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## Economic Commission for Europe

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

### Compliance Committee

#### Seventy-second meeting

Geneva, 18–21 October 2021

Item 9 of the provisional agenda

#### Communications from members of the public

## Findings and recommendations with regard to communication ACCC/C/2013/90 concerning compliance by the United Kingdom of Great Britain and Northern Ireland\*

Adopted by the Compliance Committee on 26 July 2021

### I. Introduction

1. On 4 June 2013, the non-governmental organization River Faughan Anglers Ltd. (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 of Great Britain and Northern Ireland to comply with articles 1, 3(2) and (8), 4, 6(2) and (3) and 9(2)–(4) of the Convention regarding a concrete production plant and associated settlement lagoons at a site adjacent to the River Faughan Special Area of Conservation.
2. At its forty-second meeting (Geneva, 24–27 September 2013), the Committee determined on a preliminary basis that the communication was admissible but suspended its consideration due to the communicant's ongoing court proceedings.<sup>1</sup>
3. On 22 February 2014, the communicant informed the Committee that the court had issued its judgment. It provided the written judgment on 21 September 2014.
4. At its forty-sixth meeting (Geneva, 22–25 September 2014), the Committee agreed to ask the communicant to comment on the judgment.<sup>2</sup> The communicant provided its comments on 12 December 2014.

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

<sup>1</sup> ECE/MP.PP/C.1/2013/8, para. 30.

<sup>2</sup> ECE/MP.PP/C.1/2014/11, para. 26.



5. At its forty-seventh meeting (Geneva, 16–19 December 2014), the Committee agreed to forward the communication to the Party concerned for its response and,<sup>3</sup> on 29 June 2015, the communication was forwarded.
6. The Party concerned provided its response on 27 November 2015 and, on 9 December 2015, the communicant provided comments thereon.
7. On 8 March 2016, the communicant provided further information.
8. On 27 September 2016, the Committee sent questions to the communicant and, lacking a reply, on 25 November 2016, a reminder. On 28 November 2016, the communicant replied that it had not received the previous correspondence.
9. On 2 December 2016, the Party concerned requested the Committee to reconsider the admissibility of the communication at its fifty-fifth meeting (Geneva, 6–9 December 2016). On 6 December 2016, the communicant requested that consideration of admissibility be deferred to the Committee's fifty-sixth meeting (Geneva, 28 February–3 March 2017).
10. At its fifty-fifth meeting, the Committee postponed its consideration of admissibility to await the communicant's reply to the questions of 27 September 2016,<sup>4</sup> which the communicant provided on 16 February 2017.
11. At its fifty-sixth meeting, the Committee determined the allegations concerning articles 1, 3(8) and 4 to be inadmissible and confirmed its determination of preliminary admissibility regarding articles 3(2), 6 and 9.<sup>5</sup>
12. On 23 March and 26 November 2017, the communicant provided additional information.
13. On 30 November 2017, the Party concerned provided an update.
14. The Committee held a hearing to discuss the substance of the communication at its fifty-ninth meeting (Geneva, 11–15 December 2017), with the participation of the communicant and the Party concerned.<sup>6</sup>
15. On 16 January 2018, the Committee sent questions to the parties. On 25 February and 1 March 2018, respectively, the communicant and the Party concerned provided their replies. On 6 March 2018, the communicant submitted comments on the Party concerned's reply and, on 12 March 2018, the Party concerned provided annexes to its reply and comments on the communicant's replies of 25 February and 6 March 2018. On 13 March 2018, the communicant commented on the annexes to the Party concerned's reply.
16. On 7 April 2019, the communicant submitted an update.
17. On 7 June 2021, the Committee requested documents from the communicant, which it provided on 8 June 2021.
18. The Committee completed its draft findings through its electronic decision-making procedure on 14 June 2021. In accordance with paragraph 34 of the annex to decision I/7,<sup>7</sup> the draft findings were forwarded to the parties on that date for their comments by 23 July 2021.
19. On 23 July 2021, the Party concerned and the communicant provided comments on the draft findings.
20. The Committee proceeded to finalize its findings in closed session, taking account of the comments received, and adopted its findings through its electronic decision-making procedure on 26 July 2021. The Committee agreed that the findings should be published as a formal pre-session document to its seventy-second meeting.

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<sup>3</sup> ECE/MP.PP/C.1/2014/14, para. 22.

<sup>4</sup> ECE/MP.PP/C.1/2016/9, para. 20.

<sup>5</sup> ECE/MP.PP/C.1/2017/2, para. 18.

<sup>6</sup> ECE/MP.PP/C.1/2017/23, para. 15.

<sup>7</sup> ECE/MP.PP/2/Add.8.

## II. Summary of facts, evidence and issues

### A. Legal framework

#### Environmental impact assessment

21. The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999 regulate environmental impact assessment (EIA) procedures in Northern Ireland. Regulation 9 regulates the determination by the responsible Department of whether an application requires an EIA.<sup>8</sup>

#### Conservation of natural protected areas

22. The Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 set out the procedures for designated conservation areas. Regulation 43 requires:

the competent authority, before deciding to undertake, or give any consent, permission or other authorization for, a plan or project which— (a) is likely to have a significant effect on a European site in Northern Ireland (either alone or in combination with other plans or projects), and (b) is not directly connected with or necessary to the management of the site, shall make an appropriate assessment of the implications for the site in view of that site’s conservation objectives.<sup>9</sup>

#### Planning permission

23. At the time of the events at issue, article 67B(3) of the Planning (Northern Ireland) Order 1991 provided that no enforcement action may be taken after the end of a period of four years from when the development was substantially completed. Article 83A prescribed the statutory process for providing a certificate of lawful or existing use or development (CLUD).<sup>10</sup>

#### Costs of judicial proceedings

24. On 13 April 2013, the Cost Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 entered into force, providing for cost protection orders in judicial review claims subject to the Convention.<sup>11</sup>

### B. Facts

25. The River Faughan Anglers Ltd is a not-for-profit organization that manages the fishing rights on the River Faughan.

26. Adjacent to the River Faughan Special Area of Conservation (SAC) is a concrete production plant operated by W&J Chambers Ltd (Chambers). In 1984, Chambers was refused planning permission to expand the plant. Between 1995 and 2006, the plant was expanded without planning permission.<sup>12</sup>

27. At some unknown date before 19 April 2003,<sup>13</sup> Chambers excavated a “settlement lagoon” for contaminated materials,<sup>14</sup> which was in the floodplain on the riverbank.

28. At some unknown date between 19 April 2003 and 23 May 2007, two further settlement lagoons were added in the floodplain.<sup>15</sup>

<sup>8</sup> Communication, annex 2, pp. 6–7.

<sup>9</sup> Available at <http://www.legislation.gov.uk/nisr/1995/380/made>.

<sup>10</sup> Communication, para. 10, and annex, pp. 57–58.

<sup>11</sup> Party’s response to communication, paras. 85–86.

<sup>12</sup> Communicant’s additional information, 30 August 2013, p. 8.

<sup>13</sup> Communicant’s comments on Party’s reply, 6 March 2018, annex 3, para. 6.1.7.

<sup>14</sup> Communicant’s reply to questions, 16 February 2017, p. 2.

