Annex A

1. This Communication concerns High Speed Two, "HS2"[1]. This is the proposed new high speed rail network connecting London to Birmingham ("Phase 1"), and then on to Leeds and Manchester, in a second phase ("Phase 2"). This would create what is known as the 'Y' Network. It might later extend to Glasgow and Edinburgh. It would terminate in London at Euston Station.

2. The UK Government is currently in the process of seeking powers through legislation to construct and operate HS2 Phase 1[2]. A Hybrid Bill[3] relating to the first phase is currently before Parliament, the High Speed Rail (London - West Midlands) Bill (see further below).

3. The Government's decision to seek these powers was contained in a Command Paper[4] published on 10 January 2012: *'High Speed Rail: Investing in Britain's Future – Decisions and Next Steps'*(Cm 8247), this is commonly referred to as "the DNS".[5] The DNS contained other related decisions[6]. It is the DNS that is the focus of this Communication.

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[1] HS1 is the existing Channel Tunnel Rail link from St Pancras to France and Belgium.

[2] The Committee has previously considered similar Bill procedures: see ACCC/C/2010/53 and ACCC/C/2011/61. The latter concerned a project known as Crossrail and the Committee said at para. 56 "[*i*]*t is noted that processes similar to the hybrid bill process, under a different label, exist under the jurisdictions of other Parties to the Convention (see, e.g., the recent jurisprudence of the Court of Justice of the EU concerning Belgium:* ***Boxus and others v. Région wallonne****, C-128/09 (2012) and* ***Solvay v. Région wallonne****, C-182/10 (2012)). While such processes are a reasonable way for Governments to deal with permitting large projects … the Committee underlines that the process of adopting projects by such means still have to be considered within the provisions of the Aarhus Convention, and thus that the Party concerned has to ensure adequate opportunities for public participation"*

[3] Please see further below as to the precise nature of the form of legislation under consideration and the detailed procedures within that for public participation and the consideration of environmental information.

[4] Command Papers derive their name from the fact that a Government minister presents them to Parliament "by Command of Her Majesty". The Papers are numbered consecutively and the current series takes the prefix Cm.

[5] A copy of the DNS is at Annex 1

[6] The decisions taken by the Secretary of State for Transport, as recorded within the DNS, included the following:
(i) That she should seek legislative powers for the construction and operation of a high speed railway between London and the West Midlands as the first phase of the proposed Y Network for HS2 and for that purpose promote a Hybrid Bill based upon the proposed line of route shown in the DNS;
(ii) That she should undertake a further round of public consultation on a proposed route for Phase 2 of the Y Network from the West Midlands to Manchester and Leeds;
(iii) That High Speed Two (HS2) Ltd (the company established by the Department for Transport in 2009 and charged with developing plans for a high speed railway, and providing the Government with advice on the same) should undertake the necessary preparatory work for that further public consultation; and
(iv) That she should later promote a second Hybrid Bill following her approval of a proposed route of phase 2 of the Y Network.

4. It cannot be disputed that the decisions contained in the DNS were taken only after very full consultation with the public. The details of these consultations are set out fully below and attached in the Annexes are some of the relevant documents. It is a fact that a large amount of information was provided to the public as part of such consultations; this included very extensive information on the environmental effects of HS2. The Communicants say that the information was insufficient, they complain that there were four particular matters on which environmental information was not provided, see paragraph 11 of the Communication. The first of these relates to what is described as the environmental effects of the whole Y network, that is to say Phases 1 and 2. The second to fourth matters relate to information concerning various possible alternatives to HS2[7].

5. It should be noted that the First and Second Communicants[8], and others, sought to challenge the legality of the DNS in judicial review proceedings brought before the domestic courts. Key issues raised on those claims included the contentions that:

   (i) the decision to proceed to promote HS2 required a strategic environmental assessment pursuant to Directive 2001/42/EC ("the SEA Directive") considering alternatives to HS2;
   (ii) the decision to proceed with Phase 1 of HS2 without carrying out an assessment of the cumulative impacts of Phase 2 breached Directive 2011/92/EU on ("the EIA Directive"); and
   (iii) the consultation process had been unlawful in a number of respects, see paragraphs 302 – 482 of the judgment of the Administrative Court in ***R (Buckinghamshire County Council & ors) v Secretary of State for Transport*** [2013] EWHC 481 (Admin), (a number of claims for judicial review challenging the DNS brought by, inter alia, the First and Second Communicants).[9]

6. All of those contentions were rejected by the Administrative Court, and by the Court of Appeal[10]. Of the three issues above, only the first was pursued before

[7] These matters are considered further below.
[8] The UK Government disputes the ability of the Second Communicant to bring this Communication; see below.
[9] A copy is at Annex 2
[10] ***R (Buckinghamshire County Council & ors) v Secretary of State for Transport*** [2013] EWCA Civ 920, with one dissent in respect of the SEA challenge. A copy of the judgment is at Annex 3.

the Supreme Court, sitting (unusually) as a panel of 7 Justices, which dismissed all the grounds of appeal before it unanimously.[11]

7. The Second Communicant specifically relied on Article 7 of the Aarhus Convention in support of its claim that the UK Government had acted unlawfully in failing to carry out a strategic environmental assessment ("SEA") prior to issuing the DNS: see paragraph 50 of the Supreme Court Judgment in which Lord Carnwath JSC[12] identified as the second of the issues it had to consider, *"whether if the interpretation of the Court of Appeal is correct [to the effect that SEA was not required under EU law], article 3(2) of the SEA Directive is inconsistent with Article 7 of the Aarhus Convention, and if so with what consequences."*[13] The Court rejected that ground of challenge at paragraphs 50 to 52 of the Judgment, upholding the decision of the majority of the Court of Appeal.

8. For the reasons set out below, the UK Government strongly denies that it has failed to comply with its obligations under the Convention in respect of HS2, and respectfully asks the Committee to dismiss this complaint. In short the requirements of Article 7 were and are being fully complied with and the Communicants' complaint, which seeks to resurrect their case which failed before the domestic courts, is that only the carrying out of a SEA can satisfy the requirements of Article 7. That complaint is misconceived.

Preliminary Issues

9. Prior to addressing the substance of the communication, the UK Government raises two preliminary issues. The first concerns whether the complaint at issue qualifies as a communication under paragraph 18 of the annex to decision I/7 in relation to the Second Communicant ("LB Hillingdon"). The second concerns the failure of the Communicants to exhaust all domestic remedies prior to bringing this complaint contrary to paragraph 21 of the annex to decision I/7.

(1) The Second Communicant: LB Hillingdon

10. As identified in the Communication (paragraph 4), the London Borough of Hillingdon is an elected local authority in north-west London. The London Borough of Hillingdon is one of thirty-three principal sub-divisions of the administrative area of Greater London, which were created by the London

[11] ***R (HS2 Action Alliance) v Secretary of State for Transport*** [2014] UKSC 3. A copy of the judgment is at Annex 4.
[12] Justice of the Supreme Court
[13] See also para 15(ii) of the Judgment

Government Act 1963. LB of Hillingdon is a statutory corporation established in domestic law[14], it is what is known as a "core public authority"[15]. It is responsible for the majority of local services in the borough, it has regulatory decision making powers in areas such as planning, highways and waste services, and it has the power to raise revenue by means of council tax and business rates. It is, and is recognised as being, a public authority, whose decisions are subject to challenge and scrutiny before the English Courts on general public law principles, and is without any doubt an emanation of the State.

