



Economic and Social Council

Distr.: General
23 October 2013

Original: English

Economic Commission for Europe

Meeting of the Parties to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters

Compliance Committee

Forty-third meeting

Geneva, 17–20 December 2013

Item 7 (a) of the provisional agenda

Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2011/61 concerning compliance by the United Kingdom of Great Britain and Northern Ireland*

Adopted by the Compliance Committee on 28 June 2013

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1–13	3
II. Summary of facts, evidence and issues	14–47	3
A. Legal framework	14–27	3
B. Facts	28–34	5
C. Substantive issues	35–47	7
III. Consideration and evaluation by the Committee	48–61	7
IV. Conclusion	62	10

* The present document was submitted late owing to the Committee's need for more time to finalize the agenda for its forty-third meeting.

I. Introduction

1. On 21 August 2011, a member of the public, Mr. Terence Ewing (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that the United Kingdom of Great Britain and Northern Ireland had failed to comply with its obligations under Convention.
2. The communication alleges a failure of the United Kingdom to comply with provisions of the Convention on public participation and access to justice in relation to the planning and construction of the Crossrail project in the metropolitan London area. In particular, the communication alleges that the Crossrail Act 2008 misapplied the requirements for obtaining consent relating to conservation areas and listed buildings, which normally provided for public participation, and thus that the Party concerned is not in compliance with article 6, paragraph 7, of the Convention. The communication also alleges that this constitutes non-compliance with article 3, paragraphs 1 and 9, of the Convention. In addition, the communication alleges that as a result of the Crossrail Act misapplying the requirements for obtaining consent relating to conservation areas and listed buildings, there were no planning or Conservation Area Consents or Listed Building Consents to challenge and this, according to the communication, constitutes non-compliance with article 9, paragraphs 2, 3 and 4, as well as with article 3, paragraph 1, of the Convention.
3. At its thirty-fourth meeting (20–23 September 2011), the Committee determined on a preliminary basis that the communication was admissible.
4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 18 October 2011.
5. After its thirty-fifth meeting (13–16 December 2011), the Committee asked the communicant to respond to some additional questions. The communicant responded on 4 March 2012.
6. The Party concerned responded to the allegations of the communication on 16 March 2012.
7. At its thirty-sixth meeting (27–30 March 2012), the Committee decided that it would discuss the substance of the communication at its thirty-seventh meeting (Geneva, 26–29 June 2012), with the exception of any allegations concerning the lack of a right of appeal for members of the public to challenge planning decisions, in particular in comparison to the rights of appeal enjoyed by applicants for such planning decisions, as that allegation would already be considered by the Committee in the framework of joined communications ACCC/C/2010/45 and ACCC/C/2011/60.
8. Additional submissions were provided by the communicant on 1 June 2012.
9. The Committee discussed the communication at its thirty-seventh meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication.
10. Further to the Committee's request, the Party concerned submitted information on 1 October 2012. The communicant commented on that information on 17 and 19 October 2012.
11. The Committee prepared draft findings at its fortieth meeting (25–28 March 2013), and in accordance with paragraph 34 of the annex to decision I/7, the draft findings were

then forwarded for comments to the Party concerned and to the communicants on 1 May 2013. Both were invited to provide comments by 29 May 2013.

12. The Party concerned and the communicant provided comments on 7 June 2013. A revised version of the comments by the communicant was received on 26 June 2013.

13. At its forty-first meeting (25–28 June 2013), the Committee adopted its findings and agreed that they should be published as a formal pre-session document to the Committee's forty-third meeting. It requested the secretariat to send the findings to the Party concerned and the communicants.

II. Summary of facts, evidence and issues¹

A. Legal framework

Planning applications — listed buildings

14. The communication is limited to England and Wales. The Town and Country Planning Act 1990 (sections 70–75) and the Town and Country Planning General Regulations 1992 govern planning applications in England and Wales. In addition, the Planning (Listed Buildings and Conservation Areas) Act 1990 along with the Planning (Listed Buildings and Conservation Areas) Regulations 1990 governs planning applications concerning listed buildings and conservation areas.

