

**Observations by the European Commission,  
on behalf of the European Union, to the  
Communication to the Aarhus Convention Compliance Committee  
concerning compliance by the European Union in connection with  
the proposed construction by the United Kingdom  
of the "High Speed 2" railway**

**(ACCC/C/2014/101)**

## **I. Introduction**

These observations refer to the letter by the Aarhus Convention Compliance Committee (ACCC) dated 9 September 2014, asking the European Union to submit to the ACCC any written explanations or statements clarifying the matter referred to in the above-mentioned Communication.

Pursuant to Article 17.1 of the Treaty on European Union (TEU), the European Commission replies to this letter on behalf of the European Union.

## **II. Background of the case**

On 15 April 2014, three Communicants have jointly introduced a Communication to the ACCC. These are the non-governmental organization (NGO) "HS2 Action Alliance Limited" or "HS2AA", the local authority "London Borough of Hillingdon" or "LBH" and Ms Charlotte Jones, a resident of Hillingdon whose home is located on the proposed route of the High Speed 2 (HS2) railway. The Communicants are represented by Mr Christopher Stanwell for the purpose of their Communication to the ACCC.

Under the terms of paragraph 18 of the Annex to Decision I/7 by the Meeting of the Parties on Review of Compliance, a Communication is the means for the public to address the "Party's compliance with the Convention".

In its Communication, the Communicants allege that Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (the "Strategic Environmental Assessment Directive" or "SEA Directive")<sup>1</sup> does not comply with Article 7 of the Aarhus Convention.

To recall, Article 7 of the Aarhus Convention foresees public participation concerning plans, programmes and policies relating to the environment.

---

<sup>1</sup> OJ L 197 of 21 July 2001, p. 30.

As the Communicants set out, HS2AA and LBH (amongst others) have asked, before UK courts, for review of the decisions by the Secretary of State and Transport of 10 January 2012 in the Command Paper "High Speed Rail: Investing in Britain's Future – Decisions and Next Steps" ("DNS") which sets out the UK Government's strategy for the promotion, construction and operation of HS2 between London, the West Midlands, Leeds and Manchester. HS2AA and LBH argued that this "plan or programme" in the sense of the SEA Directive had not been subject to effective public participation.

The High Court and Court of Appeal of England and Wales dismissed HS2AA's and LBH's claim on the ground that the DNS fell outside the scope of the SEA Directive because it did not "*set the framework for future development consent*" (cf. Article 3(2)(a) of the SEA Directive).

The UK Supreme Court confirmed that the DNS was not subject to the SEA Directive. The Supreme Court considered, in essence, that the reference to plans and programmes in Article 7 of the Aarhus Convention is separate from, and broader than, the SEA Directive. The Supreme Court held that "*[t]he SEA Directive must be interpreted and applied in its own terms. If this falls short of full compliance with the Aarhus Convention, it does not invalidate the directive so far as it goes.*" (paragraph 52 of the judgment).

The Communicants criticise that the SEA Directive, in the interpretation given by the UK courts, does not apply to plans or programmes where development consent is to be sought from a sovereign legislature. They argue that the UK Government, by choosing to promote a proposal by a legislative development consent procedure, can thus avoid prior assessment under the SEA Directive.

The Communicants allege that the EU, by failing to put in place a proper regulatory framework, via the SEA Directive, for all plans and programmes relating to the environment, has breached Article 7 of the Aarhus Convention.

To be noted that the Communicants have also introduced a separate Communication to the ACCC against the UK. That Communication, ACCC/C/2014/100, is directed against the adoption of the DNS for a potential breach of Article 7 of the Aarhus Convention. This Communication, though it is linked to the present case, is not the object of the present observations.

### **III. Legal observations**

#### **1. Admissibility of the Communication**

In its Preliminary Determination of Admissibility of the Communication, the ACCC has declared the present Communication as admissible, "*subject to review following any comments from the Party concerned*" (page 2, last paragraph).

The European Commission would like to comment with regard to one of the Communicants, the London Borough of Hillingdon, which is a public authority with decision-making functions.

The purpose of the Aarhus Convention is to give procedural rights to the public. Therefore, a public authority should not be allowed to bring communications against a Party. Public authorities are rather the subject of obligations under the Convention.

Paragraph 18 of the Annex to Decision I/7 by the Meeting of the Parties on Review of Compliance clearly speaks of communications "by one or more members of the public".

The European Commission would thus submit that the London Borough of Hillingdon cannot be regarded as a member of the public and in so far as the Communication refers to it should be declared inadmissible.

## **2. Observations on substance**

The Aarhus Convention is a mixed agreement.

It is implemented in the European Union at three levels.

First, the European Union implemented the Convention with regard to its institutions in Regulation 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies<sup>2</sup>. Article 9 of this regulation provides for public participation in respect of 'plans and programmes relating to the environment', which are defined in Article 2(e) to mean:

*"plans and programmes,*

*(i) which are subject to preparation and, as appropriate, adoption by a Community institution or body;*

*(ii) which are required under legislative, regulatory or administrative provisions; and*

*(iii) which contribute to, or are likely to have significant effects on, the achievement of the objectives of Community environmental policy, such as laid down in the Sixth Community Environment Action Programme, or in any subsequent general environmental action programme.*

*General environmental action programmes shall also be considered as plans and programmes relating to the environment.*

*This definition shall not include financial or budget plans and programmes, namely those laying down how particular projects or activities should be financed or those related to the proposed annual budgets, internal work programmes of a Community institution or body, or emergency plans and programmes designed for the sole purpose of civil protection".*

Second, other pieces of EU legislation applicable to Member States, in particular those referred to in Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and

---

<sup>2</sup> OJ L 264 of 25.9.2006, p. 13.

programmes relating to the environment and amending with regard to public participation and access to justice Council Directive 85/337/EEC<sup>3</sup> and 96/61/EC<sup>4</sup>, (the "Public Participation Directive")<sup>5</sup> are to be understood as ensuring that the requirements of Article 7 of the Aarhus Convention for the European Union are met.

