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Dear Ms Smagadi,

Re: Response to draft findings on compliance by the United Kingdom with provisions of the Convention regarding communications ACCC/C/2010/45 joined with ACCC/C/2011/60.

1. The United Kingdom welcomes the Committee's finding in this communication that the UK is in compliance with articles 6, 7 and 9 of the Convention. We do, however, have some concerns about the way in which the Committee has approached certain matters and have commented on various aspects of the draft findings.

Exhaustion of domestic remedies

2. In paragraph 65 the Committee notes that the C/45 communicant did not pursue its complaint with the Local Government Ombudsman (LGO). Several reasons were set out in the communication, repeated in the draft findings, for not doing so. Our understanding is that the C/45 communicant did not approach the LGO to see if they could assist with their complaint.

3. We remain of the view that, in order to give the Committee a complete picture of how a Party's systems and procedures operate to deliver compliance with the Convention, communications should only be progressed where the communicant has taken steps

to exhaust domestic remedies. As we have noted before, this would be consistent with the Committee's position in paragraph 79 of communication ACCC/C/2009/38. It is better to deal with issues at national level where possible. Parties put national rules and systems in place to help ensure compliance with the Convention. A Party cannot guarantee every local authority will get every decision right every time, but if a procedure is put in place to deal with an issue, it needs to be followed before a view can be taken whether we as a Party are in compliance or not. This is one reason the rules are written in this way. The other is to help manage the workload of the Committee – it would face an impossible task if it were to deal with every complaint relating to every local authority.

4. It should therefore be noted in the findings that domestic remedies were not exhausted before the communicant made its complaint to the Committee.

Judicial review and substantive legality

5. The Committee's consideration and evaluation of the communications includes references to the Committee's concerns regarding substantive review (paragraphs 84 and 85). The Committee noted that the C/45 communicant did not pursue judicial review in part because of "the likelihood that only the procedural legality of the screening decision could be raised in such a review" and that it is "maintaining concerns regarding substantive review".

6. As the Committee has stated, it has not concluded that the United Kingdom fails to comply with article 9(2) of the Convention in this respect, either in these communications or in respect of decision IV/9i. In our letter of 11th April 2011 we emphasised that judicial review does not just concern whether a decision was reached by a correct process, but also whether the decision was itself contrary to law. *Wednesbury* unreasonableness is not the only form of unlawfulness that may form the basis of a challenge through judicial review. We refer the Committee to a recent Court of Appeal case (*R. (Evans)* v *Secretary of State for Communities and Local Government* [2013] EWCA Civ 115). At paragraph 37, the Court stated the following:

> "…the Compliance Committee has reached no concluded view that the *Wednesbury* approach is impermissible. Moreover its expression of concern is general and unparticularised. For example, it only refers to *Wednesbury* and does not refer to the other established heads of public law review; error of law; error of fact, and the principles of relevance and of propriety of purpose which are sometimes insufficiently distinguished from Lord Greene's residual category, which Lord Diplock termed "irrationality". It also does not identify the variations in the intensity of *Wednesbury* review that reflect the nature of the interest affected".

7. The Court of Appeal also noted that other cases considering the application of the *Wednesbury* test (*R. (Loader)* v *Secretary of State for Communities and Local*

Government [2012] EWCA Civ 849 and *R. (Bowen-West)* v *Secretary of State for Communities and Local Government* [2012] EWCA Civ 321) were decided since the Committee expressed its concerns "but in neither did this court consider that put into question the existing approach" (paragraph 38).

8. In our letter of 11th April 2011 we also emphasised that a distinction needs to be drawn between the substantive legality of a decision and its merits in policy terms. Article 9(2) of the Convention requires a review procedure in which the substantive legality of any decision, act or omission can be challenged. Judicial review meets this requirement. A review of the substantive legality of a decision does not require that a court substitute its own view of the merits of the decision for that of the decision-maker.

9. Given the Court of Appeal's comments on the Committee's analysis of judicial review we reiterate that there is plenty of evidence to demonstrate that our system complies. We respectfully submit that the Committee's focus should be the question of whether, on the basis of the facts and arguments put before it, a Party is in compliance or not with the Convention, rather than suggesting that it might make findings of non-compliance if it were presented with different facts. Such an approach will also, of course, assist with the workload of the Committee.

10. The reference to the Committee's concerns over substantive review should therefore acknowledge that there is no evidence to support the claim that judicial review does not provide an adequate form of review for the purposes of the Convention.

Corrections

11. We have also noted a number of corrections to the text that need to be made and invite the Committee to reflect these in its findings. Given the number of points, these have been included in an annex.

