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Meeting of the Parties to the Convention on  
Access to Information, Public Participation  
in Decision-making and Access to Justice  
in Environmental Matters

### Compliance Committee

#### Forty-third meeting

Geneva, 17–20 December 2013

Item 7 of the provisional agenda

#### Communications from members of the public

### **Findings and recommendations with regard to communications ACCC/C/2010/45 and ACCC/C/2011/60 concerning compliance by the United Kingdom of Great Britain and Northern Ireland\***

**Adopted by the Compliance Committee on 28 June 2013**

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\* The present document was submitted late owing to the Committee's need for more time to finalize the agenda for its forty-third meeting.

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## I. Introduction

### A. Communication ACCC/C/2010/45

1. On 10 September 2010, the Kent Environment and Community Network (the ACCC/C/2010/45 communicant), submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that the United Kingdom of Great Britain and Northern Ireland had failed to comply with several obligations under the Convention (communication ACCC/C/2010/45).

2. The communication had initially been submitted on 15 January 2010, and subsequently resubmitted, further to the Committee's request for clarification, before the determination of preliminary admissibility of the communication. The communication originally alleged a general failure of the United Kingdom to properly implement the provisions of article 9, paragraphs 2 (b), 3, 4 and 5, of the Convention. To illustrate this failure, the communication referred to the example of the planning application for the Sainsbury's superstore in Hythe, Kent (the superstore).

3. At its twenty-ninth meeting (21–24 September 2010), the Committee determined on a preliminary basis that the communication was admissible. At that meeting, the Committee also identified that legal issues raised by the communication had already been dealt with by the Committee in its deliberations on previous communications concerning compliance by the United Kingdom (i.e., ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33), and decided that summary proceedings would apply, according to the procedural decision adopted at its twenty-eighth meeting (ECE/MP.PP/C.1/2010/4, para. 46).

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention (ECE/MP.PP/2/Add.8), the communication was forwarded to the Party concerned on 28 October 2010, requesting it to provide information, as appropriate, on the progress achieved on the Committee's recommendations relating to the above-mentioned three communications, and inviting it to comment on the allegations, if it so wished. On the same date, a letter was sent to the ACCC/C/2010/45 communicant inviting it to consider its allegations in the light of the findings and recommendations in respect of the three communications. Additional information relating to the communication was forwarded to the Party concerned on 10 November 2010.

5. At its thirty-first meeting (22–25 February 2011), the Committee agreed to consider the communication according to summary proceedings at its thirty-second meeting (11–14 April 2011).

6. In response to the Committee's letters of 28 October 2010, the communicant and the Party concerned provided their responses on 27 March and 11 April 2011, respectively.

7. At its thirty-second meeting, the Committee noted that the communicant in its written submissions had challenged the decision of the Committee to consider the communication according to the summary proceedings procedure. After considering the communicant's response of 27 March 2011 and the letter of the Party concerned of 11 April 2011, the Committee decided to affirm its decision at its twenty-ninth meeting to apply summary proceedings in respect of those issues already dealt with in its deliberations in

previous communications concerning compliance by the United Kingdom (i.e., ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33). The Committee requested the secretariat to inform the ACCC/C/2010/45 communicant that its letter of 27 March 2011 had been forwarded to the Party concerned and that the Party concerned would be invited to consider that letter when preparing its report in respect of the Committee's findings in ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33. In respect of those issues raised in the communicant's letter of 27 March that were not already dealt with in the three above-mentioned communications, the Committee requested the secretariat to ask the communicant to substantiate its allegations by reference both to the substantive provisions of the Convention alleged to have been breached and concrete examples from the current system in the United Kingdom within the scope of the Convention demonstrating those breaches. Otherwise, the Committee might decide to conclude the case.

8. On 12 June 2011, the ACCC/C/2010/45 communicant submitted additional information to the Committee in response to the Committee's request, including new allegations of non-compliance by the United Kingdom with article 6, paragraphs 1 (b), 2, 3, 4, 6, 8, 9, and 10, article 7 and article 9, paragraphs 2 and 3, of the Convention.

