IN THE HIGH COURT OF JUSTICE **CO/3467/2012**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N: -

THE QUEEN
(on the application of HS2 ACTION ALLIANCE LIMITED)

Claimant

- and -

THE SECRETARY OF STATE FOR TRANSPORT

Defendant

- and -

HIGH SPEED TWO LIMITED

Interested Party

Claimant's Skeleton Argument

Hearing: 3-7 & 10-11 December 2012 **Time estimate:** up to 7 days for the conjoined claims

Table of abbreviations

1. The following abbreviations are used in this Skeleton Argument.

C, HS2AA	-	The Claimant, HS2 Action Alliance Limited
D	-	The Defendant, the Secretary of State for Transport
CAs	-	The Claimant Authorities in CO/3477/2012
HHL	-	The Claimant in CO/3635/2012, Heathrow Hub Limited
ASFG	-	C's Amended Statement of Facts and Grounds
CD	-	D's Composite Defence
CJB	-	Joint Background Documentation Bundle for the conjoined claims
CAB	-	Joint Authorities Bundle for the conjoined claims
CDB	-	C's Claim Documentation for this claim
DB	-	D's Bundle for the conjoined claims
DNS	-	The Decisions Document under challenge: *High Speed Rail: Investing In Britain's Future – Decisions and Next Steps* (Cm 8247), 10 January 2012
EIA Directive	-	Directive 2011/92/EU *on the assessment of the effects of certain public and private projects on the environment (codification)*
Habitats Directive	-	Directive 92/43/EEC *on the conservation of natural habitats and of wild fauna and flora*
Habitats Regulations	-	Conservation of Habitats and Species Regulations 2010
AA	-	Appropriate assessment under art. 6(3) of the Habitats Directive and reg. 61 of the Habitats Regulations
SEA, EIA	-	strategic environmental assessment, environmental impact assessment
SEA Directive	-	Directive 2001/42/EC *on the assessment of the effects of certain plans and programmes on the environment*
SEA Regulations	-	Environmental Assessment of Plans and Programmes Regulations 2004

Commission's SEA Guidance	-	The Commission's SEA Guidance *Implementation of Directive 2001/42 on the Assessment of the effects of certain plans and programmes on the environment* [CAB/1/10]
MN2000	-	The Commission's Habitats Guidance "Managing Natura 2000 Sites" [CAB/1/11]

Introduction

2. This skeleton argument consolidates the arguments set out in C's ASFG and Reply. It also addresses the Supreme Court's recent decision in ***Walton v. Scottish Ministers*** [2012] UKSC 44 on issues relating to the SEA Directive.

3. C submits that the DNS and the decisions set out in it are unlawful for any or all of the following reasons:

   (1) The DNS was a *"plan or programme"* within the meaning of the SEA Directive but was not subjected to SEA in accordance with the Directive. D seeks to argue that a major national infrastructure project with considerable implications for the environment should not be assessed at a strategic level, though the production of the DNS was plainly foreseen and planned and the process embarked on, including the public process, well in advance of its production. EIA is no substitute for the SEA of the planning of the project and does not provide for the systematic assessment of reasonable alternatives which is a critical element in the national debate for a rail project of this scale.

   (2) The policy decisions contained in the DNS include a decision to promote HS2 by means of a Hybrid Bill in Parliament. The Hybrid Bill process does not comply with the requirements for EIA of projects of this nature pursuant to the EIA Directive. It is therefore an inherently unlawful process.

   (3) The DNS was adopted in breach of D's obligations under the Habitats Directive and Habitats Regulations, including in particular by failing to undertake an "appropriate assessment" (AA) of its potential impacts on Natura 2000 protected habitats sites under reg. of the Habitats regulations/art. 6(3) of the Habitats Directive.

   (4) The consultation process carried out by D prior to adopting the DNS was contrary to established common law principles and was unfair. Prejudice was caused as a result.

   (5) D unlawfully failed to take account of certain consultation responses.

4. By agreement with the other parties, C is taking the lead on Grounds 1 and 3, CAs are taking the lead on Grounds 2 and 4, and HHL is taking the lead on Ground 5. C has agreed to make its submissions following those of the CAs.

Factual background and chronology

5. The factual background is set out in full at [5]-[28] of C's ASFG.

Ground 1: SEA

(i) Overview and purpose of the SEA Directive

6. The SEA Directive **[CAB/3/4]** is transposed into domestic law by the SEA Regulations **[CAB1/5]** , which insofar as is possible have to be interpreted in a manner that is consistent with the Directive: see e.g. ***Marleasing SA v. La Comercial Internacional de Alimentacion SA*** Case 10/89 [1992] 2 C.M.L.R. 305 **[CAB/1/16]** and ***Webb v. EMO Air Cargo Ltd.*** [1993] 1 W.L.R. 49 per Lord Keith at p.59F-G **[CAB/2/33]**.

7. The objective of the SEA Directive is described in Article 1 as follows:

> "The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment"

8. SEA is an important step forward in EU environmental law. As the Director General of the Commission's Environmental Directorate of the Commission stated in the foreword to the Commission's SEA Guidance the SEA process is designed to ensure sustainability enters consideration before site specific applications are made **[CAB/1/10]**:

> "At the moment, major projects likely to have an impact on the environment must be assessed under Directive 85/337/EEC. However, this assessment takes place at a stage when options for significant change are often limited. Decisions on the site of a project, or on the choice of alternatives, may already have been taken in the context of plans for a whole sector or geographical area. The SEA Directive - 2001/42/EC – plugs this gap by requiring the environmental effects of a broad range of plans and programmes to be assessed, so that they can be taken into account while plans are actually being developed, and in due course adopted. The public must also be consulted on the draft plans and on the environmental assessment and their views must be taken into account."

9. The preamble to the SEA Directive provides at [4]:

> "Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption."

10. At [10] the preamble provides a further insight into the purpose of the SEA Directive (emphasis added):

> "All plans and programmes which are prepared for a number of sectors and which set a framework for future development of projects listed in Annexes I and II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public

> and private projects on the environment, and all plans which have been determined to require assessment pursuant to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna, are likely to have significant effects on the environment, and should as a rule be made subject to systematic environmental assessment..."

11. A purposive approach is to be taken to the interpretation of the SEA Directive: see ***Walton v. Scottish Ministers*** [2012] UKSC 44 per Lord Reed at [20]-[21] and Sales J. in ***R (Cala Homes (South) Ltd.) v. Secretary of State (No 1)*** [2010] EWHC 2866 (Admin) at [57] [**CAB/3/45**]. See also ***Inter-Environnement Bruxelles ASBL v. Région de Bruxelles-Capitale*** Case C-567/10 [2012] Env. L.R. 30, where the CJEU held at [37] that:

> "... the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly."

12. The considerable extent to which the CJEU will strive to give the SEA Directive an interpretation which gives the fullest effect to its objectives can be seen from the CJEU's decision in that a plan or programme could be *"required"* by legislative, regulatory or administrative provisions (and thus subject to the requirement for SEA) even if its adoption was not compulsory and therefore not *"required"* in any ordinary sense of the word (see further below). The CJEU's reason for doing so was that it would undermine the effect of the SEA Directive to exclude from its scope *"all plans and programmes... whose adoption is, in the various national legal systems, regulated by rules of law, solely because their adoption is not compulsory in all circumstances"* [28].

(ii) The requirement under the SEA Directive for SEA of the DNS

13. Article 3(2) of the SEA Directive (transposed by Reg. 5(2)-(3) of the SEA Regulations) provides, insofar as is relevant (emphasis added):

> "2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,
>
> (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or
>
> (b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC."

14. Directive 85/337/EEC (the old EIA Directive), to which the passage quoted above refers, has now been consolidated into Directive 2011/92/EU (the current EIA Directive). The list of projects in Annex I includes, at [7(a)], *"construction of lines for long distance railway traffic"* [**CAB/1/6**]. The list of projects in Annex II includes, at [10(h)] *"elevated and underground railways used exclusively or mainly for passenger transport"*. It appears to be common ground that HS2 is a project which requires EIA.

15. The concept of *"plans and programmes"* is defined in Article 2(a) of the SEA Directive (transposed by Reg. 2(1) of the SEA Regulations) as follows:

> ""plans and programmes" shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:
>
> - which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and
> - which are required by legislative, regulatory or administrative provisions..."

16. It follows that SEA is required for all "plans and programmes" prepared by Government for long distance railway transport which are "required by legislative, regulatory or administrative provisions" and which set the "framework for future development consent" for the construction of lines for long distance railway traffic. The application of these criteria to the facts of the present case is considered below.

"Plan or programme"

17. The Commission SEA Guidance [**CAB/3/10**], considered to be persuasive by Collins J in ***Save Historic Newmarket v. Forest Heath DC*** [2011] J.P.L. 1233 [**CAB/3/51**], provides at [3.3]-[3.4] that, in identifying whether a proposal constitutes a plan or programme for the purposes of the SEA Directive, a broad approach should be used in light of the wide scope of the SEA Directive and suggests that *"that the terms should be taken to cover any formal statement which goes beyond aspirations and sets out an intended course of future action"*. At [3.5], the Guidance advises that a *"plan"* could include a document *"which sets out how the authority proposes to carry out or implement a scheme or policy"*, which could include *"laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas"*. At [3.6] it advises that 'programmes' are usually thought of as *"a plan covering a set of projects in a given area, such as a scheme for regeneration of an urban area, comprising a number of separate construction projects"*. One example given is a transportation programme in which proposed transport infrastructure is defined and future policy on transport infrastructure is set out.

18. D appears to accept that that a document *"which sets out how it is proposed to carry out or implement a scheme or policy"* is a *"plan"* within the meaning of the SEA Directive, but submits that the DNS falls within the category of *"the more general policy level of decision-making at the top of the decision-making hierarchy"*, which the *travaux préparatoires* indicate was not intended to be covered by the SEA Directive: see e.g. CD [65]-[82].

19. The proper characterisation of a policy (and a policy document) is a question of law for the Court to decide for itself: see ***R (Wakil) v. Hammersmith & Fulham LBC*** [2012] EWHC 1411 (QB) at [76]-[81], where Wilkie J, applying the observations of Lord Reed in ***Tesco Stores Ltd. v. Dundee City Council*** [2012] J.P.L. 1078 (SC), rejected a submission that the Court's

jurisdiction was confined to considering whether the defendant's characterisation of a policy as a supplementary planning document was irrational.