11. As the Committee will be aware, communications may be brought before the Committee by a "member of the public". It is the UK Government's position that LB Hillingdon as a "public authority" within Article 2(2) of the Convention is not a "member of the public" on whom the Convention confers rights and protections, and accordingly has no standing to bring this complaint, for the reasons set out below.
12. The distinction between the "public" on whom rights are conferred and "public authorities" on whom obligations are imposed lies at the heart of the Convention: see for example the seventh, eighth and ninth recitals and the definitions section in Article 2[16]. The definition of "public" in Article 2(4) of the Convention is "one or more natural or legal persons, and in accordance with national legislation or practice, their associations, organizations or groups". The definition is designed to capture actors other than public authorities. A specific reference to public authorities also being covered by this term would surely have been included if that were intended, given the reference to "associations, organizations or groups" and the mention that is made of "individual citizens, non-governmental organizations and the private sector" in relation to the protection of the environment in the thirteenth recital. Moreover, and perhaps more pertinently, "public authority" is separately defined in Article 2(2) and includes "Government at national, regional and other level".

[14] As a statutory corporation its powers are limited expressly or by implication to those conferred on them by statute: see Encyclopedia of Local Government Law, vol. 2, at paras. 3-12.25.3. (Annex 39)

[15] See ***Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and Another*** [2004] 1 A.C. 546. (Annex 39)

[16] And see also the second recital which refers to Principle 10 of the Rio Declaration which stresses the need for "concerned citizens" (emphasis added) participation in environmental issues and for access to information on the environment held by public authorities. In full Principle 10 says "*Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided*".

13. The fundamental distinction between the public and "public authorities" is also emphasized by the UNECE Aarhus Implementation Guide (2014[17]). Thus the Guide notes in its introduction that "*The Aarhus Convention grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation...*" and that "*Whilst most multilateral environmental agreements cover obligations that Parties have to each other, the Aarhus Convention covers obligations that Parties have to the public. It goes further than any other environmental convention in imposing clear obligations on Parties and public authorities towards the public....*". The UK Government would also draw attention in particular to comments on the definitions in Article 2 of the Convention which states (*inter alia*):

> "Definitions play an important role in the interpretation and implementation of any convention. As the Aarhus Convention deals in part with the development of international standards for domestic legal systems, definitions are exceptionally important. Because of the wide variety of legal systems in the ECE region, it is important to define as precisely as possible the terms that are at the heart of the Convention. By doing so, a more consistent implementation of the Convention in the framework of the domestic legal systems of all Parties can be assured."

14. As the Guidance goes on to state:

> "The terms whose definitions are important under the Convention include "public authority", "public", "public concerned" and "environmental information". They help to define the scope of the Convention, in terms of the persons who should be bound by its obligations, as well as those who should be allowed to use the rights described....."[18]

15. The UK Government also relies, so far as necessary, on the specific commentary on the definitions of "Public authority" (*government at national, regional, and other level)* at page 46 of the Guidance and "public" (in particular the references to "members of the public") at pages 55 and 56 of the Guidance.

16. The Convention was plainly intended to address the relative positions of members of the public and groups in comparison with government bodies, in terms of resources, control of decision-making and information. The suggestion that the Convention ratified by the Parties should be interpreted as going beyond that and also regulating relations between different government bodies is clearly beyond the scope of the discussions that led to the Convention and the text itself. Such an approach is fundamentally at odds with the UK Government's understanding of the Convention. Neither it nor any of the other parties

[17] Second Edition (June 2014) : http://www.unece.org/env/pp/implementation_guide.html
[18] Page 44 of the Guidance

contemplated that the Convention could be an instrument that regulated intra-Government relations.

17. The Committee's findings in ACCCC/2012/68 are of relevance in this context. There a communication was brought on behalf of the Avich and Kilchrenan Community Council. Such community councils are similar to parish councils in England.[19] The Committee had to consider whether such a body qualified as a communicant under paragraph 18 of the annex to decision I/7. The UK Government's understanding throughout that case was that the communication was submitted by an individual member of the public who was a member of the Community Council. In concluding that the Community Council did qualify the Committee placed significant weight on the fact that it "*had no regulatory decision-making functions and are essentially voluntary bodies established within a statutory framework.*" When examined in full, it is clear that, for a Scottish community council to have been allowed, in the view of the Committee, to bring a communication, the absence of regulatory decision-making functions and its representative role on matters like planning applications, are the decisive factors:

> "81. In order to define the nature of the complaint, the Committee examines the role of community councils in Scotland. Although community councils have statutory duties in terms of licensing and planning, they have no regulatory decision-making functions and are essentially voluntary bodies established within a statutory framework. They mainly act to further the interests of the community and take action in the interest of the community as appears to be expedient and practicable, including representing the view of the community regarding planning applications. In addition, community councils rely on grants from local authorities and voluntary donations. Community Council members furthermore operate on a voluntary basis and do not receive payment for their services.
> 82. The Committee was also informed by the Party concerned (United Kingdom) that the representations from the Avich and Kilchrenan Community Council with regard to the projects at stake were recorded under the same section as representations from members of the public and non-governmental organizations (NGOs).
> 83. Based on the above, in particular the role of the council in representing the interests of the community in planning matters and the fact that council members provide their services on a voluntary basis and have no regulatory decision-making functions, the Committee concludes that community councils in Scotland qualify as "the public" within the definition of article 2, paragraph 4, of the Convention. It thus decides to consider the present complaint as a communication under paragraph 18 of the annex to decision I/7, as submitted by Ms. Metcalfe on behalf of the Avich and Kilchrenan Community Council."

18. There are a number of features which distinguish a Scottish community council and a London Borough Council such as the LB of Hillingdon:

[19] As distinct from district councils or borough councils. Parish councils operate at a level below district or borough councils, and, although elected, have a narrower range of powers and functions.

- the LB of Hillingdon, unlike a community council, has a very large number of "regulatory decision-making functions" e.g as a "local planning authority" under the Town and Country Planning Act 1990 it is responsible for the approval of applications for planning permission, enforcing against unlawful development, approval of proposed works to listed buildings. It is also a body with many other functions. Thus it is a housing authority, a local education authority, a library authority, a licensing authority (in respect of e.g. entertainment premises, cafes and taxis). It has other environmental regulatory functions, e.g. the approval of drainage systems, taking proceedings in respect of statutory nuisance etc. Local authorities such as the LB of Hillingdon also have powers to compulsorily acquire land for various purposes;

- the LB of Hillingdon, unlike a community council, is not an "essentially" voluntary body – it is a statutory corporation provided for in domestic legislation; it does not provide its services on a "voluntary basis" but under statutory powers and duties and it does not like a community council rely on "voluntary donations".

- a local authority, such as the LB of Hillingdon, benefits from significant Central Government funding (derived from general taxation) as well as the retention of significant revenue raised through council tax[20] and business rates[21], which it has powers to levy and enforce. Moreover local authorities also have powers to, and do, charge for many of their services;

- although LB of Hillingdon, in some cases, can be said to represent "the interests of the community in planning matters", the position as between LB Hillingdon and the community council is wholly different. The LB of Hillingdon is a local planning authority with a wide range of decision-making functions and roles under the planning legislation. It decides in the first instance whether to grant planning permission, it has planning enforcement powers including the power to serve enforcement notices and to seek injunctions. It is thus wholly unlike the community council, which does not have such powers or functions, in this regard also. The role of a parish or community council in planning matters is essentially as a consultative forum, it is to be consulted on planning applications.

