

## **Findings and recommendations with regard to communication ACCC/C/2013/91 concerning compliance by the United Kingdom**

**Adopted by the Compliance Committee on 19 June 2017<sup>1</sup>**

### **I. Introduction**

1. On 12 June 2013, Sylvia Kotting-Uhl, a citizen of Germany (the 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 the failure of the United Kingdom to comply with its obligations under the Convention.
2. Specifically, the communicant alleges that the Party concerned failed to comply with article 6, paragraphs 2, 5 and 7, and the Convention's requirements concerning discrimination because it did not provide the German public with opportunities to participate in a transboundary environmental impact assessment (EIA) procedure concerning the proposed construction of two third generation nuclear reactors at Hinkley Point, known as Hinkley Point C.
3. At its forty-second meeting (Geneva, 24-27 September 2013), the Committee determined on a preliminary basis that the communication was admissible.
4. 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 17 December 2013.
5. The Party concerned responded to the allegations on 17 May 2014.
6. The Committee held a hearing to discuss the substance of the communication at its forty-sixth meeting (Geneva, 22-25 September 2014), with the participation of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication.
7. The Committee sent the questions to both the communicant and the Party concerned on 17 November 2014. The Party concerned submitted its reply on 12 December 2014. On 9 January 2015, the Party concerned provided a further update. The communicant did not reply to the Committee's questions.
8. Additional questions were sent to the Party concerned on 19 July 2016. The Party concerned submitted its reply on 12 August 2016. The communicant submitted comments on the Party concerned's reply on 6 September 2016.
9. The Committee completed its draft findings through its electronic decision-making procedure on 8 May 2017. 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 the communicant on 10 May 2017. Both were invited to provide comments by 7 June 2017.
10. The communicant and the Party concerned provided comments on 6 and 12 June 2017, respectively.
11. The Committee proceeded to finalize its findings in closed session. After taking into account the comments received, it made some minor amendments and agreed that no other changes to its findings were necessary. The Committee then adopted its findings

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<sup>1</sup> This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

through its electronic decision-making procedure on 19 June 2017 and agreed that they should be published as a formal pre-session document to its fifty-eighth meeting (Budva, Montenegro, 10-13 September 2017). It requested the secretariat to send the findings to the Party concerned and the communicant.

## II. Summary of facts, evidence and issues<sup>2</sup>

### A. Legal framework

#### *International and European legal framework*

12. For the Party concerned, the Espoo Convention and the European Union's EIA Directive<sup>3</sup> govern the conduct of transboundary EIA procedures.

13. The Espoo Convention, as a dedicated convention on transboundary EIA procedures, establishes the obligation on the Party of origin to conduct a transboundary EIA procedure in article 3, paragraph 1:

'For a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact, the Party of origin shall, for the purposes of ensuring adequate and effective consultations under Article 5, notify any Party which it considers may be an affected Party as early as possible and no later than when informing its own public about that proposed activity.'

14. With respect to public participation in the transboundary EIA procedure, article 2, paragraph 6 states that:

"The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin."

15. A similar approach is taken in Article 7 of the EIA Directive<sup>4</sup> which implements the provisions of the Aarhus Convention and the Espoo Convention in relation to EIA in European Union law. With respect to public participation in a transboundary EIA procedure Article 7 of the EIA Directive, *inter alia*, provides:

"1. Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, *inter alia*:

- (a) a description of the project, together with any available information on its possible transboundary impact;
- (b) information on the nature of the decision which may be taken.

The Member State in whose territory the project is intended to be carried out shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.

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<sup>2</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>3</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014.

<sup>4</sup> *Ibid.*

3. The Member States concerned, each insofar as it is concerned, shall also:  
(a) arrange for the information referred to in paragraphs 1 and 2 to be made available, within a reasonable time, to the authorities referred to in Article 6(1) and the public concerned in the territory of the Member State likely to be significantly affected; and

(b) ensure that the authorities referred to in Article 6(1) and the public concerned are given an opportunity, before development consent for the project is granted, to forward their opinion within a reasonable time on the information supplied to the competent authority in the Member State in whose territory the project is intended to be carried out.

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5. The detailed arrangements for implementing paragraphs 1 to 4 of this Article, including the establishment of time-frames for consultations, shall be determined by the Member States concerned, on the basis of the arrangements and time-frames referred to in Article 6(5) to (7), and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project.

16. Article 37 of the Euratom Treaty states that every member of the European Union is required to inform the European Commission of plans to dispose of radioactive substances.<sup>5</sup>

#### *National legal framework*

17. The Planning Act 2008 sets out the process for considering an application for development consent, including the requirements for public participation in that process.

(a) Under section 56 of the Planning Act 2008, the developer is required to notify the public of the acceptance of the application and the period within which they can make representations, which must be at least 28 days.

(b) Pursuant to section 103 of the Planning Act 2008, the national authority responsible for determining applications is the Secretary of State.

