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IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL

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FROM HER MAJESTY'S COURT OF APPEAL (CIVIL DIVISION)

(ENGLAND AND WALES)

C

UKSC 2013/0187

BETWEEN:

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LONDON BOROUGH OF HILLINGDON
AND OTHERS

Appellant

and

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THE SECRETARY OF STATE FOR TRANSPORT

Respondent

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CASE FOR THE RESPONDENT

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Introduction

1. This case addresses the following-

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(1) The Substantive Issue
(2) The Judgment of the Court of Appeal
(3) Parliamentary Standing Orders
(4) Hybrid Bill Second Reading

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(5) The EIAD
(6) Public Participation under the Environmental Impact Assessment Regulations

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(7) CJEU Authorities
(8) CJEU Authorities – Relevant Propositions
(9) Submissions

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2. By virtue of article 1(4) of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment **['the EIAD']**, the EIAD does not apply to projects (including projects listed in Annex 1 of the EIAD) the details of which are adopted by a specific act of national legislation. In order for that 'exemption' to apply, the objectives of the EIAD must be achieved through the legislative process.

Authorities CB Tab 2

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Core Volume Tab 5

3. Phase 1 of HS2 is an Annex 1 project. Powers for the construction and operation of Phase 1 of HS2 are to be sought through the adoption of a specific act of national legislation. The Respondent proposes to introduce a Bill into Parliament which, if enacted, would confer development consent for the construction and operation of Phase 1 of HS2. The Bill will be hybrid: see [55] of the Statement of Facts and Issues **['the SFI']**.

Authorities Tabs 1 & 2

4. Since Directive 85/337/EC on the assessment of certain public and private projects on the environment came into effect in July 1988[1], precedents include section 9 of the Channel Tunnel Rail Link Act 1996 and section 10 of the Crossrail Act 2008.

5. It is an objective of the EIAD that the public concerned should have opportunities for early and effective participation in the environmental decision making procedures prior to the decision whether to grant development consent. The main question raised by this appeal is whether Parliamentary proceedings on the hybrid Bill will give the public concerned with the Phase 1 project such opportunities for effective participation, prior to the decision whether to grant development consent for the project through enactment of the Bill.

The Substantive Issue

Authorities Tab 10

6. Under Parliamentary proceedings on a hybrid Bill, as with a public Bill, the principle of the Bill is debated at Second Reading and established upon the Bill receiving a Second Reading. Unless the House has given any instruction or indication to the contrary, the Second Reading is considered to remove from the promoter the onus of proving the expediency of the Bill before the Select Committee. It is the established practice of Select Committees to decline to hear evidence on the principle of the Bill as already endorsed by the House at Second Reading. See Erskine May's *Parliamentary Practice* (24th Edition) at page 656.

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7. The Appellants contend that unless this aspect of Parliamentary process is changed for the Phase 1 Bill so as to allow the Select Committee to consider petitions and hear evidence on the principle of the Bill, the public concerned with the Phase 1 project will be denied the opportunity to participate effectively in the environmental decision making procedures prior to the decision whether to grant development consent for the Phase 1 project: see the Appellants' printed case at [46], [47] and [70].

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[1] Article 1(5) of Directive 85/337/EC corresponds to article 1(4) of the EIAD. Their terms are identical.

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8. The substantive issue, therefore, raised by this Appeal is whether, as the Appellants contend, the Parliamentary process on a hybrid Bill, whereby the principle of the Phase 1 Bill would be established at Second Reading and fall outside the scope of the terms of reference of the report of the Select Committee, is thereby unable to fulfil the EIAD's objective of effective public participation.

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9. The Court of Appeal considered and rejected that contention in [78]-[83] and [145]. The Respondent's case is that the Court of Appeal was correct to do so. We submit that, in their printed case, the Appellants have advanced no sustainable basis upon which the Court may properly conclude that the legislative process in Parliament will be unable to fulfil the EIAD's objective of effective public participation on the proposed hybrid Bill for the Phase 1 project.

