ACCC/C/2014/101

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

(1) HS2 ACTION ALLIANCE LIMITED

(2) LONDON BOROUGH OF HILLINGDON

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Communicants

and

EUROPEAN UNION

Party Concerned

Communicants' outline reply to the European Commission's response to the Communication

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I. Introduction

1. The purpose of this document is to assist the Compliance Committee's consideration of the next steps in relation to this communication in the light of the European Commission's response on behalf of the European Union dated 25 February 2015 and, specifically, to outline the main points that the Communicants will wish to develop at any hearing of this communication.

2. This is, by definition, only an outline reply, and therefore is not intended to be an exhaustive rebuttal of all the points made by the European Union. Accordingly, silence on any issue should not be taken to indicate agreement.

II. Preliminary issue: LBH's standing

3. The European Union objects to the standing of the London Borough of Hillingdon ("**LBH**") to bring this communication, on the basis that it not a "*member of the public*" within the meaning of Article 2(4) of the Convention, and thus not a "*member of the public*" entitled to make a communication under para. 18 of Decision I/7.

4. The European Commission's case on this point rests upon the premise that it is not possible for a body such as LBH to fall within the definition of *"public authority"* in Article 2(2) of the Convention for some purposes and the definition of a "*member of the public*" in Article 2(4) for other purposes. That premise is incorrect. The proper analysis is that the appropriate categorisation depends on the capacity in which the body is acting. This communication does not arise out of the actions of LBH as a regulatory decision-maker. It arises out of the actions of a different body, namely the adoption of the DNS by the UK Government, which affects many constituents of LBH because the route of HS2 which the DNS endorses runs through a large part of Hillingdon, and out of the failure by the EU to put in place a proper regulatory framework to ensure that such decisions are subject to public participation in compliance with Article 7 of the Convention. LBH thus brings this communication in a representative capacity on behalf of its constituents.[1] When acting in this capacity, LBH is a "*member of the public*" notwithstanding that when acting in certain other capacities (for example when defending a challenge by a local resident against a local planning decision made by LBH) it is a *"public authority"*. There are a number of reasons why this is the proper conclusion.

5. First, the definitions in Article 2 of the Convention do not support the conclusion that the definitions *"public authority"* in para. (2) and *"member of the public"* in para. (4) are mutually exclusive for all purposes. In particular:

   (1) There is clearly a degree of overlap between the Article 2 definitions: see most obviously the definition of "*the public concerned*" in para. (5) which clearly overlaps with "*the public*" in para. (4). This shows that the definitions were not intended to be completely mutually exclusive.

   (2) Any "*natural or legal person*" falls within the term "*the public*" under para. (4) and yet such "*natural or legal persons*" can also fall within the

[1] LBH has express power to challenge the acts of central Government in the interests of its constituents pursuant to s.222 of the Local Government Act 1972 (enclosed as Annex 1 hereto).

definition *"public authority"* in para. (2)(b)-(c). This supports the view that a natural or legal person can be a *"public authority"* for some purposes but a *"member of the public"* for other purposes.

6. Secondly, the European Commission's position is contrary to the Compliance Committee's approach in ACCC/C/2012/68 where it found that a communication by the Avich and Kilchrenan Community Council was admissible (and thus that the Council was for the purposes of that communication a *"member of the public"*) notwithstanding that the Council had statutory duties and would thus be within the definition of a *"public authority"* under Article 2(2)(b) of the Convention (*"natural or legal persons performing public administrative functions under national law"*).[2] The Compliance Committee must have considered that these two terms were not for all purposes mutually exclusive; otherwise, by virtue of being a *"public authority"* for some purposes it could not have been a *"member of the public"* for the purposes of this particular communication.

7. Thirdly, the *Aarhus Convention Implementation Guide* supports the Communicants' submission that a body's proper categorisation under Article 2 of the Convention depends upon the context in which they are operating. On p.48 it is stated that *"it would seem that a single body may fall under this definition* [i.e. the Art 2(2)(b) definition of *"public authority"*] *with respect to a part of its activities, while other of its activities will be of a private nature."*

8. Fourthly, there are sound reasons in principle why a local authority acting in a representative capacity on behalf of constituents who would otherwise have to bring proceedings themselves should be considered a *"member of the public"* for the purposes of Article 2(4) of the Convention and thus Decision I/7. The public authority in that context is not acting in its capacity as a regulatory decision-maker. The decision, act or omission being challenged is not one of its own. It is a decision, act or omission of a different decision maker which affects

[2] At paras. 81-83.

the people whom the authority represents. In this capacity the authority is acting on behalf of those who consider that the decision, act or omission challenged adversely affects the environment and contravenes the law relating to the environment. Its position in this capacity is in substance little different from the "*associations, organisations or groups*" who are expressly brought within the definition of "*the public*" under Article 2(4).

III. The substance of the Communication

9. The Communicants make the following outline points of reply to the European Commission's Response on the substance of the Communication.