15. Third party objectors have the right to make written representations to planning applications to local authorities for the general planning permission under regulation 19, paragraph 1, of the Town and Country Planning (General Development Procedure) Order 1995; and specifically with respect to listed building and conservation area consents, under the Planning (Listed Buildings and Conservation Areas) Regulations 1990.

16. Planning applications are usually considered by the local authorities in written form. More important applications, including applications relating to conservation areas and listed buildings, are referred to planning committees. The latter are composed of locally elected councillors of the local authority concerned.

17. The local authority planning officer prepares a report on the application, which the committee may follow or not. At the end of the presentation of the report, the committee votes on the application.

18. Each local authority adopts its own procedures for the functioning of the planning committees. Therefore, rules and regulations vary in England and Wales.

19. The right of third parties, i.e. persons other than the applicant, to make an oral presentation before the planning committee depends on the rules adopted by the local authorities. Most local authorities permit members of the public who give notice prior to the Committee's meetings to address the committee orally, along with the applicant. Both parties have a five-minute slot, but if there is more than one objector, then the time is split between them, or the chair of the planning committee determines who is going to speak. Other local authorities (such as Wandsworth Council and the City of Westminster Council), do not allow for any third party oral presentations. These authorities, however, are required to accept written objections and to take them into account, according to the statutory requirements.

¹ This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

Hybrid bill process and petitions

20. Under the law of the Party concerned, a hybrid bill is a bill that mixes the characteristics of public and private bills.² Public bills introduce legislative changes applicable to all, while private bills only change the law as it applies to specific individuals or organizations, rather than the general public. A hybrid bill is a public bill that affects private interests of an individual, a group of individuals or an entity. The procedure for a hybrid bill likewise combines elements applicable to both private and public bills. The process is usually used by the Government on behalf of private sector investors to obtain authorization of large-scale projects that are of national interest but may widely affect private interests. For instance, the process has been used for the authorization and construction of the Channel Tunnel and recently the Crossrail project (the subject of the present communication).

21. The Public Bill Office decides when a bill is a hybrid bill and the parliamentary process is longer than for regular public bills. Natural and legal persons who are “specially and directly affected” by a hybrid bill are entitled to oppose the bill or to seek amendments before a select committee appointed by the House of Commons. The select committee is appointed to examine the bill in detail, check and report on it, including reviewing the petitions by those “specially and directly affected”. Persons “specially and directly affected” are also entitled to petition and appear before a further select committee appointed by the House of Lords later in the procedure.³

22. Petitions are processed under a quasi-judicial procedure by the select committee of each House, which act in a manner as a planning committee under regular planning applications. Unlike the consideration of petitions against public bills, in which case it is at the chair’s discretion whether the objector should be heard, there is an obligation for the select committee to hear all objectors, unless they state that they do not wish to be heard or unless they decide to withdraw their petition. Under the hybrid bill process, the select committee reports on what they heard and what they deem necessary to be done to address the concerns and move the process forward.

23. A hybrid bill may be challenged before a court of law when there is a claim for a declaration of incompatibility with the Human Rights Act 1998 or of breach of European Union (EU) law.

The Crossrail Act

24. On 22 February 2005, the Crossrail Bill was introduced in Parliament by the Secretary of State (see annex 1 of the Party’s response of 16 March 2012 for a chronology of the Bill’s passage from Parliament).⁴ The Bill authorized the construction of a high-frequency railway for London and the South-East from Maidenhead Berkshire and Heathrow Airport in the west, through central London to Shenfield and Abbey Wood in the east. The Bill, following a three-year hybrid bill process, passed through the House of Commons and then the House of Lords, received royal Assent on 22 July 2008 and became an Act of Parliament.