<sup>15</sup> Communication, annex 10, p. 39.

29. In March 2008, a significant proportion of Chambers' site was granted a CLUD under article 83A of the Planning (Northern Ireland) Order 1991.<sup>16</sup> The settlement lagoons were not included in the CLUD.
30. On 21 May 2008, the Planning and Local Government Group (DOE Planning), which forms part of the Department of the Environment, received planning application A/2008/0408/F for retention of, inter alia, the unauthorized settlement lagoons. DOE Planning undertook an EIA screening and determined that the environmental impact would not be significant.<sup>17</sup>
31. On 23 March 2010, the Northern Ireland Environmental Agency (NIEA) advised DOE Planning that planning application A/2008/0408/F would fail an appropriate assessment under regulation 43 of the Conservation (Natural Habitats etc.) Regulations 1995, as it represented a "serious risk to water pollution" of the River Faughan.<sup>18</sup>
32. On 1 March 2011, DOE Planning recommended that application A/2008/0408/F be refused on the grounds, inter alia, that it contravened DOE Planning's policy on "planning and flood risk".
33. On 15 April 2011, Chambers submitted a revised site plan in which the settlement lagoons were to be relocated out of the floodplain.
34. On 13 May 2011, DOE Planning issued an enforcement notice to Chambers regarding the unauthorized lagoons. Chambers appealed the enforcement notice to the Planning Appeals Commission, which upheld the appeal on 2 April 2012 on the ground that the development had been substantially completed more than four years before the enforcement action.<sup>19</sup>
35. On 31 May 2011, an appropriate assessment was carried out regarding the revised site plan with the relocated settlement lagoons.
36. On 15 July 2011, Chambers submitted a revised application in accordance with the revised site plan.<sup>20</sup>
37. On 25 June 2012, DOE Planning carried out an EIA screening on the revised application and determined that the environmental effects would not be significant.<sup>21</sup>
38. On 25 July 2012, the communicant wrote to DOE Planning challenging the June 2012 screening decision and raising various questions. On 2 August 2012, DOE Planning replied that it did not consider it appropriate to engage in extended correspondence as the "appropriate route for remedy through judicial review" was available.<sup>22</sup>
39. On 13 September 2012, DOE Planning granted planning permission. Permit condition 1 was that the new lagoons had to be constructed and brought into operation within six months from grant of planning permission. Condition 2 was that the existing lagoons had to be decommissioned and removed from the site by 31 October 2013.<sup>23</sup>
40. On 12 December 2012, the communicant launched judicial review proceedings challenging planning approval A/2008/0408/F on various grounds.<sup>24</sup>
41. On 13 March 2014, the High Court dismissed the communicant's application.<sup>25</sup>

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<sup>16</sup> Communicant's additional information, 30 August 2013, p. 8.

<sup>17</sup> Communication, paras. 4–5, and annex 3, pp. 8–12.

<sup>18</sup> Communication, para. 5, and annex 4, pp. 13–14.

<sup>19</sup> Communication, annex 10, pp. 38–40.

<sup>20</sup> Communication, para. 6.

<sup>21</sup> Ibid., and annex 5, pp. 16–20.

<sup>22</sup> Communication, paras. 8–9, annex 7, pp. 26–34, and annex 8, pp. 35.

<sup>23</sup> Communication, para. 7, and annex 6, pp. 21–25.

<sup>24</sup> Communication, para. 10.

<sup>25</sup> Party's response to communication, annex 1.

42. On 23 May 2014, DOE Planning requested the communicant to pay £5,000, plus £1,000 in value added tax, noting that the Cost Protection (Aarhus Convention) Regulations 2013 did not apply as the proceedings had begun before the Regulations entered into force.<sup>26</sup>

43. On 30 May 2014, the communicant agreed to pay this amount.<sup>27</sup> Its own legal costs for the judicial review proceeding were £160,828.63.<sup>28</sup>

44. The new lagoons were not constructed within six months and to date remain unconstructed. The existing lagoons were not decommissioned and removed by 31 October 2013. They remain in their original location directly adjacent to the River Faughan.

### C. Domestic remedies and admissibility

45. The communicant's use of domestic remedies is described in paragraphs 40–41 above.

46. The communicant states that it had insufficient funds to appeal. It claims that paying its legal fees for the High Court proceedings put it on the verge of bankruptcy and it had to make redundant two full-time and one part-time employees to do so.<sup>29</sup>

47. The communicant submits that it applied for a cost protection order but withdrew its application because, if its judicial review was successful, it could only have recovered £35,000 of its then-£150,000 legal costs, which would put it at risk of bankruptcy.<sup>30</sup>

48. The Party concerned submits that the planning permission was conditional on implementation within six months, which had already passed when the communicant initiated judicial review proceedings. The planning permission is therefore no longer of any practical consequence to the River Faughan and the communication should be found inadmissible.<sup>31</sup>

49. The Party concerned claims that the communicant was able to and did challenge the planning permission through judicial review proceedings, and that costs were enforced against the communicant only in a limited manner, in compliance with the Convention.<sup>32</sup>

50. The Party concerned contends that the communicant's complaint that the £6,000 costs order amounted to penalization constitutes an abuse of the right to bring a communication under paragraph 20(b) of the annex to decision I/7.<sup>33</sup>

51. The Party concerned claims that the communicant has not used all domestic remedies, including for review of information requests.<sup>34</sup>

52. The Party concerned submits that the Convention does not require the introduction of "third party rights of appeal", that there were no attempts to discourage legal challenges through prohibitively expensive judicial review and that there has been no impediment to the public's ability to effectively engage in environmental decision-making.<sup>35</sup>

53. Accordingly, the Party concerned submits that the communication should be found inadmissible for being unsubstantiated and manifestly unreasonable under paragraph 20 of the annex to decision I/7 and because the communicant has not exhausted domestic remedies in accordance with paragraph 21 of decision I/7.<sup>36</sup>

<sup>26</sup> Ibid., annex 2, pp. 4–5.

<sup>27</sup> Ibid., p. 7.

<sup>28</sup> Communicant's reply to Committee's questions, 25 February 2018, para. 7.

<sup>29</sup> Communicant's additional information, 30 August 2013, p. 12.

<sup>30</sup> Ibid., pp. 9–10.

<sup>31</sup> Party's response to communication, paras. 7–9.

<sup>32</sup> Ibid., paras. 10–12.

<sup>33</sup> Ibid., para. 43.

<sup>34</sup> Ibid., paras. 52–54.

<sup>35</sup> Ibid., para. 6 (vi), (vii), (viii) and (ix).

<sup>36</sup> Ibid., para. 108.