9. At its thirty-third meeting (27–28 June 2011), the Committee took note of the communicant's submissions of 12 June 2011. It noted that the breaches of the Convention alleged by the communicant in those additional submission had considerably expanded upon those breaches alleged in the original communication ACCC/C/2010/45 that concerned article 9, paragraphs 2 (b), 3, 4 and 5. The Committee expressed its disapproval of such a "moving targets" approach, *inter alia*, because such an approach raised procedural issues with regard to admissibility and fairness to the Party concerned.

10. At the same meeting, the Committee confirmed that by applying summary proceedings the Committee would not deal with any of the issues already dealt with in the scope of its findings on communications ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33, in particular those relating to costs. With respect to the new allegations made in the ACCC/C/2010/45 communicant's letter of 12 June 2011, the Committee observed that a new communication ACCC/C/2011/60 (United Kingdom) (see below), submitted on 24 June 2011, raised some similar issues regarding the planning policy in the Party concerned. The Committee agreed that it would decide how to proceed with respect to the new allegations, and which issues to address, after the Party concerned had been provided with an opportunity to respond to both the new allegations in communication ACCC/C/2010/45 and the related issues raised in communication ACCC/C/2011/60, in accordance with paragraph 23 of the annex to decision I/7 of the Meeting of the Parties.

11. On 27 July 2011, a letter was sent to the Party concerned and the ACCC/C/2010/45 communicant informing them about the outcome of the Committee's thirty-third meeting.

## **B. Communication ACCC/C/2011/60**

12. On 28 March 2011, a member of the public, Mr. Terence Ewing (the ACCC/C/2011/60 communicant), submitted a communication to the Committee alleging that the United Kingdom had failed to comply with its obligations under the Convention (communication ACCC/C/2011/60).

13. In particular, the communication alleged that the Party concerned, by not providing the right for oral presentations to third party objectors at planning committee hearings of local authorities, was not in compliance with article 3, paragraphs 1 and 9, and article 6, paragraph 7, of the Convention. The communication also alleged that only applicants whose applications were refused had the right of appeal before the Planning Inspector; and that third party objectors had only the possibility to apply for judicial review to the High Court, an avenue that was not adequate, effective, fair or equitable, and which might be

prohibitively expensive. For these reasons, the communication alleged that the Party concerned failed to comply with article 3, paragraph 1, and article 9, paragraphs 2, 3 and 4, of the Convention.

14. At its thirty-third meeting, the Committee determined on a preliminary basis that the communication was admissible. At that meeting, the Committee also noted that the allegations made by the ACCC/C/2011/60 communicant presented similarities to the new allegations made by the ACCC/C/2010/45 communicant (see above).

15. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 27 July 2011. The Party concerned was asked to respond to the allegations of communication ACCC/C/2011/60 and also to the new allegations of communication ACCC/C/2010/45. The Committee would decide on how to proceed with those two communications after it had received the response of the Party concerned.

16. In September 2011, the ACCC/C/2011/60 communicant submitted a considerable amount of additional information, some of which constituted amended versions of previously submitted documents. At its thirty-fifth meeting, the Committee, further to the proposal of the Chair, decided that it would not consider the additional submissions.

### **C. Joint consideration of the two communications**

17. On 22 December 2011, the Party concerned provided its response to communication ACCC/C/2011/60 and the new allegations in ACCC/C/2010/45. On 5 March 2012, the ACCC/C/2010/45 communicant responded to the submissions of the Party concerned.

18. Further submissions by the ACCC/C/2011/60 communicant were made on 4 March and 1 June 2012. The Committee instructed the secretariat to process only those parts of the communicant's submissions of 1 June 2012 that related to the original submission.

19. At its thirty-sixth meeting (27–30 March 2012), the Committee considered the responses received and discussed how to proceed with communications ACCC/C/2010/45 and ACCC/C/2011/60. It decided that it would deal with the following issues:

(a) Whether the planning laws and procedures of the Party concerned, limited to England and Wales, met the standards regarding public participation in articles 6 and 7 of the Convention (ACCC/C/2010/45), including whether the fact that oral presentations allegedly might not be made at meetings of planning committees was contrary to the Convention (ACCC/C/2011/60);

(b) Whether the review procedures mentioned in the communication, to the extent that they did not cover issues considered by the Committee in ACCC/C/2008/33, met the requirements of article 9 of the Convention (ACCC/C/2010/45).