20. C submits that the proper characterisation of the DNS is in the second category referred to above, namely a document *"which sets out how it is proposed to carry out or implement a scheme or policy"* (which D appears to accept would constitute a *"plan"* within the SEA Directive). Read fairly and as a whole, it is a formal statement of Government policy which goes beyond aspirations and sets out an intended course of future action for the promotion, construction and operation of HS2 which includes its future development consent process by Hybrid Bill and specific details of the project including its route. Part 1 of the DNS sets out over 27 pages the Government's confirmed strategy for HS2 which details a series of specific parameters for HS2 including its phasing, its route (which has been *"carefully designed"*: see [76] at **CJB/4/18 1416**), mitigation measures and next steps. This is reiterated by the *"Purpose and background"* section at **CJB/4/18/1392** and the list of decisions at **CJB/4/18/1421-1422**. See also:

    (1) D's own characterisation of the DNS in its pre-action letter dated 20 February 2012: see C's ASFG [28];

    (2) Mr Graham's 3rd WS at [250] & [252], which describes the consultation which led to the DNS as relating to both *"the overall strategy for a Y-shaped high speed rail network"* and *"the detailed route of any specific line"* forming part of Phase 1;

    (3) D's statement in Parliament on 10 January 2012 describing the DNS and her evaluation of the evidence prior to it.[1] See e.g. at Column 29 -

        > "I can give a categorical assurance that I have decided that we should go ahead with the full Y network. I have also announced today the final decision on the route of phase 1 of that network".

    (4) The Scoping Report for the Appraisal of Sustainability (**"AoS"**) which stated that *"in its current status HS2 lies between transport policy and development project"* [**DB/4/87A/210**]. It is in this gap between aspirational policy on the one hand (which is too general to engage the need for any form of environmental assessment) and a specific project on the other hand (which is at the level of detail that requires EIA) where the concept of a *"plan or programme"* under the SEA Directive sits: see eg. the Commission Guidance referred to above; and

    (5) The process leading to the DNS was described by D as involving a *"sifting of options [which] will involve a successive reduction in the number of options via a series of gates"*, whereby *"options reduce as detail increases"*, culminating in the *"finalisation*

[1] Hansard HC 10 January 2012 Columns 23-41.

of options" and selection of the preferred route in the DNS. See the AoS Scoping Report [**DB/4/87A**] at pp. 210 & 217 and Figure 11 of the Draft Scoping Report [**DB/4/85A/84**]. An important objective of the SEA Directive is alternative options to be assessed and subjected to the scrutiny and consultation provided for by Articles 5-7 and Annex I of the Directive and for the public to have an "early and effective opportunity" to express their opinion whilst the options remain open: see Art. 5(2). This objective would be undermined if a sifting process leading to a final decision to adopt one option at the expense of others, as has happened the present case, can be undertaken without being subjected to SEA. See also the Opinion issued by the Committee of the Regions on 20 November 1997, quoted at CD [73], which expressed the view that policies that *"begin to pre-empt subsequent decisions on individual projects"* should be viewed as *"plans or programmes"*. The DNS plainly falls in to this category.

21. At CD [72], D appears to submit that, in the UK, only those plans which form part of Development Plan for the purposes of s. 38(6) of the Planning and Compulsory Purchase Act 2004 are *"plans"* for the purposes of the SEA Directive. That submission, if it is indeed made, is untenable and wrong in law. The concept of a *"plan"* within the meaning of the Directive is an autonomous concept of EU law and should not to be defined according to domestic law concepts. That submission would also be contrary to ***Walkil*** where Wilkie J held that the policy challenged in that case, even if it were properly characterised as a supplementary planning document (and thus not part of the statutory Development Plan), engaged the requirements of the SEA Directive: see in particular paras. 91-100.

22. At CD [82], D appears to submit that the DNS is not a *"plan"* because it is not concerned with a *"multiplicity of projects"*. There is nothing, however, in either the SEA Directive or in the CJEU's case-law which indicates that a policy may only be viewed as a *"plan"* if it is concerned with a *"multiplicity of projects"*. The passage in ***Inter-Environnement Bruxelles*** relied upon by D for this submission merely observes that plans or programmes *"normally"* concern a multiplicity of projects, which is a simple statement of fact. In any event, on D's own case the DNS does concern a *"multiplicity of projects"* since D is promoting Phase 1 and Phase 2 of HS2 as two separate projects, each with their own Bill and environmental impact assessment.

23. Further, and in any event, the thrust of D's submissions on this issue relate to the concept of a *"plan"*. The SEA Directive also applies to *"programmes"*. There is no definition of this term either in the Directive or in the case-law of the CJEU. C submits that, bearing in mind the CJEU's broad and purposive approach to the interpretation of the Directive, it cannot be said to be *acte clair* that the DNS, if not a *"plan"*, is not a *"programme"*. Notably, D

himself used the term *"programme"* to describe the then-pending decision in a letter to the Chairman of HS2 Ltd dated 26 July 2011 [**DB/6/103B/1956A**].

"Required by legislative, regulatory or administrative provisions"

24. On of the questions referred in ***Inter-Environnement Bruxelles*** [**CAB/2/288**] was:

> "Must the word 'required' in Article 2(a) of that directive be understood as excluding from the definition of 'plans and programmes' plans which are provided for by legislative provisions but the adoption of which is not compulsory...?"

25. In answering this question in the negative, and in so doing rejecting the submissions of the UK government, the CJEU held (emphases added):

> "25. According to the applicants in the main proceedings, a mere literal interpretation of [Article 2(a)], which would exclude from the scope of Directive 2001/42 plans and programmes that are only provided for by legislative, regulatory or administrative provisions, would entail the dual risk of not requiring the assessment procedure for land development plans which normally have major effects on the territory concerned and of not ensuring uniform application of the directive in the Member States' various legal orders, given the differences existing in the formulation of the relevant national rules.
>
> 26. The Belgian, Czech and United Kingdom Governments submit, on the other hand, that it is apparent not only from the wording of Article 2(a) of Directive 2001/42 but also from the directive's *travaux préparatoires* that the European Union legislature did not intend to make administrative and legislative measures that are not required by rules of law subject to the environmental impact assessment procedure established by the directive.
>
> 27. The European Commission considers that, where an authority is subject to a legal obligation to prepare or adopt a plan or programme, the test of being 'required' within the meaning of Article 2(a) of Directive 2001/42 is met. That is prima facie so, in its view, in the case of the plans that must be adopted by the Brussels-Capital Region.
>
> 28 It must be stated that an interpretation which would result in excluding from the scope of Directive 2001/42 all plans and programmes, inter alia those concerning the development of land, whose adoption is, in the various national legal systems, regulated by rules of law, solely because their adoption is not compulsory in all circumstances, cannot be upheld.
>
> 29 The interpretation of Article 2(a) of Directive 2001/42 that is relied upon by the abovementioned governments would have the consequence of restricting considerably the scope of the scrutiny, established by the directive, of the environmental effects of plans and programmes concerning town and country planning of the Member States.
>
> 30 Consequently, such an interpretation of Article 2(a) of Directive 2001/42, by appreciably restricting the directive's scope, would compromise, in part, the practical effect of the directive, having regard to its objective, which consists in providing for a high level of protection of the environment (see, to this effect, Case C-295/10 *Valčiukienė and Others* [2011] ECR I-0000, paragraph 42). That interpretation would thus run counter to the directive's aim of establishing a procedure for scrutinising measures likely to have significant effects on the environment, which define the criteria and the detailed rules for the development of land and normally concern a multiplicity of projects whose implementation is subject to compliance with the rules and procedures provided for by those measures.
>
> 31 It follows that plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for

adopting them and the procedure for preparing them, must be regarded as 'required' within the meaning, and for the application, of Directive 2001/42 and, accordingly, be subject to an assessment of their environmental effects in the circumstances which it lays down.

32 It follows from the foregoing that the answer to the second question is that the concept of plans and programmes 'which are required by legislative, regulatory or administrative provisions', appearing in Article 2(a) of Directive 2001/42, must be interpreted as also concerning specific land development plans, such as the one covered by the national legislation at issue in the main proceedings."

26. The term *"required"* in Article 2(a) of the SEA Directive was thus given a very broad and flexible meaning, to include plans and programmes the adoption of which was not compulsory (and thus not *"required"* in any ordinary sense of the term) in order to give full practical effect to the purpose of the Directive in establishing a procedure for scrutinising measures likely to have significant effects on the environment.

27. D attempts to distinguish ***Inter-Environnement Bruxelles*** on the basis that:

(1) the CJEU's overall conclusion at [31] that plans or programmes are *"required"* within the meaning of Art. 2(a) of SEA Directive where their adoption, even if not compulsory, is *"regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them"*;

(2) in the present case there were no *"legislative or regulatory provisions"* determining the competent authorities for adopting the DNS and the procedure for preparing it.

28. That submission overlooks the fact that Article 2(a) refers to *"legislative, regulatory or administrative provisions"* (emphasis added). The focus in ***Inter-Environnement*** was on the first two of these limbs. Applying the logic of the CJEU's conclusion at [31], if there were *"administrative provisions"* which determined the competent authority for adopting the DNS and the procedure for preparing it, then the DNS must be viewed as *"required"* within the broad meaning given to that term by the CJEU.

29. This is the case here because:

(1) under English administrative law, D as Secretary of State for Transport was the competent authority for adopting national strategic decisions relating to transportation, including the DNS;

(2) following D's decision to subject the Consultation Report and accompanying documentation to a formal consultation process, the procedure for preparing the DNS was regulated by administrative provisions in the form of the Government's *Code of Practice on Consultation* [**CJB/4/22**] as well as established rules of administrative law relating to consultation; and

(3) further (although this is no longer necessary in the light of ***Inter-Environnement Bruxelles***), the Government had generated a legitimate expectation, and thus a formal requirement, in EU and/or domestic law that, following consultation, it would publish its confirmed final strategy for HS2.

30. The third of these points will be developed below. However, it is submitted that the first two points are in any event sufficient in themselves to amount to *"administrative provisions"* determining the competent authority for adopting the DNS and the procedure for preparing it. Alternatively, it cannot be said to be *acte clair* that a narrower interpretation of *"administrative provisions"* is correct and therefore if the case turns on this issue a reference to the CJEU may be appropriate.[2] In particular:

(1) The term *"administrative provisions"* is an autonomous concept of EU law. As such, it must be interpreted broadly in light of the general principles of EU law in having regard to the objectives of the SEA Directive;

(2) The CJEU has not yet considered what is meant by *"administrative provisions"*. In ***Walton*** Lord Carnwath stated at [99] that *"there may be some uncertainty"* as to what the term means;

(3) Given the terms of Article 2(a) *"administrative provisions"* must be something other than *"legislative provisions"* and *"regulatory provisions"*. Aside from provisions of administrative law and provisions of policy (such as the *Code of Practice on Consultation*), it is difficult to conceive what else *"administrative provisions"* could include;

(4) In ***Walton***, the lead judgment of Lord Reed concluded at [61]-[62] that it was arguable, applying a purposive interpretation of the SEA Directive that the strategy document *Delivering a Modern Transport System for North East Scotland* (the "MTS") published by the North East Scotland Transport Partnership ("NESTRANS") in 2003 was properly characterised as a plan or programme *"required by legislative, regulatory or administrative provisions"* notwithstanding that its publication was voluntary and not in pursuance of any statutory functions. Whilst Lord Carnwath expressed *"serious doubts on the point"* due to *"the relatively informal character of the NESTRANS exercise"*, he did not disagree with Lord Reed's observation that it was arguable (indeed at [98] he expressly agreed with the reasoning in Lord Reed's judgment, as did Lords Kerr and Dyson). By contrast, the consultation process leading to the DNS could not be described as *"relatively informal"*. Given the Supreme Court's view that the MTS was arguably a plan or programme *"required by*

[2] The possibility of a reference is addressed further below.

administrative provisions" notwithstanding the relatively informal process leading to its publication, it must be at least arguable that the DNS also was. The contrary position therefore cannot be said to be *acte clair*, applying the ***CILFIT*** test (see below). A reference to the CJEU was not sought on this issue in ***Walton*** (see Lord Reed's judgment at [71]) and nor was one necessary given that it did not need to be decided in order to dispose of the appeal. In the present case, however, C submits that if the claim were to turn on the interpretation of the term *"required by administrative provisions"* then the Court should consider making a reference (see further below).