## D. Substantive Issues

### Article 1

54. The communicant alleges that, by refusing to reply to its questions, the Party concerned contravened article 1.<sup>37</sup>

55. The Party concerned claims that, since none of the Convention's operative provisions were breached, article 1 cannot have been violated.<sup>38</sup>

### Article 3(2)

56. The communicant submits that the Party concerned failed to comply with article 3(2) by failing to include environmental information in the screening decision and by inviting the communicant to initiate judicial review rather than justifying its negative screening decision.<sup>39</sup>

57. The communicant claims that many of its letters to DOE Planning went unanswered or received standard acknowledgement letters that failed to address its questions.<sup>40</sup>

58. The Party concerned submits that the authorities actively engaged with the communicant beyond established procedures. The communicant was provided with proper access to information and possibilities to engage in the process. All issues raised were fully considered and informed the relevant assessments.<sup>41</sup>

59. The Party concerned highlights DOE Planning's extensive correspondence with the communicant. It submits that the communicant's 25 July 2012 letter was not an environmental information request but yet another invitation to revisit the case and that the provision of information on available judicial remedies was not an invitation to pursue litigation.<sup>42</sup>

### Article 3(8)

60. The communicant submits that the Party concerned fails to comply with article 3(8) because of the costly nature of judicial review proceedings, which unfairly penalizes affected individuals and voluntary groups, and its refusal to introduce "third party rights of appeal" against planning decisions.<sup>43</sup>

61. The Party concerned states that reasonable costs awards in judicial proceedings do not constitute penalization under article 3(8) and there is no evidence that DOE Planning's pursuit of costs was unreasonable, noting it only sought to recover £6,000 of its £54,363.65 legal costs.<sup>44</sup>

### Article 4

62. The communicant submits that DOE Planning did not provide information on the reasoning for its negative screening decision as the communicant's letter of 25 July 2012 had requested.<sup>45</sup>

63. The Party concerned submits that the communicant has conceded that the requested information did not exist and therefore no breach of article 4 can have occurred.<sup>46</sup>

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<sup>37</sup> Communication, para. 16.

<sup>38</sup> Party's response to communication, paras. 19–21.

<sup>39</sup> Communication, para. 17.

<sup>40</sup> Communicant's reply to questions, 16 February 2017, p. 2.

<sup>41</sup> Party's response to communication, para. 13–16.

<sup>42</sup> *Ibid.*, paras. 26–27 and 30–32, and annexes 3 and 4.

<sup>43</sup> Communication, paras. 13 and 17.

<sup>44</sup> Party's response to communication, paras. 42–46.

<sup>45</sup> Communication, para. 17.

<sup>46</sup> Party's response to communication, para. 51.

**Article 6 – applicability**

64. The communicant submits that the competent authority’s assessment of the settlement lagoons concluded that the development would fail an appropriate assessment under article 6(3) of the Habitats Directive. It submits that the development thus falls under article 6(1)(b) of the Convention.<sup>47</sup>

65. The communicant claims that the waste deposited at the site was more than 25,000 tons and therefore falls under paragraph 5 of annex I of the Convention.<sup>48</sup>

66. The Party concerned denies that the project is subject to article 6 either by virtue of annex I or as an activity that may have a significant impact on the environment.<sup>49</sup>

**Article 6(2) and (3)**

67. The communicant submits that, by enabling development consents to be obtained retrospectively, the Party concerned does not allow for public involvement in environmental decision-making at an early stage, in breach of article 6(2) and (3). It highlights the settlement lagoons, which were constructed and operating before the planning application for their retention was submitted in May 2008. It submits that, as demonstrated in the present case, this practice immunizes developments from enforcement action (see para. 29 above).<sup>50</sup>

68. The communicant contends that DOE Planning generally makes the development control officer’s (DCO) report available online one week before making its recommendation on planning permission to the Council but that did not happen in this case. It claims that it repeatedly requested the DCO report but was told that it had not been finalized. It claims that the report was sent on 17 September 2012, four days after planning permission was granted and that, since the report was dated 24 August 2012, it was either withheld until planning permission was granted or given a misleading date.<sup>51</sup>

69. The Party concerned states that the planning application was advertised in a newspaper on 13 June 2008 and re-advertised on 3 August 2011. The communicant was notified under the neighbour notification process on 23 November 2008 and re-notified of any amendments. Furthermore, every element of the process was recorded on the Northern Ireland Planning Portal.<sup>52</sup>

70. Concerning the communicant’s requests for the DCO report, the Party concerned contends that the timing of its release did not affect the communicant’s right to participate in the decision-making. The agenda for the Council’s 4 September 2012 meeting was available online at least one week beforehand. The agenda serves to make the Department’s recommendation known to the public before the Council meeting and the communicant could have acted on that basis.<sup>53</sup>

**Article 9(2) and (3) – standard of review and “third party appeal rights”**

71. The communicant alleges that the Party concerned fails to comply with article 9(2) and (3) because third parties cannot appeal planning permissions before the Planning Appeals Commission. Third parties’ only redress is judicial review but this is limited to reviewing procedural defects and the rationality or *Wednesbury* reasonableness of the decision and does not review the substantive merits of the environmental decision-making.<sup>54</sup>

72. The Party concerned submits that the Convention does not require a “third party right of appeal” and judicial review is sufficient to comply with article 9(2) and (3). The Convention does not require that the court substitute its view for that of the executive, which would violate constitutional principles of separation of powers and democratic oversight of

<sup>47</sup> Communicant’s reply to Committee’s questions, 16 February 2017, p. 11.

<sup>48</sup> Communicant’s additional information, 30 August 2013, p. 8.

<sup>49</sup> Party’s response to communication, para. 57.

<sup>50</sup> Communication, paras. 19 and 21.

<sup>51</sup> *Ibid.*, para. 20.

<sup>52</sup> Party’s response to communication, para. 104.

<sup>53</sup> *Ibid.*, paras. 34–36.

<sup>54</sup> Communication, para. 23 (b).

executive decision-making. Judicial review is not limited to review of procedural errors or “*Wednesbury* unreasonableness”, but includes other forms of substantive illegality, such as errors of law or material errors of fact. The Convention does not specify a particular standard of review but only requires, in article 9(4), appropriate and effective remedies, which judicial review provides.<sup>55</sup>

#### **Article 9(4) – claimant’s own legal costs**

73. The communicant alleges that judicial review is prohibitively expensive for all but the wealthiest challengers.<sup>56</sup> It claims that a claimant’s own legal costs are a decisive factor in access to justice and that it is aware of five other High Court challenges where claimants were forced to represent themselves due to the cost of legal representation.<sup>57</sup>

74. The communicant submits that cross-caps act as a further deterrent to access to justice because they leave successful claimants unable to fully recover their own costs. It claims that it has identified, but lacks financial means to contest, 13 planning applications affecting the River Faughan in which there are serious defects.<sup>58</sup>

75. The communicant claims that it was prevented from appealing the High Court’s judgment due to the legal costs it had already incurred.<sup>59</sup>

76. The Party concerned submits that a claimant’s own legal costs are not relevant to whether proceedings are prohibitively expensive and that the cost of judicial review has already been considered by the Committee and the Meeting of the Parties in decision V/9n.<sup>60</sup>

77. The Party concerned contends that the £6,000 costs order, which represented only a fraction of the defendant’s costs, cannot be considered prohibitively expensive, and it was reasonable to recover some costs to protect the “public purse”.<sup>61</sup>

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

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

#### **Admissibility and scope of review**

79. Before the hearing at its fifty-ninth meeting, the Committee determined the allegations under articles 1, 3(8) and 4 to be inadmissible under paragraphs 19 and 20(c) and (d) of the annex to decision I/7 as follows:

(a) Regarding article 1, the communication does not contain any separate allegations concerning this provision not already encompassed within the communicant’s claims relating to other provisions;

(b) Concerning article 3(8), the communicant has not provided evidence that the costs of judicial review or any other actions taken by the public authorities in its case amount to persecution, penalization or harassment. The Committee thus found the allegation concerning article 3(8) to be not substantiated;

(c) Regarding article 4, the allegations concern the alleged failure by the Party concerned’s authorities to provide the communicant with information relevant to the environmental decision-making in order to enable it to participate effectively in that decision-making. The Committee thus agreed that these allegations should be examined under article 6(6).<sup>62</sup>

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<sup>55</sup> Party’s response to communication, paras. 63–72 and 75.

