

## **Draft findings and recommendations with regard to communication ACCC/C/2014/100 concerning compliance by United Kingdom**

**Adopted by the Compliance Committee on ...**

### **I. Introduction**

1. On 15 April 2014, High Speed 2 Action Alliance Limited, a non-governmental organization, the London Borough of Hillingdon, and Charlotte Jones, a member of the public (the communicants), 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 a failure by the United Kingdom to comply with its obligations under article 7 generally, and article 7 in conjunction with article 6(3) and (4) of the Convention.<sup>1</sup>
2. Specifically, the communicants allege that the Party concerned has failed to comply with article 7 of the Convention by failing to ensure public participation in relation to the decisions issued by the Secretary of State for Transport on 10 January 2012 in the Command Paper “High Speed Rail: Investing in Britain’s Future – Decisions and Next Steps” (the DNS) which sets out the strategy of the Party concerned for the promotion, construction and operation of a new “Y” shaped high speed railway from London to the West Midlands, Manchester and Leeds known as High Speed 2.<sup>2</sup>
3. At its forty-fifth meeting (29 June—July 2014), 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 9 September 2014.
5. The Party concerned provided its response to the communication on 9 February 2015.
6. On 17 March 2015, the communicants provided comments on the response of the Party concerned.
7. By letter of 20 May 2015, the Committee enquired with the communicants as to whether the London Borough of Hillingdon constituted a member of the public and on 4 June 2015 the communicants replied to this enquiry.
8. At its forty-ninth meeting (Geneva, 30 June—3 July 2015), the Committee found that the London Borough of Hillingdon was not a member of the public for the purposes of article 15 of the Convention and was thus unable to submit a communication to the Committee under paragraph 18 of the annex to decision I/7 of the Meeting of the Parties. It re-confirmed its earlier determination of preliminary admissibility with respect to the other two communicants.
9. On 29 August 2015, an observer, Ms. Boman-Behram, submitted a statement for the Committee’s consideration in the case.

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<sup>1</sup> The communication and related documentation from the communicant, the Party concerned and the secretariat, is available from <http://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2014100-united-kingdom.html>

<sup>2</sup> Communication, p. 2.

10. By letter of 29 September 2015, the Party concerned requested to move back the date for the hearing on the communication to 2016. On 30 September 2015, the communicant commented on this request, the Party concerned replied by letter of 2 October 2015 and the communicant replied in turn by letter of 4 October 2015.
11. At its fiftieth meeting (Geneva, 6—9 October 2015), after taking into account the views of both parties, the Committee agreed to hold the hearing to discuss the substance of the communication at its fifty-second meeting (Geneva, 8—11 March 2016).
12. On 25 February 2016, the Party concerned submitted additional information with a list of annexes mentioned therein.
13. On 3 March 2016, the communicants informed the Committee that Ms. Charlotte Jones had withdrawn from the communication leaving High Speed 2 Action Alliance Limited as the sole communicant.
14. On 4 March 2016, an observer, Mr. Landells, submitted a statement for the Committee's consideration.
15. The Committee held the hearing of the communication at its fifty-second meeting (Geneva, 8—11 March 2016), with the participation of representatives of the communicant and Party concerned. During the hearing, the Committee confirmed its determination that the communication was admissible.
16. On 26 September 2016, the Committee sent questions to the communicant and the Party concerned for their reply. The communicant submitted its replies on 28 October 2016 and the Party concerned submitted its replies on 31 October 2016. On 11 November 2016, the communicant and the Party concerned provided comments on the other party's replies.
17. The Committee received further statements from observers, namely on 21 October 2016 from Ms. Rispin, and on 10 December 2016, from Ms. Boman-Behram.
18. The Committee completed its draft findings through its electronic decision-making procedure on 26 November 2018. 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 the communicant on 30 November 2018. Both were invited to provide comments by 11 January 2018.
19. *The Party concerned and the communicant provided comments on [...] and [...], respectively.*
20. *At its [...] meeting, the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document to its [...] meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.*

## II. Summary of facts, evidence and issues<sup>3</sup>

### A. Legal framework

21. Article 3, paragraph 2, of the European Union SEA Directive<sup>4</sup> determines which plans and programmes in its Member States are to be subject to a strategic environmental assessment. The Party concerned has implemented the SEA Directive in its national law through the SEA Regulations.<sup>5</sup>

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<sup>3</sup> 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.

<sup>4</sup> Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

<sup>5</sup> Environmental Assessment of Plans and Programmes Regulations 2004.

## B. Facts

22. On 15 January 2009, the Secretary of State for Transport of the Party concerned announced the establishment of a new company, High Speed Two Ltd (“HS2 Ltd”) which was to consider the case for new high speed rail services from London to Scotland, including the development of a proposal for an entirely new line between London and the West Midlands.<sup>6</sup> In 2009, HS2 Ltd considered a number of potential route alternatives, reporting its conclusions in its December 2009 report, “High Speed Two: London to the West Midlands and Beyond”.<sup>7</sup>

23. On 20 March 2009, Booz and Co (UK) Ltd and Temple Group Ltd were appointed to assist HS2 Ltd in the preparation of an Appraisal of Sustainability Report. In June 2009, a draft Appraisal of Sustainability Scoping Report was prepared and consulted upon with certain key stakeholders, including the Environment Agency and Natural England. HS2 Ltd provided a summary of the Appraisal of Sustainability Report to the Secretary of State for Transport alongside its report of December 2009.<sup>8</sup>

24. In August 2009, the Department for Transport commissioned WS Atkins plc, an engineering company, to develop and assess potential enhancements to the current road and rail networks, as potential strategic alternatives to new rail lines.<sup>9</sup> This included the development of four packages of potential enhancements to the strategic road network, and five packages of potential enhancements to the rail network, and an assessment of the business case for each of the options, including both economic and environmental assessments.<sup>10</sup> WS Atkins plc provided its final report to the Department for Transport in early March 2010.<sup>11</sup>

25. On 11 March 2010, the Department for Transport published a Command Paper entitled “High Speed Rail”,<sup>12</sup> together with HS2 Ltd’s December 2009 Report, and a non-technical summary of the Appraisal of Sustainability report (the full document was not published at this stage as further work had been commissioned on the detail of the route and so analysis was likely to change)<sup>13</sup> and the full set of reports provided by WS Atkins plc on the strategic alternatives study.<sup>14</sup>

26. On 17 March and 11 June 2010, the Secretary of State for Transport wrote to HS2 Ltd to commission further work including the consideration of additional options.<sup>15</sup> The latter included a request for a comparative business case assessment of the potential “S” and “Y” network options. HS2 Ltd published a report in that regard on 4 October 2010.<sup>16</sup>

27. Between September and December 2010, HS2 Ltd published a number of reports.<sup>17</sup> On 4 November, 19 November and 3 December 2010, HS2 Ltd published three separate

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<sup>6</sup> Response to communication by Party concerned, para. 35, and annex 3 to the communication, para. 5.