10. First, the European Commission's Response repeatedly mischaracterises the Communication as being premised upon the general proposition that compliance with Article 7 of the Convention requires a strategic environmental assessment ("**SEA**") As set out at paras. 42-47 of Appendix I to the Communication, the Communicants' case is that:

    (1) Article 7 requires the EU to put in place a proper regulatory framework for effective public participation in the preparation of plans and programmes.

    (2) That obligation is discharged by the SEA Directive in relation to plans and programmes falling within the scope of that Directive.

    (3) However, on the Supreme Court's narrow interpretation of the scope of the SEA Directive, there is a potentially wide range of plans and programmes which do not fall within the scope of that Directive and in relation to which the EU makes no alternative provision for effective public participation.

    (4) There is therefore a lacuna in the implementation of Article 7 of the Convention in EU law, in that there are some plans and programmes in relation to which the EU has not put in place any regulatory framework for effective public participation (whether through SEA or by any alternative Article 7 compliant means).

11. Secondly, the European Commission's Response does not deny the existence of such a lacuna. It is notable in this context that the European Commission's Response is silent on the question of whether the European Commission endorses the UK Supreme Court's narrow interpretation of the scope of the SEA Directive (an interpretation which the Supreme Court made unilaterally without first referring the matter to the Court of Justice of the European Union under Art. 267 TFEU). The Compliance Committee may wish to seek clarification of the European Commission's stance on this point, because it is relevant to how broad the lacuna in the EU's implementation of Article 7 is. If the Commission considers that the Supreme Court's interpretation of the SEA Directive's scope is too restrictive, with the result that the Supreme Court has wrongly broadened the lacuna in the EU's implementation of Article 7 of the Convention (and thereby exposed the EU to a more substantial finding of non-compliance with the Convention), then the Commission ought to take infraction proceedings against the UK under Article 258TFEU in order to correct the position. Note in this context that Article 3(1) of the Convention requires the EU to take *"enforcement measures"* within the scope of its competence *"to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention"* – the issuing of infraction proceedings under Article 258TFEU is one such enforcement measure.

12. Thirdly, the facts of the present case indicate the seriousness of this lacuna. The DNS is a plan or programme within the scope of Article 7 of the Convention (see para. 60 of the UK Government's Response to ACCC/C/2014/100). Through this plan/programme, the UK Government committed itself to promote HS2, which was described in the UK Supreme Court as the *"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] Despite this, EU law did not have in place any regulatory framework to ensure that the DNS was subject to effective public participation. This lacuna is further exacerbated by the inability of individuals within the UK to rely directly upon the Aarhus Convention in

[3] ***R (HS2 Action Alliance Ltd & others) v. Secretary of State for Transport*** [2014] 1 W.L.R. 324 at para. 130.

the domestic legal system. See ***Morgan v. Hinton Organics (Wessex) Ltd*** [2009] Env. L.R. 30 where Carnwath LJ held at para. 22: "*For the purposes of domestic law, the convention has the status of an international treaty, not directly incorporated. Thus its provisions cannot be directly applied by domestic courts, but may be taken into account in resolving ambiguities in legislation intended to give it effect*". There is no domestic legislation governing the preparation of a document such as the DNS and therefore in the absence of a regulatory framework in EU law for the adoption of such a document, there is no means by which a member of the public can enforce his, her or its rights under Article 7 of the Convention.

13. Fourthly, the Compliance Committee should reject the European Commission's attempt to "pass the buck" to its Member States in relation to plans and programmes in relation to which the EU has not put in place a proper regulatory framework for public participation in accordance with Article 7 of the Aarhus Convention (see pp.4-5 of the European Commission's Response). In particular:-

    (1) The EU's obligations under the Convention do not simply relate to the decisions, acts and omissions of the EU institutions. In particular:

        i. This is clear from the Compliance Committee's findings in ACCC/C/2010/54 which found that the EU was in breach in that case by not having "*a proper regulatory framework and/or other instructions to ensure implementation of article 7 of the Convention by its member states*".

        ii. The EU is obliged as a Party to the Convention to "*take the necessary legislative, regulatory and other measures… as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention*": see Article 3(1) of the Convention. It follows that the EU is obliged to take all necessary measures within the scope of its competence to implement the provisions of the Convention. The scope of the EU's competence in this regard is

not confined to regulating the EU institutions (see further below).

iii. This is also recognised by the EU legislature, through its enactment of the Public Participation Directive 2003/35/EC, recital 6 of which observed that in the light of the European Community signing the Aarhus Convention *"Community law should be properly aligned with that Convention"* and Article 1 of which indicated that the Directive's sole objective was *"to contribute to the implementation of the obligations arising under the Aarhus convention"*. The Public Participation Directive is directed at Member States. Accordingly, the EU legislature must have considered that its obligations under the Convention went beyond regulating the decisions, acts and omissions of the EU institutions but also extended to putting in place a proper regulatory framework for compliance with the Convention by EU Member States.