[20] Council tax is a system of local taxation the level of which is set and then collected by local authorities. It is a tax on domestic property.

[21] Business rates are a tax on properties which are not used for domestic purposes, such as shops, factories, offices, beach huts and moorings. Business rates collected by local authorities are the way that those who occupy non-domestic properties contribute to the cost of local services

19. The UK Government would also stress that the position under the Aarhus Convention reflects an approach evident in international law more generally whereby local authorities are seen as part of (an emanation of) the state. The Government would thus point to the analogy with the position under the European Convention on Human Rights whereby a local authority may not be a "victim"[22]. The European Court of Human Rights has explained that the purpose of this rule is to "prevent a contracting party acting both as an applicant and respondent party before the Court"[23]. Similarly in EU law it has been held that local authorities are an emanation of the state unable to rely on the direct effect of Directives against Central Government: see (in domestic jurisprudence) ***R (Westminster CC) v Mayor of London*** [2003] B.L.G.R. 611 at paragraphs 71 – 75 and ***Wychavon CD v SSE*** [1994] Env LR 239 at 244 – 249.[24]

20. Accordingly, the UK Government submits that the Second Communicant is unable to bring this Communication. The Communication in so far as it is made by the Second Communicant should be held to be inadmissible.

(2) Failure to exhaust domestic remedies

21. The UK Government submits that all the Communicants have failed to exhaust domestic remedies prior to commencing this complaint, contrary to the Committee's own guidance, with no explanation provided for that failure.

22. The Third Communicant did not bring any proceedings before the English Courts.

23. As noted above, the First and Second Communicants have previously challenged the DNS by means of judicial review in the English Courts. However, whilst the First Communicant relied on the Aarhus Convention in support of its submission that the UK Government was required to carry out an SEA prior to issuing the DNS, it notably formed no part of the First or Second Communicants cases that there was insufficient information provided to the public during the consultation leading to the DNS for the purposes of Articles 7 of the Convention. At no point during the proceedings before the domestic court was it alleged that the alleged failure to provide information on (inter alia) reasonable strategic alternatives to

[22] See Article 34 of the European Convention on Human Rights.
[23] See ***Islamic Republic of Iran Shipping Lines v Turkey*** (2008) 47 EHRR 24 at paragraph 81. The UK Government would also note that where under the ECHR a complaint is made about the actions of a local authority it is the UK which responds to the communication as the State Party. (Annex 40)
[24] Copies are at Annex 39

HS2 constituted a freestanding breach of the Aarhus Convention.[25] And the Supreme Court in paragraph 52 of its judgment records in terms that no breach of Article 7 was alleged by the appellants in that case, which included the First and Second Communicants.

24. The Communicants submit at paragraph 24 of their Detailed Submissions that they could not have made that complaint in the domestic proceedings because non-compliance with international treaties such as the Aarhus Convention cannot be a ground of judicial review. While it is correct that the provisions of an unincorporated treaty cannot be directly applied by domestic courts, in the High Court and Court of Appeal proceedings there was a freestanding challenge to the lawfulness of the consultation process which included a complaint in respect of the lack of information on, or assessment of, alternatives to HS2 and/or the proposed wider network. Article 7 could have been raised by the First and Second Communicants as part and parcel of those complaints[26]. It was not, and was instead relied on only as being something said to support the interpretation of the SEA Directive by the First Communicant as a discrete and separate ground of challenge. Indeed in the proceedings relating to HS2 in the Administrative Court the Judge noted that one of the other claimants, Heathrow Hub Limited, in arguing that the consultation process was flawed made submissions in which "*the Aarhus Convention and domestic authorities were prayed in aid*" (see paragraph 584). The Judge though rejected the allegations that the consultation was flawed as alleged or at all. The Judge also rejected complaints made about the consultation by the Second Communicant. The First Communicant while challenging successfully the separate but related consultation process on property matters mounted no challenge to the lawfulness of the consultation on the DNS and the environmental information accompanying it.

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[25] See in particular in this regard para 51 of the Supreme Court Judgment in which Lord Carnwath JSC records the Second Communicant's complaint as follows: "*It is to be noted that this article* [Article 7] *refers to plans and programmes in general, without the qualifications found in the SEA Directive definition. It is not suggested, having regard to the extent of public consultation which has already taken place on the HS2 project, that there has been any breach of this requirement taken on its own, even assuming the DNS to be a "plan or programme" within the meaning of this article. Instead the argument, as I understand it, is that the SEA Directive must be interpreted in such a way as to ensure conformity with the Convention, which in turn requires that any plans or programmes covered by article 7 are also subject to the SEA procedure.*"

[26] In this regard reference needs also to be made to ***R. (Greenpeace Ltd) v Secretary of State for Trade and Industry*** [2007] Env. L.R. 29 where the Administrative Court (Sullivan J. as he then was) quashed a White Paper on the future of energy production in the UK issued following a consultation process on the basis that the consultation was unlawful. In considering the lawfulness of the consultation the Judge referred to and relied upon the Aarhus Convention, and in particular the requirements of Article 7 and indicated that these meant that the fullest public consultation was required: see paras. 49 – 51 (attached). And see also ***Stratford on Avon DC v Secretary of State for Communities and Local Government*** [2014] J.P.L. 104. (Annex 39)

25. Accordingly, the UK Government submits that this communication should be dismissed, as the Communicants have failed to exhaust domestic remedies contrary to paragraph 21 of the annex to decision I/7.

The Substantive Complaint

26. The Communicants complain that there was a 'failure' to provide sufficient environmental information on the strategic alternatives to HS2 and/or of the wider HS2 network during the consultation leading up to the DNS, such that there was breach of Articles 6 and 7 of the Convention.

27. The UK Government strongly denies that there is any merit in that complaint.

28. In considering this communication, it is critical to bear in mind that the DNS was neither the beginning nor, by a long way, the end of the decision-making process in relation to HS2, nor the only opportunity for public participation in that process.[27]

29. It is therefore necessary to set out the background to this matter in some detail, including the processes which followed the January 2012 decision, and which are continuing to date.

Background

30. An overview of the key events in the development of HS2 is set out in the Statement of Facts and Issues agreed between the Appellants and UK Government before the Supreme Court, a copy of which is at Appendix 3 of the Communication. That is usefully amplified by the Witness Statement of Philip Graham dated 3 August 2012[28] (a Senior Civil Servant at the Department for Transport working on HS2), the Witness Statement of Peter Miller, Head of Environment at High Speed Two (HS2) Ltd, and the Witness Statement of Alison Munro, then Chief Executive of High Speed Two (HS2) Ltd, which were relied upon in the domestic proceedings. These appear at Annexes 5, 6 and 7 respectively.

[27] This was clearly recognized by the domestic courts during the litigation. See in particular paragraphs 91-97 102, and 404-405 of the High Court Judgment (Annex 2) and paragraphs 55 and 74-82 of the Court of Appeal judgment (Annex 3)

[28] Headed 'Third Witness Statement of Philip Graham', it was the third witness statement which had been provided by Mr Graham during the proceedings, the other two dealing with procedural matters or applications which have no bearing on the present communication.

