

Findings and recommendations with regard to communication ACCC/C/2010/53 concerning compliance by the United Kingdom of Great Britain and Northern Ireland

**Prepared by the Compliance Committee and adopted on 28 September
2012¹**

I. Introduction

1. On 26 November 2010, the Moray Feu Traffic Subcommittee of Lord Moray's Feuars Committee (hereinafter, "the communicant"), representing interests of Moray Feu residents, submitted a communication to the Compliance Committee alleging that the United Kingdom of Great Britain and Northern Ireland (United Kingdom) had failed to comply with its obligations under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter "the Aarhus Convention" or "the Convention").

2. The communicant alleges that its rights under all three pillars of the Convention have been breached, and in particular articles 1, 3, 4, 5, 6, 7, and 9. First, the communicant alleges that the City of Edinburgh Council has failed to collect relevant environmental information and to provide environmental information that it already possesses, upon request. Second, the communicant alleges that it has been denied meaningful participation with respect to the permanent rerouting of traffic through the residential area of Moray Feu, Edinburgh, in order to make room for a light rapid transit system, the Edinburgh Tram Network. Third, the communicant alleges that, through the use of a private Act of Parliament to approve the tram system, residents of Moray Feu have been denied access to justice regarding a significant infringement on their environment. .

3. At its thirty-first meeting (22-25 February 2011), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 29 March 2011. On the same date, taking into account that a complaint on this matter had also been submitted by the communicant to the Scottish Public Services Ombudsman (SPSO), the Committee decided to suspend any further consideration of the communication until further information was provided on the progress of the complaint before the SPSO.

5. On 29 June 2011, the communicant forwarded to the Committee the SPSO's decision, together with the communicant's letter to the SPSO providing its comments on that decision.

6. On 12 July 2011, the communicant forwarded to the Committee various email correspondence between itself and the City of Edinburgh.

7. By letter of 23 August 2011, the Party concerned responded to the communicant's allegations.

¹ This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes which are not part of the editorial process and aim at correcting errors in the argumentation, but have no impact on the findings and conclusions) may take place.

8. At its thirty-fourth meeting (20-23 September 2011), the Committee agreed to discuss the content of the communication at its thirty-fifth meeting (13-16 December 2011).
9. In response to a request by the Committee, by letter of 29 November 2011, the communicant itemised the various provisions of the Convention it alleged the Party concerned to have breached.
10. The Committee discussed the communication at its thirty-fifth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication.
11. Further to the Committee's request for clarification of certain issues, the communicant submitted additional information on 9, 11, 15 and 16 February 2012, and the Party concerned on 17 February 2012.
12. The Committee prepared draft findings at its thirty-seventh meeting (26-29 June 2012), and in accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 13 August 2012. Both were invited to provide comments by 10 September 2012.
13. The Party concerned and the communicant provided comments on 10 September 2012.
14. At its thirty-eighth meeting (25-28 September 2012), the Committee adopted its findings and agreed that they should be published as addendum to the Committee's report on its fortieth meeting (25-28 March 2013). It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues²

A. Legal framework

15. In February 2008, the Scottish Government amended the Local Authorities Traffic Orders (Procedure) (Scotland) Regulations, 1999 (SSI 2008/03). These Regulations set out the procedure to be followed by local authorities before they make a Traffic Regulation Order (TRO) like those brought in in order to allow the Edinburgh Tram Network to operate within sections of the public road network. This amendment was intended to speed up the application of the regulations to projects which have already been subject to full parliamentary scrutiny and approved under an Act of Parliament by providing for discretionary, rather than mandatory, hearings of objections.

16. The Transport, Infrastructure and Environment Committee (TIE Committee), is an Executive Committee of the City of Edinburgh City Council. Its forerunner is the Transportation Committee. The Committee has been the main body involved on the part of the City Council in the promulgation of the traffic regulations and the implementation of the tram project, as summarized below.