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The Judgment of Court of Appeal

10. In [82], the Court of Appeal agreed with Ouseley J's conclusion at [271] of his Judgment –

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> *"It is inconceivable that the UK Parliament would be unable to meet the objectives of the Directive. It has given no indication at all that it has set its face against compliance. It is the task of its skilled advisers and not of the Court, at this stage, to rule on what it should do to comply."*

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11. In [82], the Court said that article 1(4) of the EIAD, as it has been interpreted by the CJEU, envisages that its objectives are, in principle, capable of being met by a legislative process.

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12. In [79] the Court said –

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> *"It is common ground that the conventional hybrid bill procedure, as described on page 656 of Erskine May, 24th Edn. (2011) would not be EIAD compliant because there is no stage in which the public can participate in the environmental decision making process. However, Parliament is the master of its own procedure, and the evidence filed by the SST makes it clear that Parliament will be invited to adopt a modified procedure for considering the ES which will accompany the bill, which will be based on the procedure that was followed in the Crossrail Bill. Under that procedure the public had an opportunity to comment on the ES, and the representations received from the public were presented to Parliament in a Command Paper prior to Second Reading. Thus, Members of Parliament were able to consider, not only the ES, but also the public's written comments on the ES, when the principle of the Crossrail Bill was debated at Second Reading."*

Appendix 1/3/31

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Appendix 1/3/31-2

In [82], the Court rejected the contention that a "*procedure based on that which Parliament chose to adopt when it considered the Crossrail Bill would be incapable of giving the public an opportunity to participate effectively in the environmental decision-making process*" on the proposed Bill for the Phase 1 project.

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13. The relevant procedures for public participation adopted for the Crossrail Bill are explained in [236]-[247] of the Third Witness Statement of Philip Graham on behalf of the Respondent, In [249] Mr Graham says that, for the purposes of the proposed Bill for the Phase 1 project –

Appendix 2/1/10/9/814-817

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> "*Arrangements will be made for public participation in and consultation on the ES drawing upon the Crossrail procedures discussed above.*"

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Parliamentary Standing Orders

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14. Since the hearing of the appeal by the Court of Appeal on 10-13 June 2013, Parliament has made certain changes to Standing Orders which will apply to proceedings on the proposed hybrid Bill for the Phase 1 project. See [63]-[65] of the SFI. Following those changes, the material requirements of Standing Orders are as follows.

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Authorities Tab 5

15. Standing Order 27A **['SO27A']** requires that on deposit the Bill be accompanied by an environmental statement **['ES']** which is then to be made available for inspection. The ES is required to contain the information that would be required of an ES prepared in accordance with the requirements of regulation 2(1) of and Schedule 4 to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 **["the 2011 EIA Regulations"]**.

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Authorities Tab 7

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Authorities Tab 5

16. Standing Order 224A **['SO224A']** makes formal provision within procedure in the House of Commons for public participation on the ES submitted in accordance with SO27A –

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(1) Upon deposit of the Bill, a notice shall be published stating that any person who wishes to make comments on the ES should send those comments to the Minister responsible for the Bill on or before the date specified in the notice, which shall be no earlier than 56 days from first publication of the notice.

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(2) The Minister shall publish and deposit any comments received by him in response to the notice in the Private Bill Office. He shall do so in the form specified by the Examiner.

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(3) The Minister shall submit those comments to an independent assessor, appointed for that purpose by the Examiner within the prescribed period for commenting on the ES, and shall certify the date on which all such comments have been received by the appointed independent assessor.

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(4) The independent assessor shall prepare a report summarising the issues raised by the comments made on the ES. The independent assessor shall prepare that report within such period as is specified by the Examiner (following consultation with the Minister). The specified period must be no less than 28 days after the certified date on which the comments on the ES were received by the independent assessor.

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(5) The Examiner shall submit the report of the independent assessor to the House.

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(6) The Bill shall not receive a Second Reading until at least 14 days have elapsed from the date of submission of the independent assessor's report to the House.

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(7) Similar arrangements apply in respect of any supplementary ES submitted during proceedings on the Bill up to the stage of Third Reading.

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(8) At Third Reading, the Minister shall set out (a) the main reasons and considerations upon which Parliament is invited to give consent to the project to be authorised by the Bill; and (b) the main measures to avoid, reduce and, if possible, offset the major adverse effects of the project. A written statement setting out this information must be laid before the House not less than 7 days before Third Reading.