(c) Under section 118 of the Planning Act 2008, an order granting development consent, or anything done, or omitted to be done, by (before 2011) the Infrastructure Planning Commission or (since 2011) the Secretary of State<sup>6</sup> in relation to an Application for such an Order, can be challenged only by means of a claim for judicial review. Such a claim must be made to the High Court within 6 weeks from the date when the Order is published.<sup>7</sup>

18. The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (as amended) (the EIA Regulations) transposes the EIA Directive into the Party concerned's law for the purpose of determining applications for development consent relating to nationally significant infrastructure projects in England and Wales.<sup>8</sup>

19. The statutory obligations of the developer and Planning Inspectorate are set out in regulations 4 and 9 of the Infrastructure Planning Regulations 2009 (Applications: Prescribed Forms and Procedures) and rules 8, 13 and 21 of the Infrastructure Planning Rules 2010 (Examination Procedure).

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<sup>4</sup> Consolidated version of the Treaty establishing the European Atomic Energy Community, OJ C 327/1, 26.10.2012.

<sup>6</sup> At the time that the application was made in respect of Hinkley Point C, the relevant national authority was the Infrastructure Planning Commission. The Localism Act 2011 transferred the role of relevant national authority to the Secretary of State.

<sup>7</sup> Annex 1 to the communication, page 28.

<sup>8</sup> Party concerned's response to the communication, para.13.

20. The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 regulates the manner in which an applicant must publicise a proposed application. According to regulation 4(2):<sup>9</sup>

The applicant must publish a notice, which must include the matters prescribed by paragraph (3) of this regulation, of the proposed application:

- (a) for at least two successive weeks in one or more local newspapers circulating in the vicinity in which the proposed development would be situated;
- (b) once in a national newspaper
- (c) once in the London Gazette and, if land in Scotland is affected, the Edinburgh Gazette; and
- (d) where the proposed application relates to offshore development:
  - i once in Lloyd's List; and
  - ii once in an appropriate fishing trade journal.

21. Section 102(1)(e) of the Planning Act 2008 states that "...a person is an interested party if – the person has made a relevant representation". This is interpreted as any person, regardless of identity, nationality or residence.

22. In accordance with section 102(4) of the Planning Act 2008, a representation is a relevant representation for the purposes of subsection (1) to the extent that:

- (a) it is a representation about the application;
- (b) it is made to the Secretary of State in the prescribed form and manner;
- (c) it is received by the Secretary of State no later than the deadline that is set in the publicity about the application having been accepted for examination, under s.56 of the Planning Act 2008;
- (d) it contains material of a prescribed description; and
- (e) it does not contain - material about compensation for compulsory acquisition of land or of an interest in or right over land; material about the merits of policy set out in a national policy statement, or is material that is vexatious or frivolous.

23. The Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015, which replaced a similar provision in the earlier Infrastructure Planning (Interested Parties) Regulations 2010, prescribe that a relevant representation should include the name, address and any telephone number of the person registering, as well as an outline of the principal submissions which the person proposes to make in respect of the application (regulation 4(2)). The Planning Inspectorate produces the relevant representation form. Interested parties are asked on the registration form whether they would like to receive correspondence electronically or by post.

24. Submission of comments is regulated in part 6, chapter 4 of the Planning Act 2008. Comments may be submitted in form of written representations (electronically or by post) and orally at the Preliminary meeting or at the hearing.

## **B. Facts**

25. On 18 July 2011, following a consultation process, the Party concerned adopted its National Policy Statement for Nuclear Power Generation (EN-6). The National Policy

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<sup>9</sup> As of 16 May 2017, a new regulation 9(2)(A) was inserted in the Infrastructure Planning (Applications: Prescribed Forms and Procedure) 2009, which provides that, in addition to regulation 4(2), "in the case of EIA development, the notice must be made available on a website maintained by or on behalf of the Secretary of State". See Party concerned's comments on the draft findings, para. 9.

Statement sets out the Government's policy in respect of nuclear new build and identified relevant sites and indicates that Hinkley Point, a coastal headland in Somerset, south-west England, may be a suitable location for new Nuclear Power Plants (NPPs).

26. On 31 October 2011, the Planning Inspectorate received an application for a development consent from EDF Energy, an energy company registered in the United Kingdom, for the construction of two new reactors (a project known as Hinkley Point C) and accepted it on 24 November 2011.

27. On 2 December 2011, the developer, acting on advice of the Infrastructure Planning Commission, announced a registration period within which the public can make representations. This period lasted until 23 January 2012 (52 days).<sup>10</sup>

28. Altogether 1197 persons registered as interested parties as defined in section 102(e) of the Planning Act 2008.

(a) 1006 persons registered by making a relevant representation online via the National Infrastructure Planning website or by email using the project email address;

(b) 191 persons registered by post using a paper version of the online registration form and sending it to the Planning Inspectorate offices in Bristol.

29. On 18 September 2012, Austria requested to participate in the Party concerned's EIA procedure pursuant to article 3, paragraph 7, of the Espoo Convention. In its request, Austria stated that:

“there is no convincing evidence that severe accidents with major releases of radionuclides can be excluded with certainty....Consequently, in case of certain beyond-design-based accidents Austria may be significantly affected by impacts of the NPP”.<sup>11</sup>

30. By letter of 8 October 2012, the United Kingdom replied to Austria's request of 18 September 2012 and provided information about its law and procedures. It explained that the examination stage by its Planning Inspectorate had already been concluded but invited Austria to participate and raise its concerns under the Espoo Convention by providing its comments directly to the Secretary of State for Energy and Climate Change.<sup>12</sup>

31. On 26 November 2012, the Office for Nuclear Regulation issued a nuclear site licence and on 13 December 2012 a Design Acceptance confirmation.