² This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

B. Facts

17. Moray Feu is a residential area in the centre of Edinburgh in “New Town”, inscribed in 1996 as a World Heritage Site by the United Nations Educational, Scientific and Cultural Organization (UNESCO). The communication concerns the objections of Moray Feu residents to the permanent rerouting through Moray Feu of all general traffic from the main shopping thoroughfare of the city centre (Princes Street and Shandwick Place) which lies somewhat south of the Moray Feu. The traffic alterations started in the mid-1990’s. However, the Edinburgh Tram Network, a project launched in 2004 and designed to run along the city centre, had additional impact on the traffic regulation design. The sequence of main facts with respect to the traffic regulation development and the tram project are summarized in the following paragraphs.³

18. In 1995-96, an experimental Traffic Regulation Order was introduced (Phase I of the Central Edinburgh Traffic Management (CETM) Scheme) removing westbound traffic from Princess Street, Edinburgh’s main shopping thoroughfare. The Scheme was monitored, findings were prepared and subsequently different phases of statutory consultation with various stakeholders, including public authorities, the business community and organizations and individuals in affected areas, took place from 1997 to 2003, which resulted in the introduction of amendments and measures. After the 1999 Regulations (see para. 15), independent reporters also participated in the consultation.

19. Phase II of the Scheme (permanent Traffic Order Regulation), was finalized and implemented in 2005/06. The Scheme incorporated recommendations that followed the consultations and impacted on Morey Feu, inter alia: (i) since the bulk of east and west bound traffic used Shandwick Place, the increase through the Moray Feu would be minimal; (ii) “alternatively, and preferably, there should be some more radical approach that keeps through traffic out of the [Moray Feu] altogether”; (iii) the westbound ban on Princes Street should not apply overnight or in evenings (see annex 10 to communication).

20. In 2004, the Council of the City of Edinburgh lodged two Bills with the Scottish Parliament for the construction of the tram system: Line 1 and Line 2. The system would also run along Princess Street and Shandwick Place and according to the accompanying plans general traffic would not be permitted on those streets. The parliamentary scrutiny by the Parliamentary Committee, including a Preliminary Stage, a Consideration Stage and a Final Stage, took place from 2004 to 2006.

21. In this context, in 2005 Moray Feu residents began to make representations to the Council regarding their concerns about the environmental implications of the tram scheme for the Morey Feu. In particular, the Lord Moray Feuars Committee, through the New Town, Broughton and Pilrig Community Council, submitted an objection regarding the failure to make provision to prevent wholesale traffic displacement through the Moray Feu directly in contravention of the recommendations of the 2003 Public Hearing. The objection was not acknowledged in the Parliamentary Committee report.⁴ At the Consideration Stage, the Committee heard the Council’s objections – including those of Moray Feu – but did not uphold any of them.

³ For a detailed outline of events, see the draft chronology prepared by the secretariat on 20 January 2012, the changes on the draft chronology suggested by the communicant on 15 February 2012, as well as the chronology provided by the Party concerned on 17 February 2012, all available at: <http://www.unece.org/env/pp/compliance/Compliancecommittee/53TableUK.html>.

⁴ Details on the three stages for both Bills are available at: <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/25121.aspx> and <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/25156.aspx>.

22. In April 2006, the two private Acts of the Scottish Parliament approving the construction and operation of the Edinburgh Tram Network received Royal Assent.⁵ Subsequently, detailed traffic modelling commenced.

23. In March 2008, Shandwick Place closed to general traffic under a Temporary Traffic Regulation Order in view of the tram infrastructure works (laying of tram rails, etc.). Moray Feu was one of the alternative routes on the public road network. Temporary asphalt surfacing was laid on sections of stone cobble carriageway. Shandwick Place remains closed to general traffic until today.

24. In fall 2008, "Traffic Regulation Design Update Exhibitions" at several locations in Edinburgh were held for the public to view the first draft of traffic measures coming out of the detailed design work. The proposals show the restriction on general traffic through Shandwick Place as a required feature of the permanent scheme. In the view of the communicant these exhibitions were informative rather than interactive.

25. In 2008, Moray Feu residents commenced individual representations to the Council for measures to limit the volume and nature of the traffic passing through Moray Feu. At that point, Moray Feu residents felt that the Council would not take action and they formed the Moray Feu Traffic Subcommittee (the communicant) under the Lord Moray Feuar's Committee.