31. The UK Government's first significant consideration of the case for a high speed rail line in the UK was in 2001, when the Strategic Rail Authority (an independent body sponsored by the Department for Transport, but abolished in 2009) commissioned a study from Atkins[29] into the case for new high speed lines. The Study concluded that there was a strong transport case for new north-south high speed lines as a means of relieving congestion on existing West Coast, East Coast and Midlands Main Lines and freeing up capacity on those lines for new networks.

32. That Study was not actioned but was taken into account in an independent transport study into transport and economic growth (the Eddington Report) published in 2006, and a White Paper published by the Government in 2007: '*Delivering a Sustainable Railway*'. Both suggested that high speed rail options should be considered alongside other options for assessing long-term transport capacity constraints.

33. In 2008, the Secretary of State for Transport commissioned Network Rail[30] to undertake work to consider longer-term options for the development of the rail network, which included looking at high speed lines. This lead to the Network Rail 'New Lines' Study.

34. In November 2008, building on the ongoing work commissioned from Network Rail, the Department for Transport established a National Networks Strategy Group, whose remit was to consider:

    - both shorter-term ways to make better use of existing transport capacity and more significant long term options;
    - any case for future investment having to be underpinned by a robust evidence base; and
    - taking "*full account of relevant geographical, technical and environmental considerations.*"[31]

35. On 15 January 2009, the Secretary of State for Transport announced the establishment of a new company, High Speed Two (HS2) Ltd ("HS2 Ltd") which was to consider the case for new high speed rail services from London to

[29] A major design and engineering consultancy firm with substantial experience in transport planning
[30] An arm's-length body which manages Britain's railway infrastructure within effective regulatory and control frameworks.
[31] See the Secretary of State's Written Statement to the House of Commons of 29 October 2008, extracted at paragraph 13 of Philip Graham's Witness Statement (Annex 5).

Scotland, including the development of a proposal for an entirely new line between London and the West Midlands. The remit included the requirement that HS2 Ltd assess the environmental impact and business case for different routes in enough detail to enable the options to be narrowed down. This commitment was affirmed by the then Chairman of HS2 Ltd in February 2009, who wrote to the Secretary of State confirming that:

> "… in discharging our remit, we will be paying close attention to the environmental impacts of the new line, both locally in terms of biodiversity, landscape, noise etc, and at the national/international level in terms of carbon emissions. We will factor these potential impacts into our work on the identification of route options, the specification of the new line, modal shift, etc."[32]

36. The Government recognised that in order to make an effective assessment of the case for a specific high speed rail proposal, it would be necessary to compare that proposal against alternative options, both strategic and in terms of route. In 2009, HS2 Ltd considered a number of potential route alternatives, reporting its conclusions in its 2009 report, *'High Speed Two: London to the West Midlands and Beyond'*.[33] In addition, in August 2009, the Department for Transport commissioned Atkins to develop and assess potential enhancements to the current road and rail networks, as potential strategic alternatives to new rail lines. As set out at paragraph 22 of Philip Graham's Witness Statement, the programme of work covered the development of four packages of potential enhancements to the strategic road network, and five packages of potential enhancements to the rail network, and an assessment of the business case for each of the options, including both economic and environmental assessments.

37. In its 2009 report, provided to the Department for Transport at the end of 2009, HS2 Ltd set out a detailed proposal for a new line from London to the West Midlands and also considered options for connections to Heathrow Airport and HS1. Assessment of the potential environmental impacts of various routes had been a key aspect of the work stream leading to this recommendation, including the development of, and assessment of the various options as part of, an appraisal of sustainability.[34] An Appraisal of Sustainability Report was provided to the Secretary of State for Transport alongside HS2 Ltd's 2009 report.

38. Following consideration of the HS2 Ltd 2009 report, and Atkins' analysis of strategic alternatives, on 11 March 2010 the Department for Transport published

[32] See paragraphs 26-28 of Peter Miller's Witness Statement (Annex 6)
[33] A copy is at Annex 8
[34] See paragraphs 26 to 55 of Peter Miller's Witness Statement (Annex 6)

a Command Paper – '*High Speed Rail*'[35] – setting out the position the Government had reached, which main findings included:

- That the Government intended to take forward an 'initial core' Y-shaped high speed rail network linking London to Birmingham, Manchester, the East Midlands, Sheffield and Leeds, and with connections to the West Coast and East Coast Mainlines;
- That HS2 Ltd's recommended route from London to the West Midlands would form the trunk of the network, subject to further work to reduce its impacts on the environment and communities; and
- Crucially, that a public consultation would be held covering three key issues:
    i. The strategic case for high speed rail in the UK;
    ii. The Government's proposed strategy for an initial core high speed rail network; and
    iii. HS2 Ltd's detailed recommendations for a high speed line from London to the West Midlands.[36]

39. As set out at paragraph 30 of Philip Graham's Witness Statement:

> "In relation to potential strategic alternatives to high speed rail, the Command Paper ruled out new motorways and expansions in domestic aviation on sustainability grounds. It acknowledged that enhancements to existing rail networks would be likely to have lower environmental impacts than completely new alignments (paragraph 2.39) but it found that major packages of enhancements to existing networks could not meet the Government's objectives as fully as new high speed lines, stating that:
>
> "….major, multi-billion pound upgrades to existing road and rail networks would provide far less additional capacity than a new railway line. Major upgrades also involve considerable disruption for travellers. Moreover, they yield few of the connectivity improvements which new high speed routes make possible – for example, transforming the links between the West Midlands and other conurbations in the Midlands, the North and Scotland, in additional to substantially improving journey times in London.""

40. Alongside the Command Paper, the Government also published:

- HS2 Ltd's 2009 report, with a number of supporting technical documents;
- A non-technical summary of the Appraisal of Sustainability report (the full document was not published at this stage as further work had been commissioned on detail of the route and so analysis would be likely to change);[37] and

[35] A copy is at Annex 9
[36] See, for more detail, paragraph 29 of Philip Graham's Witness Statement (Annex 5)
[37] A copy is at Annex 10

- The full set of reports provided by Atkins on the strategic alternatives study.[38]

41. On 17 March 2010, the Secretary of State for Transport wrote to HS2 Ltd setting out a revised remit for the company, which included (inter alia) further development work on the route from London to the West Midlands to prepare for public consultation and potential options for lines from the West Midlands to Leeds and Manchester. A further revised remit was provided following the formation of the Coalition Government, to include a comparative assessment of the potential 'S' and Y' network options.[39] This latter work was published in October 2010, and included an analysis of the key sustainability features in relation to each network option.[40]

42. On 20 December 2010, the Secretary of State made a statement to the House of Commons, explaining that the Government intended to consult on a 'Y' network for HS2, to be delivered in two phases, with a direct link to Heathrow and to HS1, with the Phase 1 line broadly following that proposed previously but with amendments to the vertical and horizontal alignments to reduce its impact on the environment and communities. This decision was informed by a number of reports,[41] which were published at the same time the Statement was made to the House.