31. Further, in any event, as set out at [29(3)] above, in the present case the Government had generated a legitimate expectation, and thus a formal requirement, in EU and/or domestic law that, following consultation, it would publish its confirmed final strategy for HS2. In particular:

    (1) The March 2010 Command Paper indicated a clear commitment to the principle of HS2 subject to public consultation following which a final decision would be published;

    (2) The new Coalition Government adopted this commitment in May 2010 in Coalition Agreement and *The Coalition – Our Programme for Government*;

    (3) The February 2011 Consultation Report was explicit that, following the expiry of the consultation period, a *"final decision"* would be published setting out the Government's strategy for HS2;

    (4) On 6 December 2011, D made a statement to Parliament promising to *"announce my decisions in January"* following consideration of the consultation responses received [**DB/3/58/1750**]; and

    (5) In ***R v. Shropshire HA ex parte Duffus*** [1990] 1 Med. L.R. 119, Schiemann J held that, when considering whether there was a duty to re-consult on post-consultation changes *"one must not forget that there are those with legitimate expectations that decisions will be taken."* There is no basis for concluding that this was not the case here too given the Government's commitments outlined above;

    (6) The purpose of the DNS was described in [1]-[3] therein as setting out the Government's promised *"final decisions"* following the public consultation. The DNS was therefore the Government's means of satisfying the legitimate expectation that it generated.

32. D asserts at CD [89(c)] that the existence of a legitimate expectation is *"not accepted"* but does not support this assertion.

33. C submits that the term *"required by administrative provisions"* in Art. 2(a) of the SEA Directive should be interpreted to apply to a situation where the Member State's competent authorities have through assurances and/or a course of conduct generated a legitimate expectation (at least in the EU law sense) that they will adopt a *"plan or programme"* on a particular subject (or alternatively the contrary position is not *acte clair*). This is because one of the general principles of EU administrative law is the protection of legitimate expectations (which in EU law can be generated by an assurance or a course of conduct): see e.g. Case 120/86 ***Mulder v. Minister van Landbouw en Visserij*** [1998] E.C.R. 2321, Case T-203/96 ***Embassy Limousines & Services v. European Parliament*** [1998] E.C.R. II-4239 and Cases 46/98 & 91/98 ***CEMR v. Commission*** [2000] E.C.R. II-4239.[3] The points outlined at [30] above also apply in this context.

"Sets the framework for future development consent"

34. In ***Terre-Wallone ASBL & Inter-Environnement Wallone ASBL v. Région Wallone*** Cases C-105/09 & C-110/09 [2010] E.C.R. I-5611, Advocate General Kokott stated:

> "Plans and programmes may, however, influence the development consent of individual projects in very different ways and, in so doing, prevent appropriate account from being taken of environmental effects. Consequently, the SEA Directive is based on a very broad concept of 'framework'.
>
> This becomes particularly clear in a criterion taken into account by the member states when they appraise the likely significance of the environmental effects of plans or programmes in accordance with article 3(5): they are to take account of the *degree* to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources (first indent of point 1 of Annex II). The term 'framework' must therefore be construed flexibly. It does not require any conclusive determinations, but also covers forms of influence that leave room for some discretion."

35. These observations were cited with approval by Lord Reed in ***Walton*** at [17].

36. Applying the flexible construction called for by AG Kokott, the proper conclusion is that DNS sets the framework for the grant of development consent for HS2 by Parliament. In particular, subsequent development consent process through the proposed Hybrid Bill will operate within, or at the very least be guided by, the parameters of the DNS. This is clear from the following:

    (1) The new remit which D gave to HS2 Ltd on 11 January 2012 (on the same date as the DNS was published) is to assist in promoting *"the scheme"*. This term is on any view a reference to the description earlier in the same paragraph of *"the Government's... confirmation of a preferred route for the London to West Midlands phase...including*

[3] This principle is also an autonomous concept of EU law and is different to the concept of legitimate expectations in English law.

connections to HS1" (this confirmation being contained in the DNS) [**DB/3A/68/2114**]. See also HS2 Ltd's response to questions raised at a public meeting on 12 June 2012, which included the following statement [**DB/7/110/2416**] -

> "The Secretary of State's January decision announced the route for the London to West-Midlands phase, including the stations. HS2 Ltd has been asked to develop that route. Therefore we would not expect to proceed with an option which is not consistent with the Secretary of State's decision, or which was considered and rejected by the Secretary of State in reaching her decision."

(2) The Hybrid Bill will be introduced by and promoted by D. The terms of the DNS and D's letter to CA dated 20 February 2012 [**CDB/2**] make clear that the contents of the proposed Hybrid Bill will be in accordance with the decisions made in DNS. In the same letter, D confirmed that any Parliamentary vote on the Hybrid Bill will be subject to a Government whip.[4] D will therefore be able to exercise significant control on the development consent process in order to ensure an outcome which is in accordance with the DNS. For example, D will be able to ensure that any amendment to the Hybrid Bill to adopt a route that falls outside the route corridor set out in the DNS (eg. the Heathrow Hub route) is voted down.

Conclusion on the requirement under the SEA Directive for SEA of the DNS

37. For the reasons outlined above, the DNS was *"a plan or programme"* which was *"required by administrative provisions"* and which *"set the framework for future development consent"* of HS2.

38. Alternatively, bearing in mind the considerable extent to which the CJEU strives to give the SEA Directive an interpretation which gives the fullest effect to its objectives, it cannot be said to be *acte clair* that these terms should be interpreted so as to exclude the DNS. There is at least a reasonable prospect that CJEU would conclude that the exclusion of a decision having the characteristics of the DNS from the scope of the SEA Directive would reduce the degree of scrutiny given to strategic decisions with environmental implications and would frustrate the purposes of the Directive. This may mean that a reference to the CJEU is appropriate (see further below).

(iii) Voluntary assumption of compliance with the SEA Directive and Regulations

39. In any event, the Government has through its statements and course of conduct undertaken to apply the requirements of the SEA Directive before reaching a final decision on its strategy for HS2, regardless of whether that strategy was a *"plan or programme"* which was *"required by legislative, regulatory or administrative provisions"*.

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[4] See D's letter to the CAs dated 20 February 2012 at [6] [**CDB/2**].

40. In particular:

(1) In correspondence with C's solicitors D promised that the AoS would *"broadly reflect the principles"* of the SEA Directive (3 December 2010, **CDB/7**) and *"will reflect the principles contained in the SEA Directive"* (13 January 2011, **CDB/10**).

(2) At [6.23] the DNS confirms that *"a decision was taken that it would be appropriate and beneficial to apply SEA principles to the AoS"* and at [6.24] states: *"we consider that the AoS appropriately applied the principles of the SEA Directive to the degree necessary for this stage in the project"* [**CJB/4/18/1485**]. The accompanying Glossary cites the AoS as a document which was *"conducted in accordance with the principles of the EU Directive 2001/42/EC on strategic environmental assessment"* [**CJB/4/18/1499**]. Moreover, the Review of the AoS states at [3.1.3] that: *"the AoS was intended to be compliant with the principles of SEA"* [**CJB/4/21/1601**].

41. It is well established in EU law that the competent authorities of a Member State, in transposing a Directive into its domestic legal system and applying it thereafter, are entitled to exceed the minimum requirements of the Directive. Indeed, in discussing the contexts in which the SEA Directive applies, [3.15] of the Commission SEA Guidance states -

> "It is of course open to Member States, in respect of their own national systems, to go further than the minimum requirements of the Directive should they so require".

42. Insofar as the SEA Directive does not of itself necessitate that the DNS be subjected to SEA before adoption (contrary to the submissions set out above), D has nonetheless voluntarily assumed compliance with the requirements of SEA. It follows that the DNS and the process carried out should be held to the requirements of SEA.

43. Further or alternatively, the statements referred to above gave rise to a legitimate expectation on the part of the public and interested parties (including C and the action groups associated with it) that the consultation leading to a final decision on the Government's strategy for HS2 would be in accordance with the SEA Directive and Regulations.

(iv) Relationship between SEA and EIA

44. D submits at CD [91] that the fact that the HS2 Bill will be subject to EIA is relevant to considering whether the DNS engaged the requirements of the SEA Directive. That submission is incorrect and untenable. One of the purposes of the SEA Directive was to ensure that plans and programmes which set the framework for development consent of projects engaging the EIA Directive should themselves be subject to environmental assessment: see e.g. the Tenth Recital to the SEA Directive and the provisions of Articles 1 and 2(2)(a). Indeed, Article 2(2)(a) specifically requires SEA for projects *"which set the*

framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC" and so D's submission runs contrary to the basic requirements of SEA.

45. Further, it would frustrate the objectives of SEA if a competent authority were to be able to avoid the need for SEA of a plan or programme on the basis that, at a later date, the project would be subject to EIA. The Foreword to the Commission SEA Guidance notes that the purpose of SEA is not merely to replicate EIA (emphases added):

> "The Strategic Environmental Assessment (SEA) Directive is an important step forward in European environmental law. At the moment, major projects likely to have an impact on the environment must be assessed under Directive 85/337/EEC. However, this assessment takes place at a stage when options for significant change are often limited. Decisions on the site of a project, or on the choice of alternatives, may already have been taken in the context of plans for a whole sector or geographical area. The SEA Directive - 2001/42/EC – plugs this gap by requiring the environmental effects of a broad range of plans and programmes to be assessed, so that they can be taken into account while plans are actually being developed, and in due course adopted. The public must also be consulted on the draft plans and on the environmental assessment and their views must be taken into account."