<sup>56</sup> Communication, para. 22.

<sup>57</sup> Communicant’s reply to questions, 16 February 2017, pp. 21–22.

<sup>58</sup> Communicant’s additional information, 30 August 2013, p. 10.

<sup>59</sup> Communicant’s update, 22 February 2014, p. 1.

<sup>60</sup> Party’s response to communication, paras. 82–83.

<sup>61</sup> *Ibid.*, para. 91.

<sup>62</sup> Letter to the communicant and the Party concerned, 5 December 2017, p. 1.



80. At the hearing, the Committee confirmed its earlier determination of admissibility regarding the allegations under article 3(2), 6 and 9. The Committee thus finds these aspects of the communication to be admissible.

81. Given that it was only through the Party concerned's comments on the draft findings that the Committee was informed about subsequent developments in its legal framework, the Committee examines the legal framework of the Party concerned at the time of the events at issue. Accordingly, any later developments in the legal framework are not within the scope of these findings.

#### **Article 6(1)(b) – applicability**

82. Article 6(1)(b) requires that each Party shall, in accordance with its national law, apply the provisions of article 6 to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions.

83. In its findings on communication ACCC/C/2010/50 (Czech Republic), the Committee held that the outcome of an EIA screening process was a determination under article 6(1)(b) on whether an activity which is outside the scope of annex I should be subject to the provisions of article 6.<sup>63</sup> A “positive” EIA screening determination is a determination that the activity is likely to have significant effects on the environment and thus an EIA must be carried out. In line with the above findings, it is also a determination under article 6(1)(b) that the activity is subject to the provisions of article 6.<sup>64</sup>

84. Article 6(3) of the Habitats Directive (at the time, implemented in Northern Ireland through regulation 43 of the Conservation (Natural Habitats) Regulations 1995), requires any plan or project “likely to have a significant effect” on a SAC, either individually or in combination with other plans or projects, to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The decision to carry out an appropriate assessment under article 6(3) of the Habitats Directive is therefore a determination that an activity is likely to have a significant effect on the SAC. It is likewise a determination under article 6(1)(b) that the activity is subject to the provisions of article 6 of the Convention. Importantly, it is not the outcome of the appropriate assessment that is the determination for the purposes of article 6(1)(b), but the fact that it is determined that an appropriate assessment must be carried out.

85. On 15 October 2010, DOE Planning carried out an appropriate assessment on Chamber's original application A/2008/0408/F regarding the lagoons in their existing location. By doing so, the Party concerned is deemed to have determined that the original application was an activity subject to article 6 of the Convention.

86. On 31 May 2011, DOE Planning carried out an appropriate assessment regarding the revised site plan with the lagoons relocated outside of the floodplain. Accordingly, the revised application for the project, in which the lagoons were to be relocated, was also an activity subject to the provisions of article 6.

87. The Committee thus concludes that the activity was subject to article 6(1)(b) and the requirements of article 6 applied. The original and revised applications are examined under article 6(4) and (6) respectively below.

#### **Article 6(4) – early and effective participation on original application A/2008/0408/F**

88. The communicant submits that, by allowing development consents for projects to be obtained retrospectively, the Party concerned does not allow the public to become involved in environmental decision-making at an early stage.<sup>65</sup> The communicant submits that this was the case for the settlement lagoons, as they were constructed and in operation before the planning application for their retention was submitted in May 2008.

<sup>63</sup> ECE/MP.PP/C.1/2012/11, para. 82.

<sup>64</sup> See also Court of Justice of the European Union, *Lesoochránárske zoskupenie VLK v. Obvodný úrad Trenčín*, Judgment, Case No. C 243/15, 8 November 2016, paras. 45–49.

<sup>65</sup> Communication, para. 19.

89. Article 5(1)(a) of the Convention requires that public authorities possess and update environmental information relevant to their functions. Apparently, due to DOE Planning's ongoing lack of development control regarding this site, it does not know exactly when the three lagoons were constructed.

90. One lagoon was evidently constructed prior to an aerial photograph taken on 19 April 2003. That lagoon is thus outside the scope of the Convention, which only addresses events since its entry into force for the Party concerned on 24 May 2005.

91. The two additional lagoons were constructed at an unknown date between 19 April 2003 and 23 May 2007. Since article 5(1)(a) requires DOE Planning, as the competent public authority for planning control, to possess and update environmental information relevant to its planning functions, the onus is on the Party concerned to demonstrate to the Committee that the two additional lagoons were constructed prior to the Convention's entry into force on 24 May 2005. Since the Party concerned has provided no evidence that the two lagoons were constructed before 24 May 2005, the Committee considers these to be within the scope of the Convention.

92. In its findings on communication ACCC/C/2009/44 (Belarus), the Committee held that the Party concerned in that case had failed to meet the obligation in article 6(4) to provide for "early public participation, when all options are open" because it had already decided on the activity's location prior to public participation.<sup>66</sup> Likewise, in its findings on communication ACCC/C/2004/2 (Kazakhstan), the Committee held that the fact that construction had started before public hearings were held was clearly not in conformity with article 6(4).<sup>67</sup>

93. In the present case, the construction had not only "started" prior to the opportunity for the public to participate; the lagoons had been constructed and put in operation.

94. For an activity likely to have a significant effect on the environment, such as the lagoons in the present case, it can never meet the requirement of article 6(4) of the Convention for "early public participation, when all options are open" for the decision to permit the activity to be taken after the activity has already commenced or the construction has taken place.

95. Based on the foregoing, the Committee finds that, by only providing for public participation in the decision-making to permit the lagoons once they had already been constructed, the Party concerned failed to meet the requirement in article 6(4) to provide for early public participation when all options are open.

**Article 6(6) – access to all information relevant to the decision-making on revised application A/2008/0408/F**

96. The communicant alleges that, despite its multiple requests, both in-person and in writing, for the DCO report prior to the grant of planning permission, the report was provided only four days after planning permission was granted.

97. The DCO report is one of the main, if not the main, reports on which the public authority bases its decision on whether to grant planning permission. It is thus clearly information relevant to the decision-making. Accordingly, the Committee finds that, by not providing the communicant with access to the DCO report prior to the decision to grant planning permission, despite the communicant's multiple requests, the Party concerned failed to comply with article 6(6) of the Convention.

