

## Recent Decisions by the Aarhus Convention Compliance

### Committee

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#### Introduction

1. This paper covers some of the recent decisions (within the last 12 months) by the Aarhus Convention Compliance Committee (“ACCC”) of particular interest to practitioners in England and Wales.
2. There have been 78 communications from the public since 2004, but the number has increased steadily in recent years, probably as awareness of the ACCC has increased.

Year	Number of communications	Number raised in relation to the UK
2004	10	0
2005	5	0
2006	3	0
2007	4	1
2008	13	3
2009	9	2
2010	12	8
2011	8	3
2012	14	6

3. All except for two of the communications dating from 2011 onwards are outstanding, save in relation to those deemed to be non-admissible or where summary proceedings were considered appropriate. Decisions also remain outstanding on communications from as early as 2008, and other communications whilst technically the subject of final decisions as communications from the public nevertheless have related ongoing concerns. The primary example of interest to practitioners in the UK is ACCC/C/2009/33, whose ramifications are reflected in Decision IV/9i (see further below) and where the ACCC has requested a further update in February 2013. Given that the Aarhus Convention itself seeks that proceedings be “*fair, equitable, timely and not prohibitively expensive*”, there is some irony in that in seeking to achieving a fair process itself, allowing for representations and responses and then discussion at irregular ACCC meetings, the ACCC process is not itself timely.

#### **ACCC/C/201157 – “BirdLife Denmark” – a communication concerning compliance by Denmark** **March 2012**

4. The principal issue of interest to practitioners in England and Wales concerns how the ACCC approached the issue of “prohibitively expensive” in relation to differing fees for access to the

relevant Danish Tribunal, the NEAB (the Danish Nature and Environmental Appeal Board). This is also of particular relevance given the ongoing compliance issues with Decision IV/9i (see further below) and the proposed differing levels for caps in Protective Costs Order.

5. The background to the BirdLife Denmark decision is that between 2007 and 2010 there were several thousand cases begun before the NEAB, of which a large number related to the Domestic Livestock Act<sup>1</sup>. Although the Danish Government and Birdlife Denmark did not agree on the exact figures, it appears that approximately 20% of all cases before the NEAB were brought by NGOs, and approximately 55% under the Danish Livestock Act were brought by NGOs. The success rate of NGOs was also high. The ACCC had evidence that under the Domestic Livestock Act the NGO success rate was perhaps as high as 95%, compared to a 47% success rate for permit applicants.
6. Because of the very large number of cases, the Danish Government considered various measures to speed up the case processing time and to ensure fast and efficient consideration of all appeals. One of the measures brought forward was a substantial increase in the fee payable by those other than private persons. The fee for a private person was approximately €67 and that for others (NGOs, public authorities, enterprises) was set at €400. In deciding to proceed with this particular measure, the Government's Explanatory Note to the bill stated, inter alia "*the number of appeals submitted by organisations and enterprises is expected to decrease*".
7. Other quasi-judicial administrative bodies that deal with appeals regarding issues that are somewhat comparable to environmental rights included the National Agency for Patients Rights and Complaints, the Energy Board of Appeal, the Energy Supplies Complaint Board, the Consumer Complaint Board and the Danish National Tax Tribunal. The fees charged were either much lower than the fee being imposed on organisations to bring an appeal to NEAB or free of charge.
8. Birdlife Denmark alleged that:
  - (i) The new law was not in compliance with article 9, paragraph 2 and paragraph 3 because NGOs have limited resources and the new law effectively limits the capacity of NGOs to challenge the substantive and procedural legality of decisions
  - (ii) The new law was not in compliance with article 9, paragraph 4, because they provide for differentiated fees for NGOs which was not "fair" and in the long run will be prohibitively expensive.

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<sup>1</sup> The decision also refers to the "Danish Livestock Act"

- (iii) The new law was not in compliance with article 9, paragraph 5, because there were not appropriate assistance mechanisms to remove or reduce the financial barrier for NGOs on access to justice
9. The ACCC held that there were two elements in relation to the complaint under article 9, paragraph 4. The requirement for fair procedures meant that the process must be impartial. A criterion that distinguished between individuals and legal persons was not in itself necessarily unfair.
10. However, in relation to whether it was prohibitively expensive, the ACCC upheld the need to consider *“the system as a whole and in a systemic manner”*, applying their decision as to the correct approach in ACCC/C/2008/33. The ACCC considered the relationship between average net incomes and NGO’s financial capacity to access justice is not clear, and that moreover *“the financial capacity of any particular NGO to meet the cost of access to justice... may depend on a number of factors, including the amount of the membership fee, the number of members and the amount of resources allocated for access to justice activities in comparison with other activities”*. The ACCC continued:

48. When assessing if the new fees regime is “prohibitively expensive”, apart from the amount of the fee as such, the Committee considers the following aspects of the system as a whole to be particularly relevant: (a) the contribution made by appeals by NGOs to improving environmental protection and the effective implementation of the Danish Livestock Act; (b) the expected result of the introduction of the new fee on the number of appeals by NGOs to NEAB; and (c) the fees for access to justice in environmental matters as compared with fees for access to justice in other matters in Denmark.

49. According to the statistics provided by the Party concerned... it is evident that NGO efforts have resulted in the repeal of a large number of illegal decisions, a halt on many potentially environmentally harmful activities, and the imposition of measures for limiting other harmful effects on the environment. These statistics alone provide sufficient evidence of the contribution made by appeals by NGOs to improving environmental protection and the effective implementation of the Danish Livestock Act.

50. It is the communicant’s strongly put submission that the increased fees for NGOs will result in a decrease in the number of environmental appeals filed by NGOs before NEAB. Moreover, the Explanatory Note to the bill introducing the new fees regime explicitly states: “the number of appeals submitted by organisations and enterprises is expected to decrease”. Therefore the Committee finds that the new fees system was intended to, and is likely to, result in a decrease of the number of appeals filed against environmental decisions by NGOs.

51. The Committee has been provided information by the Party concerned regarding the cost to appeal administrative decisions before other similar quasi-judicial bodies in the Party concerned.... The Committee notes that such appeals are either free or charge or have fees of considerably less than [€400], whereas higher fees are charged for appeals concerning matters regarding primarily commercial interests, such as competition, patent and trademark rights. The Committee also notes that NGO appeals before NEAB have more the nature of appeals to the first group of bodies than appeals regarding primarily commercial interests.

52. Based on the above considerations, the Committee finds that the fee of [€400] for NGOs to appeal to NEAB is in breach of the requirement in article 9, paragraph 4, that access to justice procedures not be prohibitively expensive.

11. From a UK perspective, a finding that £350 is “prohibitively expensive” is startling. Although the ACCC purports to reason to this finding from an analysis of “*the system as a whole and in a systemic manner*”, no weight is placed in the reasoning on the Danish Government’s submission that the amounts at issue were “*very modest amounts compared to the costs of legal procedures before the courts*” and that looking at the system as a whole, NEAB was an independent and impartial body with broad access to make complaints to it, with no requirement to be represented by a lawyer or have an expert, saving further costs.
12. By way of contrast in the UK system, the fee to lodge an application for judicial review is currently £60, increased by a further £215 if permission is granted and a claimant wishes to proceed, unless fee remission applies.
13. The ACCC considered that Denmark was in compliance with article 9, paragraph 2 and 3, as Birdlife Denmark had access to the relevant administrative procedures and these paragraphs did not relate to financial barriers. The ACCC did not consider the access to justice complaint under article 9, paragraph 5 allegation further because of the finding on article 9, paragraph 4.

**ACCC/C/2010/54 – – the “Irish REFIT 1” programme - a communication against the European Union in relation to obligations under Article 5 and 7 in relation to Ireland’s renewable (especially wind) energy policy**  
**June 2012**

14. The core complaint<sup>2</sup> in this case related to the alleged failure by the public authorities in Ireland to properly disseminate information concerning the Renewable Energy Feed-in Tariff 1 in a timely, accurate and sufficient manner, alleging that Ireland did not comply with relevant EU legislation, and that the EU by not sufficiently ensuring proper implementation of the relevant legislation by way of its monitoring responsibility and by approving State Aid without ensuring that Ireland had complied with EU law had breached Article 7 of the Convention and thereafter Articles 4, 5 and 9.
15. In relation to the UK, the interesting aspect of this decision is in relation to the views expressed in relation to consultation. The ACCC was critical of the two week consultation period adopted, holding that

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<sup>2</sup> There were a number of complaints. At a hearing on 21 September 2011 the Committee limited its consideration of the allegations to focus on Directive 2009/28/EC and in particular Article 7, and thereafter articles 4, 5 and 9; see paragraphs 2 and 73 of the Decision.