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The House of Lords has made corresponding arrangements under Standing Order 83A: [65] of the SFI.

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Hybrid Bill – Second Reading

17. Parliamentary proceedings on a hybrid Bill are explained in Erskine May's *Parliamentary Practice* (24th Edition) at pages 652-659. As with a public Bill, the principle of a hybrid Bill is debated at Second Reading. Proceedings on a public Bill at Second Reading are explained in Erskine May at pages 547-550. In particular –

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Authorities Tab 10

"*The second reading is the first important stage through which a bill is required to pass; its whole principle is then at issue, and is affirmed or denied by the House*...(page 548)

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When the order for second reading is read, the Member in charge of the bill....moves 'The bill be now read a second time'. Debate at this stage is not strictly limited to the bill's contents; the circumstances surrounding its presentation to the House and other methods of attaining the bill's object may be considered, and the inclusion of cognate objects may be recommended (page 548)

Opponents of a bill may, and commonly do, vote against the question for second reading, but an alternative way of opposing second reading is by moving a reasoned amendment to the question...Defeat on second reading is fatal to a bill since no future day is appointed for that stage, and the introduction of a fresh bill in substantially the same terms has been ruled out of order. (page 548)

A Member who wishes to place on record any special reasons for not agreeing to the second reading of a bill may move what is known as a 'reasoned amendment' to the question for second reading (page 548)

A reasoned amendment may also be moved to the question for the third reading of a bill..(page 549)

A reasoned amendment is intended to offer reasons for rejecting the bill. It may be declaratory of some principle adverse to, or differing from, the principles, policy or provisions of the bill, or otherwise opposed to its progress .(page 549)

A reasoned amendment, if carried on the second or third reading of a bill, is fatal to further progress of the bill, and no order is made for second or third reading on a future day...(page 550)."

The EIAD

18. The material provisions are as follows.

Authorities CB Tab 2

19. The EIAD applies to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment. See article 1(1)

20. Assessment of the environmental impacts of projects listed in Annex I of the EIAD is obligatory See article 4(1) of the EIAD. Amongst the classes of projects listed in Annex 1 of the EIAD is 'Construction of lines for long-distance railway traffic'. See paragraph 7(a) of Annex 1. The procedure for assessment is laid down under articles 5 to 10 of the EIAD. In particular –

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(1) Article 5 provides for the developer of the project to supply a range of environmental information about the project.

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(2) Article 6 requires arrangements to be made for authorities concerned by the project and the public to be consulted on that environmental information and to express their comments and opinions to the decision making body or bodies before the decision is taken on the request for development consent.

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(3) Article 8 requires that the results of consultations and the information gathered pursuant to articles 5 and 6 shall be taken into consideration in the development consent procedure.

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21. Article 11 of the EIAD requires Member states to ensure that, in accordance with the relevant national legal system, members of the public concerned having a sufficient interest have access to a review procedure before a court of law (or another independent and impartial body established by law) to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the EIAD. Any such procedure must be fair, equitable, timely and not prohibitively expensive.

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22. Article 1(4) of the EIAD provides –

> "*This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.*"

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23. The EIAD's objective that there should be early and effective opportunities for the "public concerned" (as to which see article 1(2)(e)) to participate in the development consent decision making process is clear from article 6, in particular –

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> "*6.4 The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.*
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> ......
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> *6.6 Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.*"

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Public Participation under the Environmental Impact Assessment Regulations

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Authorities Tab 7

24. The 2011 EIA Regulations transpose the requirements of the EIAD into English law in relation to applications to planning permission made under the Town and Country Planning Act 1990.

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25. By virtue of the definitions of 'EIA application', 'EIA development' and 'Schedule 1 development' in regulation 2(1) of the 2011 EIA Regulations, and of the contents of Schedule 1 thereto, an application for development consent for an Annex 1 project (in the form of an application for planning permission) is an 'EIA application' for the purposes of the 2011 EIA Regulations.

