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Item 7 (b) of the provisional agenda

Procedures and mechanisms facilitating the implementation of the Convention: compliance mechanism

Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – Part II***

Summary

This document is prepared by the Compliance Committee pursuant to the request set out in paragraph 21 of decision VI/8 of the Meeting of the Parties (ECE/MP.PP/2017/2/Add.1) and in accordance with the Committee's mandate set out in paragraph 35 of the annex to decision I/7 of the Meeting of the Parties on review of compliance (ECE/MP.PP/2/Add.8). This document, Part II, reviews the progress made by the Party concerned in implementing paragraph 8 of decision VI/8k concerning the compliance of the United Kingdom of Great Britain and Northern Ireland. The Party concerned's progress in implementing paragraphs 2, 4 and 6 of decision VI/8k is reviewed in Part I of the report, contained in document ECE/MP.PP/2021/59.

* The present document is being issued without formal editing.

** This document was submitted late owing to additional time required for its finalization.



I. Introduction

1. At its sixth session (Budva, Montenegro, 11–13 September 2017), the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) adopted decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention (see ECE/MP.PP/2017/2/Add.1). This document reviews the progress made by the Party concerned in implementing paragraph 8 of decision VI/8k. The Committee's review of the Party concerned's progress in implementing paragraphs 2, 4 and 6 of decision VI/8k is contained in Part I of the report, document ECE/MP.PP/2021/59.

II. Summary of follow-up

2. Prior to the adoption of decision VI/8k at the sixth session of the Meeting of the Parties, several statements were submitted to the Committee. Specifically, statements were sent on 1 August 2017 by an observer, Mr. Murphy; on 3 August 2017 by one of the communicants of communication ACCC/C/2008/33, ClientEarth, together with observers RSPB and Friends of the Earth; on 10 August 2017 from the communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86; and on 11 August 2017 a further statement by ClientEarth on its own. The secretariat informed those submitting the foregoing statements that their statements would be considered in the follow-up procedure on the implementation of decision VI/8k.

3. Following the adoption of decision VI/8k, on 20 September 2017, ClientEarth, together with observers RSPB and Friends of the Earth, submitted further information.

4. On 5 March 2018, observer Environment Links UK submitted a written statement that it had in parallel submitted to the eleventh meeting of the Convention's Task Force on Access to Justice (Geneva, 27–28 February 2018).

5. On 6 March 2018, the communicant of communication ACCC/C/2013/91 submitted a written statement.

6. On 13 March 2018, the communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86 submitted a joint statement.

7. At its sixtieth meeting (Geneva, 12–15 March 2018), the Committee reviewed the implementation of decision VI/8k in open session with the participation by audio conference of representatives of the Party concerned, the communicants of communications ACCC/C/2008/23, ACCC/C/2008/33, ACCC/C/2010/53, ACCC/C/2012/68, ACCC/C/2013/85 and ACCC/C/2013/86, and observer RSPB.

8. On 15 March 2018, observers RSPB, Friends of the Earth and Friends of the Earth Scotland submitted a written version of their statement delivered at the Committee's sixtieth meeting.

9. On 22 March 2018, the Party concerned submitted a written version of the statement it had delivered at the Committee's sixtieth meeting.

10. On 1 October 2018, the Party concerned submitted its first progress report on decision VI/8k, on time.

11. On 5 October 2018, the secretariat forwarded the first progress report of the Party concerned to the communicants of communications ACCC/C/2008/23, ACCC/C/2008/27, ACCC/C/2008/33, ACCC/C/2010/53, ACCC/C/2011/64, ACCC/C/2011/65, ACCC/C/2012/68, ACCC/C/2012/77, ACCC/2013/85, ACCC/C/2013/86 and ACCC/C/2013/91 (all the communicants) and observers, inviting their comments by 1 November 2018.

12. Comments on the first progress report were received from ClientEarth, together with observers RSPB and Friends of the Earth, on 31 October 2018, from ClientEarth on its own on 1 November 2018 and from the communicant of communication ACCC/C/2013/91 on 9 November 2018.