“Public participation under Article 7 of the Convention must meet the standards of the Convention, including article 6, paragraph 3 of the Convention, which requires reasonable time frames. A two week period is not a reasonable time frame for “the public to prepare and participate effectively”, taking into account the complexity of the plan or programme (see findings on communication ACCC/C/2006/16 (Lithuania)...). The manner in which the public was informed of the fact that public consultation was going to take place remains unclear; neither the Party concerned nor the communicant provided clarity on the matter. The Committee furthermore points out that a targeted consultation involving selected stakeholders, including NGOs, can usefully complement but not substitute for proper public participation, as required by the Convention...”

16. This has relevance to the shortened consultation periods which can be applicable under the new Consultation Principles (published July 2012, to take effect from “early autumn 2012”), which provides (inter alia):

Timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response. The amount of time required will depend on the nature and impact of the proposal (for example, the diversity of interested parties or the complexity of the issue, or even external events), and might typically vary between two and 12 weeks. In some cases there will be no requirement for consultation at all and that may depend on the issue and whether interested groups have already been engaged in the policy making process. For a new and contentious policy, such as a new policy on nuclear energy, the full 12 weeks may still be appropriate. The capacity of the groups being consulted to respond should be taken into consideration.

17. The Consultation Principles do note that “*this guidance does not have legal force and does not prevail over statutory or mandatory requirements*”. Clearly those advising central government would be well advised to note

- (i) The risks of a consultation period near the lower end of this spectrum in Aarhus-related cases, albeit the decision of the ACCC refers to “taking into account the complexity of the plan or programme”
- (ii) The risks of a “targeted consultation” rather than “proper public participation”

18. As noted above, there was also an attempt in this case to argue that the State aid provisions of the European Union were engaged because of the failure to submit the relevant plan to Strategic Environmental Assessment and inadequate public participation. The ACCC found that the Commission’s decision to approve State aid and financial assistance did not amount to decisions under article 6 or 7 of the Convention.

19. The complaint was brought against the EU because Ireland had not ratified the Aarhus Convention when the complaint was brought in 2010 (Ireland only ratified the Convention in June 2012). The ACCC concluded that the European Union was in breach of its obligations. The ACCC recognises that whilst Article 216 of the Treaty of the Functioning of the European Union provides that “*agreements concluded by the Union are binding upon the institutions of the Union and on its member states*” but that the ACCC notes that the European Union on ratifying the Convention indicated that Member States would be responsible for the performance of certain obligations and the Union was responsibility only for those acts which

were commensurate with EU competence. The ACCC relied on Directive 2009/28/EC to hold that the acts were commensurate with EU competence such as to engage Article 7 of the Convention in the circumstances of this complaint. Article 7 provides that *“the public which may participate shall be identified by the relevant public authority, taking into account the objectives of the Convention”*. Although the ACCC recognised that the “relevant public authority” was intended to be the authorities in Ireland, not the European Union, nevertheless concluded that there were two potential obligations arising on the European Union *“whether the legal framework of the Party concerned is compatible with the Convention; and... whether the Party concerned has fulfilled its responsibility to monitor that its member States, including Ireland, in implementing EU law properly meet the obligations resting on them by virtue of the EU being a party to the Convention”*.

20. The ACCC concluded that there was a requirement on the EU to have in place a regulatory framework to ensure proper implementation of the Convention. Although there was a framework in place in Directive 2009/28/EC these requirements *“were of a very general nature and do not unequivocally point member States... in the direction of the requirements of the Convention...”* and that

A proper regulatory framework for the implementation of Article 7.... would require Member States... to have in place proper participatory procedures in accordance with the Convention. It would also require Member States.... to report on how the arrangements for public participation made by a Member State were transparent and fair and how within those arrangements the necessary information was provided to the public. In addition, such a regulatory framework would have made reference to the requirements of article 6, paragraphs 3,4 and 8, of the Convention, including reasonable time-frames, allowing for sufficient time for informing the public and for the public to prepare and participate effectively, allowing for participation when all options are open and how due account is taken of the outcome of the public participation”

21. The ACCC found the European Union did not have in place a proper regulatory framework to ensure implementation of Article 7 in the Directive 2009/28/EC; failed to ensure through its monitoring responsibility that proper implementation of Article 7 had taken place; and was therefore non-compliant with Article 7. The ACCC went on to find that the European Union was in breach of Article 3, paragraph 1, which requires a Party to the Convention to *“take the necessary legislative, regulatory or other measures, including measures to achieve compatibility between the provisions implementing the... public participation... provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention”*.