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Authorities Tabs 6 & 7

26. Procedural arrangements for public participation in the decision making process on an EIA application are made by (i) article 13 of and Schedule 3 to the Town and Country Planning (Development Management Procedure)(England) Order 2010/2184 **['the 2010 Order']** and (ii) by regulation 16 of the 2011 EIA Regulations.

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27. Article 13 of the 2010 Order provides for publicity of a planning application by a variety of means: by site display, publication of notice in a newspaper, publication on the authority's website and by serving notice on adjoining owners and occupiers.

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28. By regulation 16(1), an applicant who makes an EIA application shall submit to the relevant planning authority an ES. Regulation 2(1) defines 'ES' in terms that accord with article 4 of the EIAD.

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29. Regulation 16(4) requires the relevant planning authority, upon receipt of the ES, to publicise the ES in accordance with article 13 of and Schedule 3 to the 2010 Order. Regulation 16(5) of the 2011 Regulations prohibits the relevant planning authority from determining an EIA application prior to the expiry of 14 days from the last date on which a copy of the ES was served in accordance with that regulation. Regulation 20 of the 2011 EIA Regulations requires an applicant who submits an ES in connection with an application for planning permission to ensure that a reasonable number of copies of the ES are available to the public at the publicised address for its inspection.

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30. Regulation 3(4) of the 2011 Regulations prohibits the relevant planning authority from granting planning permission for EIA development unless it has first taken the 'environmental information' into consideration, and the authority is required to state in its decision that it has done so. By virtue of regulation 2(1), the 'environmental information' embraces "*the [ES], including any further information and any other information, any representations by any body required by [the 2011 Regulations] to be invited to make representations, and*

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any other representations duly made by any other person about the environmental effects of the development".

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CJEU Authorities

31. The CJEU has considered the interpretation and effect of article 1(4) of the EIAD in a number of decisions –

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(1) *World Wildlife Fund v Autonome Provinz Bozen [1999] ECR I-5613*

(2) *Luxembourg v Berthe Linster [2000] ECR I-6917*

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(3) *Boxus v Region Wallone [2012] Env LR 14.*

(4) *Solvay v Region Wallonne [2012] Env LR 27*

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32. In *World Wildlife Fund*, the CJEU said [57] –

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"*57. [Article 1(4)] accordingly exempts projects envisaged by the Directive from the assessment procedure subject to two conditions. The first requires the details of the project to be adopted by a specific legislative act; under the second, the objectives of the Directive, including that of supplying information, must be achieved through the legislative process.*"

Authorities Tab 48

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33. In *Linster*, the CJEU said of the second stated condition –

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"*52. According to the sixth recital in the preamble to the Directive, the 'assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question'.*

Authorities CB Tab 8

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54. Thus, it is only where the legislature has available to it information equivalent to that which would be submitted to the competent authority in an ordinary procedure for authorising a project that the objectives of the Directive may be regarded as having been achieved through the legislative process."

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34. In *Boxus*, in paragraphs 53 to 89 of her Opinion, Advocate General Sharpston analysed the effect of article 1(4) of the EIAD in the light both of the guidance given by the CJEU in *World Wildlife Fund* and *Linster*, but also of the amendments made to the EIAD (in particular to article 6 thereof) in order to take account of the Aarhus Convention. We draw attention to the following –

Authorities CB Tab 4

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"*The rationale behind [Article 1(4)]*

55. The [EIAD], as amended in order to take account of the Aarhus Convention, seeks to improve the decision-making processes of administrative bodies. The element of public participation it introduces to the process is important to achieving this aim. In other words, the [EIAD] promotes direct public participation in administrative decision-making processes concerning the environment within a Member state.

56. Where a decision is reached by a legislative process, however, such public participation already exists. The legislature itself is composed of democratically-elected representatives of the public. When the decision-making process takes place within such a body, it benefits from indirect, but nevertheless representative, public participation

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The judgments in WWF and Others and Linster

63. The Court has already had two opportunities to consider the meaning of [Article 1(4)].

...

Applying the existing case-law to the present case

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77. The present references offer the Grand Chamber the opportunity to re-examine and clarify the dicta in WWF and Linster.