<sup>7</sup> Response to communication by Party concerned, paras. 36-37. See annex 8 to the response for the report.

<sup>8</sup> Annex A to additional information provided by the Party concerned, 25 February 2016, p. 3.

<sup>9</sup> Response to communication by Party concerned, para. 36.

<sup>10</sup> Response to communication by Party concerned, para 36, and annex 5 to the response, para. 22.

<sup>11</sup> Annex 5 to the response to communication by Party concerned, para. 28.

<sup>12</sup> Annex 9 to the response to communication by Party concerned.

<sup>13</sup> Response to communication by Party concerned, para. 40. See annex 10 to the response for the summary.

<sup>14</sup> Response to communication by Party concerned, para. 40. See annex 11 to the response for the reports.

<sup>15</sup> Response to communication by Party concerned, para. 41, and annex 5 to the response, paras. 35-37. See also annex 3 to the communication, paras. 17 and 20.

<sup>16</sup> Response to communication by Party concerned, para. 41; annex A to additional information provided by the Party concerned, 25 February 2016, p. 6; and annex 3 to the communication, paras. 19 and 21.

<sup>17</sup> Annex 7 to response to communication by Party concerned, paras. 14 and 16.

supplementary reports advising on changes to sections of the proposed route to reduce the potential impacts on the environment and communities.<sup>18</sup>

28. On 20 December 2010, the Secretary of State for Transport made a statement to the House of Commons, stating that the Government intended to consult on a “Y” network for High Speed 2. It was proposed that the network would be delivered in two phases, with phase 1 extending from London to West Midlands and phase 2 linking Birmingham with Manchester and Leeds.<sup>19</sup>

29. A public consultation on phase 1 of High Speed 2 commenced on 28 February 2011 and closed on 29 July 2011.<sup>20</sup> For this purpose, the Government published a consultation document “High Speed Rail: Investing in Britain’s Future” (“the Consultation Document”),<sup>21</sup> together with various supporting documents including the “High Speed 2 London to the West Midlands Appraisal of Sustainability”,<sup>22</sup> “High Speed 2 Strategic Alternatives Study London to West Midlands Rail Alternatives – update of Economic Appraisal” (a report by WS Atkins plc)<sup>23</sup> and a consultation summary report.<sup>24</sup> It also published detailed maps of the proposed route.<sup>25</sup>

30. The consultation asked seven questions:<sup>26</sup>

1. This question is about the strategy and wider context: Do you agree that there is a strong case for enhancing the capacity and performance of Britain’s inter-city rail network to support economic growth over the coming decades?
2. This question is about the case for high speed rail: Do you agree that a national high speed rail network from London to Birmingham, Leeds and Manchester (the “Y” network) would provide the best value for money solution (best balance of costs and benefits) for enhancing rail capacity and performance?
3. This question is about how to deliver the Government’s proposed network: Do you agree with the Government’s proposals for the phased roll-out of a national high speed rail network, and for links to Heathrow Airport and to the High Speed 1 line to the Channel Tunnel?
4. This question is about the specification for the line between London and the West Midlands: Do you agree with the principles and specification used by HS2 Ltd to underpin its proposals for new high speed rail lines and the route selection process HS2 Ltd undertook?
5. This question is about the route for the line between London and the West Midlands: Do you agree that the Government’s proposed route, including the approach proposed for mitigating its impacts, is the best option for a new high speed rail line between London and the West Midlands?
6. This question is about the Appraisal of Sustainability: Do you wish to comment on the Appraisal of Sustainability of the Government’s proposed route between London and the West Midlands that has been published to inform this consultation?
7. This question is about blight and compensation: Do you agree with the options set out to assist those whose properties lose a significant amount of value as a result of any new high speed line?

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<sup>18</sup> Annex A to additional information provided by the Party concerned, 25 February 2016, p. 6.

<sup>19</sup> Annex A to additional information provided by the Party concerned, 25 February 2016, p. 7.

<sup>20</sup> Response to communication by Party concerned, para. 43, and annex A to additional information provided by the Party concerned, 25 February 2016, pp. 7-8.

<sup>21</sup> Annex 13 to the response to communication by Party concerned.

<sup>22</sup> Annex 14 to the response to communication by Party concerned.

<sup>23</sup> Annex 15 to the response to communication by Party concerned.

<sup>24</sup> Annex 16 to the response to communication by Party concerned.

<sup>25</sup> Response to communication by Party concerned, para. 43.

<sup>26</sup> Annex 5 to response to communication by Party concerned, pp. 79-80.

31. Paragraphs 2.78 to 2.95 of the Consultation Document were headed “Alternatives to High Speed Rail”. The text box on pages 79-80 of the Consultation Document referred to the consideration by HS2 Ltd of alternatives to its recommended line of route for phase 1 of High Speed 2.<sup>27</sup> Details were given in annex B “Alternative Options for High Speed 2 (London to the West Midlands)” of the Consultation Document.<sup>28</sup> Appendix 6 to the Appraisal of Sustainability Report set out an appraisal of the sustainability of the recommended phase 1 route in comparison with selected alternatives.<sup>29</sup>
32. The consultation process also included 41 days of local roadshows at which Department for Transport and HS2 Ltd staff were available to discuss the details of the proposals. Over 55,000 submissions were received during the consultation.<sup>30</sup>
33. On 10 January 2012, the Secretary of State for Transport announced the outcome of the consultation process and published the DNS. Under the heading “Alternatives to high speed rail” at page 68 of the DNS, the Government set out its reasons for rejecting the case for alternatives to the proposed high speed rail network. Alongside the DNS, the Government made available a range of reports and studies including a consultation summary report.<sup>31</sup>
34. From 4 April to 30 May 2012, a public consultation was held on the draft High Speed 2 London to West Midlands EIA Scope and Methodology Report.<sup>32</sup>
35. From 25 October 2012 to 31 January 2013, a public consultation was held on the adoption of safeguarding directions, as anticipated in the DNS, to protect the route corridor adopted in the DNS from conflicting development.<sup>33</sup>
36. On 13 May 2013, the High Speed Rail (Preparation) Bill was introduced in the House of Commons and on 18 July 2013, the Bill completed the Public Bill Committee stage.<sup>34</sup>
37. From 16 May to 11 July 2013, a public consultation was held on the draft Environmental Statement for phase 1 of High Speed 2.<sup>35</sup> Some 20,944 submissions were received and a summary of the responses received was published in November 2013.<sup>36</sup>
38. On 17 July 2013, public consultation on the detailed route for phase 2 of the “Y” Network began following the preparation of a Command Paper regarding phase 2,<sup>37</sup> an Appraisal of Sustainability<sup>38</sup> and various reports on options, design, engineering, costs, economics, scheme refinement and consultation.<sup>39</sup> Public consultation on phase 2 took the form of a consultation paper,<sup>40</sup> maps and a suite of supporting documents.<sup>41</sup>
39. The High Speed Rail (London – West Midlands) Bill received a first reading on 25 November 2013.<sup>42</sup>

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<sup>27</sup> Annex 13 to response to communication by Party concerned.