22. It should also be noted that the European Union’s position was also that (1) it had done its “utmost” to pursue alleged or actual breaches of the relevant directives by Ireland and had been “highly vigilant” (2) there were infringement proceedings which the Commission could initiate in appropriate cases and (3) Ireland was not found to be in non-compliance with the three EU Directives on access to documents, EIA and SEA.



23. Some aspects of this decision appear to be relevant to communication ACCC/C/2012/68 from a Scottish Community Councillor, Mrs Metcalfe, at Avich & Kilchrenan Community Council, which alleges that the authorities at the EU, UK and Scottish administrative levels failed to provide information to the public, as required by articles 4 and 5 of the Convention, regarding the implementation of the renewable energy programme in Scotland, which involved also the implementation of a number of individual wind energy projects. The communication also alleges that the failure of transparency in information impeded effective public participation, as required under articles 6 and 7 of the Convention. Finally, the communication alleges that there are no adequate review procedures, as required by article 9, paragraphs 1 and 2, of the Convention, for members of the public to challenge the occurred failures on access to information and public participation. The communication was preliminarily determined admissible at CC-36 (27-30 March 2012) and responses were filed from the EU and UK in October 2012. Most recently the ACCC has written requesting specific information from the parties. The UK has been asked to (1) demonstrate how the comments submitted by Mrs Metcalfe in relation to the relevant windfarm and access route were considered during the decision making (2) what document formed the basis for decisions in relation to the wind farm and access route (3) clarification as to whether under Scottish law information about comments received during the EIA procedure should be available before the decision was issued and (4) why one of the policy documents at issue (the “Renewable Energy Routemap”) is a policy rather than a plan or programme. The EU has been asked to “*provide information on how the requirement of article 6, paragraph 8, was addressed in the consultations leading to the adoption of the communication on “Renewable Energy; a major player in the European Energy Market”*” and Mrs Metcalfe has been asked to provide “*specific evidence (hard proof)*” of the comments that she submitted and that they were not considered in relation to both the wind farm, the access route, and the consultations on “Renewable Energy; a major player in the European Energy Market”.

**Decision IV/9i – on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention, as adopted by the Meeting of the Parties at its fourth session.**

24. Decision IV/9i itself was adopted in July 2011, endorsing the findings of the Committee with regard to communication ACCC/C/2008/33 and requiring regular updates as to the progress in implementing the recommendations of the Committee. The ACC’s findings were that the UK Government had failed to comply with the Convention:

- (a) By failing to ensure that the costs for all court procedures subject to article 9 were not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to this effect, the UK failed to comply with article 9, paragraph 4, of the Convention;

- (b) The system as a whole was not such as “to remove or reduce financial [...] barriers to access to justice” as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider
  - (c) By not ensuring clear time limits for the filing of an application for judicial review, and by not ensuring a clear date from when the time limit started to run, the UK failed to comply with article 9, paragraph 4 of the Convention
  - (d) By not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4 of the Convention, the UK also failed to comply with article 3, paragraph 1
25. The ACCC recommended to the UK, with the UK’s agreement, that it
- (a) Review its system for allocating costs in environmental cases within the scope of the Convention and to undertake practical and legislative measures to overcome the problems identified to ensure that such procedures
    - (i) Were fair and equitable and not prohibitively expensive; and
    - (ii) Provided a clear and transparent framework
  - (b) Review its rules regarding the time frame for the bringing of applications for judicial review, to ensure that the legislative measures involved were fair and equitable and amounted to a clear and transparent framework.
26. There have been a number of procedural stages since then, including the Ministry of Justice’s consultation on Lord Justice Jackson’s Review of Civil Costs, which has led to proposals to amend the Civil Procedure Rules. These proposals are (inter alia) to have a recoverable fixed costs regime whereby a claimant’s liability to a defendant is capped at £5,000 if the claimant is an individual and at £10,000 if the claimant is an organisation, and the liability of the defendant to the claimant is capped at £35,000. The Coalition for Access to Justice for the Environment and ClientEarth have both made further representations to the ACCC (on 19 September and 14 August 2012, and subsequently Client Earth made further representations on 24 September). Concerns raised by these organisations include:
- (i) the quantum of the proposed caps;
  - (ii) the illogical principle of the “crude distinction” between individuals and organisations;
  - (iii) the level of the cross-cap such that “*claimants’ lawyers would effectively have to subsidise litigation*”, or solicitors “*will be forced to charge on the usual basis, which means that claimants will have to pay their own legal costs, plus the cap, if they lose*”;
  - (iv) the scope of the proposed protection, including whether Article 9(1) and Article 9(3) are included or whether it is limited to the public participation provisions;
  - (v) whether the caps apply to appeals and if so on what terms;
  - (vi) how it is to relate to private law claims such as environmental nuisance and statutory reviews;
  - (vii) the issue of injunctive relief, in particular in relation to cross-undertakings in damages;