13. On 29 November 2018, observer RSPB provided further information.
14. After taking into account the information received, the Committee prepared its first progress review and adopted it through its electronic decision-making procedure on 24 February 2019. On 26 February 2019, the Committee's first progress review was forwarded to the Party concerned, all the communicants and the observers.
15. At its sixty-third meeting (Geneva, 11–15 March 2019), the Committee reviewed the implementation of decision VI/8k in open session, with the participation by audio conference of representatives of the Party concerned and of the communicants of communications ACCC/C/2008/23, ACCC/C/2008/33 (ClientEarth), ACCC/C/2010/53, ACCC/C/2013/85 and ACCC/C/2013/86 and observer RSPB.
16. On 15 March 2019, the communicants of communications ACCC/2013/85 and ACCC/C/2013/86 submitted a joint statement.
17. On 20 March 2019, ClientEarth submitted comments on the statement delivered by the Party concerned at the open session of the Committee's sixty-third meeting.
18. On 22 March 2019, observers RSPB and Friends of the Earth submitted a statement.
19. On 31 July 2019, the secretariat sent the Party concerned a letter to remind it of the deadline of 1 October 2019 for its second progress report.
20. On 30 September 2019, the Party concerned submitted its second progress report, on time.
21. On 2 October 2019, the secretariat sent the Party concerned's second progress report to all the communicants and the observers for their comments.
22. Comments on the second progress report were received from the communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86 on 8 October 2019, the communicant of communication ACCC/C/2010/53 on 9 October 2019, observers RSPB, Friends of the Earth, and Friends of the Earth Scotland on 29 October 2019, observer Environment Links UK on 30 October 2019 and ClientEarth on 31 October 2019.
23. After taking into account the information received, the Committee prepared its second progress review and adopted it through its electronic decision-making procedure on 6 March 2020. On the same date, the Committee's second progress review was forwarded to the Party concerned, all the communicants and the observers.
24. On 11 March 2020, observers Mr. Chris Murphy and Ms. Doris Noe sent a statement.
25. At its sixty-sixth meeting (Geneva, 9–13 March 2020), the Committee reviewed the implementation of decision VI/8k in open session, with the participation by audio conference of representatives of the Party concerned and of the communicants of communications ACCC/C/2008/33 (ClientEarth), ACCC/C/2010/53, ACCC/C/2013/85 and ACCC/C/2013/86 and observer Friends of the Earth.
26. On 13 March 2020, observers RSPB, Friends of the Earth and Friends of the Earth Scotland submitted comments on the Committee's second progress review.
27. On 18 March 2020, ClientEarth sent a statement and an update on 14 August 2020.
28. On 30 September 2020, the Party concerned submitted its final progress report.
29. On 1 October 2020, the secretariat sent the Party concerned's final progress report to all the communicants and the observers for their comments.
30. Comments on the Party concerned's final progress report were received from the communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86 on 15 October 2020, from ClientEarth on 29 October 2020, and from observers RSPB, Friends of the Earth, Friends of the Earth Scotland and Environmental Rights Centre for Scotland on 29 October 2020.
31. On 15 June 2021, ClientEarth sent additional information.
32. The Committee completed its draft report to the seventh session of the Meeting of the Parties on the progress by the Party concerned to implement decision VI/8k through its

electronic decision-making procedure on 5 July 2021. In accordance with paragraph 34 of the annex to decision I/7, the draft report was then forwarded on that date to the Party concerned, all the communicants and the observers for their comments by 19 July 2021.

33. At its seventy-first meeting (Geneva online, 7–9 July 2021), the Committee reviewed the implementation of decision VI/8k in open session with the participation by virtual means of the Party concerned, the communicants of communications ACCC/C/2008/33 (ClientEarth), ACCC/C/2013/85 and ACCC/C/2013/85 and observers RSPB and Environmental Rights Centre for Scotland.

34. Comments on the Committee’s draft report were received on 19 July 2021 from the Party concerned, ClientEarth, the communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86 and observers RSPB, Friends of the Earth England, Wales and Northern Ireland, Friends of the Earth Scotland, Environmental Rights Centre for Scotland and C & J Black Solicitors.