43. A public consultation on HS2 commenced on 28 February 2011 and ran for 5 months, closing on 29 July 2011. The consultation was widely reported[42]. The Government published an over-arching consultation document ("the Consultation Document"),[43] alongside a suite of supporting documents as well as detailed maps of the proposed route and which included:

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[38] (1) High Speed 2 Strategic Alternatives Study Baseline Study (March 2010) (2) High Speed 2 Strategic Alternatives Study Strategic Outline Case (March 2010) (3) High Speed 2 Strategic Alternatives Study Rail Interventions Report (March 2010) (4) High Speed 2 Strategic Alternatives Highway Interventions Report (March 2010). Copies of these documents are at Annex 11

[39] See paragraphs 35-37 of Philip Graham's Witness Statement (Annex 5)

[40] A copy is at Annex 12

[41] See paragraphs 14 – 16 of Alison Munro's Witness Statement (Annex 7)

[42] http://www.railwaygazette.com/news/single-view/view/hs2-consultation-launched.html
http://www.bbc.co.uk/news/uk-politics-12591464
http://www.bbc.co.uk/news/uk-england-13513123
http://www.bbc.co.uk/news/uk-england-12514475
http://www.bbc.co.uk/news/uk-england-13743067
http://www.lawsociety.org.uk/support-services/advice/articles/proposed-hs2-link--implications-for-practitioner
http://www.chilternsociety.org.uk/hs2/newsletter-jan12.php

[43] A copy is at Annex 13

- HS2 London to the West Midlands Appraisal of Sustainability[44];
- Strategic Alternatives to the Proposed Y Network (an Atkins report)[45]; and
- A consultation summary report.[46]

44. The consultation process included 41 days of local roadshows at which DfT and HS2 Ltd staff were available to discuss the detail of the proposals. Further details of the consultation process are set out at paragraphs 250-272 of Philip Graham's Witness Statement. The questions to which consultees were invited to respond expressly included "Q6 Appraisal of Sustainability", which asked "*Do you wish to comment on the Appraisal of Sustainability of the Government's proposed route between London and the West Midlands that has been published to inform the consultation?*".

45. Over 55,000 responses were received during the consultation.

46. Following the consultation, the Government undertook a general review of many elements of the high speed rail strategy, including potential refinements to route design at more than 20 locations along the proposed route, and commissioning further analysis on the main strategic alternatives to HS2 from Atkins and Network Rail. On 10 January 2012, the Secretary of State for Transport announcement the outcome of the consultation and published the DNS setting out her decisions and next steps in the process. Alongside the DNS, the Government made available a substantial public record of the analysis and consideration by HS2 Ltd and the DfT of issues raised during consultation.[47] These included:

    - Consultation Summary Report – an independent analysis of consultation responses by Dialogue by Design (consultants);[48]
    - Review of the Government's Strategy for a National High Speed Rail Network;[49]
    - High Speed Rail: Alternatives Study: Update following Consultation;[50]
    - Review of Strategic Alternatives to High Speed Two;[51]

[44] This was itself accompanied by a non-technical summary and a number of technical Annexes, including one reviewing the sustainability of the main route alternatives considered. Copies are at Annex 14
[45] A copy of this document is at Annex 15
[46] A copy of this document is at Annex 16
[47] A full list is detailed at paragraph 52 of Philip Graham's Witness Statement (Annex 5)
[48] A copy is at Annex 17
[49] A copy is at Annex 18
[50] A report by Atkins. A copy is at Annex 19
[51] A report by Network Rail. A copy is at Annex 20

- Review of Possible Refinements to the Proposed HS2 London to West Midlands Route;[52]
- Review of HS2 London to West Midlands Route Selection and Speed;[53] and
- Review of HS2 London to West Midlands Appraisal of Sustainability.[54]

47. As set out above, the decision making process did not terminate with the publication of the DNS. Following the decision to proceed to promote Phase 1 by seeking powers from Parliament by means of hybrid Bill, work commenced on preparing for the Parliamentary process, which included the production of the Bill itself,[55] preparation of an Environmental Statement required to be laid with the Bill pursuant to Parliamentary Standing Orders, and amendment of the Parliamentary Standing Orders to ensure compliance with the requirements of the EIA Directive, specifically as regards public participation.[56]

48. It is necessary at this stage to summarise the hybrid Bill process. A succinct explanation is to be found at paragraphs 57-58 of the Judgment of Lord Reed JSC[57], together with a summary of the EIA procedures at paragraphs 59-60:

> "Hybrid bill procedure
>
> 57. It may be helpful at the outset to explain what is meant by hybrid bill procedure. A hybrid bill shares certain characteristics of a public bill and a private bill. The Speaker has defined a hybrid bill as "a public bill which affects a particular private interest in a manner different from the private interests of other persons or bodies of the same category or class" (Hansard (HC Debates), 10 December 1962, col 45). This hybrid character influences the Parliamentary procedure: a hybrid bill proceeds as a public bill, with a second reading, committee report and third reading, but with an additional select committee stage after the second reading in each House, at which objectors whose interests are directly and specifically affected by the bill (including local authorities) may petition against the bill and be heard. Parliamentary standing orders make provision for those persons who have standing to lodge a petition.
>
> 58. It is for Parliament and not the Government to determine the Parliamentary procedure for a hybrid bill laid before it. It is however a matter of agreement between the parties that, in the case of the hybrid bill for Phase 1 of HS2, the principle of the bill will be set upon the bill's receiving a second reading following debate, subject to the Government whip, in the House of Commons. It is expected that the principle of the bill will extend to a high speed rail line running between London, Birmingham and the West Midlands,

[52] A copy is at Annex 21
[53] A copy is at Annex 22
[54] A copy is at Annex 23
[55] A copy of the judgment is at Annex 4. A copy of the Bill is at Annex 24
[56] Copies of the relevant Standing Orders (27A and 224A) are at Annex 25
[57] An overview of the hybrid Bill process as envisaged as at January 2012 (now overtaken by the amendments to Standing Orders) is also set out at paragraphs 217-247 of the Witness Statement of Philip Graham (Annex 5)

with its central London terminus at Euston and a link to HS1 (ie the Channel Tunnel Rail Link). It is also common ground that the established convention is that a select committee for a hybrid bill cannot hear petitions which seek to challenge the principle of the bill, unless instructed to do so by the House at second reading (Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 24th ed (2011), ed Jack, p 656). Under the Parliamentary procedures as currently envisaged by the Government, matters that go to the principle of the bill will not be considered by the select committee. Such matters would be expected to include the business case for HS2, alternatives to the high speed rail project and alternative routes for Phase 1. The principle of the bill could in theory be re-opened at third reading, but that debate also will be subject to the Government whip.

The relevant standing orders

59. In order to understand the arguments, it is also necessary to note the relevant Parliamentary standing orders ("SOs"). SO 27A for Private Business requires that a bill authorising the carrying out of works the nature and extent of which are specified in the bill must be accompanied by an environmental statement, which must be available for inspection and for sale at a reasonable price. The environmental statement must contain the information required by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824), "the 2011 Regulations"), which transpose the requirements of the EIA Directive, so far as affecting applications for planning permission, into English law.

60. SO 224A, which was introduced in June 2013 after the hearing of the appeal in the Court of Appeal, requires that upon the deposit of the bill a notice must be published stating that any person who wishes to make comments on the environmental statement should send those comments to the minister responsible for the bill. The minister must publish and deposit the comments received, and submit them to an independent assessor appointed by the Examiner of Petitions for Private Bills. The assessor is then to prepare a report summarising the issues raised by those comments. The report must be submitted to the House at least 14 days prior to second reading. At third reading the minister must set out the main reasons and considerations upon which Parliament is invited to consent to the project and the main measures to avoid, reduce and if possible offset the project's major adverse effects. A written statement must be laid before the House not less than seven days before third reading. The House of Lords has made corresponding arrangements under SO 83A."