46. See also the Commission's *Report on the Effectiveness of the Directive on Strategic Environmental Assessment* (2009) which observed at section 4.1 (in recognition of the legal structure of the SEA Directive):

> "The two Directives are to a large extent complementary: the SEA is "up-stream" and identifies the best options at an early planning stage, and the EIA is "down-stream" and refers to the projects that are coming through at a later stage.
>
> ....
>
> Consideration could be given to merging the EIA and SEA Directives in order to clarify their interrelationship and boost their complementarity and efficiency through a holistic environmental assessment process. While this may appear to be an attractive option, very few MS recommended merging the two Directives; they stressed that each process should be completely separate in its own right, because the two Directives are complementary and address different stages and processes."

47. Following publication of this Report, no steps have been taken by the EU legislative bodies to merge the EIA and SEA Directives. It must therefore be concluded that they, too, consider that the two Directives are and should continue to be *"complementary and address different stages and processes"*.

48. The above passage from the Commission's Report was cited by Lord Reed with approval in ***Walton*** at [14]. At [10], Lord Reed held:

> "[The SEA Directive] is complementary, in particular, to the EIA Directive. Both directives impose a requirement to carry out an environmental assessment, but they are different in scope."

(v) Lack of compliance/substantial compliance with the SEA Directive and Regulations

Legal framework

49. Article 2(b) of the SEA Directive defines the concept of "environmental assessment" as follows:

> "... "environmental assessment" shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4-9."

50. Article 5(1) of the SEA Directive (transposed by Reg. 12 of the SEA Regulations) provides that where an environmental assessment is required under Article 3:

> "... an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I."

51. Annex I of the SEA Directive (transposed by Reg. 12 and Schedule 2 of the SEA Regulations) sets out that the environmental report prepared for the purposes of SEA must include:

> "(a) an outline of the contents, main objectives of the plan or programme and relationship with other plans or programmes;
>
> (b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;
>
> (c) the environmental characteristics of areas likely to be significantly affected;
>
> (d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Directives 79/409/EEC and 92/43/EEC;
>
> (e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;
>
> (f) the likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;
>
> (g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;
>
> (h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;
>
> (i) a description of the measures envisaged concerning monitoring in accordance with Article 10;
>
> (j) a non-technical summary of the information provided under the above headings."

52. A footnote states that the likely significant effects to be assessed under Annex I(f) *"should*

include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects".

53. The Commission SEA Guidance states at [5.6] that the studying of alternatives pursuant to Art. 5(1) and Annex I(h) *"is an important element of the assessment and the Directive calls for a more comprehensive assessment of them than does the EIA Directive."* It explains that while the EIA Directive requires that only an outline of the main alternatives is studied and an indication is given of the main reasons for the choice taken, taking into account environmental effects, the SEA Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives. Accordingly, the requirements set out above in relation to scope and level of detail of the information in the environmental report also apply to the assessment of alternatives (see [5.12] of the Guidance). The duty is not simply to assess all reasonable alternatives but also to explain the reasons for selecting the alternatives dealt with. Unless this is done, the reader of the environmental report will be unable to understand the basis for selecting the alternatives and whether the selection was deficient: see ***Heard v. Broadland DC*** [2012] EWHC 344 (Admin) at [66]. In the context of a plan or programme which promotes a particular kind of development, the duty to assess *"reasonable alternatives"* covers not only alternative options for that kind of development, but also alternatives to it: see ***City & District Council of St Albans v. SSCLG*** [2010] J.P.L. 10 per Mitting J at [21].

54. The requirement in Annex I(i) to include a description of the measures envisaged concerning monitoring is also of particular importance. Article 10 of the SEA Directive obliges Member States to monitor of the implementation of plans and programmes in order to maintain the high level of environmental protection called for by Article 1. Annex I(i) requires the environmental report to contain a specific description of how that monitoring is to be done, so that the public and other bodies consulted on the draft plan and the accompanying report can comment on the proposals for monitoring and can subsequently ensure that the proposed monitoring measures are complied with .

55. Article 6 of the SEA Directive (transposed by Reg. 13 of the SEA Regulations) provides:

> **"Consultations**
>
> (1) The draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article and the public.
>
> (2) The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.
>
> (3) Member States shall designate the authorities to be consulted which, by reason of

their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes.

(4) Member States shall identify the public for the purposes of paragraph 2, including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned.

(5) The detailed arrangements for the information and consultation of the authorities and the public shall be determined by the Member States."

56. Regulation 4 of the SEA Regulations provides that, in England, the designated consultation bodies for the purposes of Article 6(3) are the English Heritage, Natural England and the Environment Agency.

57. Article 7 of the SEA Directive (transposed by Reg. 14 of the SEA Regulations) provides, insofar as is relevant:

> **"Transboundary consultations**
>
> (1) Where a Member State considers that the implementation of a plan or programme being prepared in relation to its territory is likely to have significant effects on the environment in another Member State, or where a Member State likely to be significantly affected so requests, the Member State in whose territory the plan or programme is being prepared shall, before its adoption or submission to the legislative procedure, forward a copy of the draft plan or programme and the relevant environmental report to the other Member State."

58. Article 9(b)-(c) of the SEA Directive (transposed by Reg. 16 of the SEA Regulations) requires that, when the plan or programme is adopted, there shall be published alongside it:

> "(b) a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of consultations entered into pursuant to Article 7 have been taken into account in accordance with Article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with, and
>
> (c) the measures decided concerning monitoring in accordance with Article 10."

<u>What is necessary to achieve substantial compliance with the SEA Directive</u>

59. D does not contend SEA has been formally undertaken or that there has been compliance with all the requirements of the SEA Directive prior to adoption of the DNS. Instead D submits that there has been *"substantial compliance"* with the Directive and therefore no breach of EU law. D contends at CD [100] & [104] that substantial compliance can exist even where what has been done falls short of being equivalent to complete compliance with the requirements of the SEA Directive.

60. This submission is incorrect. Substantial compliance can only exist where what has been done is equivalent to compliance with all the requirements of the Directive. By definition, it engages consideration of whether the substance of the obligations has been met even if

in formal terms they have not. See Case C-431/92 ***Commission v. Germany*** [1995] E.C.R. I-2189, where the submission accepted by Germany was described at [41] as follows (emphasis added):

> "Germany submits, finally, that an assessment of the effects of the project at issue on the environment was carried out by the competent authority on the basis of the national legislation then in force, namely the Bundesimmissionβchutzgesetz of 15 March 1974 (German Federal Act on the protection of the environment). Although that assessment was not formally based on the directive, it is said by Germany to have complied with all its requirements"

61. See also ***R (Edwards) v. Environment Agency*** [2008] 1 W.L.R. 1587, where Lord Hoffmann held at [61] (emphasis added):

> "In *Commission of the European Communities v Federal Republic of Germany* (Case C-431/92) [1995] ECR I-2189 the German authorities gave consent to the construction of a power station without requiring the submission, *eo nomine*, of an environmental statement. (At that time the EIA directive had not yet been transposed into German law). Instead, the authorities required and published the information specified by the Bundesimmissionsschutzgesetz (Federal Pollution Protection Law). The Court of Justice found that as this information coincided with that required by the EIA directive and the public had been given the opportunity to make representations about it, the requirements of the directive had been satisfied. The same is in my opinion true of the application in this case."

62. This is consistent with the approach taken in ***Berkeley v. Secretary of State for Environment*** [2001] 2 A.C. 603 at pp. 616-618, where the HL rejected the submission that there had been substantial compliance simply because the relevant information could be found in various different sources making it clear that the substance of the obligation would have to be met including consultation on the assembled body of environmental information in the ES. This approach is also consistent with the SC's decision in ***Walton***, where although Lord Carnwath and others made it clear that ***Berkeley*** was not a universal statement on the scope of the discretion not to quash (see [103] to [140] & [156]), nonetheless a key element to the court exercising its discretion was that the substance of the rights under EU law should have been met (applying the EU principles of effectiveness and equality). As discussed further below, the substance has not been met here since the key provisions of Articles 5and 8 have not been complied with and the public been deprived of the substance of SEA including consultation in accordance with Article 6 on an environmental report which set out the reasonable alternatives and identified their comparative impacts. Important information which would have informed consultation and the responses to it simply has not been put to the public.

63. Moreover, if a *"substantial compliance"* defence were to be allowed in circumstances where what has happened falls short of equivalence with the requirements of a Directive, that would be inconsistent with Art. 288 TFEU which provides that *"a directive shall be*

binding as to the result to be achieved", an obligation to which the CJEU ascribes great importance: see Case 41/74 ***Van Duyn v. Home Office*** [1975] 1 C.M.L.R. 1, at [12]. Moreover, it would breach the obligation on Member States under Art. 4(3) TEU to *"ensure fulfilment of the obligations...resulting from the acts or the institutions of the Union's objectives"*: see ***Inter-Environnement Wallonie*** at [43]-[47].

The Court's jurisdiction in considering whether there has been substantial compliance

64. At CD paras. 102 and 111, D appears to contend that the Court's jurisdiction is confined to considering whether D was reasonably entitled (in the *Wednesbury* sense) to conclude that there had been substantial compliance with the SEA Directive, as opposed to deciding the issue for itself.

65. That submission should be rejected. Whether there has been substantial compliance is a question of law for the Court to decide for itself. This is clear from ***Commission v. Germany*** and ***Edwards***, where the view taken in each case that there had been substantial compliance with the requirements of the EIA Directive was based upon the court's own appraisal of what had happened. The same approach was adopted by Collins J. in ***Save Historic Newmarket v. Forest Heath DC*** [2011] J.P.L. 1233 and Ouseley J in ***Heard*** at [87] in rejecting a submission that there had been substantial compliance with the SEA Directive in that case.

66. However, the cases mentioned at CD [102] in support of D's submission relate to different issues, namely the Court's jurisdiction in considering challenges to:

    (1) a judgment on screening that a development would not have any likely significant environmental effects and therefore did not require EIA; and

    (2) a planning judgment that an environmental statement accompanying an application for EIA development provided sufficient information about the likely significant effects of a proposed development.

    (Note the similar distinctions drawn by Laws LJ in ***Bowen-West v. SSCLG*** [2012] Env. L.R. 22 at [32]-[35])

67. This is not a case about the exercise of specific judgments within the scope of applying EIA or SEA but about compliance with the legal requirements for SEA. The issue in the present case is whether there has been substantial compliance with the requirements of the SEA Directive, which the above cases indicate is a hard-edged question of law. It is plain from ***Berkeley***, ***Edwards*** and ***Walton*** that the HL/SC considers it to be a matter for the Court. Again, this may be a point where a preliminary reference to the CJEU may be appropriate since this is a question of EU law and the answer is not *acte clair* in D's favour.