12. We are of course happy to assist the Committee further should any additional clarification be required.

Yours sincerely,

Ceri Morgan

ANNEX – LIST OF CORRECTIONS

Summary of facts, evidence and issues

Paragraph 30 – Footnote 2, citing some of the key statutory instruments, refers twice to the Town and Country Planning (Development Management Procedure) (England) Order 2010.

Paragraph 32 – Local investment plans (LIPs) prioritise *investment* goals, rather than development goals. As our letter of 31 July 2012 explained, the purpose of LIPs is to inform funding discussions, in particular bids for funding from the Homes and Communities Agency (HCA). As that letter also explained, LIPs are intended to support the implementation of statutory development plans, or in some cases to inform the evidence base, by identifying investment priorities. Paragraph 32 also suggests that LIPs "may be included in LDF documentation". As LIPs are entirely non-statutory they cannot form part of the statutory Local Development Framework for an area. A LIP may be included in the bundle of documents that forms part of the evidence base, but it is important to be clear that they are not part of the LDF itself.

Paragraph 33 – Local Investment Plans can be prepared and adopted by a range of organisations working with the Homes and Communities Agency, but always including the local authorities for the area covered by the LIP. This may include a Local Strategic Partnership to which a local authority or group of authorities belong, as was the case in East Kent, or it could involve a Local Enterprise Partnership. There is a misunderstanding about the role of Local Enterprise Partnerships (LEPs), which are not a direct replacement for Local Strategic Partnerships (LSPs). In general LEPs operate over a much wider geographic area. The role of LEPs was explained in our letter of 22 December 2011.

Paragraph 35 – This should refer to the Planning *Inspectorate* rather than Planning Inspector.

Paragraph 39 – The reference to Screening Opinion should refer instead to the Secretary of State making a Screening *Direction*.

Paragraph 43 – The final sentence should refer to the fact that the Secretary of State decided not to call the application in for his own decision, rather than to his opinion on whether EIA was required. His view on whether EIA was needed is, correctly, mentioned in the final sentence of paragraph 44.

Paragraph 52 – Whether EIA is required is determined by the competent authority through *thresholds* on a case by case basis.

Paragraph 55 – This summarises the response that we have given to the C/45 communicant's allegations concerning LIPs, but not the response that we provided in relation to the communicant's similar allegations concerning Local Enterprise Partnerships.

As the allegations concerning LEPs are summarised in paragraph 54, then paragraph 55 ought also to summarise the response that we gave concerning the role of LEPs in our letter of 22 December 2011.

Paragraph 56 – "party" needs to be added at the end of the first line.

Paragraph 57 – in the third line, "call-in" needs to be deleted between the words "superstore" and "application".

Consideration and evaluation by the committee

Paragraph 70 – As noted in relation to paragraph 33, Local Investment Plans may be adopted by Local Strategic Partnerships, but equally they may be adopted by other partnerships involving the local authority (or authorities) for the area concerned.

Paragraph 72 – As noted in relation to paragraph 33, LEPs are not a direct replacement for LSPs. We suggest omitting the words "currently in the process of replacing LSPs" from this paragraph.

Paragraph 77 – "enquiry" (fourth line) should read "inquiry".

Paragraph 79 – As noted in relation to paragraph 32, LIPs cannot form part of the statutory development plan for an area, so this paragraph should also make this clear.

Paragraph 80 – Contains the sentence "If the adoption of LIPS or other developments, were to prejudice public participation as envisaged by article 6, paragraph 4, in relation to article 6 or 7 of the Convention, this would engage the responsibilities of the Party concerned under these provisions of the Convention". This is unclear. As set out in our response of 31 July 2012, LIPs are not Article 7 plans or programmes.

Paragraph 83 – This paragraph confuses the right of an applicant to appeal to the Secretary of State with the ability for any party to request that a planning *application* is 'called-in' by the Secretary of State for his own determination. An applicant for planning permission has a right of appeal if their application is refused by the local planning authority, or if the local planning authority fails to determine the application within the statutory period (in which case the authority is deemed to have refused the application), or if the application is approved but with conditions attached which the applicant wishes to challenge. This is separate from the ability for any party to request that an application be called-in by the Secretary of State <u>before</u> the local planning authority has issued its decision. The call-in procedure was explained in our letter of 11 April 2011, and unlike an appeal does not involve a re-taking of the decision at stake, as no formal decision will have been issued prior to the application being called-in. The last sentence needs to say that decisions that are called in and those that are the subject of an appeal may, depending on the proposed activity under consideration, engage article 6 of the Convention.