

**In the matter of a communication to the Aarhus Convention Compliance
Committee**

HS2 ACTION ALLIANCE LIMITED

Communicants

and

UNITED KINGDOM

Party Concerned

Communicants' speaking note¹

I. INTRODUCTION

1. This speaking note addresses the substance of the communication. The first procedural issue raised by the United Kingdom, relating to the London Borough of Hillingdon's participation in the communication, has already been resolved. Charlotte Jones has withdrawn. The second procedural issue raised by the UK, relating to domestic remedies, is addressed at paras. 13-15 of the Communicants' Reply.
2. This communication relates to the Command Paper *High Speed Rail: Investing In Britain's Future – Decisions and Next Steps* (Cm 8247) ("**the DNS**": Appendix 2 to the Communication) published by the Secretary of State for Transport ("**SST**") on 10 January 2012. The DNS set out the UK Government's strategy for the promotion, construction and operation of High Speed Two ("**HS2**"), a new high speed railway line, and its detailed proposals for Phase 1 of the route from London to the West Midlands. The UK accepts that the DNS is a "*plan or programme relating to the environment*" within the meaning of Article 7 of the

¹ This speaking note should be considered in conjunction with the Communicants' detailed submissions dated 10 April 2014 (Appendix 1 to the Communication) and the Communicants' Reply dated 17 March 2015 in response to the United Kingdom's submissions.

Convention.²

3. The UK Supreme Court ('UKSC') described this project as "*the largest infrastructure project carried out in this country since the development of the railways in the 19th century*" which "*will undoubtedly have a major impact on the environment*")³. The UK Parliament has been given responsibility for determining whether to grant development consent for the projects to which this plan/programme relates (namely Phases 1 and 2 of the railway line) . The UK Government now accepts that the plan/ programme did not comply with the requirements of the EU SEA Directive. The problem arises because (1) the UKSC has held that plans/programmes for projects which are to be given development consent by Parliament are not subject to SEA and (2) UK courts do not enforce duties such as those under Article 7 which derive from untransposed international agreements such as the Convention.
4. The UK Government has said that the DNS "*is intended to be persuasive*" in obtaining development consent from Parliament. The Government whose political party has a majority of seats in Parliament, has also indicated that it intends to 'whip' its Members of Parliament to vote in favour of granting development consent (see paras. 61-66 of the Supreme Court's judgment for an explanation of the 'whipping' process).
5. This communication raises issues of principle as to the level of environmental information necessary for effective public participation as required by Article 7. This is a general issue. It is especially important when the national legislature is the body given responsibility for determining whether to grant development consent for the projects within such plans and programmes. Such plan and programmes are not only likely to have national political importance but also to have correspondingly wide environmental effects. The Compliance Committee findings in relation to this communication are therefore likely to have a broad significance beyond the facts of this case.

² See paras. 8 -9 of the Communicants' Detailed Submissions.

³ See para. 2 of the Communicants' Detailed Submissions.

II. THE REQUIREMENTS OF ARTICLE 7

The requirements of Article 7 in general

6. Article 7 includes express requirement that public participation in relation to plans and programmes must be:
 - (1) during their preparation (and therefore the UK's reliance on events post-dating the adoption of the DNS (in January 2012) should be rejected);
 - (2) *"within a transparent and fair framework, having provided the necessary information to the public"*; and
 - (3) compliant with the standards set out in Article 6, paragraphs 3, 4 and 8, namely that:
 - i. the provision of *"reasonable time frames"* which allow sufficient time *"for the public to prepare and participate effectively during the environmental decision-making"* (Article 6, paragraph 3);
 - ii. the provision of *"early public participation, when all the options are open and effective public participation can take place"* (Article 6, paragraph 4); and
 - iii. ensuring that the final decision takes due account of the outcome of the public participation (Article 6, paragraph 8).
7. These requirements are qualitative: what matters is not the number of people consulted or the volume of material provided to them for the purposes of that consultation, but whether the public participation is of the requisite quality.
8. What constitutes to the *"necessary information"* which must be provided to the public in any given case ought to be judged by (i) the overall aim of securing a *"transparent and fair framework"* for the early and *effective* participation in the choice between *"all the options"* and (ii) the context in which Article 7 sits, namely the pillar of the Convention dealing with public participation in environmental decision-making.