68. Further, and in any event, the line of case-law mentioned at CD [102] originated prior to the Aarhus Convention coming into force[5] and its compatibility with EU law is now open to doubt following the findings of the Aarhus Convention Compliance Committee ("**ACCC**") in Complaint ACCC/C/2008/33, known as the ***Port of Tyne*** case, expressing doubt as to whether the *Wednesbury* jurisdiction was sufficiently broad to satisfy the requirement of Article 9(2) of the Aarhus Convention that persons with sufficient interest in environmental decisions may challenge their *"substantive legality"*. See in particular [125]-[127]:

> "125. The Committee finds that the Party concerned allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to article 9, paragraph 2 and 3, of the Convention, including, inter alia, for material error of fact, error of law, regard to irrelevant considerations and failure to have regard to relevant considerations, jurisdictional error and on the grounds of *Wednesbury* unreasonableness (see paragraphs 87-89 above). The Committee, however, is not convinced that the Party concerned, despite the above mentioned challengeable aspects, meets the standards for review required by the Convention as regards substantive legality. In this context, the Committee notes for example the criticisms by the House of Lords, and the European Court of Human Rights, of the very high threshold for review imposed by the *Wednesbury* test.
>
> 126. The Committee considers that the application of a "proportionality principle" by the courts in E&W could provide an adequate standard of review in cases within the scope of the Aarhus Convention. A proportionality test requires a public authority to provide evidence that the act or decision pursued justifies the limitation of the right at stake, is connected to the aim(s) which that act or decision seeks to achieve and that the means used to limit the right at stake are no more than necessary to attain the aim(s) of the act or decision at stake. While a proportionality principle in cases within the scope of the Aarhus Convention may come a long way in providing for a review of substantive and procedural legality, the Party concerned must make sure that such a principle does not generally or prima facie exclude any issue of substantive legality from a review.
>
> 127. Given its findings in paragraphs 125 and 126 above, the Committee expresses concern regarding the availability of appropriate judicial or administrative procedures, as required by article 9, paragraphs 2 and 3, of the Convention, in which the substantive legality of decisions, acts or omissions within the scope of the Convention can be subjected to review under the law of E&W. However, based on the information before it in the context of the current communication, the Committee does not go so far as to find the Party concerned to be in noncompliance with article 9, paragraphs 2 or 3, of the Convention."

69. See also ***Boxus v. Région Wallone*** Cases C-128/09–C-131/09, C-134/09 & 135/09 [2012] Env. L.R. 14 where the CJEU held (emphasis added):

> "54. The requirements flowing from art.9 of the Aarhus Convention and art.10a of Directive 85/337 presuppose in this regard that, when a project falling within the scope of art.6 of the Aarhus Convention or of Directive 85/337 is adopted by a legislative act, the

[5] The Aarhus Convention came into force on 30 October 2001. The EIA Directive was amended by Directive 2003/35/EC with effect from 25 June 2005 to incorporate certain of the Convention's provisions. Paragraph 7.3 of the Commission SEA Guidance indicates that the SEA Directive was intended to give effect to the Convention in relation to plans and programmes. The Convention forms part of EU law: see ***Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*** [2011] 2 C.M.L.R. 43.

question whether that legislative act satisfies the conditions laid down in art.1(5) of that directive and set out in [37] of the present judgment must be amenable to review, under the national procedural rules, by a court of law or an independent and impartial body established by law.

55. If no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous paragraph and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.

56. In the present instance, if the referring court finds that the Decree of the Walloon Parliament of July 17, 2008 does not satisfy the conditions laid down in art.1(5) of Directive 85/337 and recalled in [37] of the present judgment, and if it turns out that, under the applicable national rules, no court of law or independent and impartial body established by law has jurisdiction to review the substantive or procedural validity of that decree, the decree must then be regarded as incompatible with the requirements flowing from art.9 of the Aarhus Convention and art.10a of Directive 85/337. The referring court must then disapply it."

Although this was in the context of EIA, it has to be recognised that the SEA Directive is also regarded in EU law as giving effect to the requirements of Aarhus.

70. No domestic judgment has yet addressed the findings in ***Port of Tyne*** and it is likely that the CJEU would give weight to the ACCC's concerns, given it is the body charged by the Aarhus Convention to deal complaints of non-compliance.[6] In the meantime, the CJEU's position on the correctness of the cases relied upon by D at [102] cannot be *acte clair*.

No compliance or substantial compliance in the present case

71. D has fallen far short of what is required by the SEA Directive in a number of respects.

72. First, the AoS is not equivalent to an environmental report compliant with the requirement of Article 5(1) and Annex I(f) to assess the likely significant effects of implementing the plan or programme. In particular:

(1) The AoS (and the AoS review) assesses only Phase 1 of HS2, but the DNS is a plan or programme for the entire network, including the "Y" to Leeds and Manchester and the Heathrow Spur. D's response is that these will be assessed in the AoS report for Phase 2: see [87] of Mr Miller's WS. By that stage, however, it will be too late to meet the objectives of SEA: the principle of Phase 2 has already been adopted in the DNS without any assessment of its in-combination effects with Phase 1. The decision (and consultation) for Phase 1 was therefore undertaken in ignorance of its in-

[6] Cf. the principle that, where a Directive seeks to give effect to an international agreement to which the EU is a party, the CJEU will strive to interpret the Directive in a manner that is harmonious with that international agreement: see e.g. Case C-69/94 ***Commission v. Germany*** [1996] E.C.R. I-3989 at [52] and Case C-341/95 ***Safety Hi-Tech v. S&T Srl*** [1998] E.C.R. I-4355 at [20]. Further, the Aarhus Convention is already partly transposed into EU law in the EIA and SEA Directives.

combination effects with Phase 2. This is despite the fact that unpublished work on the cumulative effects of Phase 2 is said by Mr Miller to be *"comparable with that undertaken for Phase 1"*: see [87] of his WS. There is no good reason why that information could not have been included in the AoS. Further, D has recently announced, without prior consultation, the locations where the junctions from Phase 1 to Manchester, Leeds and Heathrow will be located.[7] Therefore by the time of the Phase 2 AoS is published, the parameters of the Phase 2 route will already have been established. It will therefore be too late for them to be informed by environmental assessment. Moreover, the exclusion of cumulative *environmental* effects contrasts with D's reliance on the cumulative *economic* benefits of the entire Y network in reaching her decision. The result has been that the purported economic advantages of the whole network have been weighed against the environmental disadvantages of Phase 1 only.

(2) Even if the DNS were properly characterised as a plan or programme only for Phase 1, there was still a requirement under Annex I(f) to consider its cumulative effects with Phase 2 and D has failed to do so as explained above.

73. Secondly, there was no equivalent to an environmental report containing an assessment of reasonable alternatives, taking into account the objectives and geographical scope of the plan or programme, in accordance with Article 5(1) of the SEA Directive and Annex I(h). Section 5 of the AoS, entitled *"Alternatives"*, cross-referred to Appendix 6 of the AOS **[DB//100/1525]** and an accompanying report entitled *High Speed Rail Strategic Alternatives Study* (**"the Alternatives Study"**) **[CJB/3/13]** containing a purported review of alternatives. However, these fall significantly short of what is required by Article 5(1). In particular:

(1) The Alternatives Study only assesses the economic effects of the alternatives to which it refers: see e.g. the Summary and Conclusions section [**CJB/3/13/911**].

(2) Appendix 6 of the AoS assesses only Phase 1 and alternatives relating to certain route and station options along the London to West Midlands route. No environmental assessment of any strategic alternatives to HS2 and/or Phase 1 has been undertaken. It thus suffers from the same deficiency as Mitting J identified in ***St Albans***, namely that whilst some limited alternatives for the development proposed by the plan are considered, alternatives to it are not.

(3) The appraisal contained in Appendix 6 was undertaken in 2009-10 and assessed the previous March 2010 preferred scheme against certain alternatives. It does not

[7] See http://highspeedrail.dft.gov.uk/node/5691

assess the scheme proposed in the February 2011 Consultation Report.

(4) By the time of the February 2011 Consultation Report, many alternatives had already been considered and "sifted out" without any public consultation or SEA. See [5(5)] above and the description of the pre-AoS process in the AoS Scoping Report [**DB/4/87A/210&217**] and draft Scoping Report [**DB/4/85A/84**]. Such assessment of alternatives as there was therefore did not comply with Article 6(3) of the SEA Directive which requires the public to be given an *"early and effective opportunity"* to comment on the environmental assessment of draft plans and programmes. See also ***Re Seaport Investments Ltd*** [2008] Env. L.R. 23 at [50]-[51] where Weatherup J. held that it would be contrary to Article 6(3) if by the time of the publication of the environmental report the stage has been reached where the plan has *"become sufficiently settled without being subjected to the appropriate environmental information"* and where *"the development of the draft plan had reached an advanced stage before the environmental report had been commenced"* as *"there was no opportunity for the latter to inform the development of the former"*. This happened in the present case as the alternatives referred to in Article 6 had already been sifted out before the publication of and consultation upon the AoS.

(5) Certain alternatives to the route adopted in the DNS which D maintains he did consider during the consultation process, such as CAs' Optimised Alternative and Heathrow Hub's proposed route, have not been the subject of any environmental assessment either against the route proposed in the February 2011 Consultation Report or against the route adopted in the DNS (including the post-consultation amendments). Therefore even if Appendix 6 of the AoS contains an assessment of some of the alternatives considered, it does not contain an environmental assessment of all of the reasonable alternatives considered as required by Article 5(1) and Annex 1(h).

(6) The requirement of Annex I(h) of the SEA Directive for an *"outline of the reasons for selecting the alternatives dealt with"* on the grounds required by the Directive has simply not been met. As explained above, this means the basis on which the alternatives purportedly considered were selected cannot be understood: see ***Heard***.

(7) Appendix 6 is difficult to follow and this exacerbates the absence of an SEA Statement summarising how the proposed route was chosen *"in the light of the other reasonable alternatives deal with"* in accordance with Art. 9(c) of the SEA Directive (see further below). This is significant given that one of the objectives of the SEA Directive is to give effect to the public participation provisions of the Aarhus Convention in relation to plans and programmes: see [7.3] of the Commission SEA Guidance and Recitals 16-17 of the Directive.

(8) There was nothing equivalent to an environmental report assessing the alternatives to the post-consultation amendments to the Phase 1 route in accordance with Article 5(1). See ***St Albans City*** at paras. [16]-[18] and [21]-[22] (where D failed to carry out a proper assessment when changes to the RSS were proposed and adopted).