32. On 19 December 2012, the Planning Inspectorate issued a report containing a recommendation to the Secretary of State for Energy and Climate Change.

33. In January 2013, the Austrian Government wrote to inform the Secretary of State for Energy and Climate Change that it had decided to initiate a public participation procedure. The Secretary of State requested that comments from the Austrian consultation should be sent to him by 5 March 2013.<sup>13</sup>

34. From 21 January 2013 to 1 March 2013, the Austrian public had the opportunity to review and comment on the documents received from the Party concerned.

35. On 1 March 2013, the communicant sent a letter to the German Minister of Environment asking the government to request a notification from the Party concerned.<sup>14</sup> On 21 March 2013, the Minister decided this to be unnecessary.<sup>15</sup>

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<sup>10</sup> Party concerned's response to communication, para. 31(a).

<sup>11</sup> See letter from the Party concerned's Planning Inspectorate to Austria, 8 October 2012, page 2, quoting Austria's letter of 18 September 2012. Party concerned's letter of 8 October 2012 is available as Annex 2 to Germany's response to communication ACCC/C/2013/92 concerning its compliance.

<sup>12</sup> Letter from the Party concerned's Planning Inspectorate to Austria, 8 October 2012, page 3.

<sup>13</sup> Party concerned's response to communication, para. 28.

<sup>14</sup> Annex 5 of the communication.

<sup>15</sup> Annex 6 of the communication.

36. On 5 March 2013, an expert statement and a number of comments from groups of individuals were sent by Austria to the Party concerned's authorities.

37. On 13 March 2013, the communicant, upon receiving confirmation from the German Government that it had not been notified about the proposed project at Hinkley Point C, sent a letter to the Secretary of State for Energy and Climate Change requesting the participation of the German public in the procedure.<sup>16</sup> The Secretary of State's office dismissed the request by letter of 15 March 2013.<sup>17</sup>

38. On 19 March 2013, the Secretary of State for Energy and Climate Change issued the Development Consent Order for the construction of Hinkley Point C.

39. At its twenty-eighth session (10-12 September 2013), the Espoo Implementation Committee began its consideration of the information provided by a German Member of the Parliament and Friends of the Irish Environment, an Irish non-governmental organization, regarding the planned construction of Hinkley Point C. The Espoo Implementation Committee considered, among other issues, whether or not a notification of Germany was required with regard to the project. The Committee adopted its findings and recommendations at its thirty-fifth session (15-17 March 2016). Its findings state:

Notification (article 2, paragraph 4, and article 3, paragraph 1)

The Committee [...] finds that the characteristics of the activity and its location warrant the conclusion that a significant adverse transboundary impact cannot be excluded in case of a major accident, an accident beyond design basis or a disaster. The Committee also finds that, as a consequence of its conclusion concerning the likely significant adverse transboundary impact, the United Kingdom is in non-compliance with its obligations under article 2, paragraph 4, and article 3, paragraph 1, of the Convention.<sup>18</sup>

## C. Domestic remedies

### *The communicant's recourse to domestic remedies*

40. On 1 March 2013, the communicant sent a letter to the German Minister of Environment, Peter Altmaier,<sup>19</sup> asking the German government to request a notification from the Party concerned. On 21 March 2013, the Minister decided this to be unnecessary.<sup>20</sup>

41. On 13 March 2013, the communicant, upon receiving confirmation from the German Government that it had not been notified about the proposed project at Hinkley Point C, sent a letter to the Party concerned's Secretary of State, Edward Davey, requesting the participation of the German public in the procedure.<sup>21</sup> The request was dismissed on 15 March 2013.<sup>22</sup>

### *Recourse by other interested persons*

42. An Taisce, the National Trust for Ireland, requested judicial review of the decision to grant development consent for the Hinkley Point C on the grounds of the alleged non-compliance by the Party concerned with national and EU law concerning the

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<sup>16</sup> Annex 1 of the communication.

<sup>17</sup> Annex 2 of the communication.

<sup>18</sup> ECE/MP.EIA/IC/2016/2, para. 66.

<sup>19</sup> Annex 5 of the communication.

<sup>20</sup> Annex 6 of the communication.

<sup>21</sup> Annex 1 of the communication.

<sup>22</sup> Annex 2 of the communication.

participation of the Irish public in a transboundary EIA procedure. The High Court of England and Wales rejected the challenge.<sup>23</sup>

43. On 27 March 2014, the Court of Appeal granted An Taisce permission to appeal. On 1 August 2014, the Court of Appeal rejected An Taisce's claim and found that it would not be necessary to refer the case to the Court of Justice of the European Union.<sup>24</sup> On 11 December 2014, the Supreme Court refused permission for An Taisce to appeal against the order of the Court of Appeal.<sup>25</sup>

#### **D. Substantive issues**

44. The communicant alleges that, by failing to provide for the participation of the German public in the EIA and the development consent procedure concerning the Hinkley Point C NPP, the Party concerned has failed to comply with article 6, paragraphs 2, 4, 5 and 7 of the Aarhus Convention. She also alleges that the public concerned in Germany was discriminated against, in breach of the Convention and international law in general.<sup>26</sup>

45. The communicant alleges that, with respect to Hinkley Point C, the Party concerned made a misguided interpretation of "impact" as referring only to the planned construction and operation of the project and failed to consider other scenarios, such as severe accidents which may have impacts on neighbouring countries.<sup>27</sup> As a result, the Party concerned failed to identify the full scope of the public concerned.