35. After taking into account the information received, the Committee finalized and adopted its report to the seventh session of the Meeting of the Parties on the implementation of decision VI/8k in closed session at its virtual meeting on 26 July 2021. The Committee’s report on the implementation of paragraphs 2, 4 and 6 of decision VI/8k is contained in Part I of the report, document ECE/MP.PP/2021/59. The Committee’s report on the implementation of paragraph 8 of decision VI/8k is contained in Part II of the report, document ECE/MP.PP/2021/60.

III. Consideration and evaluation by the Committee

Paragraph 8 (a) and (b) of decision VI/8k

36. To fulfil paragraph 8 (a) and (b) of decision VI/8k, the Party concerned would need to put in place a clear requirement to ensure that:

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

(b) When identifying who is the public concerned by the environmental decision-making on ultra-hazardous activities, such as nuclear power plants (NPPs), public authorities will apply the precautionary principle and consider the potential extent of the effects if an accident would indeed occur, even if the risk of an accident is very small.

Relevant legal framework

37. The Party concerned reports that the relevant procedure is set out in “Planning Advice Note 12” (PAN 12), which applies to all Nationally Significant Infrastructure Projects (NSIP), including NPPs.¹ PAN 12, version 5, applied from March 2018.² PAN 12, version 6, was adopted in December 2020 and supersedes version 5.³

38. Section 7.1 of PAN 12 sets out the Planning Inspectorate’s approach to public participation in the transboundary context. Section 7.1 of PAN 12, version 6, provides that:

7.1.1 The Espoo and Aarhus Conventions set out provisions for public participation in the [environmental impact assessment] procedure. The Inspectorate will (where relevant) invite participation in the PA2008 process from the public in [European Economic Area (EEA)] State(s) and any other Convention states. Public participation will occur:

¹ Party’s first progress report, 1 October 2018, p. 8; Party’s second progress report, 30 September 2019, para. 46.

² Party’s second progress report, 30 September 2019, annex K.

³ Party’s comments on Committee’s draft report, para. 8.

- Where the proposed development is, in the view of the Inspectorate, likely to have a significant effect on the environment in other specific EEA State(s); and
- Where the proposed development is a nuclear NSIP.

7.1.2 The Inspectorate will issue press releases to the media in the EEA State(s) and/or other relevant States. This will be published, alongside any relevant translations, on the gov.uk website and linked to the British Embassy websites in any relevant States. The press releases will include information on the transboundary screening assessment including links to the Inspectorate’s National Infrastructure Planning Website, and details of how the public can express their views on the application for development consent and (if they so wish) how they may formally participate in the PA2008 examination process. Alongside these actions Applicants will be asked to publish a press notice in the print media of each EEA State(s) where a significant effect on their environment [has been] identified. In the case of a nuclear NSIP, the Applicant will also be asked to publish a press notice in all neighbouring States of the UK regardless of whether significant effects are identified. On this basis members of the public are afforded the same ability as the UK public to participate in the process should they wish to do so.⁴

39. The Committee examines below first, whether PAN 12, version 6, meets the requirement in paragraph 8 of decision VI/8k to put in place a “clear requirement” to ensure that subparagraphs (a) and (b) of paragraph 8 are met, and second, whether its content fulfils the requirements of those subparagraphs.

Clear requirement

40. The Party concerned describes PAN 12 as part of a “suite of advice” to be followed by the Planning Inspectorate in preparing a recommendation to the Secretary of State, who then makes the final decision on a NSIP. The Secretary of State would expect the process in PAN 12 to have been followed unless it has been stated otherwise.⁵

41. In reply to the Committee’s request for court decisions demonstrating that a failure to follow a Planning Advice Note can be successfully challenged by members of the public through administrative or judicial review, the Party concerned states that no such challenges have been brought to date.⁶ It submits however that, in general, the Secretary of State must act in accordance with its own published guidance unless there are good reasons not to, citing two judgments in this regard. The Party concerned submits that it would be “very difficult to maintain” that there is a good reason for breaching international law.⁷ As such, the Party concerned considers that a failure to follow PAN 12 could result in a successful legal challenge if there were no clear reasons to explain why PAN 12 did not need to be followed in the particular case or to indicate that the outcome would anyway have been the same.⁸