74. Thirdly, contrary to Annex I(i), there is no description of the measures envisaged concerning monitoring in accordance with Article 10 of the SEA Directive. The AoS did not contain any such description: [9.2.3] simply contains the nebulous statement that *"going forward, a monitoring programme could be established..."* **[CJB/2/12/789]** and Appendix 1 under the heading of monitoring simply states *"to be done in the future"* [**DB/5/96/1322**]. The Booz-Temple statement at **DB/7/109** acknowledges at pp.2403-4 that no description of monitoring measures was contained in the AoS. This is not compliant with the requirements of the SEA Directive, which requires specific measures for monitoring to be spelt out prior to the adoption of a plan or programme. As explained above, ensuring the monitoring of the implementation of plans and programmes is a central purpose of the SEA Directive: see Article 10 and the Commission SEA Guidance at [5.39] & [8.3]-[8.8]. At CD [107], D submits that the AOS Review published with the DNS deals with monitoring, but in fact it simply states that measures may be developed at the EIA stage rather than providing the required description of monitoring measures in accordance with Annex I(i) and Article 10 of the SEA Directive. In any event, the AOS Review cannot be a substitute for an environmental report under the SEA Directive since it was not consulted upon prior to adoption of the DNS.

75. Fourthly, the lack of anything equivalent to an environmental report dealing with alternatives and monitoring (above) is exacerbated by the fact that the DNS was not accompanied by a SEA Statement summarising how the proposed route was chosen *"in the light of the other reasonable alternatives deal with"* in accordance with Art. 9(c) of the SEA Directive or a statement of the measures decided concerning monitoring in accordance with Article 10. Whilst the AoS Review does refer to consultation responses received, it does not on any view summarise how the AoS was taken into account in D's decision-making process in accordance with Article 8 of the SEA Directive, nor does it summarise the reasons for choosing HS2 and the particular route proposed in the light of the other reasonable alternatives.

76. Fifthly, contrary to Art. 7(1) of the SEA Directive, and despite the obvious potential transboundary implications given the proposed link to the Channel Tunnel and the European rail network, there has been no transboundary consultation. C advances the following submissions in this regard:

(1) On the evidence before D, there was plainly potential for significant environmental

effects as a result of connecting HS2 to HS1 and the Channel Tunnel rail link. For example, the MVA report prepared for D in relation to the connection to HS1 concluded that the *"key risks"* of such a connection included a lack of rail capacity in France to accommodate the additional trains to and from HS2 [**DB/5/93/1113**]. The potential consequences of such capacity constraints materialising include the construction of additional railway infrastructure in France to provide additional capacity. That would on any view have significant environmental effects. Therefore there was clearly potential for HS2 having indirect and/or in-combination effects in at least one other Member State.

(2) There is no evidence that D turned his mind to the potential for the link to HS1 generating pressure for additional railway infrastructure in France (and thus having indirect and/or in-combination effects in France).[8] The Booz-Temple statement at **DB/7/109** merely asserts at p. 2393 that *"the volume of high speed trains running from the UK into France and Belgium is controlled by the capacity and operational arrangements associated with the existing Channel Tunnel"*. However, the MVA analysis was alive to the potential for the Channel Tunnel to act as a constraint [**DB/5/93/1113**] but notwithstanding that fact advised that there were potential issues relating to capacity constraints in France. That issue was not grappled with prior to the need for transboundary consultations under Art 7 of the SEA Directive being scoped out.

(3) The domestic case-law relied upon at CD [105(c)] in support of the submission that relief should in any event be withheld on this issue because no Member State has complained about not being consulted is of no assistance in the EU law context, given the duty imposed on Member States by Art 4(3) TEU. Moreover, the CJEU has recently rejected a submission by the UK Government analogous to that which D advances in the present case, holding that a claimant may seek the quashing of a provision on the basis that it breaches EU law on freedom of establishment, notwithstanding that the claimant himself is not exercising any EU freedom of establishment rights: see Case C-18/11 ***HMRC v. Phillips Electrics UK Ltd*** (6 September 2012), where at [39] the CJEU held that it was of -

> "no relevance... that it is not the taxpayer, a company established in the United Kingdom, whose freedom of establishment has been unjustifiably restricted, but rather the non-resident company with a permanent establishment in the United Kingdom".

77. Sixthly, as detailed under Ground 4 significant changes to the Phase 1 route corridor were

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[8] Note that in this regard that the link to HS1 was not proposed in the February 2011 Consultation Paper or assessed in the AoS but was one of the post-consultation changes.

made after the consultation had closed and were not the subject of further consultation or SEA. These also represent a failure to comply with the requirements of SEA since the post-consultation changes had obvious potential for significant environmental effects (including but not limited to the destruction of a significant area of ancient woodland: see below). These changes ought to have been subject of environmental assessment under Article 5 and consultation under Article 6.

(v) Relief

78. Article 5 of the SEA Directive provides that SEA must be undertaken *"during the preparation of that plan or programme before its adoption or submission to the legislative procedure"*. Article 8 requires that prior to the plan or programme's adoption, account must be taken of:

    (1) the environmental report prepared in accordance with Article 5(1) and Annex I; and

    (2) the opinions expressed in the consultations under Articles 6 and 7.

    These provisions are critical to compliance with the SEA Directive and to the effective participation of the public in the process.

79. In the present case, the DNS has been adopted in the absence of either an environmental report in compliance with Article 5(1) and Annex I or a consultation which complies with Articles 6-7.

80. The clear starting-point, therefore, is that the DNS should be quashed in the light of the Court's duty of sincere-co-operation under Art. 4(3) TEU, the requirement under Art. 288 TFEU that *"a directive shall be binding as to the result to be achieved"* (the 'result' required in the present case being the preparation and adoption of the plan/programme for HS2 being informed by strategic environmental assessment in accordance with the SEA Directive), and the requirement under Art. 19(1) TEU (inserted by the Lisbon Treaty) that:

> "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

81. See also Art. 47 of the EU Charter of Fundamental Rights, which provides:[9]

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."

82. In ***Inter-Environnement Wallonie*** the CJEU emphasised the duty under Art. 4(3) TEU as follows:

[9] Art. 6(1) TEU provides that the Charter of Fundamental Rights has the *"same legal value as the Treaties"*.

"43. It is clear from settled case law that, under the principle of co-operation in good faith laid down in art.4(3) TEU , Member States are required to nullify the unlawful consequences of a breach of EU law ...

44. It follows that where a "plan" or "programme" should, prior to its adoption, have been subject to an assessment of its environmental effects in accordance with the requirements of Directive 2001/42, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment (see, by analogy, *Wells* [2004] 1 C.M.L.R. 31 at [68]).

45. National courts before which an action against such a national measure has been brought are also under such an obligation ...

46. Consequently, courts before which actions are brought in that regard must adopt, on the basis of their national law, measures to suspend or annul the "plan" or "programme" adopted in breach of the obligation to carry out an environmental assessment (see, by analogy, Wells [2004] 1 C.M.L.R. 31 at [65]).

47. The fundamental objective of Directive 2001/42 would be disregarded if national courts did not adopt in such actions brought before them, and subject to the limits of procedural autonomy, the measures, provided for by their national law, that are appropriate for preventing such a plan or programme, including projects to be realised under that programme, from being implemented in the absence of an environmental assessment."

83. See also ***Berkeley*** where, in considering the relief consequential upon a failure to comply or substantially comply with the EIA Directive, Lord Bingham emphasised at p. 608C-E (in the context of the predecessor to Article 4(3) TFEU, Article 10 of the EC Treaty) -

> "the obligation of national courts to ensure that Community rights are fully and effectively enforced"

84. Lord Hoffmann held at p. 616D-E considering the discretion to quash under statute:

> "... I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive. To do so would seem to conflict with the duty of the court under article 10 (ex article 5) of the EC Treaty to ensure fulfilment of the United Kingdom's obligations under the Treaty. In classifying a failure to conduct a requisite EIA for the purposes of section 288 as not merely non-compliance with a relevant requirement but as rendering the grant of permission ultra vires, the legislature was intending to confine any discretion within the narrowest possible bounds. It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires: see Glidewell LJ in ***Bolton Metropolitan Borough Council v Secretary of State for the Environment*** (1990) 61 P & CR 343 , 353 Mr Elvin was in my opinion right to concede that nothing less than substantial compliance with the Directive could enable the planning permission in this case to be upheld."

85. Whilst ***Berkeley*** has to be read in its context (where there was a complete failure even to consider EIA), Lord Hoffmann's observations were applied in the SEA context by Mitting J. in ***St Albans*** at [22], by Collins J. in ***Save Historic Newmarket*** at [7] and in ***Heard*** by Ouseley J at [84]-[87].

86. The exercise of the Court's discretion has now been considered by the SC in ***Walton***, albeit

obiter. Lord Carnwath, in particular, reviewed the position in some detail at paras. 103-140 (his views were agreed by the other members of the SC[10]) who made clear that ***Berkeley*** did not support a universal proposition that any breach of EU law required the automatic nullification of the national act or decision. Having reviewed the authorities, including Case C-201/02 ***R. (Delena Wells) v Secretary of State Case*** [2004] Env. L.R. 27 at [64]-[67], Lord Carnwath held at [139] (emphasis added):

> "139. Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source."

87. Lord Hope concurred at [156]:

> "The scope for the exercise of that discretion in that context is not therefore as narrow as the speeches in *Berkeley* might be taken to suggest. The principles of European law to which Lord Carnwath refers in para 138 support this approach. Where there are good grounds for thinking that the countervailing prejudice to public or private interests would be very great, as there are in this case, it will be open to the court in the exercise of its discretion to reject a challenge that is based solely on the ground that a procedural requirement of European law has been breached if it is satisfied that this is where the balance should be struck."

88. The passages in ***Wells*** considered by Lord Carnwath included at [64]-[67]:

> "64 As to that submission, it is clear from settled case-law that under the principle of cooperation in good faith laid down in Art.10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law (see, in particular, Case 6/60 *Humblet* [1960] E.C.R. 559, at 569, and Joined Cases C-6/90 and C-9/90 *Francovich* [1991] E.C.R. I-5357, para.[36]). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (see, to this effect, Case C-8/88 *Germany v Commission* [1990] E.C.R. I-2321, para.[13]).
>
> 65 Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to this effect, Case C-72/95 *Kraaijeveld* [1996] E.C.R. I-5403 , para.[61], and *WWF* , cited above, para.[70]). Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.
>
> 66 The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.
>
> 67 The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States,

[10] Lord Reed at [81], Lord Hope at [156] and Lord Kerr and Lord Dyson at [157] who agreed with all 3 substantive judgments.

> provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) (see to this effect, inter alia, Case C-312/93 *Peterbroeck* [1995] E.C.R. I-4599 , para.[12], and Case C-78/98 *Preston* [2000] E.C.R. I-3201 , parag.[31])."

The principle has been frequently repeated by the CJEU, most recently in Case C-41/11 ***Inter-Environnement Wallonie ASBL, Terre wallonne ASBL v. Region Wallonne*** [2012] 2 C.M.L.R. 21 at [42].

89. It can thus be seen why, although automatic nullification/quashing is not supported, nonetheless the precondition for this is that effect has nonetheless been given to the substance of the obligations under EU law. Procedural autonomy is dependent on compliance with the principles of equivalence and effectiveness including the requirement that the national rules "*do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order*".

90. The breaches of here are prejudicial to many and there has been significant failure to give effect to the substance of the rights under EU law.

