

**Communication to the Aarhus Convention
Compliance Committee concerning compliance
by the United Kingdom in connection with
public participation in the trans-boundary
environmental impact assessment procedure
for two nuclear reactors at Hinkley Point**

ACCC/C/2013/91

OPENING COMMENTS ON BEHALF OF THE UNITED KINGDOM

A. INTRODUCTION

1. On 19th March 2013 the United Kingdom Government granted development consent for a new nuclear power station at Hinkley Point in Somerset in the south west of England. The power station is to be known as Hinkley Point C.
2. The Communicant argues that this decision was taken in breach of Article 6 of the Convention. She complains about a lack of trans-boundary consultation. She says that the public in Germany should have had an opportunity to participate in a trans-boundary Environmental Impact Assessment ("EIA").
3. The United Kingdom Government denies any breach of Article 6 of the Convention. Public participation has been integral to this decision-making process. The United Kingdom is fully committed to ensuring that the public have the opportunity to participate in such decisions. There have been numerous opportunities for public participation in the series of decisions taken by the United Kingdom Government which have resulted in the grant of permission to build the Hinkley Point C power station. In accordance with Article 3(9) of the Convention, those opportunities were provided to the public regardless of citizenship, nationality or domicile.
4. So far as concerns the Communicant's particular complaint, prior to the decision to grant development consent, the United Kingdom Government undertook an environmental impact assessment in accordance with the standards set in EU law (including the requirements on public participation).
5. Following that assessment the United Kingdom Government concluded that the project was not likely to cause a significant adverse trans-boundary impact. That decision took account of expert evaluation of the design of the reactors to be used and the detailed specification for the structures which will house the reactors. The evaluation considered what might happen in the

event of accident, attack and extreme weather event. The Government's decision on trans-boundary impact has been scrutinised and upheld by judgments of the English High Court and Court of Appeal. The same point has been addressed by an Opinion issued by the European Commission under Article 37 of the Euratom Treaty.

6. The United Kingdom believes that it has followed and complied with its obligations under the Espoo Convention. (And this matter will itself be considered by the Espoo Implementation Committee at its meeting in December 2014.) In these circumstances, the decision not to initiate a trans-boundary EIA was taken in accordance with the provisions of the Espoo Convention, and is entirely consistent with the requirements of Article 6 of the Aarhus Convention.
7. In these opening comments, the United Kingdom will do the following.
 - (1) Summarise the history of opportunities for public participation in the decision-making leading up to the grant of development consent (see section B below).
 - (2) Describe briefly relevant characteristics of the new power station at Hinkley Point C (see section C below).
 - (3) Explain that the only possible issue that the communication raises is whether the United Kingdom complied with Article 6(2) of the Convention (see section D below).
 - (4) Explain why Article 6(2) of the Convention did not require the United Kingdom directly to notify the public in Germany (see section E below).

B. OPPORTUNITIES FOR PUBLIC PARTICIPATION

8. The public has had a wide range of opportunities to participate in the decision-making process that has led to the decision to grant development consent for the new power station at Hinkley Point. This has happened over a period of nearly six years prior to the Secretary of State's decision to grant development consent.
9. The opportunities for public participation are summarised in the Schedule to these opening comments. These opportunities allowed the public to participate in a wide range of key decisions, starting (in 2007) with the strategic decision as to whether new nuclear power stations should be constructed at all, then extending to the decision as to where new nuclear power stations should be located, the decision on which reactors should be permitted, and to the final decision to make the development consent order for Hinkley Point C.
10. For example
 - (1) There was public consultation on the question of principle whether new nuclear power stations should be permitted. This consultation provided information on, and sought views about, all aspects of nuclear power including safety aspects (see point 1 in the Schedule).
 - (2) There was public consultation on what criteria should be used to select the sites where new nuclear power stations could be located. The criteria that were consulted on included reference to environmental impact, including the environmental impact that might arise from an accident (see point 5 in the Schedule).