98. The Committee notes, however, that in October 2013, DOE Planning issued an instruction to its officials that DCO reports should be published on the planning portal one week prior to the date on which the decision on whether to grant permission would be made.<sup>68</sup> Moreover, the Committee has no evidence that the non-compliance identified in the

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<sup>66</sup> ECE/MP.PP/C.1/2011/6/Add.1, para. 78.

<sup>67</sup> ECE/MP.PP/C.1/2005/2/Add.2, para. 25.

<sup>68</sup> Communicant's reply to questions, 16 February 2017, pp. 6–7.

preceding paragraph has occurred in other cases or is of a wide or systemic nature. The Committee thus does not make a recommendation on this point.

### **Article 6 in general – certificate of lawful development**

99. At the time of the events at issue, article 83A of the Planning (Northern Ireland) Order 1991 provided for a “certificate of lawfulness of existing use or development” (CLUD) to be granted for an existing use of buildings or land if no enforcement action might at that time be taken because, inter alia, the time for enforcement action had expired.<sup>69</sup>

100. Article 67B(3) stated that no enforcement action might be taken after the end of a period of four years from when the development was substantially completed.<sup>70</sup>

101. Pursuant to article 83A(4), “if, on an application under this article, the Department is provided with information satisfying it of the lawfulness at the time of the application of the use, operations or other matter described in the application ... the Department shall issue a certificate to that effect”.<sup>71</sup>

102. There is no provision for public participation to be carried out prior to the grant of a CLUD. In fact, the application for, and grant of, a CLUD is not even publicly notified.<sup>72</sup>

103. In 2006, DOE Planning commenced enforcement proceedings A/2006/0043CA regarding the unauthorized change of use, infilling and lagoons at Chambers’ site.<sup>73</sup>

104. On 5 March 2008, DOE Planning issued a CLUD under article 83A for the existing use “Premises of concrete products and sand and gravel merchants including offices, weighbridge, canteen, drying shed, vehicle maintenance shed, bagging plant, concrete plant, storage (pipes, bagged sand, gravel binds), parking area, hardstandings for circulation and laying out of blocks and washing facilities” at Chambers’ site.<sup>74</sup>

105. The lagoons and other operations to the south-west of the site were not included in the CLUD because they were not yet immune from enforcement action under article 67B(3) (that is, they had not yet been substantially completed for more than four years). This ultimately led to application A/2008/0408/F being made.<sup>75</sup>

106. The combined effect of article 67B(3) and the March 2008 CLUD was that Chambers’ operation was “salami-sliced”, so that, by the time the appropriate assessment on application A/2008/0408/F was carried out on 15 October 2010, the application concerned only a small part of Chambers’ operation.

107. However, as evidenced by DOE Planning’s 2006 enforcement proceedings A/2006/0043CA, issued after the Convention’s entry into force for the Party concerned, the non-permitted activity of “use, infilling and lagoons” was in fact just one activity, on one site, by one operator.

108. It is evident from the 24 August 2012 DCO report that, at the time of deciding planning permission, all options were no longer open and that this was due in significant part to the CLUD. That report states that:

The vast majority of the operation was dealt with under the CLUD and therefore is certified as lawful development. The Department accepts that the remaining aspects of the development are modest, when considered in the context of the entire operation ... It would be unreasonable to expect the entire operation to relocate to a new location in order to accommodate business-related expansion. The lagoons are an important

<sup>69</sup> Communication, annex 12, p. 57.

<sup>70</sup> Communication, annex 10, p. 40.

<sup>71</sup> Communication, annex 12, p. 57.

<sup>72</sup> Party’s response to communication, annex 5, p. 32.

<sup>73</sup> Party’s reply to Committee’s questions, 12 March 2018, annex A, p. 1.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

element in the running of the business and were originally constructed on the recommendation of NIEA in order to prevent run off in the River Faughan.<sup>76</sup>

109. DOE Planning formulated its recommendation to approve planning permission that same day.

110. The Committee understands that the combined effect of articles 67B(3) and 83A meant that DOE Planning had no option in March 2008 but to grant the CLUD upon Chambers' application. The problem is thus with the legal framework of the Party concerned and not just an isolated case.

111. The combined effect of articles 67B(3) and 83A is that:

(a) Activities that may have significant environmental effects become immune from enforcement action four years after they have been substantially completed (a potential barrier to access to justice under article 9(3) of the Convention, but since this was not raised in the communication, the Committee will not examine this point here);

(b) Activities that may have significant effects are retrospectively permitted (without any environmental assessment or any environmental conditions being included in the permit), without any opportunity for the public to participate in that decision-making.

112. Articles 67B(3) and 83A are thus fundamentally inconsistent with the requirement to ensure effective public participation (and access to justice) under the Convention. Indeed, they run directly counter to the obligation in article 1 that each Party shall guarantee the rights of public participation in decision-making (and access to justice) in environmental matters in order to contribute to the protection of the right of every person to live in an environment adequate to his or her health and well-being.

113. Based on the foregoing, the Committee finds that, by having in place a system through the combined operation of articles 67B(3) and 83A of the Planning (Northern Ireland) Order 1991 whereby activities within the scope of article 6 of the Convention that are themselves in breach of national law relating to the environment are deemed to be lawful and permitted without public participation meeting the Convention's requirements, the Party concerned failed to comply with article 6 of the Convention in its entirety.

#### **Article 9(2) – applicability**

114. Since the 13 September 2012 planning permission was a decision under article 6(1)(b) of the Convention, the requirements of article 9(2) applied to that decision.

115. Additionally, as the Committee has held in previous findings,<sup>77</sup> a screening decision is a determination under article 6(1)(b). Accordingly, article 9(2) applied to the 2008 and 2012 screening decisions on the original and revised planning applications.

#### **Article 9(2) – challenging substantive legality**

116. The communicant alleges that it did not have access to a review of the substantive legality of the 2012 screening decision and the 13 September 2012 planning permission as required by article 9(2).

117. The Committee thus examines whether the review of substantive legality carried out by the court met the standard required by article 9(2).

118. In its findings on communication ACCC/C/2012/76 (Bulgaria), the Committee assessed court practice in providing interim relief under article 9 (4), specifically, appeals against orders for preliminary enforcement of EIA/strategic environmental assessment (SEA) decisions challenged on the grounds of potential environmental damage. The Committee found that:

A practice in which the review bodies rely on the conclusions of the contested EIA/SEA decision, rather than making their own assessment of the risk of

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<sup>76</sup> Communication, annex 12, p. 53.

<sup>77</sup> ECE/MP.PP/C.1/2013/12, para. 83.

environmental damage in the light of all the facts and arguments significant to the case, taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm, does not ensure that such procedures provide adequate and effective remedies to prevent environmental damage. Therefore, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.<sup>78</sup>

119. The Committee considers that the same analysis holds for the requirement to provide for a review of substantive legality under article 9(2). While recognizing that different legal systems may have differing approaches regarding the precise nature of the review procedure provided for the purpose of article 9(2), article 9(2) requires that a reviewing body must review all the facts, evidence and arguments before it and, based on that review, determine whether the contested decision is lawful. This requires the court to carry out its own assessment, in the light of all the evidence before it, as to whether the applicable legal requirements were met. The court must also clearly set out its reasoning when doing so.