26. Moray Feu representations included inter alia that: the impact of the traffic displacement was untenable; at the refusal of the Council to carry out surveys to measure the increase in traffic volume, the Lord Moray Feuar's Committee undertook surveys that showed an approximately 45% volume increase (traffic was extended through the night and included buses and Heavy Goods Vehicles – HGV); traffic should be shared between Moray Feu and Princess Street (going through the latter especially during the evenings and overnight), while the reopening of a parallel route through the non-residential Charlotte Square should be considered; the volume and type of vehicles through Moray Feu should be considered; Moray Feu had not been included in the Air Quality Management and Council Noise Management Areas; no pedestrian safety and no impact assessment had been undertaken; the traffic intrusion in a UNESCO World Heritage Site, etc.⁶

27. Following the representations, additional air quality monitoring started in Great Stuart Street in 2009. In addition, it was recommended that traffic be permitted one-way eastbound on Hope Street to encourage traffic to use Charlotte Square in preference to Moray Feu. Tram orders and design were accordingly amended.

28. As the tram network was progressing, new Traffic Regulation Orders were needed to amend the existing ones so as to enable the operation of the tram network. The Statutory Consultation for promotion of new Orders was launched in 2009 and the drafts were sent to key stakeholders and posted on the Internet for information.

29. In January 2010, the communicant made a formal complaint to the City of Edinburgh Council, which involved an exchange of letters. This was followed by a complaint to the SPSO in June 2010, whose decision was issued on 22 June 2011, in which none of the communicant's complaints were upheld (see para. 68 below).

30. In February 2010, further to the outcome of the Statutory Consultation process, members of the Council, as the local traffic authority, approved the start of the legal process

⁵ Edinburgh Tram (Line One) Act 2006 and Edinburgh Tram (Line Two) Act 2006

⁶ See of the original communication listing the claims of the communicant at p. 8.

to make two TROs in relation to the Edinburgh Tram Network.⁷ The TROs (TRO1) were advertised on 22 February 2010 with a period to comment/object until 20 March 2010.

31. In September 2010, the report on the comments and objections on the TRO1 noted that the majority of the comments and objections received related to: (i) concerns about the impact of the traffic restriction on Shandwick Place; and (ii) concerns about a proposed banned manoeuvre at Blenheim Place.

32. On 23 November 2010, the Council's TIE Committee considered the report and recommendations, i.e.: (i) the TRO proposal for implementing the tram system (according to the communicant, without provision for limiting traffic displacement through Moray Feu); (ii) a recommendation to set up "workshops" to address objections; and (iii) a recommendation to retain the ban on Shandwick Place.

33. In January 2011, the inaugural meeting with all objectors to TRO1, including the Moray Feu, took place, at which the structures of the forthcoming 3 workshops were agreed and Chairs were elected. One of the communicant's representatives was elected to chair two workshops.

34. In March 2011, air quality issues were reviewed by the Tram Sub-Committee (of the TIE Committee), with representations from the Moray Feu and expert witnesses called by officials. The Sub-Committee concluded that monitoring was being undertaken correctly, that there was no significant evidence of increased respiratory problems in the Moray Feu, and noted that the experts disputed the figures for nitrogen dioxide and particulates in the atmosphere cited by Moray Feu.

35. A study concluded in April 2011 showed that the impact of rerouted traffic on Moray Feu would likely be less than that reported in 2008. The study results were communicated to Moray Feu.

36. In the meantime, steps were also undertaken for the introduction of a 20 mph zone in the area north of Haymarket.

37. In September 2011, the Edinburgh Council took the decision to introduce the tram project in phases and approval was given for the Statutory Process to vary TRO1 Orders, as necessary.

38. In February 2012, the TIE Committee considered the report on the workshop and its recommendations on how to take forward the issues identified.

B. Substantive issues

Access to information – articles 4 and 5

39. The communicant alleges that the Council has failed to both gather appropriate environmental data and to provide on request data that they already possess, in breach of articles 4 and 5 of the Convention. No specific environmental impact study on the likely effects of the increased traffic flow on residential Moray Feu has been published. The communicant has repeatedly requested data regarding the trams scheme from the Council including: traffic volume counts, prior to and following the "temporary" traffic diversion in

⁷ The Orders were: (i) The City of Edinburgh Council (Edinburgh Tram) (Prohibition of Entry, Motor Vehicles and Turning, One-Way Roads, Bus/Tram Priority Lanes and Weight Limit) Traffic Regulation Order 201(-) TRO/09/60A, and (ii) The City of Edinburgh Council (Edinburgh Tram) (Traffic Regulation; Restrictions on Waiting, Loading And Unloading, and Parking Places) Designation and Traffic Regulation Order 201(-) TRO/09/60B.