46. The communicant submits that the provisions of article 6 do not differentiate between the participation of persons who live in the country where the project is to be realized, and persons of another country.<sup>28</sup> She submits that this is only logical, as the environment knows no frontiers. In the present case, it is obvious that the consequences of a serious accident at Hinkley Point C would not necessarily stop at the borders of the Party concerned. In particular the westerly winds which dominate in the north-east Atlantic, the United Kingdom and the North Sea are likely to transport nuclear outfalls also to Germany.

47. The communicant submits that if it is possible for a government that is a Party to the Aarhus Convention to request participation, as the Austrian government did in the case of Hinkley Point C, members of the concerned public should also have the legal right to do so; otherwise their rights would depend on the position of their government which she submits would be incompatible with the concept of the Aarhus Convention which does not consider the right to participate to be a conditional right. Rather, it grants citizens an unconditional right of their own.

48. She alleges that, with respect to the decision-making on Hinkley Point C, the Party concerned discriminated against the public in Germany and thereby infringed upon the general principle of international law - which also underlies the Aarhus Convention - which prohibits discrimination and holds that equal situations must be treated equally.

49. In this regard, she points out that the Party concerned allowed the participation of the Austrian public in the decision-making process concerning Hinkley Point C, but did not provide for the participation of the German public, even though, geographically, Germany is located closer to the proposed NPP than Austria. German citizens would thus be more likely to be affected by an accident than the Austrian public and there is accordingly no legitimate reason to exclude the German public from participation. She submits that the fact that the Austrian government had requested the participation of its citizens, and the German

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<sup>23</sup> *R v The Secretary of State for Energy and Climate Change* [2013] EWCH 4161 (Admin).

<sup>24</sup> *R v Secretary of State for Energy and Climate Change and another* [2014] EWCA Civ 1111, submitted by Party concerned on 21 August 2014.

<sup>25</sup> Case No. UKSC 2014/0250, see Permission to Appeal results, December 2014 at <https://www.supremecourt.uk>.

<sup>26</sup> Communication, pages 3-4.

<sup>27</sup> Communication, page 2.

<sup>28</sup> Communication, page 4.

government has not formulated the same request, is not relevant under the Aarhus Convention. As pointed out above, the Aarhus Convention does not differentiate between such cases, but considers as relevant only whether the public is concerned.

50. The communicant asks the Committee to provide a clarification of the fundamental rights of members of the public to participate independent of national frontiers and governments' positions.<sup>29</sup>

51. The Party concerned opposes the communicant's allegations. The Party concerned submits that the communication is both inadmissible and without merit.

52. Firstly, the Party concerned submits that the true substance of the complaint is an alleged failure by the Party concerned to comply with the transboundary consultation requirements under article 3 of the Espoo Convention. The Party concerned strongly denies that it has failed to comply with its obligations under the Espoo Convention (and notes that the High Court of England and Wales has recently issued a judgment to the effect that no such failure occurred).<sup>30</sup>

53. The Party concerned contends that the Espoo Convention should be treated as the relevant *lex specialis* because the intergovernmental approach laid down by the Espoo Convention provides the appropriate and practical mechanism for determining whether a transboundary consultation was required in respect of Hinkley Point C as well as the form any such consultation should take. The Party concerned contends that this is also the approach adopted under European Union law in Article 7 of the EIA Directive. The Party concerned further contends that the Parties to the Aarhus Convention have recognised, by way of the penultimate recital to the Convention, that the Espoo Convention addresses the transboundary context.

54. The Party concerned further submits that when reaching the decision to grant development consent for Hinkley Point C it complied with the requirements of the Espoo Convention. Under article 2, paragraph 4 and article 3, paragraph 1 of the Espoo Convention, a Member State is required to notify another Member State if a project is likely to have a significant adverse transboundary impact affecting that other State. In respect of Hinkley Point C, the Party concerned concluded on the basis of the evidence available to it that no such effects were likely. For that reason, the Party concluded that no relevant notification obligation arose under the Espoo Convention. The Party concerned further submits that its High Court has concluded that this decision was lawful, and was consistent with the requirements of the Espoo Convention as implemented in its national law.

55. The Party concerned alleges that its compliance with the applicable provisions of the Espoo Convention is demonstrated by the following steps which were taken by the relevant authorities.

(a) The relevant public authorities notified all member states of European Economic Area (EEA) of the appraisal of sustainability (incorporating a strategic environmental assessment) undertaken in relation to the National Policy Statement which set out the Government's policy in respect of nuclear new build and identified relevant sites, including at Hinkley Point C. The notification related to two public consultations on the National Policy Statement which took place in 2009 and 2010, the second of which concluded that significant transboundary effects were unlikely.

(b) Furthermore, as a matter of good practice, each time the Party concerned consulted the public on the process towards siting nuclear power stations and the National Policy Statement for Nuclear Power Generation, all consultation documents were sent to other EU and EEA states, including Germany. This included the Consultation on Strategic Environmental Assessment Scoping Report for the new nuclear National Policy Statement; the Consultation on the Strategic Siting Assessment Process and Siting Criteria for New Nuclear Power Stations in the United

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<sup>29</sup> Communication, page 6.