25. As an alternative to the hybrid bill process, the scheme could have been promoted by a third party under the Transport and Works Act 1992. According to the Party concerned

² For a general overview of the categories of bills (draft laws) and the parliamentary process in the United Kingdom, see <http://www.parliament.uk/about/how/laws/bills/>.

³ The House of Commons and the House of Lords together constitute the Parliament.

⁴ Documentation on the communication, including submissions by the communicant and the Party concerned, is available on a dedicated web page on the Committee’s website (<http://www.unece.org/env/pp/compliance/compliancecommittee/61tableuk.html>).

this would have had a number of drawbacks. It would not have allowed the Government to publicly state support for the scheme in advance and the Secretary of State for Transport would have been required to decide the application on a quasi-judicial basis. In addition, an order under the Transport and Works Act could not, on its own, secure all the necessary powers and consents required to build the Crossrail. This is because the Crossrail project required provisions to be made relating to the way that railways are regulated as well as planning permission for the railway itself. A hybrid bill allowed both of these things to be achieved in a single bill and so for the railway and its impacts to be properly considered in totality. Moreover, the process of securing the necessary powers and awarding the contract might have taken up to three years longer using the Transport and Works Act procedure than using the hybrid bill process, which would have unnecessarily delayed progress with the scheme and extended the uncertainty for those people affected by the project.

26. Under section 10 of the Crossrail Act “planning permission shall be deemed to be granted under Part 3 of the Town and Country Planning Act 1990 for the carrying out of development authorised by this Act”. The usual process for granting planning permission under the Town and Country Planning Act 1990 and/or conservation area consent under the Planning (Listed Buildings and Conservation Areas) Act 1990 was therefore changed.

27. With respect to environmental impact assessment (EIA), projects authorized under the hybrid bill procedure are considered to be outside the scope of the amended EU EIA Directive.⁵ However, national legislation requires that House of Commons Standing Orders relating to private business apply to hybrid bills, including the Standing Order 27A which provides for the deposit of an Environmental Statement at the time the bill is deposited at the Private Bill Office. Environmental Statements are available for inspection.

B. Facts

28. The project relating to the Crossrail — currently under construction — included the building of stations in several areas of London to serve the Crossrail link. It was processed under the hybrid bill procedure. Consultations had started before the introduction of the Bill to Parliament. Information about the process and the impact of the project, including revisions of the project documentation (such as proposals for amendments and supplementary environmental statements), was available on the Internet⁶ and in the press. Also, the Crossrail Project Bulletin was published quarterly to provide progress about the project.

29. The development site is within the boundary of the Soho Conservation Area and adjoins the Hanway Street Conservation Area on the opposite side of Oxford Street and the Bloomsbury Conservation Area of the London Borough of Camden on the other side of St Giles Square.

30. Prior to 2010, a Victorian terrace of shops stood at the junction of Charing Cross Road and Oxford Street. In addition, further down Charing Cross Road, there was the adjoining Astoria building, which had been used for entertainment venues and had hosted a number of alternative lifestyle club events. According to the communicant, both were held to have made a “positive contribution” to the Soho Conservation Area in the City of Westminster.

⁵ See article 1, paragraph 4, of 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 (codification).

⁶ See <http://www.crossrail.co.uk/>; updated information was also posted on the Parliament website (www.parliament.uk).

31. Starting in mid-2010, the Victorian buildings on the corner of Oxford Street and Charing Cross Road and also further down Charing Cross Road, including the Astoria building, were demolished or dismantled, a process that was completed in early 2011.

32. The Select Committee in the House of Commons sat in public for 84 days of hearings and heard 205 of the 466 petitions against the Bill between 17 January 2006 and 18 October 2007. Among the petitions, there were three petitions which related directly to the Astoria theatre (one of the buildings of concern named in the communication). As a result of the procedure, a number of amendments were made.

33. Upon the Bill having its first reading at the House of Lords in December 2007, a second petitioning period was triggered, which lasted from 8 January to 30 January 2008, during which the Select Committee of the House of Lords heard 45 of 113 petitions submitted.