March 2008; and air quality measurements (noting that air quality had been one of the Council's justifications for the 1996 and 2005 clearance of general traffic from Princes Street). Following the Council's indication that it had not and did not intend to make such measurements, the communicant commissioned a pre-diversion traffic count and undertook its own post-diversion count. Finally, in October 2010, the Council also installed an automatic traffic counter.

40. With respect to exhaust gas pollution, the communicant alleges that despite its requests the Council refused to monitor these on the ground that Moray Feu was outside its Noise and Air Quality Management Areas. The communicant considers this justification highly flawed, because the central Edinburgh Air Quality Management Area was designed to cover the Princes St/Shandwick Place route.

41. The communicant therefore set up its own nitrogen dioxide and noise monitoring and recording station in a basement area of Randolph Crescent. Sometime later, allegedly without informing the communicant, the Council set up a passive diffusion tube in one of the streets of Moray Feu approximately two metres above street level. Data from this requested by the communicant showed that this street had changed from one of the least polluted streets in Edinburgh to one which in December 2009, was the second most polluted street monitored as part of the Council's Air Quality Management Area and the only of those five streets to be residential in nature. Residents raised concerns over the placement of the passive tube above street level when many residents reside in basement flats approximately 5 metres below the level of the diffusion tube. Residents' monitoring showed the basement level to be experiencing higher concentrations of pollutants.

42. The communicant also queries the corrections applied by the Council to its raw nitrogen dioxide measurements which according to the communicant significantly reduced the Council's reported figure. The communicant claims that a DEFRA expert showed the Council's application of a diffusion curve correction to be flawed and that the Council refuses to acknowledge this fact. Moreover, the communicant claims the Council refuses to disclose the inputs to its use of a correction tool supplied by DEFRA. On the base of this undisclosed correction tool the Council claims that the data collected by the communicant is invalid (annex 12 to the communication, annex 5 to Party's response).

43. The communicant submits, that despite its invitation for the Council to do so, Council officials have failed to collaborate with the communicant in its belated installation of nitrogen dioxide diffusion tubes, and refused to site any of these alongside existing the communicant's sensors for comparison.

44. With respect to traffic noise, the communicant claims that it has recorded extremely high day and night time traffic noise levels but these have been dismissed by the Council (annex 14 to the communication). To the knowledge of residents the Council has not carried out noise measurements within the Feu.

45. The Party concerned notes that the tram scheme was subject to a full Scottish Transport Appraisal Guidance appraisal which was considered by Parliament in reaching its decision to promote the scheme.

46. More generally, the Council has a statutory duty to monitor air quality and to assess and develop actions to improve air quality.⁸ The Council collects and calibrates air quality data in compliance with UK national guidelines, namely with DEFRA Local Air Quality Management Technical Guidance (09). This data and calibration is validated by an

⁸ This is described in more detail in a report to the Tram Sub-Committee on 28 February 2011 (annex 7 to Party's response).

independent laboratory. The data is published annually – as required of all Scottish Local Authorities – once it has been scrutinised and formally ratified by the Scottish Government and the Scottish Environment Protection Agency.

47. The Party concerned agrees with the communicant that the Moray Feu is outside current City Centre Air Quality Management Area. The Party concerned submits this is because the recorded levels of nitrogen do not warrant the inclusion of the Moray Feu area in the Area. Notwithstanding this, additional air quality monitoring has been undertaken in the Moray Feu (Great Stuart Street) since July 2009.⁹

48. In respect of the communicant's allegations that the Council has failed to provide raw data upon request, the Party concerned claims this was indeed provided, together with the advice that as it was "raw" data, and therefore had not been calibrated, no conclusions could be drawn from it at that stage.

49. The Party concerned invites the Committee to note that the SPSO did not uphold the communicant's complaint that the Council did not carry out a proper and comprehensive environmental impact study (SPSO findings of 22 June 2011, paras. 34-36).

50. The Party concerned submits that at the meeting of the TIE Committee on 27 January 2011, the communicant claimed that data presented to the committee was "flawed" and that officials had "significantly underestimated" levels of pollutants. To address these claims, the TIE Committee instructed officials to prepare another report on the following: technical data supplied by the objectors; monitoring of nitrogen oxygen/pollutants on building facades and at basement level, and; medical information on any increase in respiratory complaint.