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79. ...The [EIAD] is not about formalism. It is concerned with providing effective EIAs for all major projects; and, in its amended form, with ensuring adequate public participation in the decision-making process. Where the legislative process functions normally and correctly, it provides – through the operation of representative democracy – the same safeguards as those that would have been required under the EIA Directive.

80. It is evident that the process of scrutiny by the legislature may well be unlike the process set out in Articles 5 to 10 of the [EIAD]. National courts are not required to ensure that the legislature follows exactly the same process as would be required of an administrative body evaluating the same project. Rather, they must consider whether the legislative process has functioned correctly and adequately.

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> 81. *If, as I suggest, it is necessary to move towards a functionality-based test in order to avoid formalism whilst giving consistent real meaning to the exclusion clause in [Article 1(4)], the question is then: how to decide whether the legislative process has functioned adequately?*

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> 84. *In my view, in order to assess whether that has happened in any particular case, the national court will need to examine the following aspects.*
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> *(a) input: was the information placed before the legislature sufficiently detailed and informative to enable the legislature to evaluate the likely environmental impact of the proposed project?*
>
> *(b) process: was the appropriate procedure respected and was the preparation time and discussion time sufficient for it to be plausible to conclude that the people's elected representatives were able properly to examine and debate the proposed project?*
>
> *(c) output: does the resulting legislative measure (read, if appropriate, in conjunction with supporting material to which it expressly refers) make clear what is being authorised and any limitations or constraints that are being imposed?"*

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35. The CJEU (Grand Chamber) in paragraphs 35 to 43 endorsed the interpretation of [Article 1(4)] given in *World Wildlife Fund* and *Linster* (above). In paragraph 47 the Court said-

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> *"47. It is for the national court to determine whether [the two conditions] have been satisfied. For that purpose, it must take account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates."*

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36. In *Solvay* at paragraphs 41 the CJEU repeated that reasoning.

Authorities
CB Tab 9

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CJEU Authorities – Relevant Propositions

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37. The following propositions are, we submit, established by these authorities –

(1) In the case of a legislative process, public participation in the environmental decision making process exists principally through representative democracy. Members of Parliament participate as representatives of the public.

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(2) Unless the legislative process fails to function normally and correctly, it provides the same safeguards as to public participation as would have been required under the EIAD in respect of a non-legislative procedure.

(3) The fact that the legislative process differs from the procedures that are applied under the EIAD itself is immaterial to the question whether the legislative process has functioned normally and correctly.

(4) The question whether the legislative process has so functioned in any given case is to be assessed by the national court.

(5) In order to resolve that question, the national court must take account of the legislative act adopted and the legislative process as a whole, including preparatory documents and parliamentary debates.

Authorities CB Tab 4

(6) It is self-evident that, insofar as the adequacy of the *process* is concerned (Advocate General Sharpston at [84(b)] in *Boxus*), the ability of the court to intervene *before the legislative process has even begun* is very limited indeed. It is necessarily confined to an extreme case where the known procedural arrangements are so grossly defective that they cannot conceivably be expected to operate in a correct and normal manner. Otherwise, the only proper course for the national court to adopt *at this stage in the legislative process* is to decline to intervene.

Submissions

38. The Appellants advance two grounds for their contention that the Parliamentary process on a hybrid Bill, whereby the principle of the Phase 1 Bill would be established at Second Reading and fall outside the scope of the terms of reference of the report of the Select Committee, is thereby unable to fulfil the EIAD's objective of effective public participation; see [47]-[48] of the printed case.

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39. The Appellants' first ground amounts in substance to the assertion that Parliament (in particular the House of Commons) is incapable of proper and effective scrutiny of a government bill because of (i) the government whip and (ii) collective ministerial responsibility. In short, for government bills, at least at the Second Reading debate, the legislature operates to rubber stamp the Government's legislative proposals: see [49]-[51] of the printed case.

40. That this is the substance of the Appellants' submission follows from their acceptance at [46] that, in principle, indirect public participation will suffice to meet the EIAD's objective of effective public participation. If that is correct (as is clearly established by the CJEU authorities), the Appellants' case

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necessarily rests on the proposition that where the legislature contains members who also form part of the executive or who are members of a political party, that principle ceases to apply. The contention is that such a legislature is incapable of granting development consent in a manner which is compatible with the public participation objectives of the EIAD. To employ the language of [46] of the printed case, that debate at Second Reading will amount to no more that 'window dressing'.