<sup>28</sup> Annex 13 to response to communication by Party concerned, pp. 122-149.

<sup>29</sup> Annex 14(viii) to response to communication by Party concerned.

<sup>30</sup> Response to communication by Party concerned, paras. 44-45.

<sup>31</sup> Response to communication by Party concerned, para. 46, and annexes 17-23 to the response.

<sup>32</sup> Annex A to additional information provided by the Party concerned, 25 February 2016, pp. 9-10.

<sup>33</sup> Communication, para. 7(5), and annex 3 to the communication, paras. 45-46.

<sup>34</sup> Annex 3 to the communication, para. 59.

<sup>35</sup> Response to communication by Party concerned, para. 50.

<sup>36</sup> Response to communication by Party concerned, para. 50. For the summary of submissions received, see annex 29 to the response.

<sup>37</sup> “High Speed Rail: Investing in Britain's Future-Phase Two: The route to Leeds, Manchester and beyond”.

<sup>38</sup> “Options for Phase 2 of the high speed network: Appraisal of Sustainability”.

<sup>39</sup> Annex 3 to communication, para. 49.

<sup>40</sup> “Consultation on the route from the West Midlands to Manchester, Leeds and beyond”.

<sup>41</sup> Annex 3 to communication, para. 50.

<sup>42</sup> Response to communication by Party concerned, para. 54, and annex A to the additional information from the Party concerned, 25 February, p.11.

40. From 25 November 2013 to 27 February 2014, public consultation was held on the Environmental Statement for phase 1. 21,833 responses were received during the consultation. The responses were summarized by an independent assessor in a report provided to the House of Commons and published on 7 April 2014.<sup>43</sup>

41. The High Speed Rail (London – West Midlands) Bill received a second reading on 28 April 2014.<sup>44</sup> The petitioning period commenced on 29 April 2014 and closed on 23 May 2014, during which some 1,925 petitions were received, including from the communicant.<sup>45</sup>

42. In order to introduce changes to the Bill, on 9 September 2014, the High Speed Rail (London – West Midlands) Bill: Additional Provision, accompanied by an Additional Provision Environmental Statement, was introduced to Parliament.<sup>46</sup>

43. Between 19 September and 14 November 2014, public consultation was held on the Additional Provision Environmental Statement. On 23 October 2014, the communicant attended a specific session with the Select Committee to explain why it considered the Select Committee should undertake an evaluation of alleged deficiencies in the Environmental Statement prior to hearing other petitions.<sup>47</sup> The Select Committee heard some 186 petitions before the end of January 2015.<sup>48</sup>

44. Between July 2015 and January 2016, five additional provisions and supplementary environmental statements were introduced into Parliament and consulted upon.<sup>49</sup>

45. On 4 February 2016 the Select Committee hearings concluded, and on 22 February 2016 it published its Second Special Report of Session 2015-2016.<sup>50</sup>

46. Phase 1 of High Speed 2 is expected to open in 2026, running between London and the West Midlands and providing direct high speed services to the Channel Tunnel. Phase 2, providing high speed services beyond the West Midlands and direct high speed services to a new Heathrow Airport station, is expected to open 2032-2033.<sup>51</sup>

## **C. Domestic remedies and admissibility**

### **Domestic remedies**

47. In April 2012, the communicant commenced judicial review proceedings to challenge the DNS. The grounds of claim included that the DNS was a “plan or programme” which “set the framework for development consent” and was “required by administrative provisions” within the meaning of the SEA Directive, and that its adoption had been in breach of the obligation under article 5 and annex I of the SEA Directive.<sup>52</sup> The High Court agreed with the communicant that the DNS had failed in significant respects to subject the reasonable alternatives to the High Speed 2 proposal to environmental assessment or public consultation.<sup>53</sup> The claim was dismissed, however,

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<sup>43</sup> Response to communication by Party concerned, para. 52.

<sup>44</sup> Response to communication by Party concerned, para. 54, and annex A to additional information from the Party concerned, 25 February 2016.

<sup>45</sup> Annex A to additional information from the Party concerned, 25 February 2016, p. 12. See annex 36 to response to communication by Party concerned for the report.

<sup>46</sup> Annex A to additional information from the Party concerned, 25 February 2016, p. 13.

<sup>47</sup> Annex A to additional information provided by the Party concerned, 25 February 2016, p. 13, and annexes 33 (i)-(ii) to the response to communication by Party concerned.

<sup>48</sup> Response to communication by Party concerned, para. 54.

<sup>49</sup> Annex A to additional information provided by the Party concerned, 25 February 2016, pp. 14-16.

<sup>50</sup> Annex A to additional information provided by the Party concerned, 25 February 2016, pp. 15-16.

<sup>51</sup> Annex 1 to response to communication by Party concerned, paras. 9-10.

<sup>52</sup> Communication, para. 13, and annex 5 to the communication.

<sup>53</sup> Communication, para. 15, and annex 6 to the communication, paras. 160-172.

because the High Court held that the DNS did not “set the framework for development consent” nor was it “required by administrative provisions” within the meaning of the Directive.<sup>54</sup> Appeals before the Court of Appeal in July 2013<sup>55</sup> and the Supreme Court in January 2014<sup>56</sup> were also dismissed, both courts interpreting the term “set the framework for development consent” in a way that excluded the DNS.

48. The communicant asserts that non-compliance with international treaties, such as the Convention, cannot be a ground of judicial review in the courts of the Party concerned. The communicant states that therefore the only means to challenge the ineffective consultation on the DNS was to rely on the SEA Directive and to submit that it should be interpreted harmoniously with article 7 of the Convention, since direct reliance on article 7 of the Convention was legally impossible within the domestic legal system.<sup>57</sup>

49. The Party concerned asserts that the communicant has failed to exhaust domestic remedies. It accepts that the communicant challenged the DNS by means of judicial review in the courts. However, it submits that, whilst the communicant relied on the Convention in support of its submission that the Party concerned was required to carry out a strategic environmental assessment prior to issuing the DNS, it did not allege there was insufficient information provided to the public during the consultation on the DNS for the purposes of article 7 of the Convention. The Party concerned contends that at no point during the proceedings before the domestic courts was it alleged that the alleged failure to provide information on reasonable strategic alternatives to High Speed 2 constituted a freestanding breach of the Convention.<sup>58</sup>

50. The Party concerned further disagrees with the communicant’s argument that a challenge based directly on the Convention would not have been possible. The Party concerned submits that in the High Court and Court of Appeal proceedings there was a freestanding challenge to the lawfulness of the consultation process which included a complaint in respect of the lack of information on, or assessment of, alternatives to High Speed 2 and the proposed wider network and that article 7 of the Convention could have been raised as part and parcel of those complaints.<sup>59</sup>

#### **Admissibility of claims related to the SEA Directive**

51. The Party concerned claims that the communicant is arguing matters which would have been required to be assessed if article 7 of the Convention required the preparation of a strategic environmental assessment. It submits that the lack of a strategic environmental assessment is a matter that cannot be challenged before the Committee as this turns not on article 7 of the Convention but on the respective decision-making processes to which the SEA Directive, and the EIA Directive, were intended to apply.<sup>60</sup> The Party concerned submits that article 7 of the Convention requires that there be “public participation” in the preparation of plans and programmes, as opposed to a requirement to conduct an SEA.<sup>61</sup>

52. The communicant disagrees with the submission of the Party concerned. It states that its communication does not concern a failure to carry out a strategic environmental assessment but rather to comply with article 7 of the Convention which requires that during the preparation of a plan or programme there must be public participation which is “effective” and “within a transparent and fair framework, having provided necessary information to the public”.<sup>62</sup> It submits that a strategic environmental assessment would

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<sup>54</sup> Communication, para. 15, and annex 6 to the communication.