<sup>30</sup> *R v The Secretary of State for Energy and Climate Change* [2013] EWCH 4161 (Admin), see annex 4b to the Party concerned's response to the communication.

Kingdom and the Consultation on the United Kingdom National Policy Statements on Energy. The Party concerned claims that it did not receive any responses from the German Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety that indicated any interest from the German public.

(c) Relevant representations were made in relation to Hinkley Point C from consultation bodies and members of the public including non-governmental organisations. The relevant representations did not specifically mention potential transboundary impacts or the need to allow the foreign public to participate.

(d) The public authorities of the Party concerned undertook a screening exercise to determine whether a transboundary consultation was required in respect of the application for development consent for Hinkley Point C, in accordance with the requirements of article 3, paragraph 1 of the Espoo Convention. On the basis of robust evidence that the project was not likely to cause a significant adverse transboundary impact, the Planning Inspectorate properly concluded that such a consultation was not required.

(e) The Party concerned cooperated with the specific request of the Austrian Government to enable a consultation to take place in Austria.

56. The Party concerned submits that for the above reasons, and consistent with the guidance set out by the Compliance Committee at its twenty-eighth meeting,<sup>31</sup> the criteria relating to the ‘abuse of the right to make such communications’ should be applied. According to the Party concerned, the complaint is ‘manifestly unreasonable’, and should be dismissed. For these reasons, the Party concerned also requests that the Committee reverse its preliminary decision on the admissibility of the complaint.

57. With respect to the substance of the communication, the Party concerned agrees that the decision to grant development consent to Hinkley Point C relates to an activity falling within article 6, paragraph 1(a) of and Annex I to the Aarhus Convention, and that consequently the provisions of article 6 of the Convention are applicable. However, according to the Party concerned, there is no obligation under article 6 of the Convention to the effect that a Party is required to conduct direct consultations with the population of another Party. The Party concerned asserts that obligations arise under article 6 of the Convention for each Party in respect of its own territory and population, and that if any wider obligation arose it would have been set out expressly on the face of article 6 because any such obligation would amount to a form of derogation from the sovereignty of each Party within its own territory.

58. Furthermore, the Party concerned claims that the Planning Act process was fully complied with in respect of the Hinkley Point C application and that it includes in particular:

(a) Requirements for notification of the public concerned of all matters specified in article 6, paragraph 2, of the Convention;<sup>32</sup>

(b) Sufficient time at each stage for public participation (article 6, paragraph 3, of the Convention), at an early stage in the process when options are open and effective participation can take place (article 6, paragraph 4, of the Convention), including through extensive pre-application engagement by the developer (article 6, paragraph 5, of the Convention);<sup>33</sup>

(c) Access for the public concerned to all information relevant to the decision free of charge and as soon as it became available (article 6, paragraph 6, of the Convention);<sup>34</sup>

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<sup>31</sup> ECE/MP.PP/C.1/2010/4, para. 44.

<sup>32</sup> Party concerned’s response to the communication, para. 21(a).

<sup>33</sup> *Ibid.*, para. 21(b).

<sup>34</sup> *Ibid.*, para. 21(c).

(d) Procedures being put in place for public participation in the examination of the application (article 6, paragraph 7, of the Convention);<sup>35</sup>

(e) A requirement for the developer, the Planning Inspectorate and the Secretary of State to take account of representations received in the process, including from the public (article 6, paragraph 8, of the Convention);<sup>36</sup>

(f) The publication, in accordance with article 6, paragraph 9, of the Convention, of the Secretary of State's decision of 19 March 2013 to grant development consent by way of a statement to Parliament, press release and letter to interested parties, as well as by advertisements in the press.<sup>37</sup>

59. The Party concerned submits that the Hinkley Point C process was not the subject of a public notice published in Germany (other than on the internet) but that no obligation to publish such a notice arose in this case. The Party concerned alleges that, as stated above, no express provision is made in the Aarhus Convention for notification to be made either to the governments of other Parties or non-Parties or the public of those States.<sup>38</sup>

60. Moreover, the Party concerned claims that the German public were able to participate in the Hinkley Point C application process in the same way as the public of any other State, including the United Kingdom. It asserts that all of the information regarding the process was made available on publicly accessible websites and that it was open to any person, regardless of citizenship, nationality or domicile, to make representations.<sup>39</sup>

61. In this respect, the Party concerned claims that no additional opportunity was provided to the Austrian public. The Party states that the information provided to the Austrian Government was already freely available to the public, including the German public.<sup>40</sup>

62. Finally, with regard to the allegation that the Party concerned did not consider scenarios involving severe accidents, the Party concerned refers to the conclusions of its High Court in *R v The Secretary of State for Energy and Climate Change* which held that the evidence before the Court showed:

“a remarkable consistency of opinion and come from a variety of expert sources. They clearly provide, taken into account as they were, a sound and reasoned rational basis for the Secretary of State to come to his decision. They also show that the Secretary of State did take into account the prospect of a severe accident. He regarded it though as no more than a bare possibility.”<sup>41</sup>

63. For all the above reasons, the Party concerned submits that it has fully met its obligations under article 6 of the Convention.