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41. That is an impossible proposition to sustain whether as a matter of constitutional law or under the principles established by the CJEU authorities. The only proper approach for the Court to adopt is to find that it is at least *plausible* that Members of Parliament will give effective scrutiny to the Bill and, for that purpose, take into account the public's comments and representations. Whether that is in fact the case will fall to be considered by the court, if called upon to do so, in the light of the Parliamentary debates: *Boxus* at [47].

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Authorities CB Tab 4

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42. We respectfully submit that the Appellants' attempt to support this ground by comparing the legislative function with the local government planning decision making is of no assistance. As the Appellants accept [56], local politicians are at liberty to hold political views relevant to a development consent decision. The law requires that they do not approach such a decision with 'closed minds'. The proposition [58] that MPs (whether they be ministers, subject to the whip of the governing party or otherwise) must be assumed to approach the Second Reading debate on a government bill with 'closed minds' is legally unsustainable both under national law and on the CJEU authorities. Nor is there any evidence before the Court to suggest that such a state of affairs is to be anticipated in respect of the proposed Bill for Phase 1 of HS2.

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43. The Appellants' second ground [60] founds on the proposition that it is implausible to anticipate that Members of Parliament will be in a position properly to examine and debate the Phase 1 project at Second Reading.

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44. The Court of Appeal [79]-[82] rejected this contention, having regard to the informal arrangements made for the purpose of obtaining and reporting the public's comments and representations in response to the ES to the House in the context of the Crossrail Bill.

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45. As a result of recent changes to Standing Orders, to which we have referred, there will now be a formal, staged process whereby the public's comments and representations will be obtained and reported prior to the Second Reading debate on the proposed Bill for Phase 1. Time will be allowed for each stage of that process. The role of the independent assessor will allow the assessor to focus the attention of Members of Parliament on the significant issues emerging from the public's representations. It is reasonable

Authorities Tab 5

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to expect that these changes may assist and even enhance Parliamentary scrutiny of the Bill at Second Reading.

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46. We submit that, in the light of both the evidence of Mr Graham and of these changes to Parliamentary procedures, there is no basis at all for this ground of the Appellants' case. We have drawn attention to the requirements of SO27A as to the production of an ES, to the requirements of SO224A and to the Parliamentary procedures on a hybrid Bill. It is plain, in our submission, that there is no sustainable basis for the Court to conclude that the Parliamentary procedures will be incapable of delivering effective consideration by Members of Parliament of the issues raised by the public in their comments and representations in response to the ES.

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47. The points made in [69] of the printed case are based on a misunderstanding of the CJEU authorities.

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Authorities CB Tab 8

Authorities Tabs 6 & 7

48. The CJEU has not said that the procedures for public participation in the legislative process must be equivalent to those that would apply in the ordinary development control or consent context. On the contrary, the authorities say that one should not seek such equivalence. In *Linster* the CJEU made an altogether different point at [59], i.e. that the *information* available to the legislative body at the time when the details of the project are adopted should be equivalent to that which would have been submitted to the competent authority, in an ordinary procedure for granting consent. We have drawn attention to the corresponding requirements applicable to an EIA application which falls to be determined by a planning authority under the 2011 EIA Regulations and the 2010 Order. It is clear that the *Linster* requirement is capable of being met in the case of the proposed hybrid Bill for Phase 1.

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49. As to [69] of the printed case –

(a) The role of the Select Committee is relevant as part of the overall process of Parliamentary scrutiny of the Bill. Its report is able to inform the weighing of the environmental balance at Third Reading.

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(b) Members of Parliament at Second Reading will have the benefit of the report of the independent assessor appointed by the Examiner. The purpose of that report is to summarise the issues arising from public comments and representations on the ES. It is reasonable to expect that report will be of value to the House in debating the principle of the Bill, taking account of the broad range of environmental issues and factors that may be raised through the process under SO27A and SO224A. By way of illustration, it is to

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be expected that the Councils will respond to the ES by advancing the case for their Optimised Alternative in preference to the Phase 1 project and HS2, on the ground (amongst others) of the alleged environmental superiority of the Optimised Alternative. It is reasonable to expect that the independent assessor will summarise those issues in the report.

