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Compliance Committee

Fifty-eighth meeting
Budva, 10–13 September 2017
Item 8 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2014/101 concerning compliance by European Union

Adopted by the Compliance Committee on 18 June 2017

Contents

I. Introduction

1. On 15 April 2014, HS2 Action Alliance Limited, a non-governmental organization, the London Borough of Hillingdon, and Charlotte Jones, a member of the public (together the communicants), 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 European Union to comply with its obligations under article 7 of the Convention.[1]

2. Specifically, the communicants alleged that the Party concerned has failed to comply with article 7 and article 3, paragraph 1, of the Convention by failing to establish a 'proper regulatory framework' for public participation in the preparation of plans or programmes relating to the environment.[2] The communication relates to events which are also before the Committee in the context of communication ACCC/C/2014/100 concerning compliance by the United Kingdom of Great Britain and Northern Ireland (United Kingdom).

3. At its forty-fifth meeting (Maastricht, 29 June - 2 July 2014), 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 9 September 2014.

5. The Party concerned provided its response to the communication on 25 February 2015.

6. On 17 March 2015, the communicants commented on the response to the communication by the Party concerned.

7. At its forty-ninth meeting (Geneva, 30 June – 3 July 2015), the Committee found that the London Borough of Hillingdon was not a member of the public for the purposes of article 15 of the Convention and was thus unable to submit a communication to the Committee under paragraph 18 of the annex to decision I/7 of the Meeting of the Parties. It re-confirmed its earlier determination of preliminary admissibility with respect to the other two communicants.

8. On 25 February 2016, the United Kingdom submitted comments on the communication as an observer.

9. On 3 March 2016, the Committee was informed that Ms. Jones had withdrawn her complaint leaving HS2 Action Alliance Limited as the sole communicant.

10. The Committee held a hearing to discuss the substance of the communication at its fifty-second meeting (Geneva, 6 – 9 October 2015), with the participation of representatives of the communicant and the Party concerned. During the hearing, the Committee confirmed that the communication was admissible.

11. The Committee prepared its draft findings in closed session and completed them through its electronic decision-making procedure on 25 May 2017. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 26 May 2017. Both were invited to provide comments by 13 June 2017.

[1] The communication and related documentation from the communicant, the Party concerned and the secretariat, is available from http://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2014101-european-union.html.

[2] Communication, p. 16.

12. The Party concerned provided comments on 8 June 2017. On 13 June 2017, the communicant indicated it had no comments.

13. At its virtual meeting on 14 June 2017, the Committee considered the comments by the Party concerned on the draft findings in closed session. After taking into account the comments received, it made a minor amendment to its considerations and agreed that no other changes to its findings were necessary.

14. The Committee adopted its findings through its electronic decision-making procedure on 18 June 2017 and agreed that they should be published as a formal pre-session document to its fifty-eighth meeting (Budva, Montenegro, 10-13 September 2017). It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues[3]

A. Legal framework

15. In its declaration upon approving the Convention, the Party concerned, inter alia, declared that:

> The Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention.

The European Community is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force."

16. Recital 10 of the Public Participation Directive[4] states that:

> Provision should be made in respect of certain Directives in the environmental area which require Member States to produce plans and programmes relating to the environment but which do not contain sufficient provisions on public participation, so as to ensure public participation consistent with the provisions of the Aarhus Convention, in particular article 7 thereof. Other relevant Community legislation already provides for public participation in the preparation of plans and programmes and, for the future, public participation requirements in line with the Aarhus Convention will be incorporated into the relevant legislation from the outset.

17. Pursuant to article 2, paragraph 5 of the Public Participation Directive, that Directive's provisions on public participation do not apply to plans and programmes for which a public participation procedure is carried out under Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive).

18. With respect to environmental assessment of plans and programmes regarding the environment, article 3, paragraph 2, of the SEA Directive[5] provides:

[3] 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.

[4] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

[5] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

> Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,
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> (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or
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> (b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.

19. The above reference to Directive 85/337/EEC is to the EIA Directive, which has now been consolidated into Directive 2011/92/EU.[6] Construction of lines for long distance railway traffic is an activity listed in paragraph 7(a) of Annex I to the EIA Directive. Paragraph 10(i) of Annex II of the EIA Directive applies to the construction of railways not covered by Annex I.

20. Article 3, paragraph 4, of the SEA Directive states that:

> Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.

