

Our Ref: CHTS/HSA110-1129056/NMMA
 Your Ref: ACCC/2/2014/100
 28 October 2016

Secretary to the Aarhus Convention
 United Nations Economic Commission for Europe
 Environment and Human Settlement Division
 Palais des Nations, Room 429-4
 CH-1211 GENEVA 10

For the Attention of Fiona Marshall

Dear Fiona

Communications to the Aarhus Convention Compliance Committee ("the Committee") concerning compliance by the United Kingdom in connection with the proposed construction of the "High Speed 2" railway (ACCC/C2014/100) ("the Communication")

I refer to your letter dated 26th September 2016 and the subsequent correspondence on this matter.

Please find below the communicants responses to the questions that the Compliance Committee required a response to.

Question 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?

Response

1.1 The following major options (alternatives to the proposed high speed, Y shaped configuration) were discussed by decision makers but rejected without consultation as required by Article 7 Aarhus Convention and foreclosed from public comment in the DNS consultation.

DNS states at Introduction [4]:

'Part 1 of this document sets out the Government's confirmed strategy for high speed rail'

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A section of the 'Summary of High Speed 2' headed 'Constructing the Y network' elaborates at [8 --10] and [13].

1.2 i. **Reverse E Configuration** - the questions to the public in the February 2011 Consultation Document were premised on Y shape configuration. See:

(I) UK Government Documents: Annex B Volume 1 Tab 9 March 2010 Department for Transport Paper *High Speed Rail* (fig 4.6 p.75 Y shape network proposed) and (alternatives fig 4.5 p.72 reverse E and S shape – **Appendix 1**); and

(II) UK Government Documents: Annex B Vol 2 Tab 13 p 47 February 2011 Consultation Paper [2.30] [2.32--2.33] and questions to public at Part 3 Section 6 (ii) at p.113 premised on Y shape configuration).

1.3 ii. **S Shape Configuration** - the questions to the public in the February 2011 Consultation Document were premised on Y shape configuration. See:

(I) UK Government Documents: Annex B Volume 1 Tab 9 March 2010 Department for Transport Paper *High Speed Rail* (fig 4.6 p.75 Y shape network proposed) and (alternatives fig 4.5 p.72 reverse E and S shape); and

(II) UK Government Documents: Annex B Tab 12 13 p.47 February 2011 Consultation Paper [2.30] [2.32--2.33] and questions to public at Part 3 section 6 (ii) at p.113 premised on Y shape configuration not passing Heathrow).

1.4 iii. **Alignment through London Heathrow:**

(I) UK Government Documents: Annex B Volume 1 Tab 9 March 2010 Department for Transport Paper *High Speed Rail* (fig 4.6 p.75 Y shape network proposed) and (alternatives fig 4.5 p.72 reverse E and S shape); and

(II) UK Government Documents: Annex B Tab 13 p.47 February 2011 Consultation Paper [2.30] [2.32--2.33] and questions to public at Part 3 section 6 (ii) & (iii) at p.113 premised on Y shape configuration not passing Heathrow).

1.5 iv. **A new but conventional speed rail line** (with the same objective of relieving pressure on south - north rail movements). See:

(I) UK Government Documents: Annex B Volume 1 Tab 9 March 2010 Department for Transport Paper *High Speed Rail* at [2.4 - 2.6] on p.42 and [2.64 - 2.65] on p.54;

(II) UK Government Documents: Annex B Volume 2 Tab 13 February 2011 Consultation Paper at [2.96-2.102] p.61. The consultation question at the foot of that page is directed only at "value for money". There was no consultation on the comparative environmental impacts of this option; and

(III) DNS at [32] and [38]: Annex B Volume 1 Tab 1, pp.22-23.

Question 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?

Response

2.1 The major options set out at 1.2 -- 1.5 above considered by decision makers before initiating the hybrid bill procedure were considered as "touching on the principle of the Bill" and not subject to public challenge.

