

**United Kingdom comments on the preliminary admissibility of
PRE/ACCC/C/2016/136 (United Kingdom)**

2 March 2016

Summary

1. We consider that communication PRE/ACCC/C/2016/136 is inadmissible for the following reasons:
 - The communicant has based their complaint on a number of fundamental factual errors. The suggestion that there were later decisions made about aspects of the Oxford-Bicester railway, following the initial authorisation in 2012, and that these were taken without public participation, is incorrect. The decisions that are the subject of the communicant's complaint in fact formed part of the original 2012 authorisation, and the communicant makes no suggestion that there was no public participation on that decision. Allegations have also been made in respect of decisions that are yet to be made. The allegations concern matters that are **incompatible with the provisions of the Convention and decision I/7** because they concern decisions that have not actually taken place.
 - One decision that did take place after the 2012 authorisation is on the specifications for a replacement bridge. Because the communicant has confused this decision with the original authorisation to demolish and replace the bridge, the communicant has **not provided corroborating information** for the assertion that this matter is within scope of article 6; it is plainly **outside the scope of the Convention**.
 - More generally, the communicant has **failed to utilise or exhaust domestic remedies**. Later decisions associated with the works on the railway line could have been challenged after the original 2012 decision, but the communicant has not explained why it did not attempt to challenge the subsequent decision.
2. We therefore request that the Committee finds the communication to be inadmissible and closes the case.
3. In order to assist the Committee ahead of the meeting to discuss the preliminary admissibility of this communication on 8 March, we have set out, in advance of that meeting, the reasoning we will talk the Committee through. We are of course happy to provide any further information the Committee feels that it needs in order to determine the issue.

Comments on the admissibility of the communication

Inaccuracies in the communication

4. The communicator's allegations of non-compliance with the Convention are based on a misunderstanding of what was in fact authorised by the TWA Order and deemed planning permission, which the communicator did not challenge at the time.
5. The communicator's arguments are predicated on the assumption that later decisions subject to public participation requirements under the Convention were taken in relation to the First Turn Bridge and the type and volume of trains operating on the line, and that these were not subject to public participation. This is not the case.

(i) First Turn Bridge

6. Contrary to paragraph 12 of the communication, the demolition and reconstruction of the First Turn Bridge was authorised by the TWA Order and deemed planning permission. This had been considered as part of the Environmental Statement prepared in 2009 and made publicly available as part of the TWA Order application process.
7. The TWA Order itself¹ provides, at article 5(4)(b), for works to "make, provide and maintain all such...bridges...as the Company thinks fit". Article 2(1) defines "maintain" as including "repair, adjust, alter, remove, reconstruct and replace".

(ii) Use of track by operating trains

8. There remains in place only permission to operate trains on the Oxford-Bicester line as assessed by the TWA Order process, including the Noise and Vibration Mitigation Policy. The operational pattern of trains authorised to use the track is consistent with the public consultation.
9. It is misleading for the communicator to suggest that there has been a subsequent decision to increase the volume of train services. This again appears to come down to the communicator misunderstanding what was permitted under the TWA Order.
10. The communicator refers, at paragraph 23 of the communication, to the Planning Committee commenting that limiting the services would be outside the scope of the application to partially discharge the planning condition. This comment appears to have been in response to representations wanting the pattern *reduced* from that which had already been assessed under the TWA Order.

¹ Annex 2 to the communication.

