

Communication to the Aarhus Compliance Committee concerning compliance by the United Kingdom with provisions of the Convention in connection with the proposed construction of the “High Speed 2” railway (ACCC/C/2014/100) The fifty second meeting of the Aarhus Compliance Committee in Geneva

**NOTE OF THE ORAL PRESENTATION
by James Maurici QC to the Committee on
10 March 2016 on behalf of
THE GOVERNMENT OF THE UNITED KINGDOM**

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Introduction

1. This communication concerns “High Speed 2” - a proposed new high speed rail network connecting London to Birmingham (Phase 1) and then on to Manchester and Leeds (Phase 2) creating what has been called a ‘Y’ network¹. The particular focus of the communication is the UK Government’s decision to seek the necessary powers from Parliament to construct and operate Phase 1. That decision was contained in a document² published in January 2012 and called ‘*High Speed Rail: Investing in Britain’s Future – Decisions and Next Steps*’ (Cm 8247); this is often referred to in the papers as “the DNS”³.
2. As the DNS itself explains “*rail generally offers lower carbon emissions per passenger mile than either road or air travel*”⁴. New rail provision is regarded as necessary to increase “*the environmental efficiency of travel*” in the UK⁵ and is “*fundamental to meeting ... objectives for carbon emissions reductions*”⁶.
3. The UK refers the Committee to the United Kingdom’s reply to the Communication of 9 February 2015 and further submissions of 25 February 2016 which sets out in more detail its case in response.
4. The purpose of these submissions is to highlight the key points.

¹ See Annex 13, p 29 for an illustration of the ‘Y’ network.

² Known as a “Command Paper”. Command Papers are government papers. They are presented to Parliament as conveying information or decisions that the government think should be drawn to the attention of one or both Houses of Parliament. The term ‘Command’ is in the formula carried on the papers: “*Presented to Parliament by the Secretary of State for ... by Command of Her Majesty*”. The first numbered series of Command Papers was introduced in 1833: see <http://www.parliament.uk/about/how/publications/government/>.

³ See **Annex 1**.

⁴ See **Annex 1**, para. 2.71, p. 45.

⁵ Ibid.

⁶ Ibid.

The issue raised

5. The Communicant alleges that the UK Government failed to comply with Article 7 of the Convention prior to its publication of the DNS in January 2012.
6. Article 7 requires “*public participation*” for “*plans, programmes ... relating to the environment*”. In short the public should be provided with information on what is proposed and given the opportunity to have its say. Article 7 also says that “[t]o the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment”.
7. The Communicant has expressly accepted that Article 7 of the Convention did not require a strategic environmental assessment (“SEA”) to be carried out in accordance with the SEA Directive⁷. They are right to have made that concession⁸.
8. The only issue then in respect of this Communication is whether the DNS was subject to public participation as required by Article 7.
9. The voluminous documentation provided shows clearly that there was an extensive process for public participation⁹; and that the public was provided with a considerable amount of information in order to properly inform its participation¹⁰. None of this is, or can be, denied by the Communicant. The case the Communicant makes is focused on the “quality” of the information provided

⁷ Outline Reply § 19 & 20.

⁸ For the reasons set out in the paras. 65 – 67 of the United Kingdom’s Response and also as set out more fully in its Case before the Supreme Court at paras. 104-116 (**Annex 41**).

⁹ For a flavour of just how extensive the consultation was see Annex 17 at pp 20 – 27 and also Annex 5 pp 16 – 17 and 80 – 83.

¹⁰ For a summary of what was provided see Annex 5 para. 259 p. 80. What was made available comprises, inter alia, **Annexes 13; 14(i) – 14(ix), 16 and 45**.

to the public¹¹. Its case is that the public was not provided with information about the environmental effects of the 'Y' network and also alternatives to this. This is refuted in the strongest terms.

The 2011 Consultation

10. The facts are clear. The UK Government undertook an extensive public consultation prior to the decision at issue; and the Communicant does not seek to deny this¹².