51. The Party concerned also submits that, as requested by the TIE Committee, Council officials undertook the necessary investigation into the three matters above, including consulting experts in the field, and prepared the requested report. This was considered at a specially convened meeting of the Tram Sub-Committee on 28 February 2011. The Sub-Committee also heard evidence from the expert witnesses as well as representations from the communicant in order to better understand the issues.¹⁰

52. The Party concerned submits that, although expert witnesses at the meeting showed that the communicant's data was misleading, the Sub-Committee instructed officials to extend exceptionally the air quality monitoring in the Moray Feu area to include monitoring at basement level in order to address the communicant's concerns. As a result, in June 2011 monitoring in basements and on building facades began at a number of additional locations. From the additional monitoring, the Council will determine 'annualised' estimated mean values in the first quarter of 2012, by which time the applicable bias adjustment factor and background concentration value for the full 2011 calendar year will have been derived. This will enable further environmental information on this subject requested by the Sub-Committee to be made available to the public.

Public participation – articles 6 and 7

53. The communicant alleges failures in the public participation process. It alleges that the Scottish Transport Appraisal Guidance Report,¹¹ undertaken at the parliamentary approvals stage, does not consider the impacts of the tram scheme on the Moray Feu. In fact, it was written two years before the parliamentary hearings at which the Council denied

⁹ Ibid. at para. 2.6.

¹⁰ The committee report, witness statements and minutes of this meeting are attached as annexes 7 – 10 of the Party's response.

¹¹ Para. 2.6 of the 28 February 2011 report to the Tram Sub-Committee (annex 7 to Party's response).

that the Moray Feu would be affected. The communicant submits that it is incorrect to imply that the report fulfils the requirement for an environmental impact study on the Moray Feu traffic diversion, since the only mention of traffic diversions occurs in Appendix B to the report.¹²

54. In answer to assertions that the Council had provided opportunities for public participation that more than meet its statutory obligations, the communicant submits that it is only necessary to study the public objections and the Council's response to these to understand how unsatisfactory this participation has been for residents (as detailed in annex 5 to the Party's response).

55. Moreover, the communicant alleges that without the discipline imposed through the ultimate scrutiny of a public hearing, the Council has been able to reject inconvenient criticism with untested argument. In the view of the communicant, concessions - such as the granting of one-way re-opening of Charlotte Square - have been made only under extreme pressure from residents, ultimately with the assistance of Ward councillors.

56. The Party concerned submits that as the proposal for the tram and the traffic rerouting was approved by Acts of Parliament in April 2006, the scheme was subject to full parliamentary scrutiny and there were opportunities for public participation in this process. It notes that paragraphs 3.4 – 3.7 of the Statement of Case for the Traffic Regulation Orders describe these opportunities (annex 2 to Party's response). A full Scottish Transport Appraisal Guidance report was undertaken at the parliamentary approvals stage and the parliamentary process promoted further design refinements in response to various objections received at that time (specifically, two bill amendments were published and were in turn subject to an objection period). Information for Objectors to Private Bills is available on the Scottish Parliament website.¹³

57. The Party concerned adds that, although the Council did not, in the exercise of its discretion under the 1999 Regulations, ultimately decide to hold a hearing of objections in relation to the Traffic Regulation Orders, it undertook extensive informal consultation during the preparation of those Orders. The Party concerned submits that the absence of a public hearing does not signify a lack of opportunities to participate in the decision-making process, since the bulk of consultation, both informal and formal, precedes any hearing, if one is held. The steps taken to consult members of the public are detailed in the Statement of Case for the Traffic Regulation Orders (annex 2 to the Party's response) which provides an overview of the development of the tram project and how it met the relevant statutory requirements with respect to public participation (see Section 6 in particular). The thorough public consultation carried out for the tram TROs is also outlined in the response to the SPSO (annex 1 to the Party's response). In addition, public exhibitions of the draft TRO drawings were held in September 2008 with the purpose "to give the public the opportunity to view and comment upon the emerging TRO proposals ...", while "comments arising from this process would be considered and, as far as possible, would be incorporated in the finalisation of the design" (annex 3 to the Party's response).

58. The Party concerned submits that an example of how residents' concerns were taken into account can be seen in the modification of the TROs following concerns about increases in traffic on Shandwick place (see para. 32 above). The Party concerned contends that the draft Orders were also modified in a number of other respects as a result of comments received during the above-mentioned exhibitions.