<sup>55</sup> Communication, paras. 17-18, and annex 7 to the communication.

<sup>56</sup> Communication, para. 20, and annex 8 to the communication.

<sup>57</sup> Communication at, para. 24 as well as, and comments by the communicant dated 17 March 2015 on response to communication by Party concerned, para. 14 (2).

<sup>58</sup> Response to communication by Party concerned, paras. 21-23.

<sup>59</sup> Response to communication by Party concerned, para. 24.

<sup>60</sup> Response to communication by Party concerned, para. 65.

<sup>61</sup> Response to communication by Party concerned, para. 67.

<sup>62</sup> Communicant’s comments on the response to communication by Party concerned, 17 March 2015, para. 19(1).

have been capable of securing compliance with article 7 of the Convention but not that article 7 always requires SEA.<sup>63</sup>

## D. Substantive issues

### Applicability of article 7

53. The communicant submits that the DNS is a plan or programme relating to the environment within the scope of article 7 of the Convention.<sup>64</sup> The communicant alleges that the DNS establishes a set of coordinated and timed objectives for the implementation of the high speed rail strategy which guided the Government's further development of the High Speed 2 project and of the proposals to be included in the Hybrid Bill for which development consent is to be sought, including the environmental impact assessment of the Hybrid Bill proposals.<sup>65</sup>

54. The Party concerned accepts that article 7 applies to the DNS.<sup>66</sup>

### Alleged breaches of article 7

#### *General allegations*

55. The communicant argues that the Party concerned failed to comply with article 7 of the Convention by not conducting public participation "within a transparent and fair framework, having provided the necessary information to the public" and which complied with the requirements of article 6(3) and (4) of the Convention.<sup>67</sup> The communicant points out that the focus of the present communication is solely on whether the preparation of a plan, the DNS, complied with article 7. It submits the requirements of this article must be seen as separate and free-standing from the requirements of article 6 applicable to the subsequent decisions on whether to permit the project to which the plans relates.<sup>68</sup>

56. The Party concerned submits there is no merit in the complaint that it has failed to comply with its obligations under article 7 of the Convention.<sup>69</sup> It submits that the DNS was preceded by full and wide-ranging consultation and that it has sought to maximise public information throughout the decision-making process which remains ongoing. In support of its argument, the Party concerned cites excerpts of the judgment of the High Court and the majority judgment of the Court of Appeal.<sup>70</sup>

#### *Public participation "at an early stage when all options are open"*

57. The communicant alleges that public participation was not ensured at an "early" stage "when all options are open" as required by article 7 in conjunction with article 6(4) of the Convention.<sup>71</sup> The communicant submits that the decision to rule out the "inverted A", "reverse E" and "S" route options was taken without public participation and cites in support the March 2010 Command Paper which justifies the government's proposal of the

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<sup>63</sup> Communicant's comments on response to communication by Party concerned, 17 March 2015, para. 20.

<sup>64</sup> Communication, para. 31.

<sup>65</sup> Communication, para. 8.

<sup>66</sup> Response to communication by Party concerned, para. 60.

<sup>67</sup> Communication, para. 5.

<sup>68</sup> Communicant's comments on response to communication by Party concerned, 17 March 2015, para. 18.

<sup>69</sup> Response to communication by Party concerned, paras. 27 and 60.

<sup>70</sup> Response to communication by Party concerned, paras. 62-66, referring to paras. 2-5, 46-53, 303-306 and 13-18 respectively.

<sup>71</sup> Communicant's comments on the response to communication by Party concerned, 17 March 2015, para. 22.



“Y” network.<sup>72</sup> The communicant submits that the February 2011 Consultation Paper also described these options as already being ruled out.<sup>73</sup> It emphasizes that the questions which were subject to public consultation<sup>74</sup> were premised on a Y-shaped configuration for High Speed 2 and did not invite public participation on other configurations.<sup>75</sup>

58. The communicant further submits that no “reasonable reader” of the consultation material referred to by the Party concerned, specifically paras. 5.1.3-5 of the Appraisal of Sustainability<sup>76</sup> or the consultation questions, would have considered that the “reverse E” and “S” options were still open. It states that, contrary to the Party concerned’s submissions, the consultation was on the questions posed – no more, no less. The common law duties to take into account consultation responses were not engaged in relation to matters about which the public were not asked. It states that this is not contradicted by the fact that some of the more bold, sophisticated and uncooperative consultees ignored the limitations set by the consultation question and commented on other matters.<sup>77</sup>

59. The communicant claims that the environmental statement described the consideration of alternatives as historic fact. It submits that consideration by Parliament cannot be considered as public participation, still less at an early and effective stage.<sup>78</sup>

60. The Party concerned submits that no major options regarding the High Speed 2 were considered by the decision-makers before the 2011 public participation phase and no issues were foreclosed from public comment during the DNS consultations.<sup>79</sup> It submits that many consultation responses proposed various different line configurations and that these were fully considered.<sup>80</sup>

61. The Party concerned submits that with the adoption of the DNS in January 2012 the Government had ruled out the other options as a matter of policy but that they remained open for consideration by Parliament as part of the proposed Hybrid Bill.<sup>81</sup> It also states that the environmental statement included all major options and environmental studies considered by the Government, with strategic or major options being contained in “The Alternatives Report” while more localised alternatives were included in the “Community Forum Area Reports”, both published in November 2013.<sup>82</sup>

*Within a transparent and fair framework, having provided the necessary information to the public*

62. The communicant submits that what constitutes the “necessary information” to be provided to the public in any given case ought to be judged by (i) the overall aim of securing a “transparent and fair framework” for early and effective participation in the choice between “all the options” and (ii) the context in which article 7 sits, namely the pillar of the Convention dealing with public participation in environmental decision-making.<sup>83</sup> It

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<sup>72</sup> Communication, para. 11(3) and communicant’s opening statement at the hearing at the Committee’s 52<sup>nd</sup> meeting, para. 19(5). See annex 9 to response to communication by Party concerned, pp.17 and 72-78 for the sections referred to.