21. Article 5, paragraph 1, of the SEA Directive stipulates that:

> Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.

22. With respect to public participation on plans and programmes subject to environmental assessment under article 3 of the SEA Directive, article 6, paragraph 2 of the Directive provides:

> The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.

B. Facts[7]

23. In January 2009, the Government of the United Kingdom established a company called High Speed Two Limited (HS2 Ltd.) with the principal aim of advising on the "development of proposals for a new railway from London to the West Midlands and potentially beyond", including the identification of potential route or routes, costs and benefits and finance, and the design of the potential routes.[8]

24. A public consultation concerning the high speed rail proposals (hereafter HS2) was commenced on 28 February 2011 and closed on 29 July 2011. The scope of the consultation

[6] Directive 2011/92/EU of the European Parliament and of the Council dated 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

[7] Further background concerning the events described in this section may be found in the Committee's findings on communication ACCC/C/2014/100 (United Kingdom), forthcoming.

[8] Annex 5 to the communication, para. 5.

included the case for high speed rail and the preferred route for phase 1 of the HS2 high speed rail link from London to West Midlands.

25. On 10 January 2012, the Department for Transport published a Command paper entitled 'High Speed Rail: Investing in Britain's Future - Decisions and Next Steps' (the DNS).9 The DNS described HS2 as "the largest transport infrastructure investment in the UK for a generation".[10]

26. Part 1 of the DNS set out the United Kingdom's high speed rail strategy and a summary of its decisions, part 2 set out the Government's review of evidence from consultation responses and part 3 set out the Government's proposed next steps.[11] Under the heading 'Alternatives to high speed rail' at page 68 of the DNS, the Government set out its reasons for rejecting the case for alternatives to the proposed high speed rail network.[12] Following publication of the DNS, the Government continued work on the details of Phase 1 and preparing the preferred options for Phase 2 to enable public consultation to be carried out.[13]

27. Development consent was to be sought and obtained through the United Kingdom's Hybrid Bills process. There would be two bills: first to seek, inter alia, the grant of development consent for Phase 1. In terms of timing, the public consultation for Phase 2 would overlap with the proposed commencement of the Bill process for Phase 1. The Government considered that the project fell within the scope of the EIA Directive and would require environmental impact assessment.[14]

28. In April 2012, the communicant filed an application in the United Kingdom High Court for judicial review of the DNS. The grounds of claim included that the DNS was a "plan or programme" which "set the framework for future development consent" and was "required by administrative provisions" within the meaning of the SEA Directive, and that its adoption had been in breach of the obligation under the SEA Directive to carry out an environmental assessment and effective public consultation prior to its adoption.[15] In its judgment of 15 March 2013, the High Court acknowledged that the DNS had failed in significant respects to subject the reasonable alternatives to the HS2 proposal to environmental assessment or public consultation.[16] However, it dismissed the communicant's claim that the DNS should have been subject to environmental assessment and public participation under the SEA Directive because it held that the DNS did not "set the framework for future development consent" nor was it "required by administrative provisions" within the meaning of the SEA Directive.

29. The communicant appealed to the United Kingdom's Court of Appeal. Its appeal was dismissed on 24 July 2013 by a 2-1 majority, interpreting the term "set the framework for future development consent" in a way that excluded the DNS. The Court unanimously dismissed the United Kingdom's Secretary of State for Transport's cross-appeal against the High Court's finding that the DNS had failed in significant respects to subject the reasonable alternatives to the HS2 proposal to environmental assessment or public consultation.[17]

[9] Ibid., para. 37.
[10] DNS, p.11, see annex 3 to the communication.
[11] Annex 5 to the communication, para. 39.
[12] Ibid., para. 43.
[13] Ibid., para. 44.
[14] Ibid., para. 54.
[15] Communication, para. 20 and annex 7.
[16] Communication, para. 22 and annex 8, paras. 160-172.
[17] Communication, para. 24 and annex 9.

30. The communicant appealed to the United Kingdom's Supreme Court in October 2013. On 22 January 2014, the Court delivered a unanimous judgment holding that the DNS did not set the framework for future development consent within the meaning of the Directive, thereby rejecting the communicant's claim.[18]

C. Domestic remedies

31. The communicant's efforts to challenge the DNS in the courts of the United Kingdom, including the alleged failure to undertake an environmental assessment under the SEA Directive, are described in paragraphs 0-0 above.