Third, in so far as the European Union has not adopted specific legislation intended to implement Article 7 of the Aarhus Convention, it remains a responsibility of the Member States of the EU to implement their obligations under Article 7 of the Aarhus Convention, which, by virtue of Article 216 of the Treaty on the Functioning of the European Union, is part of EU law.

This tallies with the declaration that the European Union has made upon signing and ratifying the Aarhus Convention, namely that its *"institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention"*.<sup>6</sup>

The Public Participation Directive in its Recital 10 notes that *"provision should be made in respect of certain Directives in the environmental area which require Member States to produce plans and programmes relating to the environment but which do not contain sufficient provisions on public participation, so as to ensure public participation consistent with the provisions of the Aarhus Convention, in particular Article 7 thereof. Other relevant Community legislation already provides for public participation in the preparation of plans and programmes and, for the future, public participation requirements in line with the Aarhus Convention will be incorporated into the relevant legislation from the outset."* Thus, Recital 10 refers to three relevant categories of plans and programmes. The first category comprises plans and programmes required under existing directives which did not contain sufficient provisions on public participation (and which are now subject to public participation requirements by virtue of Article 2 of the Public Participation Directive). The second category comprises plans and programmes for which existing legislation already provided for public participation. The SEA Directive represented such a piece of existing legislation<sup>7</sup>. The third category comprises plans and programmes covered by future EU legislation.

In its Article 2 ("Public participation concerning plans and programmes"), the Public Participation Directive provides that Member States shall ensure that the public is informed about any proposals for plans and programmes envisaged under a number of pieces of specific legislation, that the public is entitled to express comments and opinions when all options are open before decisions on these plans and programmes are made, that due account is being taken of the results of public participation and that the public is informed about the

---

<sup>3</sup> Council Directive 85/337/EEC has since become Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, p. 56.

<sup>4</sup> Council Directive 96/62/EC has since become Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334 of 17.12.2010, p.17.

<sup>5</sup> OJ L 156 of 25.6.2003, p. 17.

<sup>6</sup> This declaration is also published on UNECE's website, see [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-13&chapter=27&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en#EndDec)

<sup>7</sup> See Article 2(5) of Directive 2003/35/EC.

decisions taken and the reasons and considerations upon which those decisions are based. Plans and programmes covered by a public participation procedure under the SEA Directive are excluded.

Public participation is a subsidiary objective of the SEA Directive. Its chief objective is to establish a framework for the environmental impact assessment of certain plans and programmes. The scope of the SEA Directive is indeed limited to certain plans and programmes as outlined in its Article 3. In particular, paragraph 2 (a) lists plans and programmes *"which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II"* to the EIA Directive. The SEA Directive makes provision in its Article 6 for public participation in respect of plans and programmes requiring an SEA. In as much as public participation is an integral part of an SEA process, an SEA can therefore serve as a means of complying with Article 7 of the Convention. However, it does not follow that Article 7 of the Convention *requires* an SEA. Article 7 requires public participation, not an SEA as such, and it is perfectly possible to have public participation without an SEA.

This conclusion is also confirmed by the Aarhus Convention Implementation Guide<sup>8</sup> which underlines that, *"[w]hile 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"*. The latest edition of the Aarhus Convention Implementation Guide<sup>9</sup> equally stresses under the heading *"The relationship between the Aarhus Convention, EIA and SEA"*, that *"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"*.

As noted above, the UK litigation that forms the background to this Communication concluded that the SEA Directive was inapplicable to the DNS. For three reasons, such a conclusion does not of itself show that the Union has failed to comply with Article 7 of the Convention. First of all, the Union has never purported to comprehensively transpose Article 7 into secondary EU legislation in respect of all plans and programmes adopted within Member States. It has instead limited secondary EU legislation on such plans and programmes to the three categories referred to in Recital 10 of the Public Participation Directive, namely the plans and programmes covered by Article 2 of the Public Participation Directive, the plans and programmes covered by the SEA Directive and relevant plans and programmes to be covered by future public participation requirements. Second, in so far as the Union has legislated in respect of Article 7, it has not relied on the SEA Directive alone. As noted above, public participation pursuant to Article 7 does not require an SEA, an SEA being merely one process whereby public participation can be secured. Third, as already

---

<sup>8</sup> "The Aarhus Convention: An Implementation Guide", First edition, 2000, p. 114.

<sup>9</sup> Second edition of the Aarhus Convention Implementation Guide, 2013, p. 118.

explained above, in so far as the European Union has not adopted specific legislation intended to implement Article 7 of the Aarhus Convention, it remains a responsibility of the Member States of the EU to implement their obligations under Article 7 of the Aarhus Convention, and in this regard, the UK has clearly stated in point 60 of its submissions that it accepts that Article 7 of the Convention applies to the DNS.

For the reasons set out above, the existence of a dispute about the scope of the SEA Directive does not in any way call into question the Union's implementation of Article 7 of the Aarhus Convention.

#### **IV. CONCLUSION**

In view of the above considerations, the European Commission requests the ACCC to dismiss the Communication as unfounded.