### III. Consideration and evaluation by the Committee

64. The United Kingdom deposited its instrument of ratification of the Convention 23 February 2005, meaning that the Convention entered into force for the United Kingdom on 24 May 2005, i.e. ninety days after the date of deposit of the instrument of ratification.

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<sup>35</sup> Ibid., para. 21(d).

<sup>36</sup> Ibid., para. 21(e).

<sup>37</sup> Ibid., para. 21(f).

<sup>38</sup> Ibid., para. 23.

<sup>39</sup> Ibid., para. 27.

<sup>40</sup> Ibid., paras. 27 and 29.

<sup>41</sup> Ibid., para. 31(b).

### **Admissibility**

65. The Party concerned submits the communication should be considered to be inadmissible on the grounds of being manifestly unreasonable under paragraph 20 of the annex to decision I/7 because according to the Party concerned, “article 6 does not require a State party itself to consult with the population of a different State party” and that “its true substance is an alleged failure by the United Kingdom to comply with the transboundary consultation provisions at article 3 of the Espoo Convention”.<sup>42</sup>

66. The Committee disagrees with the Party concerned. The communicant alleges breaches of specific provisions of the Aarhus Convention, and the Committee examines only these alleged breaches – and not any alleged breaches of the Espoo Convention - in the present findings. Accordingly, the Committee does not consider the communication to be manifestly unreasonable under paragraph 20 of the annex to decision I/7.

### **Scope of obligations towards the foreign public**

67. Before addressing the allegations under article 6 of the Convention, the Committee must consider (i) the scope of obligations owed by authorities competent to take decisions under article 6 of the Convention towards the public concerned in other countries, in particular in a situation where the project is not subject to transboundary consultations under the Espoo Convention, and (ii) whether the public in Germany should indeed be considered as among the “public concerned” with respect to the decision-making on Hinkley Point C.

68. With respect to the first point, the Committee notes that the definitions of the public and the public concerned in article 2, paragraphs 4 and 5, of the Convention do not contain any wording that limits their scope to only the public in the Party concerned. Rather, the Committee considers that those definitions should be seen in the context of the requirements set out in article 3, paragraph 9, of the Convention, which requires that the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to the citizenship, nationality or domicile. In the light of the above, and given that no provision of the Convention states otherwise, the scope of obligations related to public participation in decision-making with respect to proposed activities subject to article 6 of the Aarhus Convention is not limited to the public only in the Party concerned.

69. The Committee emphasises that in cases where the area potentially affected by a proposed activity crosses an international border, members of the public in the neighbouring country will be members of the “public concerned” for the purposes of article 6.<sup>43</sup> Moreover, as the Committee observed in its findings on communication ACCC/C/2004/03 (Ukraine), “foreign or international non-governmental environmental organizations that have similarly expressed an interest in or concern about the procedure would generally fall under these definitions as well.”<sup>44</sup>

70. With respect to the application of article 6 of the Convention in the transboundary context, in its findings on communication ACCC/C/2012/71 (Czechia), the Committee held:

“It is clear from the wording of article 6 that the obligations imposed by that article are not dependent on obligations stemming from other international instruments. An international treaty may envisage that a Party of origin and an affected Party share joint responsibility for ensuring public participation in the territory of the affected Party (as under the Espoo Convention), or even that the affected Party has sole

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<sup>42</sup> Party concerned’s response to communication, paras. 3-11.

<sup>43</sup> See also the Aarhus Convention Implementation Guide, second edition, page 57.

<sup>44</sup> ECE/MP.PP/C.1/2005/2/Add.3, para. 26.

responsibility for this. However, the obligation to ensure that the requirements of article 6 are met always rests with the Party of origin.”<sup>45</sup>

In response to the Party concerned’s comments on the draft findings,<sup>46</sup> the Committee reiterates that the obligations imposed by article 6 are not dependent on obligations stemming from other international instruments, including the Espoo Convention. Moreover, the Committee emphasises that there is no merit to the Party concerned’s assertion that the rights granted to the public by the Aarhus Convention are conditional and depend on whether or not its government separately chooses to exercise its own rights under a separate international instrument.<sup>47</sup> Such an interpretation is untenable given the objective in article 1 of the Convention.

71. Following on from the above, the Committee points out that in cases which are not subject to a transboundary procedure under another international instrument such as the Espoo Convention, ensuring the effective participation of the public concerned, both domestic and foreign, is the sole responsibility of the competent public authority of the Party of origin.

#### **The public concerned (article 2, para. 5)**

72. Article 2, paragraph 5, of the Convention defines the public concerned as “the public affected or likely to be affected by, or having an interest in, the environmental decision-making”. Whether a person is affected or likely to be affected by, or has an interest in, the decision-making must be construed in light of the objectives of and purpose of the Convention. According to the objectives set out in article 1 of the Convention, the rights set out in the Convention shall contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being. In addition, in the preamble of the Convention, the Parties recognise that improved public participation enhances the quality and implementation of decisions, contributes to public awareness of environmental issues, gives the public the opportunity to express its concerns and enables public authorities to take due account of such concerns.

73. With respect to decisions to permit specific activities within the scope of article 6 of the Convention, the public may be concerned either because of the possible effects of the normal or routine operation of the activity in question or because of the possible effects in the case of an accident or other exceptional incident, or both. In either case, the decision to permit a particular activity may not only impact measurable factors such as the property or health of the public concerned but also less measurable aspects, like their quality of life.