91. As set out in this skeleton and in C's case generally, the D's shortcomings in complying with the SEA Directive are many and substantial. They relate to central aspects of SEA, such as the consideration of alternatives and monitoring. The European Council and Parliament have in adopting the SEA Directive concluded that there is considerable public interest in ensuring SEA of plans and programmes prior to their adoption in order to ensure a high level of environmental protection: see the recitals to the Directive and Article 1. There is obvious and substantial prejudice to that public interest by the multiple failings in the purported SEA of a decision of such widespread and long term significance as the DNS.

92. The scale and permanence of HS2 makes it particularly vital that proper environmental assessment is undertaken of alternatives to and for the proposed scheme in accordance with the SEA Directive. The long term public interest is in ensuring that the 'sifting out' of options is done on the basis of a complete and lawful environmental assessment, given the irrevocable nature of D's decisions on matters such as the selection of the route corridor which will have consequences for generations. That long term public interest clearly outweighs the short term delay of a few months that would be caused by requiring D to undertake SEA in accordance with the requirements of the Directive.

93. D does not assert, either in submissions or in evidence, that the DNS would inevitably have been in the same form had there been SEA in compliance with the Directive. Such a submission would in any event not be open to him: ***R (Cala Homes (South) Ltd) v. SSCLG (No. 2)*** [2011] J.P.L. 1458 where Sullivan LJ held at [32] that prior to the outcome of SEA it

cannot be assumed that the adoption/modification/revocation (as the case may be) of the plan or programme in question is bound to occur regardless of the process of SEA.

94. Accordingly, even applying the approach of Lords Hope and Carnwath in ***Walton***, the case for a quashing order is compelling.

Ground 2: Incompatibility of the Hybrid Bill process with the EIA Directive

95. C adopts CA's submissions on this ground and advances the following additional arguments.

(i) Legal framework

96. Article 6(4) of the EIA Directive provides:

> "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."

97. Article 8 requires that:

> "The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 shall be taken into consideration in the development consent procedure."

98. Article 9 provides that, where a decision to grant or refuse development consent has been taken, the competent authority or authorities shall make available to the public:

> "The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 shall be taken into consideration in the development consent procedure."

99. Article 1(4) 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."

100. However, in ***Luxembourg v. Linster*** Case C-287/98 [2000] E.C.R. I-6917, the CJEU held that, for Art. 1(4) exemption only applies:

> "where the legislative process has enabled the objectives pursued by the Directive, including that of supplying information, to be achieved and the information available to the parliament at the time when the details of the project were adopted was equivalent to that which would have been submitted to the competent authority in an ordinary procedure for granting consent for a project"[11]

101. This requirement was recently reiterated in ***Marie-Noëlle Solvay and Others v. Région Wallonne*** Case C-182/10 [2012] Env. L.R. 27, where the CJEU held at [43] (emphasis

[11] At [59]; see also the Opinion of Advocate General Léger at [109] & [118]-[119].

added):

> "Article 1(5) of Directive 85/337 must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of the [Aarhus] Convention and the directive have been achieved by the legislative process, are excluded from the scope of those instruments. It is for the national court to verify that those two conditions have been satisfied, taking 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."

102. The CJEU also held at [33] that, in order for there to be compliance with EIA Directive:

> "The project must... be adopted in detail, that is to say in a sufficiently precise and definitive manner, so that the legislative act adopting the project must include, like a development consent, following their consideration by the legislature, all the elements of the project relevant to environmental impact assessment."

(ii) Non-compliance with the EIA Directive

103. C submits that the Hybrid Bill process upon which D has resolved to embark pursuant to the DNS:

(1) does not enable the objectives of the EIA Directive to be achieved and therefore does benefit from the Art. 1(4) exemption; and

(2) is contrary to Art.6(4), Art. 8 and Art. 9 and is therefore in breach of the EIA Directive.

104. The reasons for this can be summarised as follows (without prejudice to the detailed submissions advanced by CAs which C agrees with and adopts):

(1) There is no adequate mechanism within the Hybrid Procedure to define and constrain the development and proposed mitigation measures in a sufficiently precise and definitive manner so that the works ultimately constructed are not materially different from what is assessed in the Environmental Statement.

(2) Although Standing Order 27A requires an Environmental Statement to be deposited in the office of the Clerk of Parliaments, the rules on *locus standi* in Standing Orders 96-101 are inherently inconsistent with the requirement in Art. 6(4) for the *"public concerned"* to be *"entitled to express comments and opinions when all options are open to the competent authority"* since only those individuals whose property or interests are directly and specially affected will be entitled to express comments and opinions on the ES to the Select Committee. Other individuals and NGOs will be excluded.

(3) The Select Committee which considering the Hybrid Bill will do so after the principle of the Bill has been voted upon by the House of Commons at Second Reading. The Select Committee's terms of reference will exclude further consideration of the

principle of the Bill. The Committee will therefore be unable to decide whether in the light of the Environmental Statement, consultation responses, and other environmental information the project should continue, and/or whether there are better alternatives to the scheme set out in the Bill. Its remit will be limited to considering mitigation measures, including only relatively minor route changes. Therefore the requirement under Art. 6(4) for the public to be able to express their comments and opinions while *"all options"* are still open to the decision maker cannot be met.

(4) Moreover, for the same reason, the Select Committee cannot of itself meet the requirements of Article 8 of the EIA Directive for the decision-maker to take into account the environmental information and consultation responses in reaching decision on whether to grant development consent. D accepts this: see [15] of her pre-action response to CA's letter before claim.

(5) Whilst the principle of the Bill will be subject to a vote on the floor of the House of Commons at Second Reading, it is highly unlikely if not unfeasible that the decision-makers (namely the MPs who vote at Second Reading) will have read the environmental statement let along considered all the environmental information in its entirety including all public responses. The issue is further exacerbated by the fact that the outcome of the debate will be subject to a party whip (which D has confirmed in her pre-action response to CA's letter before claim on this point) and that further environmental evidence will emerge as part of the Bill process following second reading yet the principle of the Bill and thus development consent will have already been determined. This is inevitable since parties petitioning Parliament will rely on and comment on the environmental statement during the petitioning process which will only commence following Second Reading. Therefore the requirement under Art. 8 for the environmental information and the consultation responses to be taken into account by the decision-maker prior to granting development consent will not be satisfied.

(6) The Standing Orders do not require Parliament to give reasons for granting development consent by means of a Hybrid Bill. Accordingly, the legislative procedure is incompatible with Art. 9 of the EIA Directive. Even if, as in the case of Crossrail, a Command Paper were to be published containing a purported statement of reasons, that would not be sufficient since the reasons given in any Command Paper are those of the Government, not Parliament.

(7) The requirements of Article 11 of the EIA Directive cannot be met since there is no means by which members of the public will *"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 the Hybrid Bill if enacted into legislation.

(8) As set out in the CA's Ground 2, by splitting the development consent for HS2 into two Hybrid Bills, one for Phase 1 and one for Phase 2, each with its own standalone Environmental Statement, notwithstanding that the "project" is plainly the entire route, D is engaging in impermissible "salami-slicing" and is also failing to assess properly the decision in principle which is taken with the first Phase.

105. D seeks to characterise this ground as asking the court to review or interfere with proceedings in Parliament. D submits that this is constitutionally improper in domestic law, that any challenge based on the alleged non-compliance of Parliamentary procedures with the EIA Directive can be advanced by judicial review claim against the HS2 Act when enacted, and that a challenge now is therefore premature. See e.g. CD [29], & [34]-[40].

106. C submits in response:

(1) D accepts that EU law takes primacy over domestic law: see CD [30].

(2) D therefore acknowledges that any HS2 Act would be amenable to judicial review on the basis that the Parliamentary procedures were not compatible with the EIA Directive, notwithstanding that in a case which did not involve EU law this would be constitutionally impermissible: see CD [34(f)].

(3) The only real issue, therefore, is whether it is premature for such a claim to be advanced in advance of the HS2 Act being passed.

(4) The case-law on prematurity is clear that, where a defendant has set out an intended course of future action which is inherently unlawful, it is no defence that the final act or decision is still pending. See e.g. ***R v. British Advertising Clearance Centre ex parte Swiftcall Ltd*** (16 November 1995, unreported), where Carnwath J. held *"looking at the letters and affidavits realistically, they give a clear indication of how* [the defendant] *is minded to act... [If] the course they are suggesting is fundamentally unlawful, the sooner that is decided the better."* Similarly, in ***R v. Secretary of State for Transport v. London Borough of Richmond Upon Thames (No. 3)*** [1995] Env. L.R. 409, Sedley J. held at pp. 412-413 that a judicial review challenge to the lawfulness of an ongoing consultation was not premature because, although it would be possible to bring a challenge following the defendant's decision at the end of the consultation, *"if it is arguable that the new consultation is proceeding on a false basis which is justiciable in law, there will be every reason to lean in favour of deciding the issue sooner rather than later".*

(5) Accordingly, the central question is whether the DNS sets out an intended course of

conduct which is inherently contrary to the EIA Directive. If it is, then as in ***Swiftcall*** and ***Richmond*** it is in the public interest for that illegality to be determined and dealt with now rather than following the enactment of the HS2 Act by which time considerable time and money (both public and private) will have been spent upon an inherently unlawful process.

(6) For the reasons set out above and by the CAs, the procedure which D proposes to use to secure Parliamentary approval of the HS2 Bill is inherently contrary to the EIA Directive. Therefore this ground of the claim is not premature.

Ground 3: Habitats

(i) Legal framework

107. Article 6(2) and (3) of the Habitats Directive **[CAB/1/8]** provide:

> "2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats...for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

108. Article 6(3) prevents the appropriate authority from approving the plan or project unless it has ascertained that there will be no adverse effect on the integrity of the site.

109. Transposing this requirement, Regulation 61(1) of the Habitats Regulations [**CAB/1/9**] provides:

> "A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
>
> (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of that site,
>
> must make an appropriate assessment of the implications for that site in view of that site's conservation objectives."

110. The Commission's MN2000 [**CAB/1/11**] advises at [4.3.2] that a broad approach should be taken to the meaning of "plan or project" within the meaning of Article 6 and that -

> "where the link between the content of such an initiative and likely significant effects on a Natura 2000 site is very clear and direct, Article 6(3) should be applied".

111. In considering whether a proposal engages the need for an AA, the competent authority

must apply the precautionary principle. The hurdle is a very low one: only if there is no risk of the plan or project having significant effects on a European site can it be said that an AA is not necessary. See ***Landelijke Vereniging tot Behoud van de Waddenzee v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij*** Case C-127-02 [2005] 2 C.M.L.R. 31 **[CAB/2/23]**, where the CJEU held at [44]-[45] (emphases added):

> "44. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Art.174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned. Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Art.2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.
>
> 45. In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of Art.6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects."