11. The communicant states at paragraph 6 of the communication that the East West Rail was authorised by the TWA Order. This is incorrect. While the TWA Order authorised some works between Oxford and Bicester for the purposes of East West Rail, which were fully assessed and included as part of the public consultation, the remainder of the East West Rail route (from Bicester to Bletchley and Bedford) does not yet have full authorisation. Network Rail would need to apply for another TWA Order for that section of the route, which would be subject to public participation. In any case, the Noise and Vibration Mitigation Policy for the Oxford-Bicester line included an allowance for an increase in trains resulting from East West Rail, if it is authorised. The communicant's comments regarding the East West Rail should therefore be disregarded.
12. The communicant also suggests at paragraph 28 of the communication that HS2 would result in additional rail traffic that has not been subject to public participation. Network Rail has confirmed that there are no plans to route any trains related to HS2 through the line. In any case, any HS2 traffic using the Oxford-Bicester line would have to operate within the environmental controls already imposed on that part of the track through the existing planning conditions. The HS2 Bill was not seeking any variation to those controls. Similarly, the communicant's comments regarding HS2 should be disregarded.
13. The communicant's arguments are based on a number of fundamental inaccuracies and misunderstandings. These are relevant to the admissibility of the communication because the allegations rest on a false premise; that there have been changes to what was authorised by the TWA Order and deemed planning conditions:
- This is not the case in relation to the construction and demolition of the First Turn Bridge; this was authorised under the TWA Order and deemed planning consent.
 - This is not the case in relation to the volume of rail traffic on the Oxford-Bicester line; there has been no variation to permit increase and the operational pattern of trains using the track remains as authorised under the TWA Order and deemed planning consent.
 - This is not the case in relation to traffic resulting from East West Rail; East West Rail does not have full authorisation.
 - This is not the case in relation to traffic resulting from HS2; there is no such traffic.
14. The allegations in the communication are predicated on incorrect information. The allegations concern matters that are **incompatible with the provisions of the Convention and decision I/7** because they concern decisions that have not

actually taken place and should be considered inadmissible, in line with paragraph 20(d) of the annex to decision I/7.

15. This leaves the communicant with the decision by the highway authority to approve specifications for the replacement bridge. This is dealt with below.

Failure to provide corroborating information: non-application of article 6

16. The communicant's correspondence with Network Rail included at Annex 5 to the communication concerns the approval, by the highway authority (Oxfordshire County Council), of specifications for the replacement bridge. The communicant appears to have confused this with permission for demolishing and replacing the bridge, which had already been approved under the TWA Order and deemed planning permission after appropriate consideration of environmental effects and public participation.

17. As the communicant notes, the TWA Order was the subject of an environmental impact assessment meaning that article 6(1)(a) applies. The communicant makes no allegations of non-compliance in relation to the TWA Order or deemed planning permission. We note that the communicant is listed in the Planning Inspector's Report to the Secretaries of State for Communities and Local Government and for Transport² as having raised objections to the development, and such views will have been taken into account in the decision.

18. The communicant has failed to show that the *matters on which allegations of inadequate public participation are made* are within scope of article 6(1).

19. Given that the decision in question concerns detailed specifications for the like for like replacement of the bridge rather than permission to demolish and replace the bridge, the communicant would need to demonstrate that the decision on detailed specifications is within the scope of the Convention. The communicant provides no corroborating information in this regard.

20. The communicant's concerns, according to the correspondence in Annex 5, were about the safety of pedestrians, associated with the width of footpaths and kerb heights.

21. In order for the decision at issue – which can only be the decision on the detailed specifications for the rebuilt bridge – to be within the scope of the Convention, the communicant would need to show that it is caught either by:

- article 6(1)(a), as an activity listed in annex I; or

² Annex 3 to the communication, p 127.

- article 6(1)(b), as an activity which, under national law, is subject to the article 6 requirements because it has been determined that it may have a significant effect on the environment.

22. The activities in question are clearly outside the scope of article 6(1)(a). Paragraph 22 of annex I makes it clear that changes or extensions to activities caught by annex I are only caught where that change or extension “in itself meets the criteria/thresholds set out in this annex”. The communicant has provided no arguments or evidence that these activities are caught by annex I.
23. Paragraph 22 of annex I also mentions the application of article 6(1)(b) to other types of change or extension of activities. But article 6(1)(b) only applies where Parties have determined that the activity in question is subject to the requirements and where these are in accordance with national law. Again, the communicant has failed to point to which national law, or determination by the United Kingdom, is purported to make article 6(1)(b) apply.
24. In any event, it is clear that decisions on the specifications – including pavements widths and kerb heights – for a like for like replacement bridge, would not have a “significant effect on the environment”. The communicant provides no corroborating information to show that this decision was within the scope of the Convention. We emphasise again that the demolition and construction of the bridge had already been consented under a decision subject to environmental assessment and public participation.
25. Similarly, and without prejudice to the comments in paragraphs 8 to 14 above, the communicant provides no corroborating information to support any suggestion that article 6 applies in relation to the volume of rail traffic using the Oxford-Bicester line. A hypothetical decision to vary the volume of rail traffic is clearly not covered by annex I to the Convention and could not be regarded as having been determined by the United Kingdom as having a significant impact on the environment.
26. The allegations concerning article 6 are therefore **outside the scope of the Convention and not supported by corroborating information** and should, in accordance with the annex to decision I/7, be considered inadmissible by the Committee.