11. A public consultation on HS2 commenced on 28 February 2011 and ran for 5 months, closing on 29 July 2011. The consultation was very widely reported. The consultation process included 41 days of local roadshows and over 55,000 responses were received during the consultation¹³.

12. In order to inform the public the Government produced at the outset an overarching consultation document *High Speed Rail: Investing in Britain's Future Consultation (February 2011)*¹⁴. This document with appendices ran to 150 pages and provided the public with the information it needed about what was being proposed. The Committee is asked to examine that document very carefully. Moreover, the information provided by no means stopped there. Alongside that consultation document the Government also published a number of other documents to help inform the public, including:

- 1) The *HS London to the West Midlands Appraisal of Sustainability*¹⁵. This was published alongside a non-technical summary and a number of technical

¹¹ See the Communicants Outline Reply § 21.

¹² The Outline Reply § 21 makes clear that the Communicant does not seek to challenge "the scale of the consultation that took place prior to the adoption of the DNS".

¹³ Again for a flavour of just how extensive the consultation was see Annex 17 at pp 20 – 27 and also Annex 5 pp 16 – 17 and 80 – 83.

¹⁴ See **Annex 13**.

¹⁵ **Annex 14**.

appendices. The contents page shows that the matters covered included: climatic factors, greenhouse gases, landscape and townscape, cultural heritage, biodiversity, air quality, noise and vibration, resource use etc. etc. It also included a chapter and an appendix reviewing the sustainability of the main route alternatives considered.

2) A report on Strategic Alternatives to the Proposed Y Network¹⁶.

13. The allegation that members of the public were not provided environmental information on the proposed 'Y' network or information about alternatives cannot be sustained in the light of these documents. Again the Committee is asked to give these documents very careful consideration.

14. To the extent that the Communicant complains that that environmental information focused primarily on Phase 1 of HS2, the UK would highlight that the DNS expressly anticipated that Phase 2 of HS2 would be subject to further public consultation, accompanied by its own Appraisal of Sustainability. That consultation ran between 17 July 2013 and 31 January 2014 and was accompanied by an Appraisal of Sustainability, which included (inter alia) consideration of scheme wide issue, such as the combined impacts of Phase 1 and Phase 2,¹⁷ and consideration of strategic alternatives to the 'Y' network.¹⁸ That further consultation is not the subject of this Communication.

15. Alongside the DNS, the Government made available a substantial public record of the analysis and consideration that had been given to the issues raised during consultation¹⁹.

¹⁶ Annex 45.

¹⁷ Section 7 of the report. Combined impacts of Phase 1 and Phase 2 are considered at Section 7.7

¹⁸ Appendix B

¹⁹ This is set out in detail at para 52 of Philip Graham's Witness Statement (**Annex 5**) and summarized at para 46 of the Response.

16. The DNS was challenged in domestic judicial review proceedings by the Communicant and others. The challenges included, *inter alia*, complaints raised as to treatment of proposed alternatives (this was largely in the context of an argument that the DNS should have been subject to the SEA Directive) and some specific complaints about the consultation process itself. These challenges failed²⁰.

17. Those challenges were assessed by the Courts against the well-established principles in domestic law as to what is required for a consultation to be fair and lawful:

- 1) The consultation must be undertaken at a time when the proposals are still at a formative stage;
- 2) It must provide sufficient information, in detail and clarity, for consultees to give the proposals intelligent consideration and an intelligent response;
- 3) There must be adequate time for the response; and
- 4) The responses must be considered conscientiously and taken into account when a decision is taken.²¹

18. As set out in the UK Government's Reply (paras 20-21), these principles directly mirror the requirements set out in Article 7 of the Convention. In other words if these principles were adhered to (which the domestic Courts ruled they were) then there would also be compliance with Article 7.

19. There can be no doubt, therefore, that the 2011 consultation, found to be fair and lawful by the domestic Courts, was also Article 7 compliant.