120. For example, in a challenge to the substantive legality of an EIA screening decision, the court must make its own assessment, based on all the evidence put before it, as to whether the proposed activity was likely to have a significant effect on the environment and thus to require an EIA. It would not be sufficient to merely check that the decision-maker carried out the correct procedural steps for determining whether a project was likely to have significant effects. Nor does it suffice for the court to check that the decision-maker had formally applied the correct legal test and that the decision-maker had convinced itself that that test was met in a particular case.

121. To be clear, the Convention does not require the court to undertake a completely fresh analysis of all matters arising in the case and to substitute its decision for the decision taken by the competent authority. Nevertheless, the court must undertake its own assessment of all the evidence before it to determine whether the applicable legal requirements were met. The Committee considers that this requires the court to perform a review function over findings of fact and the weight to be given to evidence where those may have a direct impact on the determination as to whether the applicable legal test (for example, likely significant effects) has been met.

*Communicant's judicial review proceedings*

122. In its application for judicial review, the communicant raised several grounds. The Committee focuses on the following two grounds from the communicant's application:

- (a) The Department erred in making its determination under Regulation 9 of the EIA Regulations (ground 9(c));
- (b) Permit conditions 1 and 2 are incompatible (ground 11(b)(1)).

123. In its examination below, the Committee does not purport to make any findings on what the outcome of the court's review should have been. Rather, it considers the standard of review applied by the court and whether that standard meets the requirements of a review of substantive legality under article 9(2) of the Convention.

(a) The Department erred in making its determination under Regulation 9 of the EIA Regulations (ground 9(c))

124. Under this ground, the communicant claimed that the Department erred in making its screening determination, inter alia, by failing to take adequate account of the criteria set out in Schedule 3 of the EIA Regulations (and annex III to the EIA Directive) including the potential for pollution and the environmental sensitivity of the SAC.<sup>79</sup>

125. Schedule 3(1) requires that the "characteristics of the development must be considered having regard, in particular to: ... (e) pollution and nuisances". With respect to (e), the 2012 screening decision simply states "N" (i.e. "no"), without any further explanation.

<sup>78</sup> ECE/MP.PP/C.1/2016/3, para. 77.

<sup>79</sup> Party's response to communication, annex 1, para. 4.

126. Schedule 3(2) requires that “the environmental sensitivity of geographical areas likely to be affected by development must be considered, having regard, in particular to [inter alia, areas designated pursuant to the Habitats Directive]”. For this criterion, the screening decision again states “N” without any further explanation.

127. The risk of pollution to the River Faughan SAC is the very reason why it was proposed to resite the lagoons.<sup>80</sup> However, sections 1 and 2 of the screening decision state that neither pollution nor the environmental sensitivity of the River Faughan SAC were matters that needed to be considered when carrying out the screening decision.

128. In reviewing the communicant’s claims that DOE Planning failed to take adequate account of the Schedule 3 criteria, the court did not undertake any assessment of its own of whether pollution and the environmental sensitivity of the SAC were criteria that should have been considered when carrying out the screening decision in this case, and if so, whether the screening decision demonstrated that they had been properly considered.

129. Rather, the court relied on the evidence of DOE Planning’s senior enforcement officer, Mr. Brown, as to how the screening decision had been done, even though Mr. Brown did not himself carry out the screening.

130. In essence, the judge accepted that DOE Planning properly carried out the screening decision, because Mr. Brown’s affidavit said that it did. For example, the court quotes from Mr. Brown’s affidavit regarding the Schedule 3 criteria:

The Department also took account of the selection criteria and all other information available to it when arriving at its final determination. The characteristics of the development were considered having regard to the areas as set out in Schedule 3 of the Environmental Regulations as follows ...

131. Having examined the judgment closely, the Committee cannot see any indication that the court undertook any assessment itself of whether the Schedule 3 criteria were applied correctly in determining whether the activity was likely to have a significant effect on the environment. Rather, it relied on the affidavit evidence of the decision-maker that it had carried out a proper process, since that was not evident from the “Y/N” wording of the screening decision itself.

132. That this was the standard of review applied by the court is expressly stated in the judgment. For example:

I remind myself that the judgement as to whether a development falling within Schedule 2 has significant effects upon the environment is a matter of planning judgement for the decision-maker only reviewable on *Wednesbury* grounds. Findings of fact, the weight to be given to evidence and the balancing of relevant considerations are for the primary decision-maker.

...

There is considerable force in the respondent’s submission that the criticisms levelled by the applicant are criticisms of the respondent’s findings of fact, the weight to be given to evidence particularly from specialist consultees and the balancing of relevant considerations by the respondent. It is not the function of the court in judicial review to substitute its own opinion of the evidence for that of the respondent. The court is not sitting as an appeal court to carry out a merits-based review.<sup>81</sup>

133. The Committee does not examine whether the *Wednesbury* test itself meets the requirements of article 9(2). Rather, based on paragraphs 119–121 and 124–132 above, the Committee considers that, by not undertaking its own assessment of whether the Schedule 3 criteria were met and thus whether the development was “likely to have significant effects on the environment by virtue of factors such as its nature, size or location”<sup>82</sup> but instead relying on the evidence of the public authority that the screening decision had been properly

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<sup>80</sup> See communication, annex 4, pp. 13–14.

<sup>81</sup> Party’s response to communication, annex 1, paras. 114 and 119.

<sup>82</sup> The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999, regulation 2(2).

carried out, the standard of review applied by the court in this case did not meet the requirement to provide for the review of the substantive legality of decisions subject to article 6 of the Convention as required by article 9(2).

(b) Permit conditions 1 and 2 are incompatible (ground 11(b)(1))

134. Under this ground, the communicant claimed that “the Department erred in law when imposing conditions on the permission ... by imposing conditions 1 and 2, which are incompatible by ... requiring proposed lagoon construction in the location of an existing lagoon”.

135. In its judgment, the court set out the applicable law on judicial review of permit conditions:

Conditions on planning permissions should be interpreted benevolently and not narrowly or strictly... A condition will [be] invalid only “if it can be given no meaning or no sensible or ascertainable meaning”... However, conditions must nonetheless be reasonable in the *Wednesbury* sense to be valid in law.<sup>83</sup>

136. Permit condition 3 required that the approved development “be carried out in accordance with the stamped approved drawings ... The phasing of the works hereby approved shall be carried out as detailed in drawing 07 rev 3.”

137. Drawing 07 rev 3 was before the court, together with the other stamped approved drawings. To support its case that conditions 1 and 2 were not compatible because the new lagoons were required to be built partly on top of the existing lagoons, the communicant also submitted marked-up versions of those drawings to demonstrate how the new lagoons would overlap with the existing lagoons. These included marked-up versions of drawing 07 rev 3 showing the parts of the new lagoons that would be built in the water of the existing lagoons.