¹² At p. 70: "...existing traffic will be diverted from the tram route in a number of places. There will be a change of low magnitude in the townscape of a number of areas due to increased traffic, but because the extent of traffic diversions has not been fully modelled this cannot be assessed in detail."

¹³ <http://www.scottish.parliament.uk/business/bills/billguidance/ifotpb.htm>

59. The Party concerned reports that since the communicant submitted its communication to the Committee, there have been a number of relevant developments, in particular the TRO1 Review (annex 6 to the Party's response), which set out actions to address objections to the tram TROs. One of the recommendations was to set up workshops to engage with the local communities to investigate and consider potential mitigation measures in relation to the required Shandwick Place restriction. These workshops (three in total, two chaired by a representative of the communicant) commenced in January 2011.

60. The Party concerned invites the Committee to note that the SPSO did not uphold the complaint that residents of the area were excluded from meaningful participation in the decision-making process (SPSO findings of 22 June 2011, paras. 27 - 29). The SPSO concluded specifically that residents made representations on the bills in question and were heard as to their concerns and that they have and will continue to have the opportunity to make representations on the development of the TROs.

Access to justice – article 9

61. The communicant submits that the use of a private Act of Parliament to approve the trams scheme removed the requirement to hold a public hearing irrespective of the number of objections to the scheme received from the public. It submits that the use of the Act of Parliament for this purpose, and by the Council's statement to the Parliamentary Hearing preceding the Act that the tram proposals would not impact on traffic travelling through the Moray Feu, resulted in the residents of Moray Feu being denied access to justice under article 9 of the Convention.

62. The communicant notes that the 2008 amendment to the 1999 Regulations providing for discretionary, rather than mandatory, hearing of objections, in order to speed up projects, such as the TRO, that were subject to full parliamentary scrutiny, reduced access to justice and was introduced only 3 years after the Party concerned ratified the Aarhus Convention.¹⁴ In this respect, the communicant alleges that, contrary to the Party's claim, traffic re-routing through Moray Feu had not been subject to parliamentary scrutiny. In fact at the 2005 parliamentary hearing the agent for the Council, in answer to the submissions of the community chairmen, claimed specifically that the residential Moray Feu area would be unaffected by the trams scheme (annex 2 and 3 to the communication). In this regard, the communicant notes the Council assertion that the need to permanently divert general traffic through the Moray Feu had not been discovered until 2008 (when it became public knowledge through the September 2008 exhibitions), following which, in the TRO proposal of 22 September 2009, traffic diversion was designated as a 'wider area' issue to be dealt with after the trams became operational.

63. With respect to the local workshops held instead of an independent Public Hearing, the communicant notes that any recommendations produced have been adjudicated upon by the same Council officials that the communicants had been petitioning since 2008. Moreover, it was stated those officials "attend in the role of support but not for the purpose of providing a solution".

64. The Party concerned refutes the communicant's allegation that they had no access to justice to challenge the decisions on the tram TROs. It submits that the communicants had the opportunity to participate in the decision-making process through the public consultation process described. Moreover, in respect of access to justice, the Notices for the TROs published in the Scotsman on 7 December 2010 stated that any person wishing to question

¹⁴ Annex 10 to the communication shows extracts from a previous Hearing Report dealing with traffic diversion into the Moray Feu.

the validity of the TRO may, within 6 weeks from the making of the order, apply to the Court of Session for this purpose.

65. Finally, the communicants had the option to petition for judicial review of the decision of the Council to make the TROs if they thought there was a basis to do so.

66. In respect of the option of judicial review, the communicants allege that this had been costed for them at a minimum of £60,000 with the possibility of an unlimited expenses award. The communicant submits that this is out of reach for Moray Feu residents in terms of access to justice.

C. Domestic remedies

67. In January 2010, the communicant submitted a formal complaint to the Edinburgh Council (annex 8 to communication) on a number of grounds, including a contention that they had been excluded from meaningful participation in the CETM and the Tram projects, both of which had a significant impact on Moray Feu. The complaint resulted in the exchange of a series of lengthy letters between the communicant and the Council between February and April 2010. In its final response, the Council did not uphold the complaint and indicated that the communicant had the right to appeal the decision with the SPSO.