- (viii) what attempts are being made to address the Committee's concerns regarding the unavailability of substantive review.

27. The ACCC discussed the additional information provided at its 38<sup>th</sup> meeting in late September.

By letter dated 8 October 2012 to the Defra, the ACCC reported that it

“considered that there were concerns with respect to manner in which the UK was proposing to implement the findings in communication ACCC/C/2008/33. Those concerns pertained to the time frame within which the Party concerned was seeking to implement changes, the cost of judicial proceedings, the time limits and the review of substantive legality. With respect to the cost of judicial proceedings, the Committee observed that the party concerned appeared to be taking a piecemeal rather than a holistic approach. In addition, the Committee observed that judicial discretion continued to play a significant role in the proposed changes.

With respect to substantive legality, the Committee recalled that, while in considering communication ACCC/C/2008/33 it had not found that the Party concerned was in non-compliance in that regard, it had nevertheless not been convinced that the UK met the standards of review required by the Convention and had expressed concern. Furthermore, the Committee had considered that the proportionality principle would provide an adequate standard of review for Aarhus-related cases. In your letter of 17 September 2012, you stated that proportionality was available in EU and human rights cases, while in Aarhus-related cases substantive legality was considered in terms of irrationality or unreasonableness, as originally formulated in the *Wednesbury* case. As the same statement had also been submitted to the Committee during the consideration of ACCC/C/2008/33, the Committee remained unconvinced and continued to be concerned”

28. Further information was requested by 28 February 2013 to specific questions annexed to the letter. The Annex enclosed the following questions:

**Protective Cost Orders**

- The Party concerned seems to be focusing on Protective Cost Orders (PCOs) for Aarhus-related cases:
  - o Will the new rules on PCOs apply to all Aarhus-related cases, not just those regarding public participation?
  - o Do the more limited PCOs only apply to judicial review cases or also to statutory review cases, such as those involving challenges to planning decisions?
  - o Do the more limited PCOs apply to each stage of the proceedings, i.e. does a judge in first, second and third instance re-determine whether the limits are to apply anew and at the levels of £5,000, £10,000 and £35,000 at each level or will a different manner of granting PCOs be applicable for appeals, and if so what system?
  - o Will a judge have discretion in granting the PCOs and if so what conditions frame that discretion? Or does an Aarhus-related case automatically engaged the proposed PCOs?
    - If any conditions apply, is the fact that an individual or an NGO is acting in the public interest among the relevant conditions?
  - o How were the figures of £5,000, £10,000 and £35,000 determined? In other words, why does the Party concerned find that these figures met the conditions of article 9, paragraph 4 of the Convention?
    - Who are to be considered as “groups” under the proposed PCO rules?
  - o Given that the recovery of success fees has been prohibited by the 2012 Legal Aid, Sentencing and Punishment of Offenders Act, might it be that this prohibition takes away from public interest litigations what might be achieved through the proposed limitation of PCOs (resulting in a neutral position or

limited positive effect, when it comes to the reducing of the costs of engaging in judicial review procedures)?

**Cross Undertakings in damages in case of injunctive relief**

- Will these remain in place?

**Private Law claims**

- What plans does the Party concerned have for the reduction of costs in cases of private environmental nuisance claims?

**Time Limits**

- The Party concerned in case of time limits seems to continue to rely on judicial discretion when it comes to time limits. It is not clear to the Committee how the Party is going to ensure that the rules on time limits set a clear starting point for when the time limit starts to run; and how it is going to set a clear time limit for bringing a case against a contested decision. Could you please clarify.