20. The Committee also decided that it would apply its summary proceedings procedure to the following issues raised by the two communications:

(a) Whether the procedure for judicial review available in the courts of the Party concerned met the standards of substantive legality set out in article 9 of the Convention, because the Committee had already dealt with that matter in its findings on communication ACCC/C/2008/33 (ECE/MP.PP/C.1/2010/6/Add.3, paras. 123–127), and no new information had been submitted to the Committee which would trigger reconsideration of its findings;

(b) Whether the cost of judicial review procedures in the Party concerned were prohibitively expensive, because the Committee had already dealt with that matter in its findings on communications ACCC/C/2008/27 (ECE/MP.PP/C.1/2010/6/Add.2) and

ACCC/C/2008/33, and no new information had been submitted to the Committee which would trigger reconsideration of its findings. The Committee recalled that it would continue to closely monitor the progress by the Party concerned on that issue through its follow-up on the implementation of decision IV/9i (United Kingdom), adopted by the Meeting of the Parties at its fourth session (Chisinau, 29 June–1 July 2011).

21. At the same meeting, the Committee also decided that it would discuss the substance of the two communications jointly at its thirty-seventh meeting (26–29 June 2012). With regard to the allegations that were admissible on a preliminary basis, but for which the Committee had decided to apply its summary proceedings procedure because it had already considered the legal issues raised by the communication in its findings on communications ACCC/C/2008/27 and ACCC/C/2008/33, and because it was following up on the implementation by the Party concerned of the relevant recommendations of decision IV/9i, the Committee instructed the secretariat to inform the communicants about the process to be followed and to advise them to take note of the Committee's follow-up on the implementation by the Party concerned of decision IV/9i. The Committee also instructed the secretariat to remind the Party concerned of the previous findings on communications ACCC/C/2008/27 and ACCC/C/2008/33 and the related recommendations of the Meeting of the Parties in decision IV/9i, and to request it to provide information on the progress achieved.

22. The Committee discussed the communications at its thirty-seventh meeting, with the participation of representatives of the communicants and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communications. After the discussion, the parties were invited to address several questions.

23. The Party concerned addressed the Committee's questions on 31 July 2012; the ACCC/C/2011/60 communicant on 2 August 2012 and the ACCC/C/2010/45 communicant on 13 August 2012. Additional information was submitted by the ACCC/C/2011/60 communicant on 15 and 28 September 2012. The ACCC/C/2011/60 communicant also submitted information on 22 March 2013, which was not considered by the Committee.

24. The Committee prepared joint draft findings at its fortieth meeting (25–28 March 2013) and, in accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicants on 1 May 2013. All were invited to provide comments by 29 May 2013.

25. The Party concerned and the communicants provided comments on 29 May 2013. A revised version of the comments by the ACCC/C/2011/60 communicant was received on 29 June 2013.

26. At its forty-first meeting (Geneva, 25–28 June 2013), the Committee adopted its findings and agreed that they should be published as a formal pre-session document to the Committee's forty-third meeting. It requested the secretariat to send the findings to the Party concerned and the communicants.

## II. Summary of facts, evidence and issues<sup>1</sup>

### A. Legal framework

#### Environmental information

27. In the United Kingdom, the Environmental Information Regulations 2004 implement European Union (EU) Directive 2003/4/EC on public access to environmental information, providing for the dissemination of information to the public and requiring for public authorities to make available information in response to a request within 20 working days (which deadline may be extended to 40 working days depending on the volume or complexity of the information requested).

#### Local planning decisions

28. The present communication pertains to the planning system in England and Wales, where the main act currently consolidating planning legislation is the Town and Country Planning Act 1990. Another three acts complement the Town and Country Planning Act: the Planning (Listed Buildings and Conservation Areas) Act 1990; the Planning (Hazardous Substances) Act 1990; and the Planning (Consequential Provisions) Act 1990. Most of the provisions of these three acts have been repealed or amended by the provisions of the Planning and Compulsory Purchase Act 2004.