<sup>73</sup> See annex 13 to the response to communication by Party concerned, paras. 2.32-2.33 for the sections referred to.

<sup>74</sup> See annex 13 to the response to communication by Party concerned, p. 113, for the questions.

<sup>75</sup> Communicant’s opening statement at the hearing at the Committee’s 52<sup>nd</sup> meeting, para. 19(5).

<sup>76</sup> Annex 14 (i) to the response to communication by Party concerned.

<sup>77</sup> Communicant’s comments on the reply of the Party concerned to questions, 11 November 2016, p. 1.

<sup>78</sup> Communicant’s comments on the reply of the Party concerned to questions, 11 November 2016, p. 2.

<sup>79</sup> Reply to questions by the Party concerned, 31 October 2016, pp. 1-2.

<sup>80</sup> Comments from the Party concerned on communicant’s reply to questions, 11 November 2016, pp. 1-2.

<sup>81</sup> Reply to Committee’s questions by the Party concerned, 31 October 2016, p. 6.

<sup>82</sup> Reply to questions by the Party concerned, 31 October 2016, p. 2. See annex 30 to the response to communication by Party concerned for the “Alternatives Report” and annex 31 (iv) for the “Community Forum Area Report – Colne Valley / No 7”.

<sup>83</sup> Communicant’s statement for hearing at 52<sup>nd</sup> meeting, para. 8.

submits that it follows from this that the “necessary information”, if the consultation is to be “effective”, must cover: (1) all the options: not just the authority’s preferred option; (2) with sufficient information to provide the public with a “transparent” opportunity to comment on the relative merits of the options; which necessitates (3) an equivalent level of information about “all the options” so that the process is “fair” and not biased in favour of or against particular options; and (4) an equivalent level of information as to their environmental effects.<sup>84</sup> The communicant submits that the requirements of article 7 are therefore not met where: (1) some or all of the options considered by the authority responsible for the plan or programme are ruled out without prior, appropriately informed, public participation; or (2) no information is given about particular options or their environmental effects; or (3) the level of information provided about some options is considerably more detailed than the level of information provided about other options.<sup>85</sup>

63. The communicant concedes that article 7 does not expressly incorporate the standards in article 6(6) of the Convention.<sup>86</sup> It submits, however, that what constitutes the “necessary information” under article 7, must not only be consistent with the wording and purpose of article 7 but also consistent with other international standards for public participation concerning plans and programmes. In this regard, it refers to the SEA Directive and the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (“the SEA Protocol”) which it contends are both instruments aimed at securing effective public participation in the preparation of certain plans and programmes. It asserts that their contents are therefore indicative of developing international norms of what measures are appropriate to achieve that objective. It notes that article 5 of the SEA Directive and article 7 of the SEA Protocol both require that the environmental assessment of plans and programmes to which those instruments apply must involve the publication of, and subsequent consultation on, an environmental report which must identify, describe and evaluate the likely significant effects both of the responsible authority’s preferred options and of the “reasonable alternatives” to those options.<sup>87</sup> The communicant submits that there is no justification for concluding that the level of environmental information required by article 7 of the Convention is lower than that of the internationally recognised standards set out in the SEA Directive and the SEA Protocol.<sup>88</sup>

64. The communicant submits further that, even if the Compliance Committee does not agree that the analysis outlined above sets out what article 7 requires in all cases, at the very least that analysis is applicable to the present context, namely a plan/programme for a national infrastructure development on a once-in-a-generation scale, with acknowledged very wide-ranging and significant environmental impacts, and in relation to which the body given responsibility for determining whether to grant development consent is the national legislature. The communicant submits that this affects the level of environmental information necessary to provide effective public participation as required under article 7 of the Convention.<sup>89</sup>

65. The communicant raises four specific issues in relation to which it contends that the Party concerned failed to provide the necessary information in order for the members of the public to understand the relative impacts of the High Speed 2 proposals against alternative options. These are discussed under separate headings in paragraphs 68-75 below.

66. The communicant alleges that all material referred to by the Party concerned in its submissions to the Committee regarding these four issues constitutes either: (a) material that had been made available to the courts and with regard to which the court had found

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<sup>84</sup> Communicant’s statement for hearing at 52<sup>nd</sup> meeting, para. 9.

<sup>85</sup> Communicant’s statement for hearing at 52<sup>nd</sup> meeting, para. 10.

<sup>86</sup> Communicant’s statement for hearing at 52<sup>nd</sup> meeting, para. 11.

<sup>87</sup> Communicant’s statement for hearing at 52<sup>nd</sup> meeting, paras. 12-14.

<sup>88</sup> Communicant’s statement for hearing at 52<sup>nd</sup> meeting, para. 16.

<sup>89</sup> Communicant’s statement for hearing at 52<sup>nd</sup> meeting, para. 16.

that the DNS failed to subject reasonable alternatives to the environmental assessment and public consultation; (b) material which pre-dated the February 2011 consultation, formed no part of the preparation of the DNS, and therefore demonstrates that important alternative options had already been considered and sifted out prior to the consultation; or (c) material which post-dated the adoption of the DNS on 12 January 2012 and would therefore be irrelevant to compliance with article 7.<sup>90</sup>

67. The Party concerned points out that article 6(6) of the Convention does not apply to public participation procedures covered by article 7 of the Convention and that therefore there is no requirement to publish “an outline of the main alternatives studied by the applicant”.<sup>91</sup> The Party concerned asserts that the Convention does not require that specific alternatives be studied or that information on alternatives be created but only that the available information is made available to the public.<sup>92</sup>

#### The environmental effects of the “Y” network as a whole

68. The communicant claims that the environmental information provided to members of the public related solely to phase 1 of the project and that members of the public were given no information about the environmental impacts of phase 2. It argues that the exclusion of the environmental effects of phase 2 contrasts with the reliance that the Party concerned placed in the consultation documentation and the DNS on the alleged economic benefits of the entire “Y” network. According to the communicant, the result has been that the purported economic advantages of the whole network have been weighed against the environmental disadvantages of phase 1 only.<sup>93</sup>

69. The Party concerned, relying on testimony produced before the courts, argues that its intention was to consult on three separate issues: (a) the strategic case for high-speed rail in the United Kingdom; (b) the overall strategy for a Y-shaped high speed network; and (c) the detailed route of any specific line forming part of that network.<sup>94</sup> It submits that it would have been open for the authorities to consult on (a) and (b) in isolation, before moving on to consider specific routes, but the view was taken that to do so would have been likely to slow the process significantly, delaying the achievement of the benefits the project was intended to provide. The Party concerned submits that the information provided was appropriate to the high level strategic policy on which it was consulting and the proposed route for phase 1. It further notes that the environmental statement lodged with the High Speed Rail (London – West Midlands) Bill in November 2013 included an assessment of cumulative effects (including anticipated cumulative effects of phase 2 where these could be assessed)<sup>95</sup> and assessment of strategic and route-wide alternatives.<sup>96</sup> It further states that the public consultation on phase 2 (which took place between July 2013 and January 2014) was accompanied by an appraisal of sustainability which expressly considered scheme-wide issues and the combined impact of phases 1 and 2.<sup>97</sup>

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<sup>90</sup> Communicant’s comments on the response of the Party concerned, 17 March 2015, paras. 22 and 23(3).