29. Watch this space for Defra's reply! The scope of the ACCC's investigation now stretches beyond ACCC/C/2008/33. It is a highly unusual process of clarifying Government's intentions in an area which has previously been defined by the courts and common law in a legal system which has historically developed through case-law in this area. There is a real potential for reform of environmental litigation in the UK, but also substantial risks.

**ACCC/C/2010/53 – “the Moray Feu Traffic scheme” – a communication concerning compliance by the UK and Northern Ireland**

**(Report dated September 2012, to be considered at 40<sup>th</sup> meeting in March 2013)**

30. Moray Feu residents (represented through the Moray Feu Traffic Sub-committee of Lord Moray's Feuars Committee) raised a communication in November 2010 to the ACCC alleging that the UK had not complied with its obligations as (1) the City of Edinburgh Council had failed to collect relevant environmental information and failed to provide information that it possessed on request (Article 4 and 5); (2) it had been denied meaningful participation in relation to the permanent re-routing of traffic (Articles 6 and 7) and (3) the use of a private act of Parliament to approve the tram system denied residents access to justice (Article 9)

31. In relation to the access to information, the ACCC noted that Moray Feu residents could have raised the issue with the Scottish Information Commissioner, but did not do so; and that that administrative procedure was free. There is a question as to whether in these circumstances the communication was even admissible, but the ACCC did not determine it on this basis. The ACCC went on to consider the issue of the nature of “raw data” and whether access to such “raw data” could properly be refused. The ACCC concluded that the data requested in this case should have been disclosed. Whilst there were issues around “materials in the course of completion” given the exception in article 4, paragraph 3 and 4, the ACCC considered that the data sought by the Moray Feu residents should have been provided with and the residents advised that it was not processed yet. The ACCC also noted that such data had now been supplied. However they concluded that the failure to disclose it had been a breach of Article 4,

paragraph 1 of the Convention but as the data had now been supplied, there was no on-going breach.

32. In relation to public participation, the ACCC noted that there had been a public participation process in the context of the adoption of the decision for the underlying project, and that the communication was concerned with Traffic Regulation Orders (“TRO”) associated with the main project. The ACCC noted that there could be differentiated requirements for public participation and that whether a TRO was within the scope of article 6 (specific activities), article 7 (plans, programmes, policies) or article 8 (executive regulations and the like) depended on the contextual basis of the order (applying an earlier ACCC decision in relation to Lithuania, ACCC/C/2006/16). The ACCC considered that a TRO was within Article 8. The ACCC noted that there was some discretion as to the specifics of how public participation should be organised, provided that there was effective participation at an early stage, when all the options were open, publication of a draft early enough; sufficient timeframes for the public to consult a draft and comment. The ACC noted that there was a similar traffic scheme which had been in operation since 1997 to which residents could have commented; the TRO the subject of the communication was not yet finalised and workshops were still being organised in relation to its impacts; that public participation had been taken into account “*as far as possible*” and “*detailed reasoning and specific actions were recommended*” in relation to rejecting documents on air and noise quality but continuing to monitor and to organise workshops to discuss mitigation measures and that the public participation process had not yet been completed.
33. The ACCC decided not to consider the Article 9 communication on the basis that it was “*not sufficiently substantiated through the written and oral submissions*”.

#### **Older decisions**

34. For completeness, brief note should be made of certain aspects of three other decisions of relevance to practitioners in England and Wales;
- (i) A communication by Mr Morgan and Mrs Baker in ACCC/C/2008/23 (decision adopted in May 2011). The ACCC determined that although the interim costs order made against Mr Morgan and Mrs Baker was not prohibitively expensive under Article 9(4) of the Convention, it was still unfair and inequitable under Article 9(4) that they were required to pay all of the costs and the defendant was not required to make any contribution.
  - (ii) A communication from the Cultura Residents’ Association in ACCC/C/2008/27 (decision adopted May 2011). The ACCC determined that requiring the Cultura Residents’ Association to pay the full costs of c.£40,000 was prohibitively expensive and the manner of allocating the costs was unfair.
  - (iii) A communication from Road Sense in ACCC/C/2009/38 (decision adopted August 2011). The ACCC determined that; limited non-disclosure of information was in

accordance with article 4, paragraph 4(h) given the relevant circumstances (the information redacted was the sites where freshwater pearl mussels were located and breeding, a protected species that had been subject to illegal pearl harvesting); that it would not consider the allegation in relation to the location of badger setts as Road Sense had not pursued its available domestic remedies (namely a request under Scottish Freedom of Information or Environmental Information Regulations)