34. The project findings of the EIA procedure were reported in an environmental statement which was submitted to Parliament. A press notice was issued in April 2005 and comments could be submitted until 17 May 2005. Supplementary environmental statements were also published as amendments were made to the Bill.

C. Substantive issues

Public participation

35. The communicant alleges that the only public participation that took place on the Crossrail project was during the Parliamentary procedures for the adoption of the Crossrail Bill, with petitions to the House of Lords, etc., including one from the City of Westminster, but, that no public participation took place concerning the demolition of listed buildings, as required by the specific acts. The communicant thus alleges that by removing the requirements for obtaining consents for conservation areas and listed buildings through the Crossrail Act (section 10), the Party concerned did not allow for any written or oral representations under the ordinary public participation procedures (Town and Country Planning Act 1990 and Planning (Listed Buildings and Conservation Areas) Act 1990), and thus that it failed to comply with article 3, paragraphs 1 and 9, of the Convention. Also, since the demolition of the buildings falls under article 6, paragraph 1 (b) of the Convention, the communicant alleges that the Party concerned failed to comply with article 6, paragraph 7, of the Convention.

36. At the discussion of the communication with the Committee on 25 September 2012, the communicant conceded that the Party concerned had complied with all elements of article 6 of the Convention, with the exception of the public notice. As a result of the deficient public notice, the communicant alleges that he was not aware of the ongoing process and was not able to submit his objections relating to the demolition of the buildings.

37. The Party concerned points to the fact that the definition of public authorities in article 2 of the Convention excludes legislative bodies, and that the Crossrail Bill was outside the scope of article 6 and the Convention in general. The Party concerned refers to the Aarhus Convention Implementation Guide,⁷ which, with respect to article 2, paragraph 2, of the Convention states that “elected representatives are more directly

⁷ United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, second edition (2013). A text only version is currently available online from <http://www.unece.org/index.php?id=32764>.

accountable to the public through the election process”, and also to the recent jurisprudence of the Court of Justice of the EU in *Boxus and others v. Région wallonne* (C-128/09).

38. In any event, since the whole project was subject to an Environmental Statement (according to Standing Order 27A), the Party concerned strongly advocates that there was a full public participation process and that the supply of information to the public was such as to satisfy the requirements of the Convention.⁸ Therefore, the Party concerned contends that the legislative process that was followed for the Crossrail Act 2008 gave the public sufficient opportunity to participate in the decision-making process. Members of Parliament were provided with a number of documents to enable them to form an informed opinion about environmental issues relating to the project, such as the environmental statement on the likely environmental impact of the project; and they had plenty of time to examine and consider the proposed project.

39. The Party concerned notes that the Bill was subject to Parliamentary scrutiny and that the communicant had the opportunity to participate in, and comment on, the proposals for the project and also the Bill both prior to the Bill’s introduction to Parliament and during the Bill’s progress through Parliament, before it received Royal Assent on 22 July 2008.

40. In particular, the Party concerned notes that the communicant had an opportunity prior to the Bill receiving Royal Assent to participate in the process which led to the powers which were the subject of the communication being approved by Parliament, while the Select Committee process demonstrated a further aspect of the Parliamentary scrutiny to which the Bill was subject. It further notes that consultation had been held in relation to the EIA and the supplementary environmental statements, and that the communicant had the opportunity to comment on the environmental impact of the project before the Act received Royal Assent.

41. In particular with respect to public notice, the Party concerned notes that, apart from information made available by the press and a website dedicated to the project, there were more than 100 information centres along the route of the project.

Access to justice

42. The communicant alleges that it is not possible to either judicially review or otherwise subject an Act of Parliament (such as the Crossrail Act) to any legal challenge, unless there is claim through the 1998 Human Rights Act for breach of “convention right” or “declaration of incompatibility”.

