Nobel House
17, Smith Square
London SW1P 3JR

Telephone: 08459 335577
Email: Barbara.anning@defra.gsi.gov.uk
Web: www.defra.gov.uk

defra
Department for Environment
Food and Rural Affairs

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Aphrodite Smagadi
Secretary to the Aarhus Convention Compliance Committee
Economic Commission for Europe
Environment, Housing and Land Management Division
Bureau 348
Palais des Nations
CH-1211 Geneva 10
Switzerland

Dear Ms Smagadi

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with provisions of the Convention in connection with the planning decision for a superstore in Hythe and access to justice in general (Ref. ACCC/C/2010/45)

Thank you for your letter of 27 July 2011, inviting us to provide further comments on the complaints outlined in communication ACCC/C/2010/45 following new allegations made in the communicant's letter of 12 June 2011. We understand this refers to the document entitled "Communication 45-KECN Response to ACCC Letter 2nd May 2011", which was logged on to the Convention's website on 12 June. Having already provided an extensive response in our letter of 11 April 2011, covering many aspects of the planning system in England, I will refer to instances where we have already provided a response to KECN's new arguments, and not seek to repeat them.

We are also aware of the similar allegations raised in communication ACCC/C/2011/60 and have addressed any outstanding points in a separate letter sent to the Committee dealing specifically with this complaint.

In its most recent letter of 12 June 2011, the communicant puts forward additional arguments regarding the scope and alleged breaches of articles 6, 7 and rehearses the arguments on article 9 set out in the original complaint.

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Article 6

Scope

The communicant questions whether the UK is compliant with Article 6.1(b) of the Aarhus Convention, which requires public participation in decisions on activities which are not listed in Annex I to the Convention, but which may give rise to a significant effect on the environment.

Annex II of EU Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (the Environmental Impact Assessment or EIA Directive), contains a wide range of projects which are not covered by article 6(1)(a) and Annex I of the Aarhus Convention, but for which an EIA is required *if* the project in question is likely to give rise to significant environmental effects as determined by Member States *on a case by case basis* or in accordance with criteria laid down by the Member State. The construction of a shopping centre/car park is one such project that may be subject to an EIA on this basis.

The EIA procedures under this Directive, which include requirements relating to public participation, are fully consistent with the Aarhus Convention's requirements set out in Article 6(2) to 6(10). The Directive has been transposed into law in the UK via a range of domestic instruments including in England the Town and Country Planning Regulations 2011 ("EIA Regulations") which in accordance with the Directive require the competent authority to determine on a case by case basis if an Annex II project requires an EIA. It is therefore incorrect for the communicant to say that the UK has made no determinations as to which activities other than those listed in Annex I of the Convention are likely to have a significant effect on the environment. Such determinations will be made on a case by case basis by the relevant local authority, having taken account of the selection criteria set out in schedule 3 of the EIA regulations 2011 as relevant to the development.

Alleged breaches

On 29 June 2009, Shepway District Council provided a screening opinion that the proposal to build the Sainsbury's store which is the subject of this complaint was not subject to EIA procedures. Following a resolution of the Council's development control committee to grant planning permission, a third party made a request to the Secretary of State for a screening decision in accordance with article 6 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. The Secretary of State agreed with the Council that the development would not be likely to have significant effects on the environment and therefore an EIA was not required. A copy of the screening opinion and the letter containing the Secretary of State's screening decision are annexed to this letter.

The project therefore did not come within the category of projects covered by article 6 of the Convention as defined in article 6(1)(a) and 6(1)(b). Consultation was however carried out in accordance with domestic planning law and normal practice. An account of the consultation that was conducted by both the applicant and the Council (addressing pre-application consultation, the reports of council officers and addressing planning committees) has already been provided in our letter of 11 April 2011.

Statements of community involvement

With respect to Statements of community involvement (SCIs), they are not, as the communicant contends, "a soft document that can be ignored". Section 19 (3) of the Planning and Compulsory Purchase Act 2004 requires that in preparing the other local development documents the authority must also comply with their statement of community involvement. The Court of Appeal has held that failure to adhere to the process set out in an SCI is a breach of legitimate expectation which can be a basis for the Court to quash a planning decision (R (Majed) v Camden London Borough Council [2009] EWCA 1029).

Regarding the provision of environmental information, the communicant refers to a duty on relevant authorities to provide an abbreviated environmental statement under Article 6(6) (a-f) of the Convention. This requirement has been implemented within the EU by the EIA Directive and transposed into UK law by a number of Environmental Impact Assessment Regulations. In England these form part of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. These require that an Environmental Statement is submitted by an applicant who makes an EIA application, which must include a non-technical summary. The formal requirements as to the content of Environmental Statements are set out in Schedule 4 to the Regulations. The project that is the subject of the complaint was not an EIA project and therefore an Environmental Statement was not required.

Environmental Information

The communicant refers to delays in responding to requests for environmental information in breach of Article 6(6) (a-f). Since no specific allegation is made with respect to a particular public authority, we are unable to comment on whether such delays did in this case occur.

However, the regulatory framework is clear: the Environmental Information Regulations 2004, which implement EU Directive 2003/4/EC on public access to environmental information, make provision for the dissemination of information to the public, and for public authorities to make available information in response to a request. The Regulations set clear time limits within which the public body must comply with a request. The time limit is 20 working days. The public authority may extend the period of 20 working days to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.