**Ongoing communications**

35. There are a number of other ongoing communications of significance.
  
36. Two decisions have been joined for consideration, ACCC/C/2010/45 and ACCC/C/2011/60.
  - (i) ACCC/C/2010/45. The Kent Environment and Community Network is using the ACCC process, essentially to challenge the grant of planning permission to a Sainsbury's superstore supermarket. The communication raises issues relevant to whether there should be third party rights of appeal in the planning process. KECN alleges that the UK by failing to provide a third party appeal to projects, fails to comply with article 9, paragraph 2(b), or alternatively with article 9, paragraph 3, of the Convention. In particular, the communication alleges that the only way for third parties to trigger a substantive review of a planning decision is to pursue that the planning decision be called-in by the Secretary of State, before the permission is granted, and a public inquiry take place. However, the Secretary of State rarely calls-in such a decision as this and it is beyond the competence of the Local Government Ombudsman to review such a proposed grant of permission. In addition, KECN alleges that the available judicial remedies by the Party concerned are not adequate, because they concern procedural legality of a decision and not its substance, while the costs associated with judicial remedies are prohibitively expensive; hence, the UK is alleged not to comply with article 9, paragraph 4, of the Convention. Finally, KECN alleges that by failing to provide information to the public on access to administrative and judicial review procedures, the Party concerned fails to comply with article 9, paragraph 5, of the Convention.
  - (ii) ACCC/C/2011/60. This is another communication from Mr Ewing, a previous communication having been held to be inadmissible for not supplying supporting documentation. Mr Ewing alleges that the UK does not provide for full public participation rights (such as the right to give oral presentations) to third party objectors at planning committee hearings of local authorities, which is alleged to be a breach of article 3(1), 3(9) and 6(7) of the Convention, and raises concerns in relation to the non-availability of third party rights of appeal to the Planning Inspector leaving judicial review as the only remedy, which is not adequate, effective, fair or equitable, and can be prohibitively expensive, being a breach of article 3(1), 9(2), 9(3) and 9(4).

37. Initially, the ACCC was applying its summary procedure to ACCC/C/2010/45 but subsequently after receiving further representations and reviewing the overlap with ACCC/C/2011/60 has decided it will deal with:
- (a) Whether the planning laws and procedures of the England and Wales meet the standards regarding public participation in articles 6 and 7 of the Convention, including whether the fact that oral presentations allegedly might not be made at meetings of planning committees was contrary to the Convention
  - (b) Whether the review procedures meet the requirements of article 9 of the Convention (to the extent not already covered by ACCC/C/2008/33)
38. The ACCC decided to apply its summary proceedings procedure to whether the procedure for judicial review met the standards of substantive legality set out in Article 9 of the convention, and whether the cost of judicial review was prohibitively expensive, because these matters had been dealt with in ACC/C/2008/33 and implementation was under review through Decision IV/9i.
39. Subsequently, the communications have been widened to include issues in relation to (i) the lack of public participation in enforcement proceedings and (ii) participation in Local Investment Plans.
40. The role of the public in a Council's decision in whether or not it is "expedient" to take enforcement action is an interesting point. The UK responded by way of a detailed letter on 31 July 2012, explaining in some detail the enforcement process in the UK, and the specific remedies available to any member of the public who considers that a condition has been breached but that the Council has been unwilling to take action. These were said to include:
- (i) Judicial review, and reference is made to *Ardagh Glass Ltd v Chester City Council* [2009] Env LR 34 and the power of the High Court to issue a mandatory order requiring a local planning authority to issue an enforcement notice; KECN respond that judicial review is a discretionary and often expensive remedy which cannot be used against private persons
  - (ii) The Local Government Ombudsman, who has held in a number of cases that there is "maladministration" if the authority fail to take effective enforcement action which was plainly necessary and has occasionally recommended a compensatory payment for consequent injustice; KCEN claim that the Ombudsman is not an effective remedy
  - (iii) The possibility of a claim in private nuisance if an individual is directly impacted; KCEN consider that this is not a procedure for challenging a breach of a planning condition
  - (iv) If a developer wants to apply for a planning condition to be lifted, the developer must apply for what is in effect a new planning permission under s.73 of the Town and Country Planning Act, which is subject to the full range of rights for public participation

for third parties; KCEN repeat their concern about the lack of third party rights of appeal if a condition is lifted or varied.