68. In June 2010, the communicant submitted a complaint to the SPSO, where it claimed that (a) the Council increased traffic in Moray Feu by the way they have managed traffic flow, following their decision to develop the tram system (complaint not upheld); (b) residents of Moray Feu were excluded from meaningful participation in the process (complaint not upheld); (c) the Council have not carried out a proper and comprehensive environmental impact study regarding noise, air pollution, safety and continual vehicle passage through the predominantly residential area as a proposed permanent situation (complaint not upheld); and (d) the Council repeatedly made misleading statements, both to residents of Moray Feu and to other involved parties; most notably to the parliamentary hearings regarding the effect on Moray Feu (complaint not upheld). The SPSO raised a number of issues with the Council in August 2010. The SPSO's summary of investigation, dated 22 June 2011, concluded that it had no recommendations to make.

69. No other domestic or international procedures have been initiated to address the matters referred to in the communication.

III. Consideration and evaluation by the Committee

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

71. The Committee decides not to consider the communicant's allegations on access to justice, because those – both in relation to its access to information and public participation rights – were not sufficiently substantiated through the written and oral submissions. With respect to access to information, the communicant had the possibility to address the issue with the Scottish Information Commissioner, and with respect to public participation, review procedures were available for members of the public, including the communicant, to question the validity of the TRO within six weeks from the making of the Order and also to petition for judicial review of the decision of the Council to make the TRO.

72. In addition, the Committee notes that it is not its mandate to evaluate whether the technical data measured/provided or whether the equipment used by the Council and the communicant were reliable or not.

Access to information

73. While not engaging in the discussion of whether the data collected and/or the equipment used by the Party and the communicant were reliable or not, the Committee finds it appropriate to consider the issue of the nature of “raw data” and whether access to “raw data” may be refused.

74. The definition and scope of “environmental information” under the Convention is broad. Article 2, paragraph 3, provides an indicative list of what would constitute environmental information and mentions that “environmental information” means *any* information, without qualifying the form of the information or whether such information may be in the form of “raw” or “processed” data.

75. The Committee finds that raw data on the state of air and the atmosphere constitute environmental information according to article 2, paragraph 3(a) of the Convention. Accordingly, public authorities should ensure access to the requested information as required by article 4 of the Convention.

76. The Committee considers whether public authorities may refuse a request for access to raw environmental data on the basis of an exception listed in article 4, paragraphs 3 and 4. The Convention does not provide a clear definition of the “materials in the course of completion”. Domestic legislation may provide for specific guidance on how air quality data should be collected, ingested and processed, before they are further considered and studied. This guidance has been developed with a view to mitigating the effect of various factors that might impact on the values collected, and to allowing for the calculation of representative average values on the basis of the multiple values collected in different times during a long period of time, which might have fluctuated significantly due to the presence of diverse conditions and factors (heat, pressure, etc.).

77. In respect to the requested data, the Committee finds that the Party concerned by not disclosing the raw data at the request of the communicant, failed to comply with article 4, paragraph 1, of the Convention. Should the authority have any concerns about disclosing the data, they should provide the raw data and advise that they were not processed according to the agreed and regulated system of processing raw environmental data. The same applies for the processed data, in which case the authorities should also advise on how these data were processed and what they represent.

78. The Committee notes that the Party has informed it by letter dated 10 September 2012 about the release of the requested raw data by the Edinburgh City Council. In the context of release of data, the Committee also takes note that the communicant did not use the free of cost administrative procedure of complaint to the Scottish Information Commissioner.

Public participation

79. In order to assess whether the participatory rights of the public concerned have been infringed during the decision-making procedure, it is necessary to determine what is the decision at issue. The communication relates to the implementation of the Edinburgh Tram Network in the City of Edinburgh. The Committee understands that the communicant does not challenge the public participation process in the context of the adoption of the decision for the project (Edinburgh Tram (Line One) and Edinburgh Tram (Line Two) private Acts of the Scottish Parliament received Royal Assent in April 2006); but that it challenges the public participation process for the adoption of the Traffic Regulation Orders.

80. The TROs impacting on Moray Feu include: the CETM that started in mid-1990’s, concluded in 2003 and introduced between May and October 2005; and the TRO1, which was deemed necessary in 2009 in order to properly implement the tram project.

81. The Committee will not examine the process that led to the adoption of the CETM, because this process was effectively concluded in 2003, before the entry into force of the Convention for the Party concerned.