9. It follows from this that the “*necessary information*” , if the consultation is to be 'effective', must cover:

- (1) all the options: not just the authority’s preferred option;
- (2) with sufficient information: in order to provide the public with a “*transparent*” opportunity to comment on the relative merits of the options; which necessitates:
- (3) an equivalent level of information: about “*all the options*” so that the process is “*fair*” and not biased in favour of or against particular options: ; and
- (4) as to their environmental effects .

10. The requirements of Article 7 are therefore not met where:

- (1) some or all of the options considered by that authority responsible for the plan or programme are ruled out without prior, appropriately informed, public participation; or
- (2) no information is given about particular options or their environmental effects; or
- (3) the level of information provided about some options is considerably more detailed than the level of information provided about other options.

The relationship between Article 7 and other international instruments on public participation in plans and programmes

11. Article 7 does not expressly incorporate the standards set out in Article 6, paragraph 6, which requires projects within its scope to be subject to environmental assessment.

12. It does not follow, however, that the widely-applied standards for securing public participation in plans and programmes that are set out in the EU Strategic Environmental Directive 2001/42/EC (“**the SEA Directive**”) and in the Protocol on Strategic Environmental Assessment to the Convention on

Environmental Impact Assessment In a Transboundary Context (“**the Kiev Protocol**”) are not relevant to ascertaining what Article 7 may require in some contexts. Both these instruments are aimed at securing effective public participation in the preparation of certain plans and programmes., Their contents are therefore indicative of developing international norms of what measures are, considered to be appropriate to achieve that objective.

13. Article 5 of the SEA Directive and Article 7 of the Kiev Protocol both require that the environmental assessment of plans and programmes to which those instruments apply must involve the publication of (and subsequent consultation on) an environmental report which must identify, describe and evaluate the likely significant effects both of the responsible authority’s preferred options and of the “reasonable alternatives” to those options.
14. Accordingly, our submission above as to what constitutes the “*necessary information*” under Article 7, is not only consistent with the wording and purpose of Article 7 but also consistent with other international standards for public participation concerning plans and programmes.

The requirements of Article 7 in the present context

15. It is worth recalling that in United Kingdom ACCC/C/2011/61 the Committee held that Parliament in approving hybrid bills such as for the Crossrail and HS2 schemes was not acting '*in a legislative capacity*' but as a '*public authority*'.
16. As noted above, the present communication relates to a plan/programme for a national infrastructure development on a once-in-a-generation scale, with acknowledged very wide-ranging and significant environmental impacts, and in relation to which the body given responsibility for determining whether to grant development consent is a national legislature. The Communicants submit that this affects the level of environmental information necessary to provide effective public participation as required under Article 7 of the Convention. In particular:
 - (1) There is no justification for concluding that the level of environmental information required by Article 7 of the Convention is lower than that of the internationally recognised standards set out in the SEA Directive

and Kiev Protocol; and/or

- (2) Even if, contrary to the Communicants' primary case, the Compliance Committee does not agree that the analysis outlined above sets out what Article 7 requires in all cases, at the very least that analysis is applicable to the present context.

III. THE DEFICIENCIES IN THE PUBLIC PARTICIPATION IN THE PRESENT CASE

17. The consultation undertaken on the DNS prior to its adoption in January 2012 did not comply with the standards of Article 7 of the Convention as outlined above. In particular:

- (1) some of the options considered were ruled out without any prior public participation;
- (2) no information was given about the environmental effects of some of the options considered; and
- (3) the level of information provided about the SST's preferred options for the plan/programme was not equivalent to the level of information provided about some of the other options considered.