32. In its judgment of 22 January 2014, the United Kingdom's Supreme Court held that a preliminary reference to the Court of Justice of the European Union was not necessary.[19]

33. The Party concerned does not challenge the admissibility of the communication.

D. Substantive issues

34. The communicant submits that article 7 of the Convention requires the Party concerned to put in place a proper regulatory framework for effective public participation in the preparation of plans and programmes and refers to the Committee's findings on communication ACCC/C/2010/54 (European Union)[20] in this regard. The communicant further submits that the Public Participation Directive is in itself an acknowledgement that article 7 of the Convention imposes an obligation to which the Party's legislation had to give effect.[21] The communicant further alleges that the Party concerned has competence to put in place a proper regulatory framework for effective public participation by its member States in the preparation of plans and programmes such as the DNS.[22]

35. The communicant submits that, following the judgment of the United Kingdom's Supreme Court, the scope of the SEA Directive has, however, been construed to exclude any plan or programme relating to the environment if it does not legally constrain the subsequent development consent decision by defining criteria by which the development consent decision is required to be determined.[23] The communicant submits that, as a result of that judgment, a pan-European exemption from the SEA Directive has been created for plans and programmes relating to development from which the subsequent development consent is to be obtained from the national legislature.[24]

36. The communicant submits that there is thus a potentially wide range of plans and programmes which do not fall within the scope of the SEA Directive and in relation to which the Party concerned makes no alternative provision for effective public participation.[25] The communicant alleges that there is therefore a lacuna in the implementation of article 7 of the

[18] Communication, paras. 26-27 and annex 10.
[19] Para. 53.
[20] ECE/MP.PP/C.1/2012/12.
[21] Communication, para. 42; communicants' comments on the Party's response to the communication, 17 March 2015, para. 13 (1) (iii).
[22] Communicants' comments on the Party's response to the communication, 17 March 2015, para. 13 (2).
[23] Communication, para. 43.
[24] Communication, para 44.
[25] Communicants' comments on the Party's response to the communication, 17 March 2015, para. 10 (3).

Convention in the law of the Party concerned, in that there are some plans and programmes in relation to which the Party concerned has not put in place any regulatory framework for effective public participation (whether through SEA or by any alternative article 7 compliant means).[26] It further submits that the Party concerned has failed to explain why it has put in place a regulatory framework via the SEA Directive with regard to some plans and programmes, namely those which "set the framework for future development consent" and are "required by legislative, regulatory and administrative provisions" and other plans and programmes falling within article 7 of the Convention.[27] The communicant further states that, due to the significant influence of the law of the Party concerned in its member States, the existence of this lacuna is liable to be duplicated in national law.[28]

37. The communicant submits that the Party concerned thereby also fails to "take the necessary legislative, regulatory and other measures […] as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention" as required under article 3, paragraph 1, of the Convention.[29]

38. The Party concerned denies the communicant's allegations, submitting that article 7 of the Convention is implemented at three different levels:

(a) Firstly, it is implemented as regards its institutions via the Aarhus Regulation.[30] Article 9 of the Aarhus Regulation provides for public participation in respect of "plans and programmes relating to the environment", which are defined in article 2(e) thereof.[31]

(b) Secondly, other pieces of the Party's legislation applicable to member States, in particular the Public Participation Directive[32] ensure that the requirements of article 7 of the Convention for the Party concerned are met.[33]

(c) Thirdly, insofar as the Party concerned has not adopted specific legislation intended to implement article 7 of the Aarhus Convention, it is the responsibility of the member States of the Party concerned to implement their obligations under article 7 of the Aarhus Convention, which, by virtue of article 216 of the Treaty on the Functioning of the European Union, forms part of the Party's law. [34]

39. With regard to the SEA Directive, the Party concerned asserts that public participation is only a subsidiary objective, while its chief objective is to establish a framework for the environmental assessment of certain plans and programmes outlined in article 3 thereof. The Party concerned submits that article 6 of the SEA Directive makes provision for public participation in respect of plans and programmes requiring a strategic environmental assessment (SEA). In as much as public participation is an integral part of an SEA process,

[26] Ibid., para. 10 (4).
[27] Ibid., para. 13 (3).
[28] Ibid., para. 13 (4).
[29] Ibid., para. 13 (1) (ii).
[30] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.
[31] Party's response to the communication, p. 3.
[32] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.
[33] Party's response to the communication, pp. 3-4.
[34] Ibid., p. 4.