42. The Committee considers that neither the two judgments cited by the Party concerned (which respectively concern immigration and refugee law) nor the Party concerned’s further explanations demonstrate that PAN 12 imposes a clear requirement that, if not followed, could be successfully challenged through administrative or judicial review. Moreover, the fact that, as the Committee noted in its second progress review, PAN 12 was not necessarily followed in the public notification for the Wylfa Newydd project further indicates that PAN 12 does not constitute a “clear requirement”.⁹

43. Based on the foregoing, the Committee finds that the Party concerned has not yet demonstrated that it has put in place a clear requirement that will ensure that paragraphs 8 (a) and (b) of decision VI/8k are met.

⁴ <https://infrastructure.planninginspectorate.gov.uk/legislation-and-advice/advice-notes/advice-note-twelve-transboundary-impacts-and-process/>.

⁵ Party’s second progress report, 30 September 2019, paras. 46–47, and annex K, p. 1.

⁶ Party’s comments on Committee’s draft report, para. 10.

⁷ Party’s final progress report, 30 September 2020, para. 49.

⁸ Party’s second progress report, 30 September 2019, para. 47.

⁹ See, for example, Committee’s second progress review, para. 145.

Content of Planning Advice Note 12

44. In its final progress report, the Party concerned stated that, pursuant to version 6 of PAN 12:

(a) Press notices would be provided in the primary language of all the Party concerned's neighbouring States (Danish, Dutch, French, German and Norwegian);¹⁰

(b) The developer would be asked to publish a press notice in the print media of neighbouring states and any State where a transboundary impact has been identified;¹¹

(c) The reference to "reasonable efforts" in the second bullet of section 7.1.1 would be removed.¹²

45. The Party concerned also stated that press notices would include further instructions on how to register in the primary languages of neighbouring States.¹³

46. Having examined the text of the revised PAN 12 (i.e. "version 6"), the Committee appreciates that the reference to "reasonable efforts" in the second bullet of section 7.1.1. of version 5 has been removed.

47. The Committee also notes that section 7.1.2 of version 6 states that the developer will "be asked to publish a press notice in the print media of each EEA State(s) where a significant effect on their environment [has been] identified". The Committee welcomes that notification is no longer limited only to the publication of press releases on the gov.uk and British Embassy websites. The Committee is not however convinced that publication only in the print media of the affected States will necessarily ensure effective notification of the public concerned in those States. On this point, the Committee reminds the Party concerned that paragraph 8 (a) of decision VI/8k requests the Party concerned to put in place a clear requirement to ensure that "when selecting the means for notifying the public under article 6 (2), public authorities are required to select such means as will ensure effective notification of the public concerned in the territory outside of the Party concerned." The Committee considers that section 7.1.2 should thus request the notice to be published in the print media of the affected States as a minimum, and to expressly require other means to be used as will be necessary to ensure the effective notification of the public concerned in each affected State.

48. The Committee also queries why both the first bullet of section 7.1.1 and the press notice in the print media to be published by the developer under section 7.1.2 for proposed developments other than nuclear NSIPs are still limited to "EEA" States in which a significant effect on the environment has been identified. The Committee reiterates that effective notification under the Aarhus Convention is not limited to notifying the public in affected EEA States nor the public concerned in other Parties to the Aarhus Convention.¹⁴ The Committee thus invites the Party concerned to remove the reference to "EEA" States in the first bullet of sections 7.1.1 and the two references to "EEA" States in section 7.1.2.

49. The Committee moreover points out that the public concerned, as defined in article 2 (5) and referred to in article 6 (2) of the Convention, is not limited to the public only in those States where a significant effect on the environment has been identified. Rather, effective notification requires the notification of any members of the public "affected or *likely to be affected* by, or having an interest in, the environmental decision-making". Thus, it is not sufficient to restrict notification only to the public in other States in which a significant impact on the environment has been identified.

¹⁰ Party's final progress report, 30 September 2020, para. 55.

¹¹ Ibid, para. 53.

¹² Ibid.

¹³ Ibid, para. 56.

¹⁴ Committee's second progress review, 6 March 2020, para. 137.