18. The Committee does not need to resolve differences between the UK and the Communicant about the extent of information available to the public at relevant stages. It can work on the basis of the findings of the UK courts. The UK Government cannot repudiate the findings of its own courts. The High Court made some important particular findings which were endorsed by the Court of Appeal and not challenged in the Supreme Court. Without prejudice to the other examples given in the Communicants' Detailed Submissions and Reply,⁴ we highlight the following particular illustrations.

19. The context for the High Court findings is as follows. First, the DNS was a plan or programme for a Y-shaped network. Alternative configurations, known as the 'reverse E' and 'S' were ruled out by the SST. Second: an alignment

⁴ See generally paras. 10-12 of the Communicants' Detailed Submissions and para.23 of the Communicants' Reply.

involving a through route via London Heathrow Airport was also ruled out. Third, a lower design speed was ruled out. However:

- (1) The High Court (Ouseley J) held at paragraph 165 that “....*alternatives to the Y shape, that is the reverse E and S shapes have **only** been considered and rejected on their economic and business cases*” (our emphasis). No information, or even any other statement, was provided to the public about the environmental effects of proceeding with a Y-shaped network (either at all or in comparison with the environmental effects of the reverse E and S shapes). The environmental information contained in the Appraisal of Sustainability was directed solely at the environmental impacts of the proposed route for Phase 1 of HS2 from London to the West Midlands, despite the DNS being a plan/programme for the ‘Y’ network. Thus as to the relative environmental effects of alternative configurations no information was provided to the public and no consultation took place on such information at a time which allowed for early and effective participation when all the options were open, and as a consequence no consideration was given by the SST to the outcome of public participation on these issues (see also [117], [128-134] and [172]).
- (2) Whilst information was provided to the public about the environmental effects of the SST’s preferred option of a ‘spur’ connection to London Heathrow Airport, no information at all was provided about how the environmental impacts of this option compared to the alternative option of a through route via Heathrow. The High Court held that at [169] that “*the consideration of reasonable alternatives has not been carried out on a properly comparable basis.....the absence of information on the spurs is entirely the Government's choice, and that is not an adequate basis for the absence of an assessment*” (see also [172])
- (3) The DNS was a plan or programme for high speed rail as opposed to alternative options such as lower design speed. No information was provided to the public about how environmental effects of this alternative option compared to the environmental effects of HS2 [see the High Court at [165]: ‘*...only been considered and rejected on their*

economic and business case. The same applies to the adoption of a lower design speed'.

(4) The High Court concluded at [189] that the above deficiencies were '*too great to be remedied at an EIA stage*'. The Court of Appeal agreed at [72] (majority) and [184-185] (minority). The UK Government did not challenge these conclusions in the Supreme Court.

(5) Note: material submitted by the UK Government illustrates these points. The decision to rule out the 'reverse E' and 'S' was taken without prior public participation. See the March 2010 Department for Transport Paper *High Speed Rail* (UK Documents, Volume 1 Tab 10) at pp.17 and 72-78. By the time of the February 2011 public consultation, these alternative options were described as already having been ruled out: see the February 2011 Consultation Paper at paras. 2.32-2.33 (UK Documents, Volume 3 Tab 13, p.47), and note that the questions which were subject to public consultation (at p.113) were premised on a Y-shaped configuration for HS2 and did not seek public participation on the other configurations.

20. These deficiencies, both individually and cumulatively, mean that the public participation in the preparation of the DNS did not take place in a "*fair and transparent*" manner. Participation cannot be effective if it is uninformed. The "*necessary information*" was not provided to the public to enable them to make an *effective* input into the plan/programme.

IV. CONCLUSION

21. For all or any of these reasons, the Communicants respectfully invite the Compliance Committee to find that the UK has been in breach of Article 7 of the Convention and to recommend that the UK takes legislative and practical measures to ensure that such breaches do not occur in the future.

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