74. Moreover, whether the public is affected or likely to be affected by the environmental decision-making must not be determined only by considering the risk of adverse effects or accidents in statistical terms. In the same vein, the notion of having an interest in the environmental decision-making should include not only members of the public whose legal interests or rights guaranteed under law might be impaired by the proposed activity, but also those who have a mere factual interest (for example, in the case of a proposed activity that may affect a waterway, bird watchers interested in keeping nests intact or anglers interested in keeping waters fishable). It may also include, as is the case in many jurisdictions, persons who have expressed an interest in a given case without having stated any specific reason for their interest.<sup>48</sup>

75. In cases concerning ultra-hazardous activities, such as nuclear power plants, members of the public may be affected or likely to be affected by, or have an interest in, environmental decision-making within the scope of the Convention, even if the risk of an accident is very small. When determining who is concerned by the environmental decision-making, the magnitude of the effects if an accident would indeed occur, whether the persons and their living environment within the possible range of the adverse effects could be harmed in case of an accident, and the perceptions and worries of persons living within the possible

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<sup>45</sup> ECE/MP.PP/C.1/2017/3, para. 67.

<sup>46</sup> Party concerned’s comments on draft findings, paras. 10-16.

<sup>47</sup> Ibid., and also para. 53 above.

<sup>48</sup> Implementation Guide, second edition, page 57.

range of the adverse effects, should be considered. It is clear to the Committee that with respect to nuclear power plants, the possible adverse effects in case of an accident can reach far beyond state borders and over vast areas and regions. For decision-making that relates to complex and ultra-hazardous activities such as nuclear power plants, it is therefore important to secure public participation appropriate to that activity with respect to these areas and regions both within and beyond the state borders of the Party concerned.

76. In this regard, the Committee takes note of the findings of the Espoo Implementation Committee that a significant adverse transboundary impact cannot be excluded in a case of a major accident or catastrophe at the Hinkley Point nuclear power plant (see para. 39 above).

77. In this present case, the communicant's claim is that the public in Germany should have been identified as among the public concerned for the decision-making on Hinkley Point C. Hence, the Committee's task is not to determine the entire scope of the public concerned but to determine whether or not the German public should have been identified as such. Based on its considerations in paragraphs 73-75 above, the Committee considers that the public in Germany, including the communicant, is among the public to be affected or likely to be affected by, and to have an interest in, the decision to permit the Hinkley Point C nuclear power plant. Accordingly, the public in Germany, including the communicant, are also part of the public concerned within the meaning of article 2, paragraph 5, of the Convention.

#### **Identification of the public concerned**

78. While not explicitly mentioned in article 6, paragraph 2 of the Convention, it goes without saying that proper identification of the public concerned is an essential precondition for ensuring the correct implementation of that provision. In order to effectively notify the public concerned, it is first necessary to identify who the public concerned may include. In this respect, while emphasising that it in no way diminishes the obligation on the competent public authority itself to identify who is affected or likely to be affected or will have an interest in the decision-making, the Committee commends the approach adopted in the 2008 Planning Act pursuant to which members of the public may also self-enrol as among the public concerned. As submitted by the Party concerned, in this way, effectively any person who makes such a representation in the prescribed form and time is to be considered as an "interested party" and may actively participate in the procedure. The possibility to make a representation is not limited to persons residing on the territory or nationals of the Party concerned. Moreover, the possibility to make a representation is offered at the beginning of the procedure but not excluded at later stages of the public participation procedure. Without examining the criteria set out in paragraphs (a)-(e) of section 102(4) of the Planning Act 2008 in the context of the present communication, the Committee commends the general approach described in this paragraph and considers that this approach may serve as a useful example for other Parties.

#### **Notification of the public concerned (article 6, para. 2)**

79. With respect to notification of the public concerned, the Committee generally commends the requirements regarding notifying the public set out in the regulation 4(2) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (see para. 20 above). However, while the above Regulations address notification of the public within the Party concerned, and the EIA Regulations address notification in the case of a transboundary EIA procedure, the Committee has been provided with no legal provisions which address the notification of the public concerned in other countries in cases where the proposed activity is not subject transboundary EIA procedure but may nevertheless have a transboundary environmental impact.

80. The Party concerned acknowledges that notification of the public participation procedure concerning Hinkley Point C was not published in Germany (apart from the information provided on the websites of the Party concerned's competent authorities) but submits that no obligation to publish such notice arose in this case. The Party concerned

alleges that no express provision is made in the Aarhus Convention for notification to be made either to the Governments of other Parties or non-Parties or the public of those States.<sup>49</sup>

81. In this respect, the Committee recalls its findings on communication ACCC/C/2012/71 (Czechia) in which it held that:

“In cases that are not subject to a transboundary procedure under an international treaty (e.g., Espoo Convention), the requirement to inform the public concerned in the affected countries in an adequate, timely and effective manner will be the sole responsibility of the competent authority of the Party of origin. Ensuring that the notification is effective may include, inter alia, publishing announcements in the popular newspapers and by other means customarily used in the affected countries, as well as by exploring possibilities for using more dynamic forms of communication (e.g., through social media). In cases that are subject to a transboundary procedure under an international treaty, the Party of origin remains responsible under the Aarhus Convention for the adequate, timely and effective notification of the public concerned in the affected country, either by carrying out the notification itself or by making the necessary efforts to ensure that the affected Party has done so effectively.”<sup>50</sup>

