing Costs

Claimants

Direct Costs

104. Option 6 would clarify existing practice. It is not anticipated that there would be any costs to claimants. This proposal should ensure greater clarity and transparency to claimants regarding cross-undertaking decisions.

105. Option 7 would also be a clarification of existing practice; eligibility, where contested, would remain a matter for the courts. Although the effect of the clarification is expected to be minimal. There is the risk of litigation taking time to resolve the principles.

106. Option 8 would also clarify existing practice and therefore there should be no costs to claimants. However, option 8 would remove any uncertainly encountered by claimants in the relevant cases as to their potential costs liability.

107. Option 9 would also introduce more certainty and therefore there should be no costs to claimants. It should provide greater clarity and transparency over costs protection in appeals and how the court would deal with such applications.

Defendants, HMCTS, LAA, Legal Service Providers, Third Parties

108. No costs to defendants, HMCTS, LAA, legal service providers and third parties have been identified as arising from options 6-9.

Benefits of Option 6-9

Claimants

Direct Benefits

109. Option 6 would clarify existing practice. In option 6, by ensuring that the court must consider the resources of all claimants, it may avoid situations arising where cross-undertaking in damages are made on the basis of the substantial resources of one claimant with disregard to other claimants with more modest means even though all claimants will be liable under the undertaking. It is anticipated that, given the small number of environmental interim injunction applications made - around six per year of which around four are successful - any benefit to claimants is likely to be small.

110. Option 7 and 8 would also be clarifications of existing practice. There would be no direct benefits to claimants. Option 8 would remove any uncertainly encountered by claimants in the relevant cases as to their potential costs.

111. Option 9 would introduce more certainty. Claimants bringing applications for appeal of a decision in the Administrative or Planning Courts which engage the relevant EU Directives would currently be eligible for costs protection from the Court of Appeal. It would be for the court to decide what the level of costs protection should be, as it is the case now, based on the information provided by the parties. This would mean that claimants are likely to know the costs they are likely to be liable for. It is not expected the clarification that costs protection is available on appeal would lead to a significant increase in applications, given the low number of applications to the Court of Appeal and the low number of those applications which are successfully allowed. Any benefit to the claimants is likely to be small.

Defendants

Direct Benefits

112. Option 6 and 7 would both clarify existing practice. No benefits to defendants have been identified.

113. Option 8 would also clarify existing practice. There are not expected to be any benefits to defendants. However, option 8 would remove any uncertainly encountered by defendants in the relevant cases as to their potential costs liability.

114. Option 9 would introduce more certainty. There are not expected to be any benefits to defendants.

HMCTS, LAA, Legal Service Providers

115. No benefits to HMCTS, LAA or legal service providers have been identified as arising from options 6-9.

Third Parties

116. Option 6 would clarify that, when the court is considering cross-undertakings in damages, it is to have regard to the combined financial resource when there are multiple claimants. This may offer third parties more protection for two reasons; firstly, it may discourage claimants from making unmeritorious interim injunction applications (although prohibitive expense will still be considered as is currently the case) and secondly it would clarify that more costs may be payable (as a result of there being multiple claimants) in some cases. However, these effects would only arise in cases where, at present, ambiguities exist. As such this option would be more of a clarification than a substantive change of practice.

Overall impact of Option 1-9

117. There may be an increase in applications for statutory reviews and appeals as a result of extending the current ECPR. There may be a small increase in applications to the Court of Appeal due to the clarification that costs protection is available for those applications engaging EU law.

There is likely to be only a minimal impact on HMCTS and there may be benefits to wider growth from projects which might otherwise be delayed. There is a potential risk that some meritorious challenges might be discouraged that could have potential negative effects on the environment, but our analysis is this risk is minimal because of the continued availability of costs protection in meritorious cases and the ability to increase the level of costs protection in appropriate cases.

118. Overall, the costs and benefits of these proposals and the number of cases affected are expected to be minimal. The total expected monetised costs are £40,000 per year to defendants while the total expected monetised benefits are £40,000 per year to claimants. This is due to option 1 which would expand costs protection to the relevant statutory reviews and appeals.

Risks for of Option 1-9

119. Options 6-9 would address current ambiguities by clarifying the law regarding the factors to be considered in awarding cross-undertakings in damages. However, if the current ambiguities mean that, in multiple claimant cases, their combined financial resource is not taken into account, then injunction damages may increase. Furthermore, if this means that each claimant and defendant do not currently get a separate costs cap, the amount each party pays could increase to the relevant cap. Finally, if these ambiguities allow claimants costs protection who are not entitled to it because of EU law, then additional clarity should remove this, meaning that defendants can recoup more of their costs in the event the claimant is unsuccessful.

120. These clarifications, along with option 2, may lead to an overall reduction in the number of legal challenges receiving costs protection at the current rates. The possibility to vary costs caps may incentivise or dis-incentivise claimants depending on the direction of variation they expect. The potential for the courts to be able to adjust costs caps in cases where claimants are well resourced and deemed capable of paying more than the current caps presents the potential risk that some meritorious challenges might be discouraged which could have potential negative effects on the environment, but our analysis is that this risk is minimal because of the continued availability of costs protection in meritorious cases (and the ability to increase the level of costs protection in appropriate cases) and, in any event, the costs and benefits of these proposals and the number of cases affected are expected to be minimal.