(2) There is no doubt that the EU has competence to put in place a proper regulatory framework for effective public participation by its Member States in the preparation of plans and programmes such as the DNS. The European Commission's response does not suggest otherwise. It would therefore have been within the scope of the EU's competence to prevent the lacuna that currently exists. The existence of the lacuna is therefore contrary to the EU's obligation under Article 3(1) of the Convention to take all necessary measures within its competence to implement Article 7: see above.

(3) No reasons have been given by the European Commission's Response as to why the EU considers it appropriate to draw a distinction between plans and programmes which *"set the framework for development consent"* and are *"required by legislative, regulatory or administrative provisions"*, in relation to which EU law has put in place a regulatory framework (through the SEA Directive) requiring Member States to secure public participation, and other plans and programmes falling within Article 7 of the Convention in relation to which EU law

has not put in place any regulatory framework to secure any level at all of public participation. The failure by the EU to put in place any regulatory framework to ensure compliance with Article 7 by EU Member States in relation to the latter category of plans of programmes, something which the EU plainly has competence to do, thus remains wholly unexplained.

(4) The terms of EU law are heavily influential on EU Member States in considering their own implementation of the Convention. See e.g. observations of the Compliance Committee in ACCC/C/2006/17 (European Community) that *"most Member States seem to rely on Community law when drafting their national legislation aiming to implement international obligations stemming from a treaty to which the Community is also a Party."* The existence of a lacuna in EU law is thus liable to be duplicated in national law. This can be seen from the facts of the present case. Since, as noted above, the Aarhus Convention is not directly effective in the UK legal system, the only enforceable rights members of the public have under UK domestic law in relation to public participation in the preparation of plans and programmes are those under the Environmental Assessment of Plans and Programmes Regulations 2004, the scope of which is co-extensive with the SEA Directive (and which therefore did not apply to the DNS).

IV. Conclusion

14. There remain serious issues to be considered in this communication. The Communicants therefore respectfully ask the Committee to:

(1) indicate that the European Commission's objection to LBH's standing to bring the communication is without merit, so that the Communicants, the European Commission and the Compliance Committee can thereafter focus on the substance of the communication; and

(2) progress this communication to a hearing at the soonest convenient date.

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17 March 2015

Status: ✅ Law In Force

Local Government Act 1972 c. 70

Part XI GENERAL PROVISIONS AS TO LOCAL AUTHORITIES

Legal proceedings

This version in force from: **July 3, 2000** to **present**

(version 2 of 2)

222.— Power of local authorities to prosecute or defend legal proceedings.

(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—

(a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name, and

(b) they may, in their own name, make representations in the interests of the inhabitants at any public inquiry held by or on behalf of any Minister or public body under any enactment.

(2) In this section "local authority" includes the Common Council [and the London Fire and Emergency Planning Authority] [1] .

Notes

1. Words added by Greater London Authority Act 1999 c. 29 Sch.29(I) para.20 (July 3, 2000)

Modifications

Whole Document	Modified in relation to the joint board by Hull and Goole Port Health Authority Order 2011/939, art. 7(2)
	Modified in relation to the transfer of functions to the National Assembly of Wales by National Assembly for Wales (Transfer of Functions) Order 1999/672, Sch. 1 para. 1, art. 2
Pt XI s. 222	Modified in relation to the Combined Authority by Barnsley, Doncaster, Rotherham and Sheffield Combined Authority Order 2014/863, Pt 4 art. 11(b)

	Modified in relation to Greater Manchester Combined Authority by Greater Manchester Combined Authority Order 2011/908, Pt 4 art. 11(b)
	Modified in relation to the Combined Authority by Halton, Knowsley, Liverpool, St Helens, Sefton and Wirral Combined Authority Order 2014/865, Pt 4 art. 14(b)
	Modified in relation to certain bodies established by or under 1985 c.51 by Local Government Reorganisation (Miscellaneous Provisions) Order 1990/1765, art. 4(3)
Pt XI s. 222 - s. 223	Modified in relation to the Conservation Board for the Chilterns Area of Outstanding Natural Beauty by Chilterns Area of Outstanding Natural Beauty (Establishment of Conservation Board) Order 2004/1778, Pt IV art. 29(1)
	Modified in relation to the Conservation Board for the Cotswolds Area of Outstanding Natural Beauty by Cotswolds Area of Outstanding Natural Beauty (Establishment of Conservation Board) Order 2004/1777, Pt IV art. 29(1)
	Modified for the purposes of the functions, rights and liabilities assigned to Isle of Wight Council by virtue of SI 2010/1216 by Cowes Port Health Authority Order 2010/1216, art. 4(2)
	Modified in relation to National Park authorities by Environment Act 1995 c. 25, Sch. 8 para. 3(1)(g), Pt III s. 65
	Modified for the purposes of the functions, rights and liabilities assigned to Portsmouth City Council by virtue of SI 2010/1217 by Portsmouth Port Health Authority Order 2010/1217, art. 4(2)

Subject: Local government

Keywords: Local authorities' powers and duties; Proceedings; Prosecutions