- (3) There was public consultation on the sites for new nuclear power stations that were subsequently selected, including Hinkley Point (see point 7 in the Schedule).
- (4) There were two public consultations on the National Policy Statement on nuclear power. The Nuclear National Policy Statement identified Hinkley Point as a possible site for a new nuclear power station, and the information made available to consultees included an appraisal of sustainability which considered possible environmental impacts and the possibility of accidents (see points 9 and 13).
- (5) There were further public consultations prior to the decision whether to approve the type of nuclear reactor to be used at the new nuclear power station pursuant to the EU Basic Safety Standards Directive. The final approval decision was only taken following debate in and approval by the United Kingdom Parliament (see points 6, 8 and 12 in the Schedule).
- (6) The developer of the new power station at Hinkley Point conducted a public consultation before applying for development consent (see point 10 in the Schedule).
- (7) The England and Wales Planning Inspectorate conducted an Examination in Public of the application for the development consent order. The application was publicised; any persons wishing to be interested parties could register to receive information. The Examination in Public lasted six months and involved 13 oral hearings and enabled the public to submit written representations. In the event, 1,200 written representations were submitted (see points 17-20 in the Schedule).

- (8) The decision to make the development consent order was taken only after consideration of the report prepared by the Planning Inspectorate, and consideration of all representations received by the Secretary of State after that examination. These representations included representations made by the Government and individual citizens of Austria, and the Communicant (see point 22 in the Schedule).
11. In accordance with Article 3(9) of the Convention, all these opportunities were provided to the public regardless of citizenship, nationality or domicile. The public and NGOs in, and the governments of, other states were all entitled to participate in each of the consultation exercises referred to above.
12. For example, all EEA Member States were informed of the two consultations on the nuclear National Policy Statement, and the Governments of Austria and the Republic of Ireland took the opportunity to participate in those consultations. Further, the Communicant herself took the opportunity to make representations on the application for the development consent order, and the United Kingdom Government took those representations into account.

C. THE DEVELOPMENT AT HINKLEY POINT

13. There is already a nuclear power station at Hinkley Point. The new power station will comprise two European Pressurised Reactors (“EPRs”). The consistent view of all experts who have assessed the new power station is that, even if it suffered a serious accident, it is extremely unlikely that there would be an emission of radiological material that would affect the environment in another state.

14. Prior to the grant of development consent, the specialist regulatory authorities in the United Kingdom rigorously evaluated the safety aspects of the new power station. This process of evaluation lasted 5½ years. The evaluation included the technical “generic design assessment” of the EPRs. The generic design assessment included a severe accident analysis, which assessed what would happen to the EPRs if a serious accident occurred. The evaluation also included an assessment of specific aspects of the site at Hinkley Point. The specialist regulatory authorities concluded that, in all circumstances, the new nuclear power station could be constructed and operated in a way that is safe and secure.
15. The European Commission reached the same conclusion as the United Kingdom regulatory authorities. In 2012, the European Commission issued two opinions under article 37 of the Euratom Treaty. The European Commission concluded that if an accident occurred at Hinkley Point power station, the effect on the population in another member state would not be significant from the point of view of health.
16. Austria provided to the United Kingdom a technical report assessing the likelihood and effects of a serious accident at the new power station. The report concluded that the calculated probability of an accident causing a relevant emission of radiological material was below $1e-7/a$. This means that such an accident would not be expected to occur more frequently than once in every 10,000,000 years of reactor operation.
17. Throughout its lifetime Hinkley Point C will be controlled by the rigorous and internationally-respected regulatory regime in the United Kingdom.
18. Three UK authorities have considered whether Hinkley Point C is likely to have significant effects on the environment in another EU member state: the Infrastructure Planning Commission, its successor the Planning Inspectorate,

and the Secretary of State for Energy and Climate Change. In light of the evidence above, each concluded that Hinkley Point C is not likely to have significant effects on the environment in another EU member state. Each took into account the fact that it was extremely unlikely that there would be an accident at Hinkley Point C that causes a relevant emission of radiological material.

