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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
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Palais des Nations
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Dear Ms Marshall

Re: UK response to Communicant's response to ACCC questions (ACCC/C/2015/100)

1. Were there any major options regarding HS2 discussed by decision-makers before initiating the DNS consultations that were:

a. Not subject to public consultations;

b. Foreclosed from public comment in the DNS consultations?

The Communicant's response makes the incorrect proposition that the public were precluded from commenting on any options that were not included within the February 2011 Consultation documents. Thus it is said that anything other than the Y network was "*foreclosed from public comment in the DNS consultation*" (see paragraph 1.1). This is incorrect. A high speed Y network was being proposed through the consultation. But that doesn't mean that the public were in any way foreclosed from commenting on other options. There is nothing untoward in consulting on a proposal. That is after all what consultation is about, getting the views of people on what it is proposed to do. It was never the intention that the public should be precluded from commenting on other options. Nowhere in the documentation is it said that views on other options cannot be expressed. Moreover, the reality was that the public did, in response to the consultation, comment on a wide range of options not included in the consultation documents themselves.

As the Communicant's own response makes clear the options they highlight as being "*foreclosed*" – the Reverse E, S Shape, alignment through London Heathrow and a conventional speed rail line – were all options set out and published by the Government in 2010. Information on these options was thus fully available to the public during the February 2011 consultation even if these options were not specifically set out in the DNS consultation documentation itself.

It is also important to note that the public did comment on these options and were not constrained in the way the Communicant suggests either by the formulation of the

questions or the options set out in the document. The *High Speed Rail: Investing in Britain's Future Consultation Summary Report* (Appendix 17) contains a comprehensive summary of how people responded to the consultation and on what subjects. This included the following:

A. The fact that a number of responses "*concerning the Y network suggest alternative configurations, including a T-shaped network, which would see a high speed rail connection across the North of England in conjunction with a single north-south connection; a P-shaped network (the proposed network with a connection linking Liverpool and Manchester with Leeds); an X-shaped network (with a connection between Birmingham and Bristol); a reverse-S route (swinging east after Manchester to cross the Pennines to the North-East, Edinburgh and Glasgow); a more direct route linking London to the North of the UK bypassing Birmingham; and a network consisting of a central spine with spurs*" (see paragraph 2.3.53);

B. That some respondents to the consultation suggested an adapted Y network (paragraph 2.3.54);

C. "*Among opponents of a national high speed rail network, 7,519 advocate improving and/or more effectively using the existing rail network, very often expressing the belief that this would offer better value for money than the high speed rail proposals*" (paragraph 2.3.56);

D. "*A further 713 comments indicate that respondents prefer new conventional speed lines to high speed*" (paragraph 2.3.57);

E Thousands of respondents also commented on Heathrow links: see paragraph 3.2.3 and 3.3.36.

Thus the Summary Response clearly demonstrates that the public responded on alternative configurations to the Y and the UK Government considered these responses in coming to its decision. On the alignment through Heathrow section 3.3.36 (page 72) of the Summary Response again demonstrates that the public did respond suggesting options for HS2 to be routed directly through Heathrow. Finally section 2.3.57 (page 60) of the Summary Response demonstrates that the public did respond on the option of a new but conventional speed rail line as an alternative to HS2.

Therefore, the facts of how the public responded to the February 2011 consultation demonstrate that none of the options identified by the Communicant were foreclosed and that in reality the public did comment on them and the UK Government did consider these views when coming to its decision.

Moreover, Table 2.1 of that report (page 26) shows that respondents were not constrained by the question structure proposed by the consultation with 4,285 responses being submitted in a form that did not conform to the question structure. In addition there were a further 43 responses that were detailed technical reports that again did not conform to the question structure. Table 2.2 (page 27) also demonstrates that 18,195 responses to the consultation provided information that did not directly respond to the questions. Therefore, the Communicant's proposition that the structure of the questions foreclosed options is clearly misconceived.

2. Were there any major options, or related environmental studies regarding HS2 discussed by decision-makers before initiating the hybrid Bill consultations that were:

a. Not subject to public consultations;

b. Considered as touching "on the principle of the Bill" and therefore not subject to consultations concerning the Bill.

The Communicants response misrepresents the Hybrid Bill process by conflating, and confusing, two district things: (i) the consultations required by the Parliamentary process; and (ii) the petitioning process. It is crucial to appreciate that these are separate activities with separate functions.