50. Lastly, while recognizing that the summary of the revised PAN 12 provided by the Party concerned in its final progress report was provided prior to the publication of version 6 in December 2020, the Committee cannot see any reference in version 6 to the following:

(a) Press notices be provided in the primary language of all the Party concerned's neighbouring States (Danish, Dutch, French, German and Norwegian) (see para. 44 (c) above).

(b) Press notices would include further instructions on how to register in the primary languages of neighbouring States (see para. 45 above).

51. Rather, the only reference to the language of the public notice to be published under section 7.1 of version 6 appears to be in section 7.1.2, which simply states that the press release will be published "alongside any relevant translations" without any further specifications. The Committee points out that the requirement to ensure adequate and effective notice in the transboundary context requires that all the information required under article 6 (2) of the Convention should be provided to the public concerned in the affected States, in their national languages.¹⁵ Thus, in order to effectively notify the public affected or likely to be affected by, or having an interest in, the decision-making on a proposed development that may have a transboundary impact in other States, unless the national languages of those States are indeed Danish, Dutch, French, German or Norwegian, publishing the notice only in those five languages may not be sufficient.

Concluding remarks about paragraph 8 (a) and (b) of decision VI/8k

52. In the light of the above, while welcoming the steps taken in that direction, the Committee finds that the Party concerned has not yet met the requirements of paragraphs 8 (a) and (b) of decision VI/8k.

IV. Conclusions

53. The Committee finds that:

(a) While welcoming the progress made in that direction, the Party concerned has not yet met the requirements of paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k with respect to England and Wales;

(b) While welcoming the progress made in that direction, the Party concerned has not yet met the requirements of paragraph 2 (a), (b) and (d) of decision VI/8k with respect to Scotland;

(c) While welcoming the significant progress made in that direction, the Party concerned has not yet met the requirements of paragraph 2 (a), (b), (c) and (d) of decision VI/8k with respect to Northern Ireland;

(d) Since the Party concerned is no longer a member State of the European Union, the recommendation in paragraph 2 (e) of decision VI/8k is no longer applicable;

(e) The Party concerned has not yet met the requirements of paragraph 6 of decision VI/8k, nor demonstrated any progress in that direction;

(f) While welcoming the steps taken in that direction, the Party concerned has not yet met the requirements of paragraph 8 (a) and (b) of decision VI/8k.

54. The Committee recommends to the Meeting of the Parties that it reaffirm its decision VI/8k and request the Party concerned to, as a matter of urgency, take the necessary legislative, regulatory, administrative and practical measures to:

(a) Ensure that the allocation of costs in all court procedures subject to article 9, including private nuisance claims, is fair and equitable and not prohibitively expensive;

¹⁵ See Committee's findings on ACCC/S/2015/2 (Belarus), ECE/MP.PP/C.1/2021/13, forthcoming, para. 163 (b).

(b) Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;

(c) Further review its rules regarding the time-frame for the bringing of applications for judicial review in Northern Ireland to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework;

(d) Establish a clear, transparent and consistent framework to implement article 9 (4) of the Convention;

(e) Put in place a clear requirement to ensure that:

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

(ii) When identifying who is the public concerned by the environmental decision-making on ultra-hazardous activities, such as NPPs, public authorities will apply the precautionary principle and consider the potential extent of the effects if an accident would indeed occur, even if the risk of an accident is very small.

55. The Committee also recommends to the Meeting of the Parties that it request the Party concerned to:

(a) Submit a plan of action, including a time schedule, to the Committee by 1 July 2022 regarding the implementation of the above recommendations;

(b) Provide detailed progress reports to the Committee by 1 October 2023 and 1 October 2024 on the measures taken and the results achieved in the implementation of the plan of action and the above recommendations;

(c) Collect up-to-date data to demonstrate that the requirements in paragraph 54 (a), (b) and (d) have been fulfilled with respect to the outstanding points of non-compliance in England and Wales, Scotland and Northern Ireland;

(d) Provide such further information as the Committee may request in order to assist it to review the progress by the Party concerned in implementing the above recommendations;

(e) Participate (either in person or by virtual means) in the meetings of the Committee at which the progress of the Party concerned in implementing the above recommendations is to be considered.