D. RELEVANT PROVISIONS OF THE CONVENTION

19. The Communicant alleges that the United Kingdom has acted in breach of Article 6(2), (4), (6)¹ and (7) of the Convention. This is not so. The history of opportunities for public participation already described demonstrates the following points.

- (1) The United Kingdom provided the opportunity for early public participation in the decision-making. The opportunity for early public participation was open to the public in Germany.
- (2) The United Kingdom gave to the public access, free of charge, to all information relevant to the decision-making. The opportunity for access to information was open to the public in Germany.
- (3) The United Kingdom allowed the public to submit in writing or at a hearing any comments, information, analyses or opinions that the public considered relevant. The opportunity to make submissions was open to the public in Germany.

¹ Although the communication refers to Article 6(5), the Communicant in fact relies upon the text of Article 6(6).

20. It is therefore plain that the United Kingdom has complied with Articles 6(4), (6) and (7) of the Convention – even if those provisions in the Convention required the United Kingdom to provide the relevant opportunities to the public in Germany.
21. Further, although the *Maastricht Recommendations on Promoting Effective Public Participation in Decision-Making in Environmental Matters* (“the Maastricht Recommendations”) were not endorsed by the Fifth Meeting of the Parties,² as a matter of substance the approach that the United Kingdom has taken to public participation nonetheless accorded with the recommendations in paragraphs 23 to 25. For example, any person was and is able to ask the relevant government department (the Department of Energy and Climate Change) to be notified of relevant decision-making exercises relating to nuclear projects. The list held by the department covers members of the public, NGOs and corporations. All relevant consultation documents and information were published on the internet. All responses were taken into account, regardless of whether they came from inside or outside the United Kingdom. The United Kingdom government notified all EEA states of the National Policy Statement on nuclear power – i.e. the UK’s proposed policy to permit construction of nuclear power stations, and its evaluation of the environmental consequences of that permission. The Nuclear National Policy statement specifically identified Hinkley Point as a potential site for a new power station.
22. Accordingly, the only possible issue that arises is whether the United Kingdom acted in breach of Article 6(2) by not notifying the public in Germany, directly.

² The 5th Meeting of the Parties decided to ‘take note’ of the Maastricht Recommendations in decision V/2. In this regard, the Meeting did not accept the draft decision which proposed that the Recommendations be ‘endorsed’.

E. COMPLIANCE WITH ARTICLE 6(2) OF THE CONVENTION

23. There are three main reasons why the Committee should not find that the United Kingdom acted in breach of Article 6(2) of the Convention.

(1) In substance, the complaint concerns the Espoo Convention, and should be considered under that Convention.

(2) The public in Germany did not form part of “the public concerned” in relation to the decision, because it was not likely to be affected by the grant of development consent.

(3) The Convention does not impose an obligation on a state party to notify directly the public in another state party.

(1) *The complaint concerns the Espoo Convention*

24. The Communicant’s specific complaint is that the United Kingdom acted in breach of Article 6 because it did not provide the public in Germany with an opportunity to participate in a trans-boundary EIA.

25. However, the Convention does not require trans-boundary EIAs.³ A complaint about a failure to conduct a trans-boundary EIA is, in substance, a complaint about a breach of the Espoo Convention. Such a complaint falls to be addressed under that Convention.

26. The Espoo Convention expressly sets out when trans-boundary consultation in relation to EIAs should occur, and how such consultations should be conducted. The state parties to the Aarhus Convention expressly recognised

³ *The Aarhus Convention: An Implementation Guide* (2nd ed, 2014), page 122.

this when agreeing the terms of the Convention (see the 23rd paragraph of the preamble).