Failure to utilise or exhaust available domestic remedies

27. In paragraphs 52 and 53 of the communication, the communicant suggests that they did not bring a domestic challenge because by the time they became aware of later ‘decisions’, “it was too late to challenge the decision to grant the TWA Order”.

28. As explained in paragraphs 4 to 14 above, most of the issues the communicant raises were in fact covered by the 2012 TWA Order and deemed planning consent. The communicant makes no complaint about public participation in respect of that and indeed participated in the consultation. The communicant brought no challenge at the time. It appears that the communicant has only taken issue with some aspects of the Oxford-Bicester line some time after they had been decided and has wrongly assumed that subsequent decisions were made.
29. The communicant's failure to bring a challenge when the decision they object to was actually made demonstrates that they have failed to make use of the domestic remedies that were available to them. The compliance mechanism should not be seen as an opportunity to attack a decision years later because a communicant failed to bring a challenge in good time, for reasons other than barriers to access to justice, such as those mentioned in paragraph 21 of the annex to decision I/7.
30. The only aspect that has been subject to a later decision concerns details of the specifications for the replacement bridge.
31. The communicant has not explained why they did not challenge this later decision. It is misleading for the communicant to suggest that the expiry of a time limit for challenging the initial decision would preclude them from challenging a later decision, where one has been taken. Any later decision would have been open to being challenged as much as the initial decision in 2012. The communicant decided not to bring such a challenge. In any event, the information provided by the communicant suggests that their concerns about the specifications for the bridge concerned road safety rather than anything connected with the Convention.
32. Indeed, the communicant was seemingly aware that later decisions could be challenged when a group of local residents sought legal advice in June 2015 (paragraph 54 of the communication) on challenging the decision to partially discharge Condition 19. It is perhaps telling that the legal advice provided to the group was that their proposed case was weak. In the communicant's own words, the conclusion was that:
- “there had been no error in law. The planning committee did not act inconsistently or irrationally by determining that the predictions of future noise and vibration to be robust, whilst at the same time imposing additional conditions, which may not be enforceable, to protect against any actual breaches of the noise and vibration thresholds when trains were operating.”
33. The purpose of the compliance mechanism under the Aarhus Convention is to enable deficiencies in a Party's compliance with the Convention to be identified

and, where necessary, addressed. It is not to provide an alternative form of redress in circumstances where domestic remedies are available but the communicant has chosen not to use them because they have concerns not relevant to the Convention, a weak case or only decide to contest the decision a considerable amount of time later.

34. The communicant has not taken the opportunity to enable domestic procedures to address their concerns, potentially because of concerns about the strength of their case. Allowing such communications to proceed risks undermining long-established principle that disputes are best dealt with through domestic mechanisms where these can be utilised. This would not enable the United Kingdom's procedures for resolving disputes – which form an integral part of its implementation of the Convention – to operate as intended. It would also be at odds with the rules of procedure for the compliance mechanism, and the Committee's own established practice.
35. We recognise and welcome the steps that the Committee has taken since the Fifth Meeting of the Parties in 2014 to ensure that domestic remedies are properly reflected in the compliance mechanism. But the Committee must continue to be vigilant in how it approaches cases where it is clear that the communicant has not made use of available domestic remedies if it is to avoid being overwhelmed.
36. There is no reasoned suggestion by the communicant that the domestic remedies are unreasonably prolonged or would provide insufficient redress. The implied allegation (as per the communicant's reference at paragraph 55 to *Whitby v Secretary of State for Transport and others*³), that the court's ability to review only the legality and not the merits of planning decision is a problem in Convention terms, is without foundation and is not supported by corroborating information. Article 9(3) of the Convention requires access to procedures to challenge acts and omissions which contravene provisions of national law relating to the environment, not to challenge the merits of decisions people do not agree with.
37. We submit that the communicant has **failed to make use of available domestic remedies** and that the Committee should find the communication inadmissible, on the basis of paragraph 21 of the annex to decision I/7, paragraph 6(b) of decision V/9 and the Committee's established practices.

³ [2015] EWHC 2804 (Admin).