an SEA could therefore serve as a means of complying with article 7 of the Convention but it does not however follow that article 7 of the Convention requires an SEA. Article 7 of the Convention rather requires public participation, not an SEA as such, and it would be perfectly possible to have public participation without an SEA.[35]

40. The Party concerned does not dispute that the DNS is a plan or programme under article 7 of the Convention.[36]

41. In the role of observer, the United Kingdom submits that the communicant's argument that article 7 of the Convention requires the Party concerned to set a "proper regulatory framework" by laying down in legislation a requirement on member States to comply with article 7 of the Convention is misplaced. Article 7 of the Convention instead refers to "appropriate practical and/or other provisions for the public to participate" and does not require "regulatory" provisions. The United Kingdom submits that therefore article 7 of the Convention does not require the adoption of regulatory provisions.[37]

42. The United Kingdom further submits that it is not part of the Convention's purpose, or Compliance Committee's remit, to seek to regulate relationships between the Party concerned and its member States – who are individually Parties to the Convention. The Convention was plainly intended to address the relative positions of members of the public and groups in comparison with public bodies. The United Kingdom submits that the suggestion that the Convention should be interpreted as going beyond that to also regulate relations between different governmental bodies (namely the Party concerned and its member States) is clearly beyond the scope of the discussion that led to the Convention and the text itself.[38]

III. Consideration and evaluation by the Committee

43. The European Union deposited its instrument of approval of the Convention on 17 February 2005, meaning that the Convention entered into force for the European Union on 18 May 2005, i.e. ninety days after the date of deposit of the instrument of ratification.

Admissibility

44. The Party concerned has not challenged the admissibility of the communication in relation to HS2 Action Alliance, which is the sole remaining communicant (see para. 0 above). Following the judgment of the United Kingdom's Supreme Court on 22 January 2014, the communicant had exhausted its possibilities to challenge the issues raised in the communication before the courts of the United Kingdom. With respect to the courts of the Party concerned, in its judgment the Supreme Court explicitly considered the need for a preliminary reference to the Court of Justice of the European Union and held that it was not necessary in this case (see paras. 0-0 above). Based on the above, the Committee considers that the domestic remedies available to the communicant have been exhausted and the communication is admissible.

The scope of the Committee's considerations

45. The essence of the communicant's case before the Committee is that in the light of the judgment of the United Kingdom Supreme Court, a "pan-European" exemption from the SEA Directive has been created for plans and programmes which do not "set the framework

[35] Party's response to the communication, p. 5.
[36] Party's opening statement for hearing at Committee's fifty-second meeting, paras. 6 and 27.
[37] Comments on communication by the United Kingdom, 25 February 2016, para. 4.
[38] Ibid., para. 6.

for future development consent" and this should be compensated by the Party concerned by the adoption of a proper regulatory framework to implement article 7 of the Convention.

46. At the outset, the Committee considers that it is not within its mandate to assess whether a particular plan or programme (such as the DNS) should or should not be subject to the SEA Directive. Neither is it in its mandate to assess whether the United Kingdom Supreme Court's interpretation has in fact created an exemption from the SEA Directive or whether the Court's interpretation is in line with the SEA Directive Accordingly, these matters will not be examined. The Committee will also not assess whether the provisions of the SEA Directive comprehensively implement all the procedural obligations contained in article 7 of the Convention or whether the Party's legal framework to implement article 7 of the Convention covers all plans and programmes relating to the environment envisaged by its law, as the communicant has not made allegations in these respects.

47. The considerations of the Committee will be limited to addressing the scope of obligations of the Party concerned in relation to implementing article 7 of the Convention, and in particular whether the Party concerned is under an obligation to provide a regulatory framework that would comprehensively regulate public participation in relation to all plans and programmes relating to the environment prepared in its member States.