27. The decision by the United Kingdom Government not to undertake trans-boundary consultation is already being considered by the Implementation Committee of the Espoo Convention. The United Kingdom has been invited to discuss the matter at the Committee's 32nd session in December 2014. It would be wrong for this Committee to determine matters which properly fall within the remit of another UNECE body.
28. In this context, it is also to be noted that the Maastricht Recommendations do not suggest that one state party should deal directly with the public in another state party: see paragraphs 23(c) and 25 of the Recommendations. On the contrary, the Maastricht Recommendations suggest that state parties should deal with each other at the inter-state level, including in accordance with existing arrangements such as those established by the Espoo Convention.
29. In the present case, the Federal Republic of Germany decided not to request a trans-boundary EIA under the Espoo Convention. The Maastricht Recommendations recognise that, in such circumstances, it would have been inappropriate for the United Kingdom to seek to deal directly with the public in Germany. This supports the point that such matters properly fall within the scope of the Espoo Convention, not the Aarhus Convention.

(2) *The “public concerned” did not include the public in Germany*

30. Article 6(2) imposes an obligation to inform “*the public concerned*”. Article 2(5) defines “*the public concerned*” as “*the public affected or likely to be affected by, or having an interest in, the environmental decision-making*”.

31. The United Kingdom was entitled to conclude that the public in Germany would not be affected, and would not be likely to be affected, by the decision-making and that the public in Germany did not have an interest in the decision-making. This is supported by the following matters.
- (1) The public in Germany would not be affected by Hinkley Point C unless it experienced a serious accident that caused a relevant emission of radiological material.
 - (2) The undisputed evidence is that it is extremely unlikely that such an event will occur at Hinkley Point C. This is by reason of the design of the reactors, and the standards required for construction of the buildings in which the reactors will be housed, and the level of regulation to which Hinkley Point C will be subject to throughout and beyond its operational life.
 - (3) The Communicant has placed no material before the Committee that calls this evidence into question.
 - (4) The High Court and the Court of Appeal have scrutinised the matter, and have concluded that the United Kingdom was entitled to conclude that the new power station was not likely to have a significant trans-boundary environmental impact.
 - (5) The European Commission has scrutinised the matter, and has stated that there is no basis for questioning the legal validity of the United Kingdom's conclusion that the new power station is not likely to have a significant effect on the environment in another member state.⁴

⁴ Letter dated 31st May 2013 from the European Commission to the Communicant in communication ACC/C/2013/92.

- (6) The Federal Republic of Germany saw no reason to cast doubt on the assessment carried out by the United Kingdom and the European Commission.⁵
32. Article 6(2) could only have required the United Kingdom directly to inform the public in Germany if Article 2(5) were interpreted such that “the public likely to be affected” included “the public *extremely unlikely* to be affected”. However, that interpretation of Article 2(5) cannot be sustained.
- (1) It would be contrary to the express words of the Convention as agreed by the state parties and would impose much more onerous obligations on the parties than the obligations to which they have agreed.
- (2) It is not supported by any other provision of the Convention.
- (3) It is not supported by the *Implementation Guide*.
- (4) It would make the Convention unworkable in practice.

(3) *The “public” did not include the public in Germany*

33. There is no express provision in the Convention for a state party directly to notify and consult the public in another state party. If the state parties had wanted the Convention to create such an obligation, they would have set out the obligation expressly.
34. Further, because obvious practical issues are likely to arise where one state party is required to deal directly with the public in another state party, the

⁵ Letter dated 21st March 2013 from the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety to the Communicant.

state parties would have set out the mechanism by which such an obligation was to be discharged. In contrast to the Espoo Convention, neither the Convention, the *Implementation Guide*, nor the Maastricht Recommendations set out any mechanism by which a state party is to deal directly with the public in another state party. This supports the conclusion that “*the public*” does not include the public in another state party.

35. This interpretation of “*the public*” is supported by the references to “*the public*” in various provisions of the Convention. For example, Article 3(3) requires state parties to promote the education of “*the public*” and Article 8 requires state parties to promote the effective participation of “*the public*” in the preparation of their legislation. The state parties cannot have intended that, in these Articles, “*the public*” includes the public in other countries.
36. Further, as explained above, even the Maastricht Recommendations do not suggest that one state party should deal directly with the public in another state party (see paragraphs 23(c) and 25).

F. CONCLUSION

37. For the reasons set out above, the Committee is respectfully invited to conclude that the United Kingdom did not act in breach of the Convention.