ACCC/C/2014/101

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

HS2 ACTION ALLIANCE LIMITED

Communicants

and

EUROPEAN UNION

Party Concerned

Speaking note on behalf of the Communicants[1]

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1. The crux of the Communicants' complaint is that there is a important lacuna in the European Union's implementation of Article 7 of the Convention in relation to public participation concerning plans and programmes relating to the environment.

2. The principal EU legislation on public participation concerning plans and programmes relating to the environment is the Strategic Environmental Assessment Directive 2001/42/EC ("**SEAD**").[2]

3. Prior to the EU's accession to the Aarhus Convention in 2005, the European Parliament and Council enacted the Public Participation Directive 2003/35/EC ("**PPD**") to amend EU legislation with the intention of securing compliance with the second pillar of the Convention (public participation, Articles 6-8) by the EU institutions and its Member States. Substantial amendments were made to, for example, the Environmental Impact Assessment Directive in order to secure compliance with Article 6 of the Convention in relation to public participation concerning decision-making by EU member states in relation to projects likely to have a significant effect on the environment. However, the

[1] This speaking note should be read in conjunction with the Communicants' Detailed Submissions dated 10 April 2014 (Appendix 1 to the Communication) and the Communicants' Reply dated 17 March 2015.

[2] There is no such legislation relating to policies.

PPD did not amend the SEAD in relation to public participation concerning the preparation by EU member states of plans and programmes relating to the environment, because SEAD was already considered by the EU to be compliant with Article 7 of the Convention.[3] Article 2 of the PPD made provision for public participation in relation to certain plans and programmes required by EU legislation, which were not covered by the SEAD.

4. The lacuna arises because the SEAD applies to plans and programmes prepared by EU member states only where they are "*required by legislative, regulatory or administrative provisions*" (Article 2(a)) and "*set the framework for development consent*" (Article 3(2)).

5. A plan or programme which relates to the environment but which is not "*required by legislative, regulatory or administrative provisions*" and/or which does not "*set the framework for development consent*" is therefore within the scope of Article 7 of the Convention but outside the scope of the SEAD.

6. It is clear from the wording of the Convention and the Compliance Committee's case-law[4] that Article 7 is not subject to such limitations on its scope.

7. A plan or programme which relates to the environment but which is not "*required by legislative, regulatory or administrative provisions*" and/or which does not "*set the framework for development consent*" is therefore within the scope of Article 7 of the Convention but outside the scope of the SEAD.

8. In relation to the first criterion, the lacuna has limited significance , since the Court of Justice of the European Union ("**CJEU**") has interpreted the word "*required*" to mean merely "*regulated*". See Case C-567/10 Inter-Environnement Bruxelles ASBL v. Region de Bruxelles-Capitale [2012] 2 C.M.L.R. 909.

9. In relation to the to the second criterion, the lacuna appears to be large in the light of the decision of the UK Supreme Court in R (HS2 Action Alliance Ltd) v. Secretary of State for Transport [2014] 1 W.L.R. 324. In that case, the Supreme Court considered the interpretation of the term "*set the framework for*

[3] See the references at para. 41 and footnote 19 of the Communicants' Detailed Submissions.
[4] See para. 35 of the Communicants' detailed submissions.

development consent" in Art. 3(2) SEAD to be so obvious as not to require a reference to the CJEU under Article 267 of the Treaty on the Functioning of the European Union ('**TFEU**'). The Supreme Court held this term meant that the SEAD only applied to plans or programmes which legally constrain a subsequent development consent decision by defining criteria which the development consent decision is legally obliged to apply. Unless this condition is satisfied, the SEAD does not apply to a plan or programme relating to the environment even where it is clear that:

(1) the plan or programme will have a substantial, potentially decisive, influence on the decision on whether to grant development consent for future projects; and/or

(2) the plan or programme will influence the manner in which environmental effects of a future project are considered at the development consent stage.

10. The Supreme Court judgment, if it is correct, creates an EU-wide exemption from the SEAD for plans and programmes relating to a project for which the subsequent development consent is a national legislature which is not subject to *de jure* legal constraint. This is of concern given that, as in the specific case that has lead to this communication (described by the Supreme Court 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"*), the situations where development consent is obtained from a national legislature tend to relate to the largest and thus most environmentally controversial projects.

11. 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*'.

12. The Supreme Court's approach is difficult to reconcile with the approach of the Committee. In France ACCC/C/2007/22 the Committee held that the critical question was not the existence or otherwise of a formal *de jure* constraint but whether or not *in practice* there was genuine freedom to respond to public

views.