49. The UK Government would also note that it was contended before the Court that the hybrid Bill procedure was not capable of complying with the requirements of the EIA Directive: in particular, that it was not capable of meeting the public participation objectives. That argument was comprehensively dismissed by the Supreme Court at paragraphs 98 to 116 of the Judgment of Lord Reed JSC, and the Government would draw attention in particular to paragraphs 113-115:

> "113. In the present case, there is in any event no reason to suppose that Members of Parliament will be unable properly to examine and debate the proposed project. Although the environmental statement made available to Members of Parliament may be of a size which reflects the scale of the project and the complexity of its impact upon the environment, it can be expected to include a non-technical summary of the information, in accordance with the 2011 Regulations (which transpose, in this respect, Annex IV to the EIA Directive). That can be expected to include information about the reasons for choosing HS2 rather than the main alternatives, as required by Annex IV to the Directive.

> Members of Parliament can also be expected to be provided with a summary of the comments received on the environmental statement, prepared by an independent assessor, in accordance with SO 224A. That summary can be expected to encompass any comments made by the appellants which advance the case for their optimised alternative.
>
> 114. Members of Parliament can be expected to have that information well in advance of the second reading debate on the bill: as I have explained, the summary of the comments received must be submitted to the House at least 14 days prior to the bill's receiving its second reading; and it is implicit in SO 224A that the environmental statement must itself have been submitted at least three months or so earlier (since the public must be allowed a period of at least 56 days to comment on the statement, and the assessor must be allowed at least 28 days to prepare the summary).
>
> 115. It is in any event unrealistic for the appellants to focus solely upon the second reading debate, as if it were the only opportunity for Members of Parliament to consider the environmental information. Active political debate on the HS2 project, including its environmental impact, has already been under way for some time, and it is reasonable to expect that Members of Parliament have been, and will continue to be, contacted about it by their constituents and lobbied by interested organisations, such as the appellants. As the bill proceeds through Parliament, and political interest in the project becomes more intense, Members of Parliament will have even more reason to be, and to wish to be, well informed about the project. As counsel for the respondents observed in relation to the opportunities for Members of Parliament to consider and discuss the proposal, the second reading debate is in reality the tip of the iceberg."

50. Work also continued apace on the Environmental Statement for the project which included the following key workstreams:

- Preparation of a draft Scoping and Methodology Report, which was published in March 2012, and the subject of consultation for a period of 8 week, during which 166 responses were received.[58] This resulted in the revised Scoping and Methodology Report (published in September 2012)[59] which informed the assessment undertaken for the preparation of the Environmental Statement;
- Preparation of a draft Environmental Statement, which was published for public consultation between 16 May 2013 and 11 July 2013. This included an assessment of the main alternatives considered. Some 20,944 responses were received and analysed, and a summary of those responses published in November 2013.[60]
- The responses to the consultation on the draft ES, alongside further work, then informed the preparation of the Environmental Statement which was lodged alongside the Bill in November 2013.

[58] A copy of the draft scoping and methodology report is at Annex 26 and a copy of the consultation summary responses report is at Annex 27.
[59] A copy is at Annex 28
[60] A copy is at Annex 29

51. The Environmental Statement is a detailed and lengthy document. It is made up of 5 volumes, the second of which is sub-divided into 26 volumes dealing with specific areas along the route, along with a non-technical summary, and detailed appendices of technical information, including a report on strategic alternatives.[61] In all, it runs to around 48,000 pages.[62]

52. The Environmental Statement was subject to public consultation in line with Standing Order 224A between 25 November 2013 and 27 February 2014. The responses were duly provided to the independent assessor, who produced a report summarising the responses received which was provided to the House and published on 7 April 2014.[63] Some 21,833 responses were received during the consultation.

53. In addition to those workstreams, HS2 Ltd also established 26 local community forums along the line of route, to engage with local communities in respect of the proposed project and its potential effects for the local area. This is explained further at paragraphs 56-62 of Alison Munro's Witness Statement.
54. The Bill received first reading on 25 November 2013 and second reading on28 April 2014, following a lengthy debate in the Chamber. The petitioning period commenced on 29 April 2014 and closed on 23 May 2014, during which time some 1925petitions were received, including from the Communicants. A substantial number of the petitions raise 'environmental issues'. The Select Committee process commenced on 1 July 2014, and heard some 186 petitions as at the end of January 2015. This includes a specific session by which the First Communicant was permitted to attend the Committee to explain why it considered the Committee should undertake an evaluation of alleged deficiencies in the Environmental Statement, prior to hearing other petitions.[64] An additional provision to introduce changes to the Bill was introduced into Parliament on 9 September 2014, accompanied by Supplementary Environmental Information, which was open for public consultation between 19 September 2014 and 14

[61] Volume 5 Technical Appendices Alternatives Report (CT-002-000) A copy is at Annex 30
[62] A full copy of the ES can be found on the Government's website at https://www.gov.uk/government/collections/hs2-phase-one-environmental-statement-documents. In the interests of reducing paper, the UK Government has only provided copies of the non-technical summary, Volumes 1,3,4 and 5, and Volume 2 CFA 7 which covers effects of the route in areas within the London Borough of Hillingdon. See Annex 31.
[63] A copy of the report is at Annex 32.
[64] A copy of the uncorrected transcript for 23 October 2014 and a direction given by the Committee given on 20 November 2014 (paragraph 55 of the transcript) are at Annex 33

November 2014 and the subject of a report by the Independent Assessor, which was published on 14 December 2014.[65]

55. Alongside that process, it should also be noted that the Environmental Statement, and the project's approach to the environmental aspect of the project, has been the subject of scrutiny by the House of Commons Environmental Audit Committee (EAC). As explained on the Committee's website, its remit is:

> "… to consider the extent to which the policies and programmes of government departments and non-departmental public bodies contribute to environmental protection and sustainable development, and to audit their performance against sustainable development and environmental protection targets. In the previous Parliament (2005-2010), the Committee's programme included inquiries on climate change and environmental fiscal measures ('green taxation'), as well as sustainable development and environmental protection."

56. Its first report was published on2 April 2014,[66] in which it describes the terms of its inquiry as follows:

> "**Our inquiry**
>
> 5. The parliamentary process for HS2 is unusual. Because HS2 is a major project that potentially affects individuals and businesses along its route, the Government has chosen to implement it through a hybrid bill, leaving Parliament as the 'relevant authority' to give planning permission through the passage of the Bill. That places a greater imperative on the House, and its committees, to undertake scrutiny of the proposals.
>
> 6. Our inquiry is intended to inform the House about the environmental aspects of the project when it gives the HS2 Hybrid Bill its second reading, and afterwards to inform the Select Committee when it considers petitions. In doing so, we put our 2013 report on Biodiversity Offsetting—providing alternative habitats to compensate for biodiversity lost in developments—into the context of a major project which will have to make it work in practice. The Government's response to our report indicated that Defra would await the completion and evaluation of its offsetting trials before finalising any new system. In the meantime, the HS2 Environmental Statement proposes a metric for assessing biodiversity offsetting which is adapted from that draft Defra methodology. We also examined the Government's aim of preventing net biodiversity loss, and the emissions consequences of the project.
>
> 7. We did not examine the economic case for HS2, and we make no judgement about that in this report. This has been the focus of a number of inquiries by other committees. Nor do we examine the environmental or community issues for particular parts of the route.
>
> 8. We received written submissions from a range of NGOs and individuals as well as from Government and its agencies. We took oral evidence in only two sessions in the interest of being able to produce a report ahead of the Bill's second reading. We heard from HS2 campaign groups, NGOs, Natural England, the Environment Agency, Defra and the Department of Transport as well as Robert Goodwill MP, Parliamentary Under-

[65] Copies of those documents are at Annex 34
[66] A copy is at Annex 35

> secretary of State at DfT. We are grateful for the assistance of our specialist adviser Dr William Sheate."