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(c) It is no doubt unrealistic to expect that all MPs will in fact have read the ES in full, prior to the Second Reading debate. As the Appellants accept [62] and [65], assuming the contrary does not invalidate the decision making process. By contrast, there is no good reason to *assume* that MPs will not have read the report of the independent assessor or the non-technical summary of the ES. It is at least plausible to expect that MPs *will* have read those documents.

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(d) The Appellants do not explain why the Court should find it to be implausible to suggest that the substance of representations on issues of capacity, need and alternatives to HS2 can be examined in a Parliamentary debate. The very subject matter of the debate at Second Reading is the principle of the Bill. It is at least plausible that such material will be examined in the context of that debate.

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(e) It is plainly improper and indeed impossible for the Court to attempt to draw any conclusions at this stage in the process in relation to the level of active involvement of MPs in the debate at Second Reading. The quality of the actual process at that debate is one of those unknowns that, in accordance with *Boxus* at [47], the Court is simply not equipped to consider in advance. The Appellants here resort in substance to their unsustainable assertion that the House is incapable of effective performance of its legislative function in respect of a government bill: [39]-[41] above.

Authorities CB Tab 4

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50. The Appellants' discussion of (i) the limited arrangements made by local planning authorities for some direct public participation at development control committee meetings [66]-[67] and (ii) public inquiries [68] is of no assistance. It is common ground that, under a legislative procedure, indirect public participation through representative democracy is capable of fulfilling the objectives of the EIAD.

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51. For all these reasons, we submit that the Court should reject the Appellants' contention [70] that, unless the Parliamentary process for a hybrid Bill is changed so as to allow the Select Committee to consider petitions and hear evidence on the principle of the Bill, the public concerned with the Phase 1

project will be denied the opportunity to participate effectively in the environmental decision making procedures for the Phase 1 project.

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52. We turn briefly to the Appellants' case on prematurity ([71]-[79] of the printed case).

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53. We have responded to the Appellants' substantive point. As we have submitted in [37(6)] above, on the basis of the CJEU authorities, the ability of the court to intervene before the legislative process has even begun is very limited indeed. It is necessarily confined to an extreme case where the known procedural arrangements are so grossly defective that they cannot conceivably be expected to operate in a correct and normal manner. Otherwise, the only proper course for the national court to adopt at this stage in the legislative process is to decline to intervene.

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54. If, contrary to our submissions, the Court were to reach the conclusion that the Parliamentary process for a hybrid Bill is so grossly deficient that it is incapable through its operation of fulfilling the EIAD objective of effective public participation, then it would be desirable for the Court to explain why, so that the defect may be addressed now. We have, however, set out our reasons for submitting that this is plainly not such an extreme case. For the reasons we have given, we submit that the Court of Appeal was plainly right to conclude as it did on the issue raised by this appeal. If this Court reaches that conclusion, on the CJEU authorities, the prematurity issue simply falls away.

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55. We submit that this is manifestly not a case in which a reference to the CJEU is required. The CJEU has explained the meaning and application of article 1(4) of the EIAD in a series of decisions. It is the task of the national court to apply that guidance to the facts of the present appeal.

H

Conclusion

I

56. We invite the Court to dismiss this appeal for the following amongst other

REASONS

J

(1) Because a reference to the CJEU is unnecessary for the determination of the issues raised in this appeal.

K

(2) Because Parliamentary proceedings for the enactment of a hybrid Bill are able to fulfil the public participation objectives of the EIAD.

L

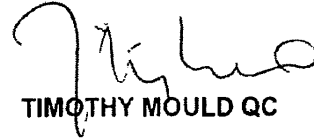
A

(3) Because there is no justification for the contention that the legislative process for a hybrid Bill for Phase 1 of HS2 will be unable to fulfil article 1(4) of the EIAD.

B

(4) Because there is no proper basis for the intervention of the national court in advance of the commencement of that legislative process.

C



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27 September 2013

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