<sup>91</sup> Opening statement to the hearing at the Committee’s 52<sup>nd</sup> meeting by the Party concerned, para. 22.

<sup>92</sup> Opening statement to the hearing at the Committee’s 52<sup>nd</sup> meeting by the Party concerned, para. 24.

<sup>93</sup> Communication, para. 11(1).

<sup>94</sup> Response to communication by Party concerned, para. 68.

<sup>95</sup> Response to communication by Party concerned, para. 68, referring to annex 31 (iii) to the response, paras. 7.4.8-7.4.10.

<sup>96</sup> Response to communication by Party concerned, para. 68, referring to annex 30 to the response.

<sup>97</sup> Response to communication by Party concerned, para. 68, referring to annex 37 (ii) to the response, section 7.

The relative environmental effects of strategic alternatives to high speed rail

70. The communicant submits that the Party concerned failed to provide information on the relative environmental effects of strategic alternatives to High Speed 2, such as improvements to existing rail networks and a lower but still high speed rail network.<sup>98</sup>

71. The Party concerned contends that the work commissioned by the Department for Transport prior to the start of the consultation in February 2011 included a number of reports on strategic alternatives to high speed rail.<sup>99</sup> It submits that these included, but were not limited to, the reports by WS Atkins plc which were published alongside the Consultation Document and which were required to consider inter alia the environmental effects of those alternatives.<sup>100</sup> The Party concerned contends that, alongside the DNS, it published updated reviews of alternatives and strategic alternatives and of its strategy for High Speed 2.<sup>101</sup> In addition, it refers to a specific alternatives report published as part of the environmental statement which included consideration of strategic alternatives to high speed rail, including alternative modes (road or domestic aviation), slower line speeds, and upgrades to existing lines.<sup>102</sup>

The relative environmental effects of alternative configurations for the high speed rail network

72. The communicant alleges that three alternative configurations, known as the “inverted A”, “reverse E” and “S” networks were considered and rejected prior to the public consultation, which was premised on the “Y” network ultimately selected.<sup>103</sup> It submits that an alignment involving a through route via London Heathrow airport had also been ruled out.<sup>104</sup> The communicant claims that the environmental information contained in the Appraisal of Sustainability was directed solely at the environmental impacts of the proposed route for Phase 1 from London to the West Midlands, despite the DNS being a plan/programme for the entire “Y” network. It submits that no information was provided to the public on the environmental effects of the complete “Y” network, either at all or in comparison with the effects of the “reverse E” and “S” shapes or the route via London Heathrow before the Secretary of State for Transport chose the preferred outcome, and therefore the public could not consult on these issues and have its comments taken into consideration by the Secretary of State.<sup>105</sup> The communicant alleges that these other options were rejected without public consultation and, in support of its allegation, it points to the statement of the High Court that “alternatives to the “Y” shape, that is the inverted A, the reverse E and S shapes have only been considered and rejected on their economic and business cases”.<sup>106</sup>

73. The Party concerned disagrees with the communicant’s allegation. It submits that, as part of the work undertaken in 2009, HS2 Ltd considered a number of alternative route options, including alternatives to the “Y” network, and its conclusions were reported to the Secretary of State in its 2009 report “High Speed Rail: London to the West Midlands and

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<sup>98</sup> Communication, para. 11(2).

<sup>99</sup> Response to communication by Party concerned, para. 68.

<sup>100</sup> Response to communication by Party concerned, referring to annex 11(iv) to the response, section 4.

<sup>101</sup> Response to communication by Party concerned, p.15, referring to annexes 18, 19 and 20 to the response.

<sup>102</sup> Response to communication by Party concerned, p. 19, referring to annex 30 to the response.

<sup>103</sup> Communication, para. 11(3), communicant’s reply to questions, 28 October 2016, paras. 1.1-1.4 and communicant’s opening statement at the hearing, 10 March 2016, para. 19.

<sup>104</sup> Communicant’s opening statement at the hearing, 10 March 2016, para. 19.

<sup>105</sup> Communicant’s opening statement at the hearing, 10 March 2016, para. 19, referring to annex 6 of the communication, para. 165.

<sup>106</sup> Communicant’s opening statement at the hearing, 10 March 2016, para. 19(1) referring to annex 6 of the communication, para. 165 and comments by the communicant dated 17 March 2015 on the response to communication by Party concerned, para. 23(3).

beyond".<sup>107</sup> It submits that this work included consideration of the environmental impacts of those options in the Appraisal of Sustainability.<sup>108</sup> It states that in October 2010, there was a further high level assessment of wider network options considering the "reverse S" as against the "Y" network, which again included a consideration of the likely environmental challenges.<sup>109</sup> The Party concerned further submits that the overarching Consultation Document itself,<sup>110</sup> as well as the Appraisal of Sustainability<sup>111</sup> and the "High Speed Rail Strategic Alternatives Study"<sup>112</sup> each included alternative scheme options. It alleges that the process for developing the options is explained further in the Environmental Statement Alternatives Study, and in the Information Paper A1: "Development of the Proposed Scheme".<sup>113</sup>

#### The relative environmental effects of an alternative route corridor for the proposed "Y" network

74. The communicant alleges that the public was only provided with information about alternatives within the proposed route corridor for phase 1 and had no opportunity for consultation upon other route corridors, such as the route between London and Birmingham alongside the existing infrastructure corridor containing the M40 motorway.<sup>114</sup>

75. The Party concerned submits that significant work was undertaken to look at the various options relating to the route corridor, both prior to and after the 2011 consultation, and subsequently in respect of phase 2, which was subject to public consultation between July 2013 and January 2014.<sup>115</sup> It states that the 2009 HS2 Ltd report set out the alternatives considered and that these were also summarised in appendix 6 of the Appraisal of Sustainability and annex B of the Consultation Document published in February 2011. It also formed part of the phase 1 Environmental Statement Alternatives Study.<sup>116</sup> The Party concerned alleges that an assessment of alternative route corridors was also included in annex B to the phase 2 Consultation Document, as well as in the Sustainability Statement.<sup>117</sup>

### **III. Consideration and evaluation by the Committee**

76. The United Kingdom deposited its instrument of ratification of the Convention on 23 February 2005, meaning that the Convention entered into force for the United Kingdom on 24 May 2005, i.e. ninety days after the date of deposit of the instrument of ratification.

#### **Admissibility and exhaustion of domestic remedies**

77. While the Party concerned challenged the status of the London Borough of Hillingdon as a member of the public (see para. 8 above), it has not challenged the status

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<sup>107</sup> Response to communication by Party concerned, para. 68, referring to annex 8 to the response, chapter 6.

<sup>108</sup> Response to communication by Party concerned, para. 68, referring to annex 10 to the response.