82. Having reviewed the applicable provisions of the Party concerned’s legislation, including the legislative amendment of 16 May 2017 pursuant to which notice is to be posted on the Secretary of State’s website,<sup>51</sup> it appears to the Committee that the Party concerned’s legal framework still does not contain a sufficient guarantee that in case of decision-making regarding activities having clearly more than national scope, such as decision-making regarding nuclear power plants, all those who potentially could be concerned, including the public concerned outside its territory, have a reasonable chance to learn about proposed activities.<sup>52</sup> In this regard, the Committee refers to its findings on communication ACCC/C/2012/71, where it held that “it is not reasonable to expect members of the public to proactively check the Ministry’s website on a regular basis just in case at some point there is a decision-making procedure of concern to them.”<sup>53</sup>

83. For the above reasons, the Committee finds that, by not ensuring that the public concerned in Germany had a reasonable chance to learn about the proposed activity and the opportunities for the public to participate in the respective decision-making, the Party concerned failed to comply with article 6, paragraph 2, of the Convention with regard to the decision-making on Hinkley Point C.

84. The Committee also finds that, by not providing a clear requirement in its legal framework to ensure that public authorities, when selecting means of notifying the public, are bound to select such means which, bearing in mind the nature of the proposed activity, would ensure that all those who potentially could be concerned, including the public concerned outside its territory, have a reasonable chance to learn about the proposed activity, the Party concerned fails to comply with article 6, paragraph 2 of the Convention with respect to its legal framework.

#### **Encouraging prospective applicants to identify public concerned (article 6, para. 5)**

85. Whilst the communicant referred to article 6, paragraph 5 in her communication, she did not further substantiate her allegation with respect to this provision and the Committee will not consider this allegation further in the context of the present communication.

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<sup>49</sup> Party concerned’s response to communication, para. 23.

<sup>50</sup> ECE/MP.PP/C.1/2017/3, para. 73.

<sup>51</sup> See footnote 9 above.

<sup>52</sup> See the Committee’s findings on communication ACCC/C/2006/16 (Lithuania), ECE/MP.PP/2008/5/Add.6, para. 67; and its findings on communication ACCC/C/2012/71 (Czechia), ECE/MP.PP/C.1/2017/3, paras. 78-79.

<sup>53</sup> See the Committee’s findings on communication ACCC/C/2012/71 (Czechia), ECE/MP.PP/C.1/2017/3, para. 76.

#### **Opportunity to submit comments (article 6, para. 7)**

86. Whilst the communicant referred to article 6, paragraph 7 in her communication, she did not provide further details to substantiate her allegation concerning this provision. The Committee considers that, due to the defective notification, the public concerned in Germany may have indeed missed out on the opportunity to submit comments on the proposed activity. However, nothing has been put before the Committee to indicate that this was due to any barriers in the procedure for submitting comments itself. Rather, the Committee understands that, in accordance with the legislation outlined in paragraphs 21-23 above, any person can submit a representation, regardless of nationality or residence. Since the Committee has already found non-compliance with respect to the defective notification of the public concerned in paragraphs 83-84 above, the Committee does not consider it necessary to consider the communicant's allegation under article 6, paragraph 7 further.

#### **Discrimination (article 3, para. 9)**

87. The Committee took into account article 3, paragraph 9 in its examination of the communicant's allegation concerning article 6, paragraph 2 (see para. 68 above). In the light of its finding of non-compliance with the latter provision, the Committee does not consider it necessary to examine article 3, paragraph 9 further.

### **IV. Conclusions and recommendations**

88. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

#### **A. Main findings with regard to non-compliance**

89. The Committee finds that:

(a) By not ensuring that the public concerned in Germany had a reasonable chance to learn about the proposed activity and the opportunities for the public to participate in the respective decision-making, the Party concerned failed to comply with article 6, paragraph 2, of the Convention with regard to the decision-making on Hinkley Point C;

(b) By not providing a clear requirement in its legal framework to ensure that public authorities, when selecting means of notifying the public, are bound to select such means which, bearing in mind the nature of the proposed activity, would ensure that all those who potentially could be concerned, including the public concerned outside its territory, have a reasonable chance to learn about the proposed activity, the Party concerned fails to comply with article 6, paragraph 2 of the Convention with respect to its legal framework.

#### **B. Recommendations**

90. The Committee, pursuant to paragraph 35 of the annex to decision I/7, recommends that the Meeting of the Parties, pursuant to paragraph 37 (b) of the annex to decision I/7, recommend that the Party concerned put in place a legal framework to ensure that:

(a) When selecting the means for notifying the public under article 6, paragraph 2, public authorities are required to select such means as will ensure effective notification of the public concerned, bearing in mind the nature of the proposed activity and including, in the case of proposed activities with potential transboundary impacts, the public concerned outside the territory of the Party concerned;

(b) When identifying who is the public concerned by the environmental decision-making on ultra-hazardous activities, such as nuclear power plants, public authorities are required to consider the magnitude of the effects if an accident would indeed occur, even if the risk of an accident is very small; whether the persons and their living environment within the possible range of the adverse effects could be harmed in case of an accident; and the perceptions and worries of persons living within the possible range of the adverse effects.

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