138. The communicant’s mark-up on the approved drawings shows overlaps between the proposed lagoons and one of the existing lagoons. It is not within the Committee’s remit to ascertain whether there were in fact any such overlaps. However, it considers that a review of the substantive legality of the permit conditions would require the court to clearly assess this discrepancy in the parties’ evidence. Yet, the communicant’s evidence on this matter is not identifiably addressed in the judgment at all. On this point, the Committee underlines that the court must clearly and demonstrably examine all the evidence before it and explain why it reaches the conclusion it does. In the present case, the court did not do so. Rather it accepted the evidence of Mr. Brown, DOE Planning’s senior enforcement officer, without explanation and without commenting on the conflicting evidence provided by the communicant. The court’s reliance on Mr. Brown’s evidence is illustrated by the almost word-for-word adoption thereof in the judgment. For instance, paragraph 57 of Mr. Brown’s affidavit states that:

Although the proposed lagoons are in close proximity to the existing lagoons, there is no overlap and the site sections as indicated on approved drawing 07 Rev 3 demonstrates that the new lagoons can be constructed without interference with the existing lagoons.<sup>84</sup>

139. Paragraph 94 of the court’s judgment states that:

Whilst the proposed lagoons are in close proximity to the existing lagoons the site sections as indicated on approved drawing 07 Rev 3 demonstrates that the new lagoons can be constructed without interference with the existing lagoons.

140. The Committee can see nothing in the judgment to indicate that the court carried out its own assessment of whether permit conditions 1 and 2 could be implemented in practice and in particular whether, based on the conflicting evidence before it, it was technically possible to construct two new lagoons in the waters of the most highly contaminated existing lagoon, without any adverse effects on the environment. Rather, the court appears to have simply relied on the decision-maker’s evidence that it could be done. While it was of course open to the court to decide that the decision-maker’s evidence was the more convincing, it

<sup>83</sup> Party’s response to communication, annex 1, para. 85, case citations omitted.

<sup>84</sup> Party’s reply to Committee’s questions, 12 March 2018, annex D, para. 57.

needed then to explain why it rejected the communicant's evidence on this point. The judgment is silent in this regard. The approach taken by the court does not meet the requirement of article 9(2) to provide for the review of the substantive legality of decisions, acts and omissions subject to article 6.

*Conclusion regarding article 9(2) – challenging substantive legality*

141. Based on the foregoing, the Committee finds that, by the court not undertaking its own assessment, based on all the evidence before it, of whether:

(a) The development was “likely to have significant effects on the environment by virtue of factors such as its nature, size or location”;<sup>85</sup>

(b) The permit conditions could be implemented in practice without adverse environmental impacts,

but instead relying on the assessment of the public authority that took the contested decisions, the Party concerned failed to provide for a review of the substantive legality of those decisions in accordance with the requirements of article 9(2) of the Convention.

142. Noting that the issue of review of substantive legality under article 9(2) in the Party concerned is also before the Committee at a wider level in communication ACCC/C/2017/156 (United Kingdom), the Committee does not make a recommendation on this issue in the present case.

**Article 9(4) – third party appeal rights**

143. Under the Party concerned's legal framework, applicants for planning permission for an activity subject to article 6 of the Convention can appeal the planning decision, and any conditions thereof, to the Planning Appeals Commission (PAC). PAC undertakes a full merits review. In contrast, other members of the public seeking to challenge the same decision must apply for permission to the High Court to bring judicial review. While, if the planning applicant brings an appeal to PAC, other members of the public can participate in that proceeding, they cannot bring a case to PAC themselves.

144. In its findings on communications ACCC/C/2010/45 and ACCC/C/2011/60 (United Kingdom), the Committee held that the right of a developer in England and Wales to appeal a refusal to grant planning permission to the Secretary of State for Communities and Local Government or to the Secretary of State's Planning Inspectors was not a review procedure under article 9(2) of the Convention because the appeal was “before an executive body, not constituting a court of law or independent and impartial body established by law”.<sup>86</sup>

145. The Committee does not examine in the present case whether the right of a developer in Northern Ireland to appeal a planning decision, or any conditions thereof, to the Planning Appeal Commission is a review procedure under article 9(2) of the Convention. However, it is clear that for a planning decision in Northern Ireland subject to article 6 of the Convention, the developer is entitled to a full merits review of that decision by a specialist planning body, whereas other members of the public seeking to exercise their rights under article 9(2) are not. This situation is clearly not fair within the meaning of article 9(4) of the Convention.

146. The Committee finds that, by maintaining a legal framework under which developers of proposed activities subject to article 6 of the Convention are entitled to a full merits review of the decision on the proposed activity, but other members of the public seeking to challenge the same decision are not, the Party concerned fails to ensure that review procedures under article 9(2) are fair as required by article 9(4) of the Convention.

147. Noting that the standard of review under article 9(2) in the Party concerned is also before the Committee at a wider level in communication ACCC/C/2017/156 (United Kingdom), including the right of developers, but not other members of the public, to a full

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<sup>85</sup> The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999, regulation 2(2).

<sup>86</sup> ECE/MP.PP/C.1/2013/12, para. 84.



merits review,<sup>87</sup> the Committee does not make a recommendation on this issue in the present case.

#### **Article 9(4) – prohibitively expensive legal costs**

148. The communicant’s own legal fees for its judicial review proceedings totalled £160,000. The communicant claims that this was 2.5 times its annual running fees, and that as a result of these fees, it had to make redundant two full-time and one part-time staff members, it was placed on the verge of bankruptcy and precluded from appealing the High Court’s judgment.

149. As it has held in past findings, “when assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, of the Convention, the Committee considers the cost system as a whole and in a systemic manner”.<sup>88</sup> In the present case, the Committee has before it the sum of legal fees paid by the communicant, but no information on whether it may have been possible to offset or mitigate some of these costs, for example, through use of a conditional fee agreement, or by instructing one barrister rather than two. Accordingly, while acknowledging that the sum of the communicant’s legal fees is extremely high, the Committee is not in a position to make a finding on this point.

#### **Article 3(2)**

150. The communicant claims that the Party concerned failed to comply with article 3(2) in two respects. First, because DOE Planning did not include the required level of environmental information in its screening decisions. Second, because when the communicant asked DOE Planning to justify its negative screening decision it declined to do so, informing the communicant that it was entitled to bring judicial review proceedings if it wished to pursue this matter.<sup>89</sup> The Committee also considers DOE Planning’s handling of the communicant’s requests for access to the 24 August 2012 DCO report of relevance to article 3(2). These matters are each examined below.

151. In its findings on communication ACCC/C/2013/92 (Germany), the Committee held that:

While this is an obligation of effort, rather than of the result, nevertheless the efforts taken may be subject to due diligence scrutiny. Moreover, while the obligation to “endeavour to ensure”, just like all other obligations in the Convention, is addressed to the Party concerned, the Committee may examine in specific cases whether a public authority or an official, as a representative of the Party concerned, took the efforts needed to meet the requirement of this provision.<sup>90</sup>

#### *Level of environmental information in screening decisions*

152. The Committee considers that the communicant has not explained how the level of information in an EIA screening decision falls under article 3(2). The Committee thus finds this allegation to be unsubstantiated.

#### *Correspondence between communicant and DOE Planning*

153. The communicant’s second allegation concerns the statement in DOE Planning’s 2 August 2012 letter that “the Department does not consider it appropriate to engage in extended and expansive correspondence in the light of your stance as there is an appropriate route for remedy through judicial review”.<sup>91</sup>

<sup>87</sup> Communication on ACCC/C/2017/156 (United Kingdom), p. 13.