The consultations required by the Parliamentary process are not constrained in any way by who can respond or what response they are able to make. As detailed in the Party concerned's response the "principle of the Bill" has no restrictive effect on the consultations. Indeed the purpose of these consultations is to provide Parliament with the public's views on the environmental effects of the proposed scheme, including their views on alternatives, to inform its decisions on the principle of the Bill.

The purpose of petitioning is to allow those directly affected by the proposed railway to request that changes are made to mitigate or remove the impacts of the scheme on their interests. As this occurs after Parliament has agreed the principle of the Bill it is right that the Select Committee, which only represents a sub-set of Parliament, cannot make decisions and should not hear requests that conflict with the principle agreed by Parliament.

3. Was there any significant information, including environmental studies, on any of the options that instructed the HS2 decision-making process which was not available to the public for commenting?

The Communicant's response does not answer the question set by the ACCC. The Communicant focusses on information that would have been required if the Strategic Environmental Assessment (SEA) Directive had applied. As the Supreme Court unanimously concluded the SEA Directive did not apply and, therefore, this information was not required. The Communicant is trying to resurrect a wholly fallacious argument that the Party concerned has already responded to namely that compliance with Article 7 requires there to be an SEA with all the associated SEA procedures. But that is not what Article 7 requires: see the response dated 9 February 2015 (Annex A) at paras. 65-67.

The Communicant points to findings by Ouseley J. in the High Speed 2 judicial review that it says support its case but these were all findings of what would have been required, and was not provided, if there was a requirement to undertake an SEA. These were not findings that go to the adequacy of the environmental information for the purposes either under common law or under Article 7.

The question the ACCC ask is whether there was any significant information that informed the HS2 decision-making process that was not available to the public for comment. As set out in the Party concerned's response all significant information was published and available for public comment.

5. Is there, in your view, any difference between the standard for consultation regarding plans and programmes under the common law (Party concerned opening statement for hearing at Committee's 52nd meeting, paragraph 17 – 18) and under article 7 of the Aarhus Convention? If so, please briefly outline the main differences

The Communicant's response seeks to argue for two differences between the common law standard for consultation on plans and programmes and the position under the Convention, as being differences of principle; and culture and practice. The reality is that there is no difference.

First difference being of principle

The Communicant is making this distinction have focussed on the concept of 'the necessary information' under Article 7 and in their view has to be understood in the context of Article 6. They refer to the paragraphs 8 to 10 of the Communicant speaking note. It is the view of the Communicant, that in order for the consultation to be effective the necessary information has to include information on the environmental effects of the rejected alternative options.

This view appears to be misconceived. The wording in Article 7 simply refers to the provision of 'the necessary information to the public'. The commentary of the Aarhus Convention guidance explains that this is providing the public with access to the information that is relevant to the plans and programmes so as to achieve effective participation.

We would suggest that this element of Article 7 of providing the necessary information (together with the provisions of paragraphs 3, 4 and 8 of Article 6) aligns with the common law standard of consultations set out in paragraph 17 of the opening statement of the Party concerned.

The Communicant in their response have referred to the Court of Appeal judgment in the case of *R (United Co Rusal plc v London Metal Exchange* [2014 EWCA Civ 1271 to the common law duty of fairness that 'there is in general no obligation on a public body to consult on options which it has discarded'. However, Article 7 read in conjunction with paragraphs 3, 4 and 8 of Article 6 does not extend the parameters of the necessary information to be provided to include alternative options that have been rejected: see paragraph 22 of the opening statement of the Party concerned. The necessary information to be provided is such information that is relevant to the plans and programmes so as to ensure the public can effectively participate.

Our position regarding the alternative options has been set out in paragraphs 20 to 25 of the opening statement of the Party concerned.

Second difference being of culture and practice

The view of the Communicant's proposition that the consultation culture and practice in the UK is not to provide information on rejected options is simply not borne out in this matter. We would draw the Committee's attention to paragraph 25 in which it is explained that a significant amount of information on alternatives was provided. We

would further emphasise the information provided in relation to the 2011 was appropriate for that stage of the HS2 project.

There is a further point namely that the common law has regard to Article 7 of the Convention when considering what is required in terms of consultation in an environmental case: see the Party concerned's response (Annex A, para 24 and footnote 26). There is thus no conceivable difference between what Article 7 required in respect of the DNS and what the common law required. The Communicants have never engaged with this.

Yours sincerely

Ahmed Azam
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