41. Reference was also made to the 1989 report by Robert Carnwath (now Lord Carnwath, a Supreme Court Justice) *Enforcing Planning Control* and reliance placed on the “strong consensus” referred to in that report:

“5.3. In this case it seems to me that the issues are largely one of policy... the suggestion might be seen as a means of “privatising” part of planning enforcement... More importantly, it would tend to change the balance of the system, by increasing the emphasis on private property interests...”

5.4. The overwhelming majority of the responses from local authorities and expert bodies were opposed to the extension of third party rights in enforcement proceedings. Particular importance was attached to retaining the discretion of the local planning authority to determine which cases justify action on planning grounds, and to distinguish between public and planning considerations. It was also considered that the Commissioner for Local Administration provides a suitable form for complaints of inaction by authorities. (In theory the Secretary of State also has the power to intervene in cases of default by authorities, although I understand that this power is rarely, if ever, exercised).

5.5. In the light of this strong consensus, I see no reason to recommend any change. I note that the suggestion was also considered and rejected in the Dobry report. Furthermore, any move to greater third-party involvement would tend to divert attention from the crucial role of the local authorities as enforcers of the law and remove some of the incentives for improving their performance...”

KECN make the point that *Enforcing Planning Control* was written well before the adoption of the Aarhus Convention and the “*new understanding and importance*” attributed to third party participation in environmental decision making.

42. The complaint in relation to Local Investment Plans appears to be that they are adopted without public participation and that they are alleged to be “development plan documents”. The UK Government strongly resists that LIPs are “development plan documents”. They are probably unfamiliar to most people; indeed one of the UK Government’s representations is not only that they have no statutory basis and usually just reflect statutory development plan documents, they are in any event of little influence in planning decision-making (and refers to the fact that they are not cited anywhere in the 9 volumes of the Planning Encyclopaedia, nor referred to anywhere on DCP Online, nor Compass Online, containing 166,000 planning appeal decisions, nor had Counsel for UK Government ever heard of LIPs before they were raised in ACCC/C/2010/45). KCEN argue that they are a “*new breed*” of “*planning by partnership*” and allege that they are to be linked with Local Enterprise Partnerships which are said to

“consist of mostly business men with chief executives from local authorities. They are self-appointed, self-regulated, their meetings are not open to the public and there is no conceivable way for the ordinary public to get involved with them or properly hold them to account. LEPs will be devising policy, strategy and development proposals that will shape the statutory plans and will as the Government indicates, be the key bodies for obtaining money from Government, European and other sources to push forward LEP policies, strategies and specific development proposals.... Therefore it is no surprise that KEEN members and many other community and residential groups are unaware of the existence of the LSPs [Local Strategic Partnerships], LIPs and LEPs. It is a new



hidden sort of planning, behind closed doors with powerful influence. It is likely that with money attached and with support from key council officers, LEP plans and policies will prevail irrespective of any later statutory, rubber-stamping exercise”

43. Greenpeace have submitted a communication ACCC/C/2012/77 in relation to costs awarded against them in a case of refusal to grant judicial review. Greenpeace had been awarded to pay nearly £12,000, most of which were Counsel’s fees, for a judicial review against the National Policy Statement for Nuclear Power Generation for which permission was refused. Greenpeace had asked that the costs be reduced to £1500 on the basis the amount was excessive and fell under the Aarhus Convention; this was refused, although the amount was reduced to £8,000. The Order indicated that the Convention only applied to UK law in so far as an EC Directive was involved and thus as EC Directives were not involved in that case, it was considered Aarhus-irrelevant. The ACCC considered it raised a different aspect to that considered in ACCC/C/2008/33 and it has been declared admissible on a preliminary basis.
44. Lastly, practitioners will be glad to hear firstly that a summary procedure was applied to another communication from Mr Ewing in ACCC/C/2012/65 (and part of the communication relating to an alleged breach given the possibility of an order for security for costs being ordered declared non-admissible on the ground of not meeting the de minimis requirements as “*it is extremely rare for an order for security for costs to be made against an individual Claimant*”), and in ACCC/C/2012/75 the ACCC declared another communication from Mr Ewing as “manifestly unreasonable” in relation to the proposed construction of HS2, because “*the proceedings on the adoption of the plan were still ongoing and the content of the communication was very close to ACCC/C/2012/61 which was currently under consideration by the Committee*”.

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