43. The Party concerned contends that an act may be challenged before courts, also in case of a breach of EU law.

44. According to the communicant, the rights of the public to access to justice are limited to these two possibilities.

45. The communicant also alleges that the Party concerned, by removing the requirements for obtaining consents regarding conservation areas and listed buildings, eliminated the possibility for members of the public to obtain judicial review. Thus, the Party concerned failed to comply with article 3, paragraph 1, and article 9, paragraphs 2, 3 and 4, of the Convention.

⁸ See also closing submissions of the Promoter following the completion of hearings into Petitions against the Bill and three sets of additional provisions (the Crossrail Bill, House of Commons Select Committee) of 28 March 2007, submitted by the Party on 25 June 2012.

46. The Party concerned contends that the aims of the Convention with respect to access to justice were fully met through the legislative process. According to the Party concerned, since the Crossrail is not a project under article 6, the access to justice provisions under article 9, paragraph 2, do not apply. In addition, since the Parliament is not a private person or a public authority under article 2, paragraph 2, of the Convention, article 9, paragraph 3, does not apply. The Party concerned also stresses that should article 9 apply, the possibility for review of the hybrid acts for breach of the Human Rights Act 1998 or EU law, although limited due to the fact of the nature of the act as a legislative act and the direct accountability of the electorate, is still in compliance with the Convention.

47. Moreover, the Party concerned underscores that in the review of petitions, the criterion of “specially and directly affected” (see para. 21 above) was not considered at all and all petitions were admitted and heard.

III. Consideration and evaluation by the Committee

48. The United Kingdom ratified the Aarhus Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

49. The Committee notes that the communicant’s allegations regarding the failure of the Party concerned to comply with the public participation provisions of the Convention do not relate to the whole project, but to the demolition of certain buildings as part of the project, as required by specific acts. The Committee does not consider the specific demolitions that were of concern for the communicant, but rather the application of the Convention in the hybrid bills system of the Party concerned.

50. As already stated above, the Committee will not consider any allegations relating to the right of third parties to judicial review under the ordinary planning procedures, as those allegations are also considered in the context of communications ACCC/C/2010/45 and ACCC/C/2011/60 (see ECE/MP.PP/C.1/2013/12).

51. In addition, the Committee will not consider any allegations of non-compliance with article 3, paragraphs 1 and 9, of the Convention as these were not substantiated by the communicant.

Crossrail Act — categorization under the Convention

52. The Committee first examines the nature of the hybrid bill and whether it falls under article 6 or article 8 of the Convention. As already established in previous findings, this must be determined on a contextual basis, taking into account the legal effects of the act, while its label under the domestic law of the Party concerned is not decisive (cf. the Committee’s findings concerning communication ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, para. 29; and concerning communication ACCC/C/2006/17 (European Community), ECE/MP.PP/C.1/2008/5/Add.10, para. 42).

53. The legal effect of the Crossrail Act, following the hybrid bill procedure, is the authorization of a project, the Crossrail. The Act is processed as a “hybrid bill” because of the magnitude of the project, affecting national interests in general. Had it been an executive regulation or an act introducing legislative changes applicable to all, it would have been processed following the public bill process. As such, it does not fall under article 8 of the Convention, because, while the system of the Party concerned — recognizing the cross-cutting impact of such a large project on various spheres of national policy, including transport, economy, employment, etc. — opts for a procedure that passes through Parliament, the act ultimately permits a specific activity. Therefore, the Act is a decision falling under article 6 of the Convention.

54. In this respect, the Committee also notes that the hybrid bill process is a process under the Parliament, the body that traditionally manifests the legislative powers in a democratic state. Article 2, paragraph 2, of the Convention, excludes from the definition of a public authority “bodies or institutions acting in a ... legislative capacity”. In the present case, however, the Parliament is no longer “acting” in a legislative capacity, but rather as the “public authority” authorizing a project. The fact that the Party concerned has in place an integrated procedure for “hybrid bills” in order for the Government to secure all powers and consents necessary for the authorization of major projects, instead of having fragmented procedures going through a number of different public authorities, central and/or regional, does not change the nature of the act as a decision permitting the project. The Committee observes that if all large-scale projects were subject to parliamentary authorizations procedure and evoked article 2, paragraph 2, of the Convention, then there is a risk that important projects would never be subject to the public participation requirements of the Convention and this would run counter its objectives.