Alternatives

20. The main thrust of the Communicant's complaint relates to the alleged lack of information (and/or 'assessments') of alternatives to the proposed 'Y' network

²⁰ Save for a discrete challenge concerning proposed discretionary property compensation schemes.

²¹ *R v North and East Devon HA ex p Coughlan* [2001] QB 213 (annexed to this document at Annex 44(i)), para 108, cited by Ouseley J at para 307 of the High Court judgment [Annex 3].

and Phase 1 route. In particular, the Communicant complains as to the alleged lack of information regarding:

- 1) Relative environmental effects of a strategic alternatives to HS2;
- 2) Relative environmental effects of alternative configurations for a high speed rail network; and
- 3) Relative environmental effects for an alternative route corridor for the proposed 'Y' network.

21. The contention that the alleged lack of this information (and/or assessment) means that the 2011 consultation was not Article 7 compliant cannot be substantiated for the following reasons.

22. First, Article 7 of the Convention stipulates that paragraphs 3, 4 and 8 of Article 6 shall apply in respect of public participation during the preparation of plans and programmes relating to the environment. It expressly – and critically, for present purposes – does not require compliance with paragraph 6 of Article 6: that the public be provided with '*an outline of the main alternatives studied by the applicant*'. To rely on an alleged lack of assessment of (or information relating to) alternatives to allege a breach of Article 7 is therefore clearly not a complaint which can be properly made under Article 7.

23. Second, as already noted the Communicant accepts that Article 7 does not require there to be an SEA (one requirement of SEA is consideration of "*reasonable alternatives*").

24. Third, this Committee has previously made clear that it does not see it as any part of its role, when considering complaints regarding the Convention, to adjudicate on the substance of the information provided by a Party as part of a process initiated to comply with Article 6 of the Convention in relation to

projects. This Committee in ACCC/C/2006/16 (Lithuania)²² held that what it is concerned to ensure, in the context of a complaint is, where alternatives have been considered, whether that information has been provided to the public²³. It is no part of the Convention, or the Committee's role, to mandate that particular alternatives be studied, or that information on such be specifically created for the purpose of public participation. Rather, it is concerned with ensuring that where information on alternatives exists, and thus may inform the decision maker's considerations, that that information is made available to the public to inform any representations they may wish to make prior to a final decision being made.

25. Fourth, it is quite wrong to suggest that the Government had not made any information available regarding alternatives. A great deal of information on the alternatives was in fact provided. The Committee is respectfully directed to:

- 1) paragraph 68 of the UK Government's Response to the Committee and paras. 29 – 32 of its Further Submissions;
- 2) the overarching consultation document itself (Annex 13) which deals with alternatives in a number of places²⁴;
- 3) Chapter 5²⁵ and Annex 6 of the Appraisal of Sustainability²⁶ dealing with alternatives;
- 4) *The High Speed Rail Strategic Alternatives Study Strategic Alternatives to the Proposed 'Y' Network*²⁷;

²² A copy of the Committee's findings (Addendum to the Compliance Committee Report to the 3rd Meeting of the Parties, ECE/MP.PP/2008/5/Add.6 (4 April 2008)) is appended to these submissions as **Annex 42(i)**

²³ See para 79 of the decision (**Annex 42(i)**, set out at para 25 of the Reply).

²⁴ See **Annex 13** pp 15-16; 47; 57 – 61 and Annex B pp 122 -149

²⁵ **Annex 14(i)** pp 35 – 36.

²⁶ **Annex 14 viii.**

²⁷ **Annex 45.** The purpose of this document rather speaks for itself.

5) the HS2 Ltd 2009 report '*High Speed Rail: London to the West Midlands and beyond*'²⁸;

The information made available during the 2011 consultation was appropriate to the stage the HS2 project had reached, and the pending decisions in respect of which the views of members of the public were sought²⁹.