Extent of obligations on the Party concerned in relation to the implementation of article 7

48. In its findings on communication ACCC/C/2014/123, the Committee noted that the Party concerned is a regional economic integration organization (REIO) within the meaning of article 17 of the Convention[39] and as such, article 19, paragraphs 4 and 5 determine the extent to which the REIO assumes obligations under the Convention:[40]

> 4. Any organization referred to in article 17 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organization's member States is a Party to this Convention, the organization and its member States shall **decide on their respective responsibilities** for the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently.
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> 5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 **shall declare the extent of their competence with respect to the matters governed by this Convention**. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence. [emphasis added]

49. As the Committee observed in its findings on communication ACCC/C/2014/123, on its approval of the Convention, the Party concerned made a declaration that met the requirements of article 19, paragraph 5. The validity of the declaration has not been disputed. The Committee therefore accepts the declaration as conclusive for the purposes of article 19, paragraph 5 of the Convention.

50. The declaration upon approval by the Party concerned inter alia states:

> The European Community is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force.

[39] Committee's findings on communication ACCC/C/2014/123, para. 83.

[40] Ibid., para. 84.

51. As the Committee held in its findings on communication ACCC/C/2014/123, the effect of the declaration by the Party concerned is that it assumes obligations to the extent that it has European Union law in force; member States remain responsible for the implementation of obligations that are not covered by European Union law in force.[41]

52. With respect to the DNS, the Committee notes that the following points are common ground between the parties to this case:

(a) Article 7 of the Convention applies to the DNS.

(b) Article 3, of the SEA Directive requires that an environmental assessment be carried out for plans and programmes which "set the framework for future development consent of projects".

(c) In its judgment of 22 January 2014, the United Kingdom's Supreme Court unanimously held that the DNS did not set the framework for future development consent, and accordingly the DNS was not required to undergo environmental assessment and public participation under the SEA Directive.

(d) The Party concerned has no other legislation in force to implement the Convention that would require the DNS to be subject to public participation.

53. The Committee notes that, according to the Supreme Court's judgment, the DNS is not covered by the SEA Directive. Nor is it covered by the Public Participation Directive. Moreover, public participation in the preparation of the DNS is not required by any other piece of EU legislation in force (see para. 0 above) nor is the preparation of the DNS itself required by any EU legislation in force.

54. The Committee notes that the communicant cites the Committee's findings on communication ACCC/C/2010/54 (European Union) in its submissions, and in particular, the Committee's finding that, with respect to article 7 of the Convention, "the Party concerned should have in place a regulatory framework to ensure proper implementation of the Convention".[42]

55. The Committee points out that its findings on communication ACCC/C/2010/54 concern a very different legal situation. Preparation of national renewable energy action plans is required by article 4 of the Renewable Energy Directive[43] which means that it is "covered by Community law in force". Accordingly, in accordance with its declaration upon approval, the Party concerned had assumed obligations under the Convention. As noted in paragraph 0 above, this is not so in the present case.

56. Based on the above considerations, the Committee finds that, in the light of the Party's declaration upon approval, since the Party concerned has no law in force that would require preparation of the DNS itself or that would require public participation with respect to plans or programmes, such as the DNS, which do not set the framework for future development consent, the Party concerned has no obligations to make appropriate practical and/or other provisions for the public to participate during the preparation of such plans and programmes. Accordingly, the Committee finds that the Party concerned is not in non-compliance with article 7 of the Convention in the context of this case.

[41] Ibid., para. 89.

[42] ECE/MP.PP/C.1/2012/12, para. 77.

[43] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

Article 3, paragraph 1

57. The Committee considers that the communicant's allegation that the Party concerned has failed to meet the requirement in article 3, paragraph 1 to "take the necessary legislative, regulatory and other measures" to implement the provisions of the Convention in this case necessarily presupposes that the Party concerned has an obligation under the Convention to provide for a framework for public participation with respect to plans and programmes relating to the environment, such as the DNS, which do not set the framework for future development consent. However, the Committee has already found in paragraph 0 above that, in the light of its declaration upon approval, the Party concerned only has obligations under the Convention to the extent that it has law in force. Thus, since the Party concerned has no law in force that would require preparation of the DNS itself or that would require public participation with respect to plans or programmes, such as the DNS, which do not set the framework for future development consent (see para. 0), the Party concerned has no obligations under article 3, paragraph 1 of the Convention to provide a proper regulatory framework with respect to public participation in the preparation of such plans and programmes either.

58. Accordingly, the Committee does not find the Party concern to be in non-compliance with article 3, paragraph 1, of the Convention in the context of this case.

IV. Conclusions

59. Based on the above considerations, the Committee does not find the Party concerned to be in non-compliance with article 3, paragraph 1, or article 7 of the Convention in the circumstances of this case.