29. The Planning and Compulsory Purchase Act 2004 requires local authorities to produce a number of documents, such as the Local Development Framework and the Statement of Community Involvement describing how the local planning authority will involve interested parties in the exercise of its functions. Sustainability Appraisals and Strategic Environmental Assessments supplement the documentation.

30. A number of other statutory instruments govern planning law in England,<sup>2</sup> while the planning policy underwent reform in 2012, with the main objective to consign increased power to local authorities.

31. Concerning the right of oral submissions at local planning decision-making meetings, the Local Government (Access to information) Act 1985 provides for public access to a local authority's meeting. Accordingly, all documents related to the meeting are publicly available at least three days in advance. Whether a member of the public can speak during the meeting depends on the local planning authority. Some authorities, including the Shepway District Council, have introduced a right to speak at planning committee meetings for applicants and objectors. In addition, the Freedom of Information Act 2000 allows access to information held by public authorities and the Environmental Information Regulations 2004 allow access to environmental information.

#### Local investment plans

32. Local investment plans prioritize development goals.<sup>3</sup> They were introduced by the Homes and Communities Agency (a non-departmental public body of the Department of

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<sup>1</sup> This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

<sup>2</sup> For a list on the statutory instruments applicable in England, see <http://www.planningportal.gov.uk/planning/planningpolicyandlegislation/currentlegislation/statutoryinstruments> (last accessed on 21 October 2013). Among them the Town and Country Planning (Local Development) (England) Regulations 2004 as amended; the Town and Country Planning (Development Management procedure) (England) Order 2010.

Communities and Local Government) as a way to help local authorities implement their plans for places and communities. There is no statutory requirement to produce a local investment plan. Adopted local investment plans may be included in Local Development Framework documentation, even if they are not part of the Framework itself.

33. Local investment plans are adopted by what are often referred to as Local Strategic Partnerships, which may involve Local Enterprise Partnerships. A Local Strategic Partnership is a non-statutory body that brings together the different parts of the public, private, voluntary and community sectors, working at a local level. Local Enterprise Partnerships are composed of representatives of the public sector, private sector and civil society; they are led by local authorities and businesses across natural economic areas and provide the vision, knowledge and strategic leadership needed to drive sustainable private sector growth and job creation in their area.

#### **Environmental impact assessment and screening (EU legislation)**

34. The EU EIA Directive<sup>4</sup> has been transposed into United Kingdom law through a number of domestic instruments, including the Town and Country Planning Regulations 2011 (EIA Regulations) in England. Accordingly, the competent authority determines on a case-by-case basis if a project falling under annex II of the EIA Directive requires an environmental impact assessment (EIA) to be carried out.

#### **Review of local planning decisions**

35. The appeal of the applicant whose application for planning permission is refused is heard by the Planning Inspectorate (in England and Wales).

36. Most planning applications are decided locally by the local planning authority. However, the Secretary of State can direct the local planning authority to refer an application for decision to the Secretary of State, the so called “call-in procedure”, to determine whether the application ought to be decided by the local planning authority or the Secretary of State.

37. In both the statutory appeal and the call-in procedure, a planning inspector is appointed to write the report. The procedure may be carried out through written representations, informal hearings or an inquiry.

38. Third parties may pursue judicial review of the decision taken by a local council at the High Court, where the procedural legality of a decision is reviewed. The procedure at the High Court may involve considerable expenses. Alternatively, third parties may complain before the Local Government Ombudsman about maladministration causing injustice.

39. With respect to EIA screening, a party can ask the Secretary of State to consider undertaking a Screening Direction upon a particular proposal to determine whether an EIA is required or not.

<sup>3</sup> See also <http://www.homesandcommunities.co.uk/hca-local-investment-planning> (last accessed on 21 October 2013).

<sup>4</sup> Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended. (See Directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification).)

## **B. Facts**

### **ACCC/C/2010/45**

40. The facts of this communication are based on planning application Y09/0627/SH concerning the proposed construction of the superstore, submitted to Shepway District Council on 24 June 2009. The communication at issue aims to exemplify the situation where third parties aggrieved about the environmental impacts of a planning proposal have limited third party rights of appeal. The communication also raises general concerns of non-compliance by the Party concerned with the public participation requirements under the Convention.