2.2 The HS2 Bill presented to Parliament was for a particular project. (Its process, which is not yet completed, is not, of course, the subject of the present complaint.) Its Preamble made clear that options i, ii iii and iv above were not open for the public (petitioners) to challenge:

"[a Bill to]

Make provision for a railway between Euston in London and a junction with the West Coast Main Line at Handsacre in Staffordshire, with a spur from Old Oak Common in the London Borough of Hammersmith and Fulham to a junction with the Channel Tunnel Rail Link at York Way in the London Borough of Islington and a spur from Water Orton in Warwickshire to Curzon Street in Birmingham; and for connected purposes. "(Gov Annex B vol 4 tab 24)"

2.3 The Report of the House of Commons Committee on public objections (petitions) confirms this. See paragraph 1 on page 8 (**Appendix 2**):

"Our instructions were to consider petitions against the Bill and 'additional provisions' to it (additional provisions being, for these purposes, amendments that potentially affect other bodies and individuals). We had powers to amend the Bill but not on its principle, which the House defined as:

[...] the provision of a **high speed** railway between Euston in London and a junction with the West Coast Main Line at Handsacre in Staffordshire, with a spur from Water Orton in Warwickshire to Curzon Street in Birmingham, and intermediate stations at Old Oak Common and Birmingham Interchange.

Also not at issue before us was the railway's "broad route alignment". The "broad route alignment" language was chosen to permit an element of sensible discretion. We had power to make changes within but not outside that alignment."

2.4 The DNS, to which our complaint relates, was not confined to a particular project but was, as is now agreed a plan / programme subject to Article 7 applying not only to high speed rail from London to Staffordshire but **beyond** the West Midlands.

Question 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?

Response

3.1 The following significant information about environmental effects was not made available to the public about the following HS2 options:

3.2 i. **Of a reverse E configuration** (as opposed to a Y configuration):

(See Vol 2 p.905 Ouseley J at [165], [117] at p 894 [128-134] at p.897, [135] and [142] and [172] at p.907 and A o S [1.3.3] at p.333 and UK Add Docs 1.2 at p.888)

3.3 ii. **Of an S configuration** (as opposed to a Y configuration):

(See Vol 2 p.905 Ouseley J at [165], [117] at p.894 [128-134] at p.897, [135] and [142] and [172] at p.907 and A o S [1.3.3] at p.333 and UK Add Docs 1.2 at p.888)

3.4 iii. **Of a route through London Heathrow** (as opposed to a spur route to Heathrow):

(See Ouseley J at [169] and [172])

3.5 iv. Of a new conventional speed route:

(See Ouseley J at [165])

3.6 It is worth noting in this context that the only question in the February 2011 Consultation Paper which was directed at environmental effects was Question (vi), which sought comments on the Appraisal of Sustainability of the Government's proposed route from London to the West Midlands (UK Government Additional Docs Vol. 2 Tab 13 p.113). The Appraisal of Sustainability did not assess the options set out at 1.2 to 1.5 above.

3.7 It is further worth noting in this context that HS2 Ltd's own advice to the Government was that the environmental effects of the different alternative route options, including those set out at 1.2 and 1.3 above, needed to be assessed before a decision was taken: see the December 2009 report *High Speed Rail: London to the West Midlands and Beyond* (Volume 1, Tab 8 of the UK Government's Response Documents). The relevant section of the report has been omitted by the UK Government but is appended hereto (**Appendix 3**) – see paragraph 6.1.34 in particular:

"Environmental approach

6.1.34 While options remain as broad concepts, rather than specific route options, it is not possible to carry out the equivalent environmental appraisal that we have undertaken for HS2.¹ At this stage, we have limited our investigation to potential impacts on nationally designated sites. The following points are worth particular mention here:

- We have made a number of assumptions to include tunnelled route sections in places where either urban or environmentally sensitive areas would be likely to preclude a surface alignment. Clearly these assumptions would need to be challenged as more detailed route development work progressed. The extent of tunnelling is liable to vary considerably from the estimates we have included here.
- Many more nationally designated sites affect potential routes beyond Birmingham than has been the case between London and the West Midlands. These include the National Parks of the Yorkshire Dales, Peak District, Lake District and Northumberland, and the World Heritage Site at Hadrian's Wall. The need to avoid significant impacts to such sites creates significant uncertainty. Such constraints may rule out whole corridors for high speed rail development or, perhaps more likely, force changes to the scheme which inhibit its objectives or increase its cost."