57. The persons referred to in paragraph 8 above include the First Communicant.

58. The Government has published a response to the Committee's report which has been published on the Committee's website,[67] and includes the following commitment in respect of further information and public participation:

> "Insofar as a petition raises environmental effects of the Bill project it is a matter that the Government anticipates the Select Committee would consider, provided that the subject matter of the petition does not touch on the principle of the Bill. If the Select Committee considers that there is a reasonable and practicable mitigation, that mitigation could be introduced into the Bill on that basis. This is a key part of their role and their conclusions will be included in their special report to the House.
>
> If the Select Committee process leads to any new likely significant environmental effects, be it from changes to the design or new information coming forward from petitioners or further surveying, the procedures set out in Standing Order 224A of the Commons Standing Orders for Private Business require a consultation to be held on this "supplementary environmental information". The responses to this consultation will be summarised by an independent assessor appointed by the House Authorities. This summary report will be available for the House when it reconsiders the principle of the Bill at Third Reading. In this way the process ensures that all environmental information, whether it touches on the principle of the Bill or not, is properly considered by Parliament as decision maker."

59. As regards the future development of HS2, between 17 July 2013 and 31 January 2014, the Government consulted on its proposals for the line of route between the West Midlands and Leeds and Manchester. This in turn was accompanied by an Appraisal of Sustainability for Phase 2, which had regard to the cumulative effects of the two Phases of the network.[68] A decision will be announced later in 2015.

The Government's Submissions

60. The UK Government denies that there is any merit in the complaint that it has failed to comply with its obligations under Article 7 of the Convention, by reason of the matters set out in the Communication or otherwise. For the avoidance of doubt the UK Government accepts that Article 7 applied to the DNS.

[67] A copy is at Annex 36
[68] Copies of the Consultation Document and Volume 1 (main report) of the Sustainability Statement are at Annex 37

61. There are a number of key points:

62. First, what Article 7 required in respect of the DNS was that there be public participation during its preparation. As set out above, the DNS was preceded by full and very wide-ranging consultation.[69]

63. Second, it is abundantly clear from the foregoing that the UK Government has sought to maximise public information throughout the decision making process, which remains ongoing. The background set out above really speaks for itself.

64. Third, while the First and Second Communicants (and others) sought to argue before the Administrative Court and Court of Appeal that the consultation was in various technical ways defective, all those arguments failed and were not the subject of any appeal to the Supreme Court. Similarly, as noted above, it never formed any part of the Communicants' complaint before the domestic courts that the information provided for consultees was insufficient, such that there was a failure to comply with the public participation rights protected by the Aarhus Convention. Thus the Government maintains that so far as the Aarhus Convention is concerned there can be no question but that the DNS was compliant with article 7.

65. Fourth, in reality, this Communication is not about the fact that the Government has failed to provide 'sufficient information' to enable informed decision-making for the purposes of Article 7. The Communication is made because the domestic courts concluded – quite rightly - that the Government was not required to carry out an SEA prior to publishing the DNS. The Communicants are seeking to get around this by arguing that matters which would have been required to be assessed if SEA was applicable are somehow required by Article 7. The non-application of SEA is a matter that cannot be challenged before this Committee. As this turns not on Article 7 of the Aarhus Convention but on the respective decision making processes to which the SEA Directive, and the EIA Directive, were intended to apply.

66. As was acknowledged by the majority of the Court of Appeal, in considering the relationship between Article 7 of the Convention and the SEA Directive, the conclusion that the DNS was not a plan or programme setting the framework for future development for the purpose of Article 3.2 of the SEA Directive did not involve any incompatibility with Article 7, and that in such a case, "*the requisite*

[69] See also the judgment of the Administrative Court at [2] – [5]; [46] – [53]; [303] – [306] (Annex 2) and the judgment of the majority in the Court of Appeal at [13] – [18] (Annex 3)

degree of public participation can be achieved through compliance with the requirements of the EIA Directive in the development consent procedure for a specific project." (paragraph 63).

67. The Government maintains that the domestic Courts were right to reject the contention that Article 7 of the Convention compelled a conclusion that an SEA should have been carried out prior to the DNS for the following reasons:

- Under Article 7 of the Aarhus Convention it is not possible to complain that a plan or programme was not the subject of an SEA. Article 7 does not require an SEA to be carried out in respect of a plan or programme. Instead it requires that there *is public participation* in the preparation of plans and programmes. While that can be achieved via an SEA procedure it need not be.
- That this is so is supported by both editions of the UNECE's Guidance to the Aarhus Convention, *The Aarhus Convention: An Implementation Guide*. Thus the Implementation Guide (1st Edition, 2000) at p. 144 says (emphases added):

> "… the Convention does not oblige Parties to undertake assessments, a legal basis for the consideration of the environmental aspects of plans, programmes and policies is a prerequisite for the application of article 7 .... Thus, proper public participation procedures in the context of strategic environmental assessment (SEA) is one method of implementing article 7 (see box[70]). SEA provides public authorities with a process for integrating the consideration of environmental impacts into the development of plans, programmes and policies. It is, therefore, one possible implementation method …
>
> … The requirement to take the outcome of public participation into account …may be satisfied through the establishment of national SEA procedures.
>
> In 1996 the European Community adopted a proposal for a Council Directive on the assessment of the effects of certain plans and programmes on the environment, COM/96/0511 Final—SYN 96/0304 (SEA proposal). The purpose of the SEA proposal was to ensure that the environmental consequences of plans and programmes were identified and assessed before adoption. The proposal covered a range of public plans and programmes in several areas such as transport, energy, waste, water, industry, telecommunications, tourism, town and country planning, and land use. It outlined the procedure to be followed and the content of the assessment. The proposal contained provisions for the public to give its opinion and for the results of public participation to be taken into account during the adoption procedure of the plans and programmes. In October 1998, the European Parliament completed the first reading of the SEA proposal. The Commission amended it in February 1999. The negotiations at Council level were proceeding during late 1999.

[70] The box on p. 115 again emphasises SEA is a way of implementing Article 7 but not itself a requirement of it. It notes that not all UNECE countries have a legal requirement for SEA at all; and some have only informal procedures for SEA.

UN/ECE has also discussed the idea of SEA as the subject of the next multilateral environmental agreement under its auspices".

- A footnote at the end of this text (no. 149) says:

"A protocol to either Convention[71] raises problems—to the Aarhus Convention because SEA is not only about public participation … It would seem to be most appropriate for SEA to be the subject of a new convention."

- The 2nd edition of the Implementation Guide (2013), is even clearer on this. The most relevant passages are at p. 118 -119:

"The scope of application of the second pillar of the Aarhus Convention is, however, different and rather broader than the scope of environmental assessment. For example … article 7 applies to plans and programmes "relating to the environment", which is a much broader concept than plans and programmes "likely to have significant environmental effects" and which are usually subject to SEA (see the commentary to article 7).