41. On 29 June 2009, the Shepway District Council provided a screening opinion that the proposal to build the superstore was not subject to EIA procedures.

42. On 15 December 2009, the Development Control Committee resolved to grant planning permission for the building of the superstore with parking for some 270 cars on a site of 1.83 hectares. Members of the public concerned, including the ACCC/C/2010/45 communicant, sought to persuade the Development Control Committee to refuse planning permission through written and oral representations before the Committee and other campaign activities.

43. On 4 January 2010, the communicant sent a letter to the Secretary of State requesting a call-in procedure, among others raising the issues of the potential harm to the viability and vitality of the historic town of Hythe, and to the adjacent conservation area of the nearby listed buildings. The Secretary of State decided not to call the application in for his own decision.

44. During the same time period, on 27 December 2009, the communicant asked for a Screening Direction from the Secretary of State to determine whether the proposal should be subjected to an EIA. That was done on the basis of concerns for traffic, air pollution and the overall carbon footprint of the proposal. The Secretary of State in response to this request also found that the proposal did not require an EIA.

45. The communicant then contemplated judicial review of the planning decision.

46. On 12 February 2010, the Shepway District Council formally granted the planning permission.

47. On 13 February 2010, the communicant, not being aware of the permission already granted, sent a letter to the Shepway District Council with a view to forcing the Council to bring the matter back to the Development Control Committee for failure to consider new guidance issued by the Government on the planning approach to be given to superstores. No response was received. The communicant sent similar letters thereafter with the hope that the Council would review its decision, but the Council refused to do so.

48. The communicant admits that one of the reasons it decided to submit a communication before the Compliance Committee was to persuade the Government to call-in the proposal so that a public inquiry could be held, to change its restrictive practice on call-ins based on the Caborn Statement<sup>5</sup> generally, and to introduce a better system for third party appeals in environmental planning cases.

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<sup>5</sup> A statement by Richard Caborn, Minister of State for the Regions, Regeneration and Planning, made on 11 February 1999, addressing the circumstances in which planning authorities, when considering planning applications for retail and leisure developments, should take into account the need for the development.

**ACCC/C/2011/60**

49. The ACCC/C/2011/60 communicant provides examples from his personal experience in the discussion of planning applications at Westminster Council and Wandsworth, and Camden, about the right of members of the public to make oral submissions and the time they are granted to comment.

**C. Substantive issues****ACCC/C/2010/45**

50. The following paragraphs summarize the main allegations by the ACCC/C/2010/45 communicant and the counter-arguments of the Party concerned.

*Public participation in specific activities — article 6*

51. The ACCC/C/2010/45 communicant alleges that public participation should take place not only in the context of EIA and strategic environmental assessment procedures, but for any project, such as the superstore, unless the possibility of harm is excluded. Therefore, the Party concerned fails to comply with article 6, paragraph 1 (b), of the Convention. The communicant points to a number of elements in planning law in England that significantly impact on the effectiveness of the public participation procedure, and further alleges that the Party concerned fails to comply with the requirements of article 6, paragraphs 2, 3, 4, 6, 8 and 9, of the Convention.

52. The Party concerned refutes all the ACCC/C/2010/45 communicant's allegations. In particular, the Party concerned stresses that whether an EIA is required or not is determined by the competent authority through thresholds on a case-by-case basis, according to the criteria set by EU and United Kingdom law.

53. The Party concerned explains that, in general, according to statutory requirements, members of the public have a number of opportunities to participate in the decision-making process, according to the minimum standards provided under article 6, of the Convention, and that, in the superstore case, enhanced consultations, exceeding the minimum requirements set by planning law and ordinary practice, were organized, despite the fact that the project did not require an EIA.

*Public participation in plans and programmes — article 7*

54. The ACCC/C/2010/45 communicant alleges that local investment plans substantially predetermine the future policies in Local Development Frameworks, especially when activities have received financial endorsement by developers. However, there is no public participation, while environmental concerns may be undermined. In addition, according to the communicant, the new Local Enterprise Partnerships will also impede public participation in the adoption of plans and programmes. Therefore, the communicant alleges that the Party concerned fails to comply with article 7 of the Convention.