¹ Note that (as is clear from the appended extracts) within this document the term 'HS2' was used to describe the London-West Midlands Route. The "potential routes beyond Birmingham" referred to in the second bullet point of 6.1.34 included the Y Network, the reverse E and the S – but despite the advice by HS2 Ltd in this passage that the environmental effects of the various options had not yet been, and should be, assessed, no such assessment was made available for public consultation prior to the Government adopting a plan/programme for the Y Network within the DNS.

Question 4

Please provide a concise description (in a table or diagram if convenient) of the main steps in the decision-making regarding the HS2, including the DNS and Hybrid Bill procedures, clearly indicating:

- (a) The range of major options:
 - i. Discussed in detail at each stage;
 - ii. Already foreclosed at each stage (i.e. matters not to be considered - see for example, the reference to petitions that do "not touch on the principle of the Bill" in paragraph 58 of the Party concerned response to the communication).
- (b) Whether each of the options discussed at a given stage was accompanied by information regarding its potential environmental consequences (environmental studies); and whether that information was available to the public at the time of consultation.
- (c) Whether each of the options discussed at each given stage was:
 - i. Open to public comment;
 - ii. Accompanied by any related information regarding that option's potential environmental consequences available at that time.

No response.

Question 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, para. 17-18) and under article 7 of the Aarhus Convention? If so, please briefly outline the main differences.

Response

5.1 There are two differences between the standard of a common law requirement to consult as set out at [17-18] of the opening statement of the Party concerned, and that under the Convention.

5.2 The first is of principle. The concept of 'the necessary information' under the Convention Article 7 must be understood in the context of Article 6. (See Communicant's speaking note [8-10]). The necessary information must, if it is to make possible effective consultation, include information as to the environmental effects of alternative options which were rejected in favour of the preferred option.

5.3 That is quite different quite different from the position under the common law which does not require information about alternatives. The test under the common law is simply 'fairness'. The position at common law is that

'..... there is in general no obligation on a public body to consult on the options which it has discarded'

as the Court of Appeal held in R (United Co Rusal plc) v. London Metal Exchange [2014] EWCA Civ 1271 (**Appendix 4**) at [31] & [93-94]

5.4 The second is that of culture and practice. However wide the theoretical scope of the common law duty to consult, the culture of the UK is such that the standard is lower in practice and excludes a need to provide information about the environmental effects of alternatives.

5.5 Hence, although the common law duty of consultation was raised as an issue by parties in the UK litigation challenging HS2, the courts rejected the challenge (see Court of Appeal [84] & [87] vol 2 pp.1110-1111) CA). This was despite finding that some aspects of the environmental information was seriously defective and

"...too great to be remedied at the EIA stage. The pass would have been sold. Parliament has to be regarded as not free to reach its own decision. The full network is an important part of the case for even starting on Phase 1, though not determinative of it. The Phase 1 line determines the need for spurs"

(See Ouseley J at [189] (vol 2 p 911) and CA [72] & [184-185]) (Vol 2 p.1107 and 1143). As Lord Justice Sullivan observed at [156-157] (vol 2 p.1133) there is no need for environmental information about alternatives to be provided at the project assessment stage.

If I can be of any further assistance do not hesitate to contact me.

Kind regards

Yours sincerely

A handwritten signature in black ink, appearing to read 'Christopher Stanwell', written over a horizontal line.

Christopher Stanwell
Partner
for DAC Beachcroft LLP

cc: Mr Ahmed Azam, Department of Environment, Food and Rural Affairs, United Kingdom
(ahmed.azam@defra.gsi.gov.uk).

Enc.