As pointed out by the communicants, the issue of obtaining environmental information from water companies is being addressed in a separate communication (ACCC/C/2010/55), consideration of which is delayed whilst the issue is still before the national courts.

Decisions on planning applications

The communicant claims there is a breach of Article 6(9) with regard to informing individuals about planning decisions. The requirement to inform the public about when an

application is granted is set out in Article 6 of the EIA Directive which is implemented in England through part 6 of the EIA Regulations. This requires the authority to maintain a register for public inspection and inform the public through a local advert.

In this particular case, given the planning decision related to a project which was not likely to have significant effects on the environment, the requirements to inform the public about the decision (as contained in Article 6(9) of the Convention and corresponding provisions in the EU/domestic legislation) did not apply.

Article 7

Local Investment Plans

The Communicant contends that Local Investment Plans (LIPs), documents produced by groups of local authorities, should be subject to public participation under Article 7 of the Aarhus Convention.

Local Investment Plans were introduced by the Homes and Communities Agency (a non-departmental public body of the Department for Communities and Local Government) as a way to help local authorities implement their plans for places and communities. Whilst the HCA works with local authorities, either individually or in groups, to draw up local investment plans that reflect local priorities for action and investment, the plans belong to the relevant Councils. A description of Local Investment Plans can be found at http://www.homesandcommunities.co.uk/hca-local-investment-planning. There is no statutory requirement to produce a Local Investment Plan. Contrary to the assertion in paragraph 6(i) of the Communicant's most recent communication, the Local Investment Plan is **not** a development plan document. If a project is listed within a Local Investment Plan and the HCA has set aside funding for it, this does not mean that the project will automatically receive planning permission. The project will still have to go through the necessary planning permission process as would any other request to develop.

We do not accept that LIPs are plans and programmes within Article 7 as they are not a development plan document and do not allocate land for development or set the framework for future development consent. Where they do set out policies that are relevant to the environment, the policies will also be contained in other documents which are themselves DPDs and subject to assessment under the Strategic Environmental Assessment Directive, so a separate public participation exercise is not required (see "Strategic Context" in the link above on local investment planning). Where public participation is not required, it will generally in any event be conducted in accordance with guidance published by HMG (http://www.bis.gov.uk/files/file47158.pdf).

Local Development Framework

The communicant alleges that it is not possible for the public to participate in the early formulation of planning policy. In our letter of 11 April 2011 we set out details of the opportunities the public have to participate in plan making. The preparation of Development Plan Documents is subject to the Environmental Assessment of Plans and

Programmes Regulations 2004 (SI 2004 No. 1633), which implement the SEA Directive in England. The public participation procedures set out in this legislation are fully compatible with Article 7 of the Convention. As noted above, primary legislation also requires local planning authorities to comply with their statement of community involvement when preparing Development Plan Documents.

Local Enterprise Partnerships

The communicant contends that Local Enterprise Partnerships are not accessible to the public whilst being likely to have a "significant effect on planning and decision making". Local Enterprise Partnerships are led by local authorities and businesses across natural economic areas. The majority of Local Enterprise Partnerships (LEPs), including the relevant LEP in this case (the South East Enterprise Partnership), are not corporate bodies, but instead operate as a partnership. The UK Government announced in the 2011 Budget a number of potential roles that Local Enterprise Partnerships might choose to take on. This can include leading on the preparation of policies related to economic development or producing evidence and technical assessments to inform others' decision-making. In undertaking these roles, an LEP will support the local planning authority in its statutory role. Documents produced by LEPs will not be Development Plan Documents and will not allocate land for development or set the framework for future development consent, so they will have a similar status to Local Investment Plans as set out above and will not be subject to the SEA Directive.

Localism Act

Our letter of 11 April 2011 sets out the mechanism through which the Localism Act widens the opportunities for the public to participate in the planning system.

The communicant makes specific reference to the amendment made by the Localism Act to s70 of the Town and Country Planning Act 1990. This provision was introduced during the House of Commons report stage and third reading on the Localism Bill in May 2011, and is now section 143 of the Localism Act 2011. Its purpose is to clarify the current legal situation by confirming that issues relating to local finance considerations should be taken into account in the determination of planning applications, but only where they are material to the particular application being considered. The amendment does not change the legal position. An amendment made at the House of Lords report stage confirms that the amendment made to s70 of the 1990 Act does not amend whether regard is to be had to any particular consideration, or the weight to be given to any consideration to which regard is had. Apportioning weight remains a matter for the decision maker. The amendment does not affect the status of the development plan in the determination of planning applications; this is still governed by section 38(6) of the Planning and Compulsory Purchase Act 2004, which has not been amended.

Article 9

The communicants' arguments regarding access to justice by third parties as well as the enforcement of planning conditions are addressed in our letter of 11 April 2011. We also refer the Committee to the UK's written observations dated 28 July 2009 in case

ACCC/C/2008/33: paragraphs 27 – 37 and 108 – 133 on the issue of substantive legality in the context of judicial review, and paragraphs 88 – 93 on procedures available to the public to challenge acts or omissions of private individuals.

Barbara Anning