55. The Party concerned contends that public participation for the preparation of Local Development Frameworks is fully in compliance with the Convention. The Party concerned also contends that local investment plans do not allocate land for development, nor set the framework for future development consent, while there is neither a statutory requirement to produce a local investment plan nor a requirement that a project included in the local investment plan automatically receive planning permission. As such, local investment plans do not fall within the ambit of article 7.

56. The Party concerned also contends that Local Enterprise Partnerships are not corporate bodies, but instead operate as a partnership. It furthermore submits that Local

Enterprise Partnerships may choose a number of roles. These roles may include leading on the preparation of policies related to economic development or producing evidence and technical assessments to inform others' decision-making. In so doing Local Enterprise Partnerships support local planning authorities in their statutory roles. As such these Partnerships, like local investment plans, do not fall within the ambit of article 7.

*Access to review procedures — article 9*

57. The ACCC/C/2010/45 communicant alleges that since the Party concerned does not provide a third party the right of appeal to projects listed in annex I to the Convention or other proposals which may have a significant effect on the environment, it fails to comply with article 9, paragraph 2 (b), of the Convention.

58. The communicant also alleges that most third parties do not have access to a review procedure for the legal substance of the matter, because very few applications are actually called in by the Secretary of State every year — and the superstore application was not. The communicant adds that judicial review does not allow for review of the legal substance of the matter; and that the Local Government Ombudsman looks at the substance of the matter, but rarely provides a suitable review in environmental planning matters. Therefore, the Party concerned fails to comply with article 9, paragraphs 2 (b) and 3, of the Convention.

59. The communicant further alleges that judicial review — practically the only avenue for any party to challenge a decision — is limited to procedural legality, and thus ineffective; and that judicial review involves high-costs risk by the claimant, and thus is inadequate. Therefore, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.

60. Finally, the ACCC/C/2010/45 communicant alleges that the Party concerned does not provide information to the public regarding the potential administrative review procedure by the Secretary of State in the screening decision and, therefore, the Party concerned fails to comply with article 9, paragraph 5, of the Convention.

61. The Party concerned refutes these allegations of the communicant, because there is the possibility for judicial review and for a complaint before the Local Government Ombudsman, even if there is no obligation under the Convention for the provision of administrative and judicial review procedures. On planning conditions, the Party concerned explains that upon notification about breaches in planning control, the competent authority may act if it considers it expedient in the context of the overall enforcement policy.

**ACCC/C/2011/60**

*Public participation in specific activities*

62. The ACCC/C/2011/60 communicant alleges that by not giving statutory rights to third party objectors to make oral presentations to a planning committee, the Party concerned fails to comply with article 3, paragraphs 1 and 9, and article 6, paragraph 7, of the Convention.

63. The Party concerned contends that no such obligation exists under the provisions of the Convention and refers to the ample opportunities in general for public participation under its law and practice.

*Access to justice*

64. The ACCC/C/2011/60 communicant alleges that by not giving statutory rights of appeal before the Planning Inspector to third party objectors, the Party concerned fails to comply with article 3, paragraph 1, and article 9, paragraphs 2, 3 and 4, of the Convention.

65. The Party concerned refutes the communicant's allegations and refers to its arguments on access to justice, already explained in relation to communication ACCC/C/2010/45.

#### **D. Domestic remedies**

66. The ACCC/C/2010/45 communicant did not pursue its complaint before the Local Government Ombudsman for the following reasons: (a) the Local Government Ombudsman would normally refuse jurisdiction, if legal remedies were still available (i.e., judicial review); (b) the remedy is not effective, as it may take longer than six months for a full investigation, and the implementation of a challenged planning permission may have already started; (c) the Ombudsman's remit is maladministration in local authorities and other bodies, rather than substantive aspects of decision; and (d) the Ombudsman has no power to overturn or override a decision.

67. The only option left according to the ACCC/C/2010/45 communicant was to pursue judicial review on the basis of legal procedural grounds. But it decided not to do so, due to the very high costs associated with this procedure. It also decided not to apply for a Protective Costs Order because of the restrictive and difficult rules that apply to such applications (see *R (Corner House Research) v. Secretary of State for Trade and Industry*).<sup>6</sup>

68. The ACCC/C/2010/45 communicant made a complaint to the European Commission with respect to the alleged failure of the Party concerned to inform members of the public about the EIA procedure, and in particular the possibilities to challenge the screening outcome; and a complaint with respect to the fact that local investment plans are not subject to strategic environmental assessment, while they substantially predetermine the Local Development Frameworks.