The wider context of the DNS

26. It is also important to understand the role of the DNS in respect of the HS2 project. The DNS was a statement of Government intent – or policy – that there should be a high speed network, and that powers should be sought from Parliament to construct and operate Phase 1 of the same. As part of the process for seeking those consents, the UK Government has, following the DNS (the subject of this complaint) through its compliance with the Standing Orders of Parliament³⁰, complied with the substantive requirements of the EIA Directive³¹ which Directive itself gives effect to Article 6 of the Convention.

27. As part of that ongoing process:

1) The UK Government has prepared, laid before Parliament, and consulted upon an Environmental Statement in respect of the Phase 1 project. The Environmental Statement is a detailed and lengthy document³² which considers strategic alternatives to the proposed project, including

²⁸ **Annex 8.**

²⁹ Any contention that the UK Government had failed to provide environmental information relating to the 'Y' network must be considered against this background. As it was by the domestic courts: see, in particular, para. 95 of the High Court Judgment (Annex 2) and para. 56 of the Court of Appeal Judgment (**Annex 3**).

³⁰ See **Annex 25.**

³¹ See para 45 of the UK Response.

³² 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 (see **Annex 31**).

alternative modes (road/air)³³ alternatives to the proposed 'Y' network³⁴, upgrades to existing rail networks³⁵ and alternatives to the proposed Phase 1 route³⁶.

- 2) The Environmental Statement was subject to public consultation³⁷. The responses were duly provided to the independent assessor³⁸. Some 21,833 responses were received during the consultation. The Environmental Statement has also been subject to scrutiny by the House of Commons Environmental Audit Committee³⁹, and by the Examiners of Petitions for Private Bills to whom members of the public, such as the Communicant, have had the opportunity, and have in fact, submitted 'Memorials', setting out what they consider to be errors, omissions or defects in the Environmental Statement⁴⁰.

Exhaustion of domestic remedies

28. The principle that a complainant should seek redress before his or her domestic courts prior to seeking a remedy on the international stage is a well-established principle of international law⁴¹.

³³ pgs 12-18.

³⁴ pgs 18-23.

³⁵ pgs 27-47.

³⁶ pgs 60-74.

³⁷ In accordance with Standing Order 224A.

³⁸ , who produced a report summarising the responses received which was provided to the House and published on 7 April 2014 (**Annex 32**).

³⁹ See **Annex 35**.

⁴⁰ Proposed changes to the scheme have been subject to supplementary and additional environmental statements, which have, in turn, been subject to public consultation in accordance with Parliamentary Standing Orders, the responses submitted to the independent assessors for preparation of a report to be laid before Parliament, and scrutiny by the Examiners of Petitions for Private Bills, and related committees (see para. 16 of the Reply).

⁴¹ See, for example *De Wiles, Ooms and Versyp v Belgium* [1971] ECHR 1 pg.396 (**Annex 43(i)**) and *The Interhandel Case (Switzerland v United States)* [1959] I.C.J. Rep 6. pg 27 (**Annex 43(ii)**).

29. It is reflected in paragraph 21 of the Annex to Decision I/7, and its importance reiterated in paragraph 6(b) of Decision V/9 of the Meeting of the Parties who resolved: *“That the Committee should ensure that, where domestic remedies have not been utilized and exhausted, it takes account of such remedies, in accordance with paragraph 21 of the annex to decision I/7”* (**Annex 42(ii)**).
30. While it is true that Article 7 of the Convention is not directly enforceable before the domestic courts of the UK it could have been relied on by the Communicant as part of a challenge to the lawfulness and/or fairness of the consultation undertaken by the UK Government in the domestic proceedings⁴². It did not do so. Other claimants in those proceedings did do so, see e.g. Heathrow Hub Ltd⁴³.
31. Thus the Communicant has failed to exhaust its domestic remedies in respect of the substantive complaints raised, and this should be taken into account by the Committee if it considers, contrary to the UK Government’s submissions, that it may have concerns in respect of the DNS.

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⁴² See (for example) *Walton v Scottish Ministers* [2012] UKSC 44 per Lord Carnwath at para 100 (**Annex 44(ii)**).

⁴³ See para para. 584 of the High Court decision (**Annex 3**).