13. It is also difficult to reconcile with the approach of the CJEU in Case C-6/04 Commission v UK that plans do not have to be binding but merely to have '*considerable influence*' on protected areas to be subject to Article 6 (3) & (4) of the Habitats Directive 92/43/EEC [AG [44] & CJEU [51-55]). Article 7 of the Convention merely requires that plans '*relate to*' the environment.

14. The Supreme Court (although differing from Sullivan LJ) thought that there was not even a possibility of its approach being wrong. Otherwise it would have been bound to refer the question to the CJEU under Article 267 TFEU.

15. The Communicants accept that Article 7 of the Convention does not require strategic environmental assessment in all cases. However, it does require the EU to establish *"a proper regulatory framework and/or other instructions to ensure implementation of article 7 of the Convention by its member states"* (ACCC/C/2010/54, para. 85) providing '*a clear transparent and consistent framework*' (Albania ACCC/C/2005/12, para. 87). In relation to plans and programmes falling outside the scope of the SEAD and Article 2 of the PPD, there is no regulatory framework or any other instruction put in place by the EU to ensure implementation of Article 7 of the Convention by its member states (whether by strategic environmental assessment or by any alternative Article 7 compliant means). In the light of the *HS2* judgment, this lacuna is wide and troubling.

16. The significance of this gap in the EU's regulatory framework for securing compliance with Article 7 of the Convention is underlined by the following points:

    (1) The terms of EU law are heavily influential on EU member states in considering their own implementation of the Convention. See e.g. ACCC/C/2006/17, where the Compliance Committee observed 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 EU law. For example, in the UK legal system, the domestic legislation relating to

public participation concerning plans and programmes relating to the environment is contained in the Environmental Assessment of Plans and Programmes Regulations 2004, the scope and wording of which is materially identical to the SEAD.

(2) The Grand Chamber of the CJEU has held that the Convention is not directly effective in EU law (Case C-240/09 Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky ECLI:EU:C:2011:125 at [44--47]**)**.

(3) In some countries such as the UK (i) non-compliance with the Convention cannot be relied upon directly in national courts as a ground for challenging administrative decisions, and (ii) there is no domestic legislation transposing Article 7 in cases not covered by the SEAD. Thus the lack of any EU obligation for public participation in relation to plans and programmes relating to the environment which do not "*set the framework for development consent*" means that there is no legal mechanism by which members of the public can enforce their rights under Article 7, which is contrary to Article 9 of the Convention.

17. Any attempt by the European Commission to resist this communication on the ground that it is the responsibility of EU member states to fill this lacuna should be rejected. As already noted above, the Compliance Committee has already held that the EU itself is responsible for putting in place a proper regulatory framework for compliance with the Convention by its Member States, and its failure to do so has the clear practical consequences outlined in paragraph 11 above. Moreover:

(1) 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 TFEU 216

(2) and further below).

(2) This is also recognised by the EU legislature. PPD, recital 6 observed that in the light of the European Community signing the Aarhus Convention *"Community law should be properly aligned with that Convention"*. Article 1 indicated that the PPD's sole objective was *"to contribute to the implementation of the obligations arising under the Aarhus convention"*. The PPD 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. It also extended to putting in place a proper regulatory framework for compliance with the Convention by EU Member States.

(3) 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 <u>all</u> plans and programmes relating to the environment. The European Commission's response to this communication 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.

(4) No reasons have been given by the European Commission's response to this communication as to why the EU considers it appropriate to draw a distinction between two kinds of plans and programmes. The first kind *"set the framework for development consent"* and are *"required by legislative, regulatory or administrative provisions"*. For them EU law <u>has</u> put in place a regulatory framework (through the SEAD) requiring Member States to secure public participation. The second kind fall within Article 7 of the Convention but EU law <u>has not</u> put in place any regulatory framework or any other instruction to secure any level 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.

18. Notably, the European Commission's response to this communication is silent on whether the European Commission endorses the Supreme Court's narrow interpretation of the term "*set the framework for development consent*" in the SEAD . The communicants invite the Compliance Committee 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.

19. Note in this context that Article 3(1) of the Convention requires the EU to take implementation and "*enforcement measures*" within the scope of its competence "*to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention*". If the Commission considers that the Supreme Court's interpretation of the SEAD's scope is too restrictive, and thus has the effect of wrongly widening the lacuna in the EU's implementation of Article 7 of the Convention, it ought, pursuant to its obligations under Article 3(1) of the Convention, to commence infraction proceedings against the United Kingdom in order to correct the position.

20. The Compliance Committee is respectfully requested to uphold the communicants' complaint of non-compliance by the EU.

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