### **III. Consideration and evaluation by the Committee**

69. The United Kingdom ratified the Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

70. As mentioned above (paras. 19–20), the Committee decided at its thirty-sixth meeting to consider communications ACCC/C/2010/45 and ACCC/C/2011/60 jointly and to apply its summary proceedings to those aspects of the communications that it had already considered in its findings on communications ACCC/C/2008/27 and ACCC/C/2008/33.

71. The Committee, after the discussion with representatives of the parties at its thirty-seventh meeting, decided to further focus its considerations on the allegations regarding screening decisions subject to article 6, paragraph 1 (b), of the Convention, the procedure at public planning meetings and the Party concerned's compliance with article 6, paragraph 7, of the Convention. It would also look at the role of local investment plans, adopted by local public-private partnerships, including Local Strategic Partnerships, in the planning process and their relationship to article 7 of the Convention, as well as any issues that, in conjunction with the above, might arise in relation to article 9 of the Convention.

72. The Committee decides not to examine the general compatibility of the planning laws of the Party concerned with the Convention due to the fact that the communications remain vague as to how these laws fail to comply with the Convention; while the Party concerned has provided sufficient prima facie information to illustrate that there are

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<sup>6</sup> *R (Corner House Research) v. Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

numerous opportunities for public participation during the planning process. The Committee therefore does not reach any conclusion regarding compliance by the Party concerned on this matter.

73. The Committee also decides not to consider the role of Local Enterprise Partnerships, because the allegations of non-compliance concerning them were submitted very late in the proceedings and these instruments are currently in the process of being implemented.

#### **Decisions on specific activities — article 6**

74. The activities referred to in communications ACCC/C/2010/45 and ACCC/C/2011/60 do not come within the ambit of article 6, paragraph 1 (a), of the Convention.

75. Article 6, paragraph 1 (b), of the Convention requires Parties, in accordance with national law, to apply the provisions of article 6 to decisions on proposed activities not listed in annex I to the Convention which may have a significant effect on the environment. Parties to this end are to determine whether the proposed activity is subject to article 6 of the Convention. As the Committee found in communication ACCC/C/2010/50 (ECE/MP.PP/C.1/2012/11, para. 82), the outcome of an EIA screening decision is a determination under article 6, paragraph 1 (b), of the Convention.

76. Communication ACCC/C/2010/45 refers to the EIA screening decision of 2 June 2009 by the Shepway District Council regarding the superstore. On the basis of the information before it in relation to the store, as well as other situations raised in communications ACCC/C/2010/45 and ACCC/C/2011/60, the Committee finds that the communicants fail to substantiate that the authorities misapplied their discretionary power under article 6, paragraph 1 (b), of the Convention.

77. Therefore, the Committee does not further examine whether the Party concerned in relation to these activities is in compliance with article 6, paragraph 2 to 9, of the Convention.

78. Nevertheless, the Committee notes that article 6, paragraph 7, of the Convention gives any member of the public the right to submit comments, information, analyses or opinions during public participation procedures, either in writing or, as appropriate, orally at a public hearing or inquiry with the applicant. The fact that some local authorities only provide for participation of members of the public at planning meetings via written submissions, as stressed in communication ACCC/C/2011/60, is not as such in non-compliance with article 6, paragraph 7, of the Convention.

#### **Plans and programmes — article 7**

79. The Committee considers that local investment plans, and possibly also Local Strategic Partnerships or Local Enterprise Partnerships, may well be part of the decision on plans or programmes within the purview of article 7 of the Convention. While there is no statutory requirement for the authorities to prepare local investment plans and these plans are not part of a statutory development plan, there appears to be a growing trend for local authorities in the United Kingdom to set their local planning priorities framework through local investment plans. The Homes and Communities Agency has developed a Good Practice for local investment planning<sup>7</sup> that encourages integration of community

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<sup>7</sup> See <http://www.homesandcommunities.co.uk/sites/default/files/aboutus/plan-good-practice.pdf>, available from <http://www.homesandcommunities.co.uk/hca-local-investment-planning> (last accessed on 21 October 2013).

involvement. Still this remains guidance for good practice, and authorities have some discretion whether to engage all stakeholders, and not only prospective developers.