55. The project concerns the construction of a high-frequency railway, from east to west, across London and with connections to the underground rail network. The legislation of the Party concerned (Standing Order 27A) requires an EIA procedure and the deposit of an Environmental Statement. Therefore, the project is an activity under article 6, paragraph 1 (a), in conjunction with paragraph 20 of annex I to the Convention.

56. It is noted that processes similar to the hybrid bill process, under a different label, exist under the jurisdictions of other Parties to the Convention (see, e.g., the recent jurisprudence of the Court of Justice of the EU concerning Belgium: *Boxus and others v. Région wallonne*, C-128/09 (2012) and *Solvay v. Région wallonne*, C-182/10 (2012)). While such processes are a reasonable way for Governments to deal with permitting large projects of significant national and also transboundary impact (e.g., the Channel Tunnel), the Committee underlines that the process of adopting projects by such means still have to be considered within the provisions of the Aarhus Convention, and thus that the Party concerned has to ensure adequate opportunities for public participation. Although the Party concerned refers in the case of the Crossrail Act to a “specific legislative act”, the Committee holds that the process adopting the Crossrail Act by means of a hybrid bill falls within the scope of article 6 of the Aarhus Convention as it serves as a decision to permit a specific activity.

Notification of the public participation procedure — article 6, para. 2

57. As a project under article 6, paragraph 1 (a), in conjunction with paragraph 20 of annex I, the public participation provisions of article 6 apply. During the hearing, the communicant submitted that all public participation requirements under article 6 were complied with, with the exception of the public notice, under article 6, paragraph 2. Due to the failure of the Party concerned to inform the public in a sufficient manner, the communicant alleges that he was not aware of the ongoing process, including the decisions for demolition of the buildings he was interested in, and missed the opportunity to submit his objections.

58. On the basis of the information received, and taking into account the statement from the communicant that public participation, with the exception of public notice, was fulfilled, the Committee does not examine whether each of the requirements of article 6, paragraphs 3–9, was satisfied.

59. With regard to the public notice, the Committee notes that information about the project and the elements of article 6, paragraph 2, of the Convention were available for the public early on during the permitting procedure, on the Internet (via the websites of the developer and the Parliament), in the press and also at the information centres set up along the route of the project. The number of petitions objecting to the project, including to the

demolition of buildings, shows that members of the public were adequately informed. Therefore, the Committee finds that the Party concerned did not fail to comply with article 6, paragraph 2, of the Convention.

Access to review procedures — article 9, para. 2

60. Article 9, paragraph 2, of the Convention requires Parties to ensure access to procedures for review of decisions, acts and omissions subject to article 6. This provision addresses standing, as well as the scope of review, that should comprise the substantive and procedural legality of the act. To comply with the Convention, the Party concerned must ensure that within its domestic legal system all criteria required under article 9, paragraph 2, of the Convention, also those extending beyond EU law and the 1998 Human Rights Act, are met in regard to hybrid bills processes.

61. The Committee examines in particular the scope of the review procedures after the adoption of the Crossrail Act (or any act adopted further to a hybrid bill procedure authorizing a specific activity). In the case of the Crossrail Act no such challenge was brought before a court of law. Thus, the Committee is not in position to determine whether the legal remedies available under the law of the Party concerned would have enabled members of the public concerned to challenge the Crossrail Act as required under article 9, paragraph 2, of the Convention.

IV. Conclusions and recommendations

62. Having considered the above, the Committee concludes that by adopting the Cross Rail Act through the hybrid bill process the Party concerned was not in non-compliance with article 6 paragraph 2. Furthermore, the Committee holds that due to the lack of sufficient information about the practice on legal remedies concerning hybrid bills, the Party concerned is not in non-compliance with article 9, paragraph 2, of the Convention.
