

Statement by the Commission, on behalf of the EU, in the hearing on

10 March 2016 in Geneva concerning communication ACCC/C/2014/101

Honourable Members of the Compliance Committee, Communicant, ladies and gentlemen,

1. We would like to thank the Aarhus Convention Compliance Committee (ACCC) for having invited us today to this hearing on **communication ACCC/C/2014/101** concerning alleged non-compliance by the EU with Article 7 of the Aarhus Convention in connection with the proposed construction in the UK of a high speed railway from London to the West Midlands, known as "High Speed 2" or "HS2". We appreciate this additional opportunity to present our observations to the Communicant's claims.
2. Let me just briefly resume the main facts, as far as they are relevant for the communication directed against the EU. Also, some new elements have not yet been dealt with in the Union's written observations of 25 February 2015.
3. The "HS2 Action Alliance", the London Borough of Hillingdon and Ms. Charlotte Jones jointly introduced the communication on 29 June 2014.

4. The Communicants allege that the Strategic Environmental Assessment Directive 2001/42/EC, or "**SEA Directive**", does not comply with **Article 7** of the Aarhus Convention. As we know, this Article foresees public participation requirements concerning plans and programmes relating to the environment.
5. Planning phase I of the HS2, reaching from London to the West Midlands, is set out in the Command Paper *"High Speed Rail: Investing in Britain's Future – Decisions and Next Steps"*, or "DNS". The DNS is the focus of the present communication.
6. The DNS has previously been submitted to the **national Courts of the UK**. In last instance - and this is important for the present Communication against the EU - the UK Supreme Court held that the **DNS was not subject to the SEA Directive**. Yet, the **UK Government accepts that Article 7 applied to the DNS**.
7. According to Article 3(2)(a) of the SEA-Directive, an environmental assessment is only needed for plans and programmes which, among other criteria, ***"set the framework for future development consent of projects"***. The UK Supreme Court found that the DNS did not meet this criterion.

8. The Communicants now criticise before the ACCC that the **SEA Directive**, in the interpretation given by the UK Supreme Court, does **not apply** to plans and programmes **where development consent is to be sought from a sovereign legislature**.
9. The question whether, nonetheless, the UK has complied with the requirements of Article 7 of the Convention is subject of the related, yet separate, **communication ACCC/C/C/100 against the UK**.
10. With respect to the EU, the addressee of the present communication 101, the Communicants allege that, by failing to put in place a proper regulatory framework for **all** plans and programmes relating to the environment, the Union has breached Article 7 of the Aarhus Convention.

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11. We can be brief regarding the **admissibility** of the Communication. We solely want to recall that the ACCC on 7 August 2015 found that one of the three Communicants, namely the London Borough of Hillingdon, is not a member of the public competent to bring a Communication. The ACCC thereby followed the submissions by the EU and by the UK in their parallel Case 100. The Union is satisfied with the ACCC's decision in

that regard and sees this **issue as closed**. It is not disputed that the two further Communicants have standing before the ACCC.

12. We took note of the message by Mr Stanwell of 3 March 2016 on behalf of Nabarro LLP, acting for the Communicants, that Ms Jones would not be proceeding with her communication.

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13. Let us now come to the main arguments **on substance** by the EU to rebut the Communicants' claim, as set out also in more detail in our written observations to this case.

14. First of all, we would like to recall that Article 7 of the Aarhus Convention refers to the obligation to adopt *"appropriate practical and/or other provisions for the public to participate"*. **Article 7 does not, however, require the adoption of "regulatory" provisions.**

15. Second, **compliance with Article 7 does not require an environmental assessment under the SEA-Directive.** Article 7 requires public participation, not an SEA as such. This is confirmed by the Aarhus Convention Implementation Guide, and we refer to our written observations in that regard.

16. In addition, the SEA Directive is **only one of the instruments** adopted at EU level to contribute to the implementation of Article 7. We will now come to this point.
17. In their reply of 18 March 2015 to the Union's observations, the Communicants insist that "***the EU plainly has competence***" to put in place the framework to ensure compliance with Article 7.
18. Indeed, the Union is competent to legislate in the ambit of Article 7 and has exercised its competence by adopting a number of directives, as explained in our written observations.
19. As we know, there is the **SEA Directive** which makes an environmental assessment mandatory for certain plans and programmes.
20. Furthermore, the '**Public Participation Directive**' **2003/35/EC** enacts Article 7. It applies to a range of directives in the environmental area, listed in its Annex I and concerning areas like water, waste or air.
21. Further instruments under the scope of Article 7 are mentioned in the Union's regular reports on the implementation of the Aarhus Convention within the EU which are well known to the ACCC, and thus need not be repeated here.

22. The EU has thus clearly exercised its competence to contribute to the implementation of Article 7 of the Convention.
23. However, the Communicants seem to fail to distinguish between the existence of a competence by the Union to adopt measures in the ambit of Article 7 with an obligation to **fully and exclusively** exercise that competence. And this is a vital difference.
24. Indeed, where the EU's obligations as a Party to the Aarhus Convention are at stake, it is important to bear in mind that, where the Union has adopted internally legislation to contribute to the implementation of Article 7 of the Convention, **Member States** under Article 291 of the Treaty on the Functioning of the European Union **have to implement the obligations stemming from Union law.**
25. In so far as the Union has not adopted specific legislation contributing to implement Article 7 of the Aarhus Convention, it **remains a responsibility of the Member States of the EU to implement their own obligations under the Aarhus Convention.**
26. For the case at hand, this means that the **UK is responsible to cover any obligations arising from Article 7** in respect of the DNS that might not already be covered by Union legislation.

27. The UK fully accepts that Article 7 applies to the DNS. In answer to its respective communication ACCC/C/2014/100 and in answer to the Communicants' reply, the UK detailed **how the consultation procedure for the DNS** relating to phase I of the HS2 **complied with Article 7**.

28. We thus consider the Communicant's arguments against the Union as **unfounded**.

29. We are at the disposal of the ACCC for any further clarifications during this hearing.