Moreover, the Aarhus Convention does not require an environmental assessment to be carried out. The Aarhus Convention does not stipulate that an environmental assessment must be a mandatory part of public participation procedures nor does it regulate the situations where environmental assessment is required. However, if an environmental assessment is carried out (either EIA or SEA) then the public participation provisions of the Convention will apply (see the commentary to articles 6 and 7).

Thus, one can conclude that while public participation is in fact a mandatory part of environmental assessment, an environmental assessment is not a mandatory part of a public participation procedure under the Aarhus Convention, as the Convention covers a broader scope ...

While environmental assessment in the form of EIA or SEA plays an important role in facilitating the effectiveness of public participation under articles 6 and 7 of the Convention, EIA and SEA procedures, as currently regulated at the national and international level, cannot be considered to fully implement the Convention's public participation requirements (see the commentary to articles 6 and 7). However, environmental assessment is a very useful tool in ensuring effective public participation in decision-making: without environmental assessment documentation, the public usually have no easy access to reports or studies evaluating the environmental and health risks of an activity. Thus, such documentation helps the public to develop and express their own science-based opinions on the proposed activity, plan or policy."

- It is thus clear from the Implementation Guides (2000) and (2013) that: (i) Article 7 of the Aarhus Convention does not require there to be SEA of plans and programmes; and (ii) the objective of article 7 is public participation not environmental assessment. SEA is seen as, at most, one

[71] The Aarhus Convention or the Espoo Convention.

possible way of transposing/implementing the requirements of article 7 for public participation. The matters which underlie the Communication, see paragraph 11, are matters that would be required by an SEA. They are not required by Article 7.

68. There are 4 specific complaints made by the communicants at paragraph 11 of the submissions. Those clearly need to be considered in the context of the wider background to the HS2 project as set out above, and in particular the fact that the decision making process did not finish with the DNS. For completeness, the UK Government brief response to those points is as follows:

- **Environmental effects of the "Y" network:** As set out at paragraphs 250-256 of Philip Graham's witness statement, the Government's intention since March 2010 was to consult on three separate issues: (i) the strategic case for high-speed rail in the UK (ii) the overall strategy for a Y-shaped high speed network and (iii) the detailed route of any specific line forming part of that network. It would have been open to the Government to consult on (i) and (ii) in isolation, before moving on to consider specific routes, but the view was taken that to do so would have been likely to slow the process significantly, delaying the achievement of the benefits the project was intended to provide. The Government maintains that the information provided was appropriate to (i) the high level strategic policy on which it was consulting and (ii) the proposed route for Phase 1, and reiterates the range of material which was published alongside the Consultation Document. The Government would also note that (i) the Environmental Statement lodged with the Bill in November 2013 includes an assessment of cumulative effects (including anticipated cumulative effects of Phase 2 where possible to assess the same[72]) and assessment of strategic and route-wide alternatives[73] and (ii) the public consultation on Phase 2 (which took place between July 2013 and January 2014) was accompanied by an appraisal of sustainability which expressly considered scheme wide issues and combined impact of Phases 1 and 2.[74]
- **Relative environmental effects of strategic alternatives to high speed rail**: As set out above, the work commissioned by the Department for Transport prior to consultation in February 2011 included a number of reports on strategic alternatives to high speed rail. These included (but were not limited to) the Atkins reports which were published alongside

[72] See para 7.4..8 – 7.4.10 of Volume 1 of the Environmental Statement at Annex 31
[73] See the Alternatives Report at Annex 30
[74] See section 7 of the Sustainability Statement : Volume 1: main report of the Appraisal of Sustainability (Annex 37)

the Consultation Document and which were required to consider (inter alia) the environmental effects of those alternatives.[75] Alongside the DNS, the Government published updated reviews of alternatives and strategic alternatives, and of its strategy for High Speed 2.[76] In addition, there is a specific Alternatives Report published as part of the Environmental Statement which includes consideration of strategic alternatives to high speed rail, including alternative modes (road or domestic aviation), slower line speeds, and upgrades to existing lines.[77]

- **Relative environmental effects of alternative configurations for a high speed rail network**: As part of the work undertaken in 2009, HS2 Ltd considered a number of alternative route options, including alternatives to the 'Y' network, and its conclusions were reported to the Secretary of State in its 2009 report '*High Speed Rail: London to the West Midlands and beyond*'.[78] That work included consideration of the environmental impacts of the options.[79] In October 2010, there was a further high level assessment of wider network options, considering the 'Reverse S' as against the 'Y' network, which again included a consideration of the likely environmental challenges.[80] Paragraphs 41 to 68 of Peter Miller's witness statement explains the approach adopted to the appraisal of sustainability, including alternative scheme options, and the process for developing the options is explained further in the Environmental Statement Alternatives Study, and also in Information Paper A1: 'Development of the Proposed Scheme'.[81]

[75] See, for example, section 4 of the Strategic Outline Case (March 2010) at Annex 11 and in particular 4.2 where the report sets out the appraisal framework for the strategic alternatives, including that it should (inter alia) "*[have] sufficient level detail to identify areas of non compliance with sustainability objectives for transport measures*", "*[enable] comparison between options where there is a significant difference in terms of environmental compliance or in cost implications arising from achieving environmental compliance*", and "*[seek] to apply the same standards and requirements that would have been appropriate had a Strategic Environmental Assessment [SEA] been needed*"

[76] Review of the Government's Strategy for a National High Speed Rail Network; High Speed Rail: Alternatives Study: Update following Consultation; Review of Strategic Alternatives to High Speed Two. Copies are at Annexes 18, 19 and 20.

[77] A copy is at Annex 30.

[78] See in particular Chapter 6 of the report, a copy of which is at Annex 8.

[79] See the 2009 Appraisal of Sustainability Non Technical Summary (Annex 10)

[80] A copy of the report is at Annex 12. See in particular para 4.2

[81] As part of its ongoing public engagement during the Parliamentary process, HS2 Ltd has published a suite of 'Information Papers' which are designed to explain aspects of the scheme, and commitments made by the project. They cover matters such as the project's approach to noise, flood risk, land acquisition and disposal, waste management, station design etc. They can be found on the Gov.uk website at https://www.gov.uk/government/collections/high-speed-rail-london-west-midlands-bill#information-papers. A copy of Information Paper A1 is at Annex 38, and the Alternatives Report is at Annex 30.

- **Relative environmental effects of an alternative route corridor for the proposed 'Y' network**: Again, significant work was undertaken to look at various options for the route corridor, both prior to the 2011 consultation, and after, and subsequently in respect of Phase 2, which was the subject of public consultation between July 2013 and January 2014. The 2009 HS2 Ltd report sets out alternatives considered, and these were also summarised in Appendix 6 of the Appraisal of Sustainability and Annex B of the Consultation Document published in February 2011. It also forms part of the Phase 1 Environmental Statement Alternatives Study.[82] Assessment of alternative route corridors is also set out in Annex B to the Phase 2 Consultation Document, and in the Sustainability Statement.[83]

Conclusion

69. For all the reasons set out above, the UK Government strongly denies that there has been any non-compliance with its obligations under the Convention in respect of the HS2 project, and respectfully asks the Committee to dismiss this complaint as without foundation.

JAMES MAURICI QC

JACQUELINE LEAN

9th February 2015

[82] See chapters 9 and 10. (Annex 30)
[83] Annex 37. See in particular Chapter 3 of the Sustainability Statement.