82. The Convention provides for somewhat differentiated requirements for public participation in the framework of decisions on specific activities (art. 6), plans, programmes (art.7) and policies (art. 7) or executive regulations and generally applicable legally binding normative instruments (art. 8). Whether the Traffic Regulation Order falls within the scope of article 6, article 7 or article 8 of the Convention must be determined on a contextual basis taking into account the legal effects of the Order (cf. ECE/MP.PP/2008/5/Add.6 at 57, findings on communication ACCC/C/2006/16 concerning Lithuania).

83. The TRO1 provides direction on how traffic would be organized in a certain area. It is not an act permitting a specific activity, but it has general application to all persons that are in a similar situation and unlike a plan or programme, it creates binding legal obligations. As such, it is an act within the scope of article 8 of the Convention.

84. The Convention prescribes the modalities of public participation in the preparation of legally binding normative instruments of general application in a general manner pointing to some of the basic principles and minimum requirements on public participation enshrined by the Convention (i.e. effective public participation at an early stage, when all options are open, publication of a draft early enough, sufficient timeframes for the public to consult a draft and comment). Parties are then left with some discretion as to the specificities of how public participation should be organized. In the present case, the public has been given the opportunity to comment at various occasions (see also report of the Scottish Public Services Ombudsman, in particular paragraphs 22-29). The Committee finds that the Party concerned has offered opportunities for public participation to a degree that meets the requirements of article 8.

85. In particular, the Committee notes that: (i) the effect of the TRO1 was essentially the same as the effect of the CETM, namely the rerouting of traffic from the shopping thoroughfare of the city through Moray Feu, and although the Committee does not examine whether the process for the adoption of the CETM was in compliance with the Convention, Moray Feu residents essentially have had the opportunity to provide comments/objections/representations to the effects of CETM already since 1997; (ii) importantly, the TRO1 has yet not been finalized and at the recommendation of the TIE Committee, workshops are still being organized to take forward measures to address the wider-area impact of the traffic restriction on Shandwick Place.

86. The Committee also examines whether the result of public participation was taken into account as far as possible. This is mandatory under article 8 and in practice it means that the final version of the normative instrument – here the TRO – should be accompanied by an explanation of the public participation process and how the results of the public participation were taken into account.

87. To this end, the Committee reviewed the TIE Committee Reports: “Edinburgh Tram – Traffic Regulation Orders” and “Edinburgh Tram – Traffic Regulation Order: TRO1 Review” both dated 21 September 2010 (annexes 5 and 6 to the Party’s response of 23 August 2011). The Committee finds that the comments relating to the impact on Moray Feu were considered. Although the comments and supporting documentation on air and noise quality were rejected, a detailed reasoning was provided and specific actions were recommended to be undertaken, which included: to continue to monitor air quality and review, and to organize workshops with the residents to discuss mitigation measures, because although the official measurements showed that air and noise quality were within the UK and EU standards, it was recognized that there is an air and noise quality impact. In

addition, it was recommended to note alternative rerouting (e.g. reopening of Hope Street eastbound) to help redistribution of traffic in the area.¹⁵

88. For these reasons, the Committee does not find that the Party concerned has failed to take into account as much as possible the objections/comments of the communicant. At the same time, the Committee notes that the public participation process has not been completed yet. The Party concerned may well have striven to promote public participation, but the Committee notes that participation would have been more effective if the raw data, which was part of the basis for decision-making, had been duly provided to the public. While the Committee has already concluded that refusing access to the raw data constitutes non-compliance with article 4, the Committee does not find this to amount to non-compliance also with article 8. Noting that the decision-making procedure has not been completed, the Committee stresses that the raw data should be made available to the public in the continuing decision-making.

IV. Conclusions and recommendations

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

A. Main findings with regard to non-compliance

90. The Committee finds that by not providing the requested raw data to the public the Party concerned failed to comply with article 4 paragraph 1 of the Convention for a certain period (para. 77), but its notes that the raw data are provided to the public now. Therefore, the Party concerned is no longer in non-compliance with article 4, paragraph 1, of the Convention.

B. Recommendations

91. The Committee pursuant to paragraph 36 (b) of the annex to decision I/7 of the meeting of the Parties to the Convention 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 ensure that the practice to release raw data in on-going decision-making processes is maintained.

¹⁵ See in particular paragraphs 3.24 to 3.40, Item 2.1 in Appendix 1 and Sections 14 to 18 in Appendix 2 of the “Edinburgh Tram – Traffic Regulations Orders” report.