<sup>109</sup> Response to communication by Party concerned, para. 68, referring to annex 12 to the response, para 4.2.

<sup>110</sup> Opening statement to the hearing by the Party concerned, para. 25(2), referring to annex 13 of its response to communication, pp. 15-16, 47, 57-61 and annex B, pp. 122-149.

<sup>111</sup> Opening statement to the hearing by the Party concerned, para. 25(3), referring to chapter 5 and annex 6 of the Appraisal of Sustainability (annex 14 (i), pp. 35-36 and annex 14 (viii) to the response).

<sup>112</sup> Opening statement to the hearing by the Party concerned, para. 25 (4), referring to annex 45 to its response to communication.

<sup>113</sup> Response to communication by Party concerned, para. 68, referring to annex 6, paras. 41-68, annex 30 and annex 38 of that response.

<sup>114</sup> Communication, para. 11(4).

<sup>115</sup> Response to communication by Party concerned, para. 68.

<sup>116</sup> Response to communication by Party concerned, referring to, annex 30, chapters 9 and 10.

<sup>117</sup> Response to communication by Party concerned, referring to annex 37 (ii), chapter 3.

of High Speed 2 Action Alliance, which is the sole remaining communicant (see para. 13 above).

78. Regarding the exhaustion of domestic remedies, the Committee notes that following the judgment of the Supreme Court on 22 January 2014, the communicant had exhausted its possibilities to challenge the issues raised in the communication before the courts of the Party concerned. Contrary to the submission of the Party concerned (see para. 49 above), the Committee does not consider it necessary to examine whether the alleged failure to comply with article 7 of the Convention was a free-standing ground of challenge or only a supporting argument.

79. Based on the above, the Committee considers that the communication is admissible.

### **The scope of the Committee's considerations**

80. With respect to the DNS, the Committee finds that the following points do not appear to be disputed by the parties to this case:

- Article 7 of the Convention applies to the DNS;
- Article 7 of the Convention does not require a strategic environmental assessment to be carried out;
- Before the adoption of the DNS, public participation was conducted;
- The communicant's claim relates to the DNS stage and not to subsequent steps in the decision-making procedure regarding High Speed 2.

81. The essence of the communicant's claim is that consultations regarding the DNS did not represent "early public participation, when all options are open" and were not conducted "within a transparent and fair framework, having provided the necessary information to the public." This is because many options had been ruled out before the adoption of the DNS without any prior public consultation and consideration of their environmental impact and because of an alleged lack of information during the 2011 public participation procedure.

82. In the light of the above, the Committee will focus its examination on the following issues:

- (a) "Early public participation, when all options are open" under article 7 in conjunction with article 6(4) of the Convention;
- (b) The obligation in article 7 to ensure "a transparent and fair framework, having provided the necessary information to the public".

### **"Early public participation, when all options are open" under article 7 in conjunction with article 6(4) of the Convention**

83. As the Committee found in its findings on communication ACCC/C/2007/22 (France):

"...from the viewpoint of compliance with article 6, paragraph 4, of the Convention, the decisive issue is whether "all options are open and effective participation can take place" at the stage of decision-making in question. This implies that when public participation is provided for, the permit authority must be neither formally nor informally prevented from fully turning down an application on substantive or procedural grounds. If the scope of the permitting authority is already limited due to earlier decisions, then the Party concerned

should have also ensured public participation during the earlier stages of decision-making.”<sup>118</sup>

84. In a tiered decision-making procedure, the requirement for “early public participation, when all options are open” refers to the availability of options at a given stage of the decision-making. It neither requires that all options must be studied nor indicates which options/alternatives must be studied and at which stage – this is within the discretion of the competent authorities. It merely precludes foreclosing any options without public participation. Nothing in article 6(4) precludes the right of the competent authorities in the context of article 7 (or in the case of article 6, of project proponents) to select their preferred option (or options) and promote it (or them); nor does it require that all options studied by the competent authorities, for example those considered in passing at an early exploratory stage, be presented to the public. However, it does imply that members of the public should be able in their comments to challenge the options put forward in the draft plan and to propose other options, including the zero option. This has a bearing on the obligation in article 6(8) to take due account of the outcome of the public participation. This provision, seen in this context, requires the competent authorities to consider the option or options suggested by the public and provide reasons for not accepting them.

85. In light of the previous paragraph, the Committee considers that it would not meet the requirements of article 6(4) of the Convention if options were de jure and de facto still open but this was in no way apparent to members of the public participating in the decision-making procedure. The Committee does not, however, consider that this was the case in the public consultation on the DNS. The communicant alleges that the public participation documents presented the choice of the “Y” route as accepted fact and that the consultation questions did not enquire as to the different options considered (see paras. 57-58 above). The Committee does not agree. While the Party concerned did promote its preferred option in the consultation documents (see chapter 4 of the 2010 Command Paper<sup>119</sup> and chapter 5 to the Consultation Document<sup>120</sup>), the Committee does not consider that there is any evidence before it that members of the public could not propose other options, including the zero option. Rather, the consultation questions enquired whether the public agreed that the “Y” network was the best option (see, for example, questions 2 and 5 in para. 30 above).

86. Based on the above, the Committee concludes that the communicant’s allegation that the Party concerned failed to comply with article 7 in conjunction with article 6(4) of the Convention by not providing for public participation when all options were open is not substantiated. Accordingly, the Committee finds that the Party concerned has not failed to comply with article 7 in conjunction with article 6(4) in the circumstances of this case.

**Obligation to provide “the necessary information to the public” “within a transparent and fair framework” under article 7 of the Convention**

87. Article 7 of the Convention contains limited guidance on what constitutes “the necessary information” to be provided to the public for the purpose of its participation in the preparation of plans and programmes.

88. It is clear that “the necessary information” in article 7 includes the notice requirements in article 6(2). These requirements are incorporated by virtue of the express reference in article 7 to article 6(3), which in turn stipulates that notice is to be carried out in accordance with article 6(2).

89. In contrast, the information requirements in article 6(6) are not directly applicable to article 7 of the Convention. On this point, it is obvious that the information and documentation developed for the preparation of plans and programmes would frequently differ from that listed in subparagraphs (a) – (f) of article 6(6). However, the Committee considers that the rationale of both provisions is that the available information that will

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<sup>118</sup> ECE/MP.PP/2009/4/Add.1, paragraph 38.

<sup>119</sup> Annex 9 to response to communication by Party concerned, especially pp. 68-78.

<sup>120</sup> Annex 13 to response to communication by Party concerned, especially pp. 81-97.

enable the public to participate effectively in the relevant decision-making in each case must be provided. While not directly applicable, article 6(6) may accordingly serve as a source of guidance in the application of the requirement in article 7 to provide “the necessary information” to the public, provided that the differences between decisions on specific activities and plans and programmes are taken into account.<sup>121</sup>

90. An important difference between article 6 and article 7 is that article 6 covers specific activities commonly considered as those “which may have a significant effect on the environment”, while article 7 relates to plans and programmes “relating to the environment”.