80. Therefore, in order to ensure investment flow for future projects, there is a risk that in preparing the local investment plans, authorities consult only with potential developers and do not involve other members of the public. In addition, although local investment plans are not material to the actual planning decisions and they may be included in the Local Development Framework documentation, they seem to be evolving into a de facto element of planning. It is thus highly unlikely that local investment plans have no effect at all on subsequent planning decisions, if consultations have already been carried out with prospective investors.

81. The Committee emphasizes that article 6, paragraph 4, of the Convention requires “early public participation, when all options are open and effective public participation can take place”, both in relation to activities under article 6 of the Convention and in relation to plans and programmes under article 7 of the Convention. If the adoption of local investment plans, or other developments, were to prejudice public participation in the planning procedure 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. If this were the case, the Party concerned would also be obliged to ensure all-inclusive public participation, i.e., not limited to the involvement of private sector, in this early stage of planning.

82. According to the information before the Committee, the practice for the preparation of the local investment plans has not crystallized across the Party concerned and largely depends on the discretion of the authority to engage public participation of all stakeholders. Therefore, the Committee is not in a position to conclude whether the Party concerned fails to comply with its obligations arising from article 7. However, given the growing significance of the cooperative endeavours between public and private actors for the preparations of local investment plans, and in view of the object and purpose of the Convention, the Committee considers that participation of the public in the preparation of the local investment plans and related procedures is highly appropriate.

**Review procedures — article 9, paragraph 2, in conjunction with article 6, paragraph 1 (b)**

83. As mentioned above, the outcome of an EIA screening decision is a determination under article 6, paragraph 1 (b), of the Convention. These determinations thus are subject to the requirements of article 9, paragraph 2, of the Convention. This entails that members of the public concerned, as defined in article 9, paragraph 2, of the Convention, “shall have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6.”

84. The Committee notes that the right of an applicant to appeal to the Secretary of State for Communities and Local Government or to the Secretary of State’s Planning Inspectors are not procedures under article 9, paragraph 2, of the Convention. They are instead procedures by way of which an applicant whose planning decision has been refused may appeal that decision before an executive body, not constituting a court of law or independent and impartial body established by law. This is so even though in the course of such an appeal members of the public concerned may be heard. If the procedure results in a retaking of the decision at stake, then, depending on the proposed activity under consideration, it engages article 6 of the Convention. Similarly, the latter would be the case if the Secretary of State calls in an application for its own determination.

85. The Committee notes that the communicants in communication ACCC/C/2010/45 did not pursue judicial review of the screening decision at stake in the communication for

reasons of the expenses probably involved in such a review procedure, as well as the likelihood that only the procedural legality of the screening decision could be raised in such a review.

86. The Committee has addressed the issue of the costs involved in procedures for judicial review with respect to the Party concerned in ACCC/C/2008/33, and has found the Party concerned not to comply with article 9, paragraph 4, of the Convention. Thus, the Committee maintains its findings on that communication regarding costs (ECE/MP.PP/C.1/2010/6/Add.3, para. 136). As to the possibility to obtain a review of substantive legality in a procedure for judicial review, which was also addressed in findings in ACCC/C/2008/33, no new facts have been brought before the Committee. Therefore, the Committee, while maintaining its concerns regarding substantive review expressed in paragraph 127 of communication ACCC/C/2008/33, does not conclude that the Party concerned fails to comply with article 9, paragraph 2 in this respect.

#### **IV. Conclusion**

87. Having considered the above in the context of communications ACCC/C/2010/45 and ACCC/C/2011/60, the Committee does not find the Party concerned to be in non-compliance with articles 6, 7 or 9 of the Convention and makes no recommendations.

88. In view of the finding in paragraphs 85 and 86, the Committee points the Party concerned to its findings and recommendations in communications ACCC/C/2008/27 and ACCC/C/2008/33 and decision IV/9i (United Kingdom), adopted by the Meeting of the Parties to the Convention at its fourth session.

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