<sup>88</sup> Committee’s findings on communication ACCC/C/2008/33 (United Kingdom), ECE/MP.PP/C.1/2010/6/Add.3, para. 128.

<sup>89</sup> Communication, para. 17.

<sup>90</sup> ECE/MP.PP/C.1/2017/15, para. 88.

<sup>91</sup> Communication, annex 8, p. 35.

154. The Party concerned submits that this letter must be considered against the background of all the correspondence and engagement that preceded it.<sup>92</sup>

155. The Committee has reviewed the correspondence between the communicant and DOE Planning from 2006 to 2012.<sup>93</sup> It is clear to the Committee that, in its letters to DOE Planning during that period, the communicant was seeking to exercise its rights under the Convention to access environmental information, to challenge contraventions of national law relating to the environment and to participate in any resulting permitting process that might take place on those then-non-permitted activities.

156. In that correspondence, the communicant repeatedly asked DOE Planning to take action against Chambers' non-permitted activities, lest a pollution incident occur or the non-permitted activities become immune from enforcement.<sup>94</sup>

157. By the time that DOE Planning took enforcement action in 2006, the majority of Chambers' non-permitted activities had become immune from enforcement and were granted a CLUD in 2008. Regarding the non-permitted lagoons, by the time DOE Planning issued enforcement notices in May 2011, those too had become immune from enforcement action.

158. The result of DOE Planning's failure over many years to take effective enforcement action against Chambers' non-permitted activities, notwithstanding the communicant's many requests, was that those operations became immune from enforcement and, for most of the site, subject to a CLUD. Thus the public could no longer have access to justice to challenge the operator's contraventions of national law, because the law was deemed to be no longer contravened. Nor could the public have a right to participate in any permitting process, because there is no public participation regarding a CLUD.

159. Based on the foregoing, the Committee finds that, by failing to take effective enforcement action against the operator's non-permitted activities for so long that those activities were deemed lawful and could no longer be subject to either public participation in decision-making under article 6 or access to justice under article 9(3), the Party concerned failed to meet the requirements of article 3(2) to endeavour to ensure that its officials and authorities facilitate the public's participation in decision-making and access to justice under the Convention.

*Communicant's requests for access to 24 August 2012 report*

160. The Committee understands that it is DOE Planning's practice to publish the DCO report prior to making a recommendation on a planning permission to the Council. This did not however happen with the 24 August 2012 DCO report.

161. When the communicant sought access to the report on 4 and 11 September 2012 (in person) and on 6 September 2012 (in writing), DOE Planning informed the communicant that the report was not finalized. The report was posted to the communicant on 17 September 2012, after planning permission was granted on 13 September 2012.<sup>95</sup>

162. At the hearing before the Committee, the Party concerned conceded that matters "fell down" here and that the usual practice of "an open file approach" was not delivered in this particular instance. It accepted that the communicant had sought a copy of the report, that it was not provided on request and that the report existed at the time it was requested.

163. The Committee recalls that the DCO report is one of the main, if not the main, reports to be put before the decision-makers prior to granting planning permission. The communicant's request for access to the report was directly related to its desire to participate in that decision-making prior to planning permission being granted. The competent

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<sup>92</sup> Party's response to communication, para. 26.

<sup>93</sup> Ibid., annex 5.

<sup>94</sup> See, for example, the communicant's letters to DOE Planning of 1 February 2006, 16 February and 19 June 2007, 5 February, 11 August, 9 October and 20 November 2008, 6 December 2011 and 21 August 2012.

<sup>95</sup> Communication, para. 20.

authority's failure to provide the report to the communicant in these circumstances is a serious matter.

164. Given the foregoing, the Committee finds that, by not providing the communicant with access to the DCO report prior to the decision to grant planning permission, despite the communicant's multiple requests, the Party concerned failed to meet the requirements of article 3(2) to endeavour to ensure that its officials and authorities assist the public in seeking access to information and facilitate its participation in decision-making under the Convention.

165. Taking into consideration that no evidence has been presented that the non-compliance with article 3(2) found in paragraph 164 was of a wide or systemic nature, the Committee refrains from making a recommendation on this point.

## IV. Conclusions and recommendations

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

### A. Main findings regarding non-compliance

167. The Committee finds that:

(a) By only providing for public participation in the decision-making to permit the lagoons once they had already been constructed, the Party concerned failed to meet the requirement in article 6(4) to provide for early public participation when all options are open;

(b) By not providing the communicant with access to the DCO report prior to the decision to grant planning permission, despite the communicant's multiple requests, the Party concerned failed to comply with article 6(6) of the Convention;

(c) By having in place a system through the combined operation of articles 67B(3) and 83A of the Planning (Northern Ireland) Order 1991 whereby activities within the scope of article 6 of the Convention that are themselves in breach of national law relating to the environment are deemed to be lawful and permitted without public participation meeting the Convention's requirements, the Party concerned failed to comply with article 6 of the Convention in its entirety;

(d) By the court not undertaking its own assessment, based on all the evidence before it, of whether:

(i) The development was "likely to have significant effects on the environment by virtue of factors such as its nature, size or location";<sup>96</sup>

(ii) The permit conditions could be implemented in practice without adverse environmental impacts,

but instead relying on the assessment of the public authority that took the contested decisions, the Party concerned failed to provide for a review of the substantive legality of those decisions in accordance with the requirements of article 9(2) of the Convention;

(e) By maintaining a legal framework under which developers of proposed activities subject to article 6 of the Convention are entitled to a full merits review of the decision on the proposed activity, but other members of the public seeking to challenge the same decision are not, the Party concerned fails to ensure that review procedures under article 9(2) are fair as required by article 9(4) of the Convention;

(f) By failing to take effective enforcement action against the operator's non-permitted activities for so long that those activities were deemed lawful and could no longer be subject to either public participation in decision-making under article 6 or access to justice

<sup>96</sup> The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999, regulation 2(2).

under article 9(3), the Party concerned failed to meet the requirements of article 3(2) to endeavour to ensure that its officials and authorities facilitate the public's participation in decision-making and access to justice under the Convention;

(g) By not providing the communicant with access to the DCO report prior to the decision to grant planning permission, despite the communicant's multiple requests, the Party concerned failed to meet the requirements of article 3(2) to endeavour to ensure that its officials and authorities assist the public in seeking access to information and facilitate its participation in decision-making under the Convention.

## **B. Recommendations**

168. The Committee, pursuant to paragraph 36(b) of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37(b) of the annex to decision I/7, recommends that the Party concerned take the necessary legislative, regulatory, administrative and practical measures to ensure that:

(a) Decisions to permit activities subject to article 6 of the Convention cannot be taken after the activity has already commenced or has been constructed, save in highly exceptional cases and subject to strict and defined criteria;

(b) Activities subject to article 6 of the Convention are not entitled, by law, to:

(i) Become immune from enforcement under article 67B(3) of the Planning (Northern Ireland) Order 1991 or any legislation that supersedes it;

(ii) Receive a certificate of lawful development under article 83A of the Planning (Northern Ireland) Order 1991 or any legislation that supersedes it.

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