91. Specific activities “which may have a significant effect on the environment” would normally be required by national law to undergo some form of environmental impact assessment. Hence, article 6(6) refers to information typically provided in the process of environmental assessment, such as a description of “the significant effects of the proposed activity on the environment” or of “the measures envisaged to prevent and/or reduce the effects”.

92. The concept of plans and programmes “relating to the environment” is much broader and covers not only plans and programmes “which may have a significant effect on the environment” but also those which may have an effect on the environment without the effect being “significant” and those plans or programmes intended to promote environmental protection. Plans and programmes “which may have a significant effect on the environment” would normally be required under national law to undergo some form of strategic environmental assessment and for these plans and programmes the requirements of article 6(6) could be applied *mutatis mutandis*. By contrast, for plans and programmes relating to the environment but not subject to strategic environmental assessment, in particular those intended to promote environmental protection (for example, an environmental education programme or an environmental inspection plan), some of the information listed in subparagraphs (a)-(f) of article 6(6) may not be relevant.

93. The Committee considers that some of the requirements included in article 6(6) nonetheless should be used as guidance as to what constitutes elements of the obligation under article 7 to provide the public with “the necessary information”. The first element is the obligation to provide “all information relevant to the decision-making [...] which is available at the time of the public participation procedure”. This would include, inter alia, the “main reports and advice issued to the public authority” available at the time when the public is informed in accordance with article 6(2) (see article 6(6)(f)). It would also include any available information on the effects of the proposed plan or programme on the environment (see article 6(6)(b)). A second element is the obligation to provide an “outline of the main alternatives studied by the applicant” which in the case of plans and programmes would mean those studied by the competent authority responsible for the preparation of the given plan or programme.

94. In the light of the above observations, the Committee considers that the obligation in article 7 to provide “the necessary information to the public” includes requirements both:

(a) To actively disseminate the information indicated in article 6(2) including information about the possibilities to participate and availability of the relevant information; and

(b) To make available to the public all information that is in possession of the competent authorities and is relevant to the decision-making and is to be used for that purpose. The relevant information under category (b) would normally include the following information:

(i) The main reports and advice issued to the competent authority;

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<sup>121</sup> See also *The Aarhus Convention: An Implementation Guide* (Implementation Guide), United Nations publication, Sales No. E.13.II.E.3, p. 179.



- (ii) Any information regarding possible environmental consequences and cost-benefit and other economic analyses and assumptions to be used in the decision-making;
- (iii) An outline of the main alternatives studied by the competent authority.

*Information provided during the consultation on the DNS*

95. Turning to the specific submissions of the communicant, the Committee notes that the communicant alleges that the Party concerned failed to provide the necessary information to the public in four main respects (see paras. 68, 70, 72 and 74 above). The Committee examines each of these below.

(a) The environmental effects of the “Y” network as a whole

96. The communicant submits that there was a failure to consider the cumulative environmental effects of phase 1 and 2 of the “Y” network, the option selected in the DNS, as a whole (see para. 68 above). As set out in paragraph 94 (b)(ii) above, the Committee considers information regarding the possible environmental consequences of a plan or programme to be “necessary information” for the purposes of article 7 of the Convention. This information should therefore be disclosed, where it is available.

97. The Committee notes, however, that the Party concerned has provided evidence (see para. 69 and footnote 97 above) that demonstrates that information on the cumulative effects of the project was provided at a later stage in the decision-making procedure when this information became available. That this information was subsequently made available is not disputed by the communicant.

98. Based on the above, the Committee finds that, in the circumstances of this case, the Party concerned did not fail to comply with the requirement in article 7 to provide “the necessary information to the public” with respect to the environmental effects of the “Y” network for the purposes of the decision-making on the DNS.

(b) “An outline of the main alternatives studied by the competent authority”

99. The communicant alleges that there was a lack of information on the relative environmental effects of the alternatives studied by the Party concerned, including:

- (a) The relative environmental effects of strategic alternatives to high speed rail (see para. 70 above);
- (b) The relative environmental effects of alternative configurations for the high speed rail network (see para. 72 above);
- (c) The relative environmental effects of an alternative route corridor (see para. 74 above).

100. In this regard, the Committee recalls its findings on communication ACCC/C/2006/16 (Lithuania), in which it held that:

“The Convention, while requiring the main alternatives studied by the applicant to be made accessible, does not prescribe what alternatives should be studied. Thus, the role of the Committee is to find out if the data that were available for the authorities taking the decision were accessible to the public.”<sup>122</sup>

101. The Committee considers the term “options” used in article 6(4) of the Convention to be wider than the term “alternatives studied” found in article 6(6) of the Convention. “Options” refers to all the possible courses of action which the decision-maker may choose

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<sup>122</sup> ECE/MP.PP/2008/5/Add.6, para. 79.

or the public may propose, including the so-called “zero option”.<sup>123</sup> The “alternatives studied” are those options which were elaborated and studied by the applicant.

102. In the present case the Party concerned studied a range of alternatives prior to the publication of the DNS (see paras. 22-28 above). It also provided information on the main alternatives studied prior to the public consultation on the DNS (see paras. 31, 71, 73 and 75 above). That this information was provided is not disputed by the communicant even if, in its view, that information was not sufficient. As stated above, the Committee will not assess whether the Party concerned sufficiently studied the environmental effects of all alternatives considered. The key point is that there is no evidence before the Committee that would indicate that the Party concerned held further information on the alternatives studied at the time when the public consultation was held but failed to disclose it.

103. Based on the above, the Committee finds that the Party concerned did provide an outline of the main alternatives studied by the competent authority to the public and thus did not fail to comply with the requirement in article 7 to provide “the necessary information” to the public in this respect.

104. Based on its conclusions in paragraphs 98 and 103 above, the Committee finds that the Party concerned did not fail to comply with the requirement in article 7 to provide the “necessary information to the public” in the circumstances of this case.

#### *Transparent and fair framework*

105. The requirement in article 7 to make provisions for the public to participate within a “transparent and fair framework” covers both the transparency and fairness of the general framework of the Party concerned for public participation in plans and programmes and also the transparency and fairness of the public participation procedure carried out on a particular plan or programme. In the present case, the communicant’s allegation does not address the framework of the Party concerned in general but is rather very much built upon its allegation that not all the necessary information was provided to the public in the context of the decision-making on the DNS. Having found in paragraph 104 above that the Party concerned did not fail to provide the necessary information to the public in this case, the Committee accordingly finds that the communicant’s allegation that the Party concerned failed to provide a transparent and fair framework, as required by article 7, is unsubstantiated.

## **IV. Conclusions**

106. Based on the above considerations, the Committee does not find the Party concerned to be in non-compliance with article 7 of the Convention in the circumstances of this case.

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<sup>123</sup> See findings on ACCC/C/2009/38 (United Kingdom), (ECE/MP.PP/C.1/2011/2/Add.10), para. 82.