112. MN 2000 adds at p. 33 **[CAB/1/11/387]** that:

> "... in line with the precautionary principle, it is unacceptable to fail to undertake an assessment on the basis that significant effects are not certain."

113. In assessing whether an AA is required, the overall proposal must be considered in its entirety, even if it is divided into different phases. The "salami-slicing" of projects, i.e. their division into a number of elements, should not be permitted to avoid the requirements of the Directive: ***Commission v. Spain*** Case C-227/01 [2004] E.C.R. 8253 **[CAB/2/22]**.

114. Moreover, since the Directive requires that a plan or project be assessed in combination with others, this would in any event require the assessment together of the whole series of elements which might otherwise be divided.

(ii) Applicability of the Habitats Directive

115. As with Ground 1, D submits that the DNS is not a *"plan"* within the meaning of the Habitats Directive because it is properly characterised as *"no more than a statement of an intention by the Government to lay before Parliament a Hybrid Bill seeking authorisation for HS2"* and will not have any significant influence on any future development decisions. See CD [145]-[146].

116. C repeats the submissions made above in relation to Ground 1. It is unrealistic for D to contend that the DNS will not have any significant influence on any future development decisions, when the remit given to HS2 Ltd is to draw up a detailed scheme for Phase 1 which is within the parameters set by the DNS (in particular relating to the route) and Parliament's consideration of whether to grant development consent for that scheme via the HS2 Bill will be subject to a whipped vote whereby D will be able to ensure that the Bill proceeds within those parameters and any amendment tabled which seeks a route that is inconsistent with the DNS (e.g. Heathrow Hub's proposed route) is voted down.

117. It should be noted that the Habitats Directive does not contain the additional requirement found in the SEA Directive that a plan must be *"required by legislative, regulatory or administrative provisions"* in order for the Directive's requirements to be engaged. Therefore D's submissions that there is no such requirement in the present case, whilst relevant to the SEA ground above, have no bearing on the applicability of the Habitats Directive.

(iii) Failure to comply with the Habitats Directive

118. Contrary to what might be inferred from CD [124] & [138], D did not reach a judgment at the time of adopting the DNS that there were no likely significant effects on European designated sites. Natural England's July 2011 consultation response had indicated that a likely significant effect on the SW London Water-bodies SPA could not be ruled out, stating that *"the conclusion that an AA is not needed can only be made after... further research has been done"* [**DB/7/118/2464 & 2466**]. The AoS Review published at the same time as the DNS asserted that the likelihood of such risks was *"very low"* but did not contest Natural England's conclusion that it could not be ruled out [**CJB/4/21/1612**] – indeed the threshold for AA is precautionary, and low.[12] The DNS was adopted on this basis.

119. Accordingly, applying the approach required by the CJEU in ***Waddenzee***, it could not rationally be concluded prior to the adoption of the DNS that there was no risk of the strategy contained in DNS having an impact on European sites. Therefore an AA was required prior to the publication of the DNS and the absence of such renders the DNS unlawful.

120. D submits at CD [138(h)] that work done subsequent to the DNS *"supports the view that there is no likely significant effect on the SW Waterbodies SPA"*. That submission should be rejected since work done after the adoption of a plan, which has not been consulted upon and which was not taken into account by the decision-maker at the time when the plan was adopted, cannot be an AA required by Art. 6(3) of the Habitats Directive prior to the

[12] Mr Miller's WS also does not contest Natural England's conclusion: see paras. 114-116.

adoption of the plan. In any event, D's submission is factually inaccurate since, notwithstanding this additional work since January 2012, Natural England has by letter dated 27 June 2012 reconfirmed its view that likely significant effects on the SW London Water-bodies SPA cannot be ruled out [**DB/7/112/2452**].

121. Further, and in any event, in deciding not to undertake AA prior to adopting the DNS, D has failed to have regard to cumulative / in-combination effects of Phase 1 and Phase 2 taken together. Regardless of whether the DNS is properly characterised as a plan for the entire HS2 route or solely Phase 1, the cumulative / in-combination effects of the entire scheme need to be considered in order to avoid "salami slicing", which is contrary to the purpose and application of the Habitats Directive since it will fail to assess the impacts of the whole scheme prior to approving it in principle: see ***Commission v. Spain*** (above) and MN2000 at p. 34, which states that *"it is important to note that the underlying intention of this combination provision is to take account of cumulative impacts, and these will often only occur over time. In that context, one can consider plans or projects which are* ***completed; approved but uncompleted****; or* ***not yet proposed***" **[CAB/1/11/388]**.

122. The failure to have regard to the cumulative / in-combination effects of Phase 1 and Phase 2 together means that no regard has been given to whether Phase 2 would have significant effects on European designated sites (such as the River Mearse SAC which spans a wide area north of Birmingham). Accordingly, the overall effect of HS2 on the UK's network of European designated sites has not been considered. It is no defence for D to contend that cumulative / in-combination effects will be considered in the AoS for Phase 2 because the principle of Phase 2 has already been fixed by the DNS.

123. Moreover, Article 16(1) requires competent authorities to consider whether there is *"no satisfactory alternative"* to a scheme causing harm to habitats; by postponing consideration of this issue in relation to Phase 2 until after the detailed route for Phase 1 and the principle of Phase 2 have been fixed by the DNS, D has narrowed the range of potential alternatives to a route for Phase 2 that causes harm to habitats. This further demonstrates why the cumulative and in-combination effects of the entire route needed to be considered prior to the adoption of the DNS.

124. D's suggestion that any duties under the Habitats Directive can and will be discharged at the Hybrid Bill stage (see e.g. CD [149]) is not an answer to the legal challenge. As set out above, Article 6(3) of the Habitats Directive requires AA (unless there are no likely significant effects on European designated sites) of both *"plans"* and *"projects"*. There is therefore no permissible scope for avoiding AA of a *"plan"* on the ground that the development to which it relates will be the subject of AA later down the line at the *"project"* stage. To do so would be to replace the two-tier scrutiny specifically provided for

by Art. 6(3) with a single tier of scrutiny. As well as being contrary to the express provisions of Art. 6(3), this would frustrate the purpose and effectiveness of the Habitats Directive since reducing the degree of scrutiny to a single tier would jeopardise the competent authorities' ability to secure a high level of preservation and protection of European designated sites (as to which see the First Recital to the Habitats Directive).

125. Finally, as acknowledged at [6.4.4] of the AoS Review [**CJB/4/21/1612**], an interconnected population of Bechstein's bats have been recorded in woodland on both sides of the proposed route in the vicinity of Finmere. This population is known to move across the proposed route for both feeding and to move to breeding and hibernation sites. See also Mr Miller WS at [122]. The presence of the route in this location therefore presents a high probability of killing, injuring and disturbing this population. Bechstein's bats are listed in Annex II of the Habitats Directive as animal species of community interest whose conservation requires the designation of special areas of conservation. They are also listed under Annex IV of the Habitats Directive as animal species of community interest in need of "strict protection": see also Article 12(1) of the Habitats Directive. However D has completely failed to evaluate the impact of the HS2 network on the bat population encountered along the proposed route. The AoS Review simply notes:

> "... consultation responses also indicated that the consultation route falls within proximity of an area of ancient woodlands important to Bechstein's bats. We acknowledge that consideration would need to be given to possible impacts which could result from the construction and operation of HS2 London to West Midlands. Under the Conservation of Habitats and Species Regulations 2010 and the Wildlife and Countryside Act 1981, as amended, bats and certain other species receive statutory protection and we would comply with the requirements of this legislation."

126. However, under Article 16(1) of the Habitats Directive, derogation from the "strict protection" requirements of Article 12(1) and Annex IV is only permissible if there is *"no satisfactory alternative"*. Yet for the reasons outlined in relation to Ground 1 (SEA), the DNS does not contain any assessment of the environmental effects of alternatives. Moreover, Article 16(1) also requires that, in order for derogation to be permissible, it must not be *"detrimental to the maintenance of the populations of species concerned at a favourable conservation status in their natural range"* and D has undertaken no assessment of this.

127. Accordingly, D has adopted a policy which promotes derogation from the *"strict protection"* requirements of Article 12(1) without addressing the necessary criteria for doing so under Article 16(1). That amounts to a further breach of the Habitats Directive.

(iii) Relief

128. C repeats the submissions made above in relation to relief for breach of the SEA Directive.

This is not a case of trivial and inconsequential non-compliance but one of a serious failure to undertake an AA contrary to the advice of Natural England and the low threshold required by EU law.

129. The suggestion at CD [158], based upon the comments of Sullivan LJ in ***R (Boggis) v. Natural England*** [2010] P.T.S.R. 725 at [36], that, in the absence of any expert evidence from C that there was a risk to European designated sites, the Court should withhold relief on the habitats ground should be rejected. Unlike ***Boggis***, in the present case D was presented with expert advice from Natural England, which D did not take issue with, that likely significant effects on European designated sites could not be ruled out. Having received advice from the national body charged with providing advice on such issues, there is no need for further expert views to be filed by C in order for the Court to be satisfied that, if the decision to adopt the DNS without an AA were quashed, an AA might be required upon reconsideration of the matter by D.

130. The fact that there will be an AA at the *"project"* stage cannot be a valid reason for declining to quash a *"plan"* which was unlawfully adopted without an AA. As explained above, Article 6 of the Habitats Directive deliberately imposes a two-tier scrutiny at both *"plan"* and *"project"* stages in order to ensure a high level of preservation and protection of European designated sites. For the Court to acquiesce in the adoption of a *"plan"* in breach of the Directive would seriously undermine that objective and thus be contrary to duty of sincere co-operation under Article 4(3) TEU.

Ground 4: Failure to consult in accordance with established principles of lawful consultation

131. As with Ground 2, given the agreement that CA will take the lead on Ground 4, C adopts CA's submissions on this ground (including the additional submission in [116A-C] of CAs' amended grounds that D's failure to provide the passenger loading data for the years from 2007 rendered the consultation unfair and unlawful) and in order to avoid unnecessary duplication does not repeat them here in their entirety.

132. The particular points which C highlights are as follows (without prejudice to the generality of CA's submissions).

133. First, the DNS sets out the strategy not merely for the detail of the initial Phase 1 from London to West Midlands but also for the overall HS2 project including the remainder of the network including the "Y" to Leeds and Manchester and the spur link to Heathrow which together will form Phase 2. The precise details of Phase 2 are left over for future consultation, but the principle of Phase 2 is set by the DNS (see eg. paragraphs 45-57 at **CJB/4/18/1408-1411** and the plan at p.28, **CJB/4/18/1412**). As a result, thousands of people and businesses whose property will directly be impacted by the route of the Y

and/or the Heathrow Spur will have been denied the opportunity of a fair and effective consultation on whether Phase 2 should proceed. Such individuals will not know whether and if so how they are affected until the consultation on Phase 2, but by that stage the principle of Phase 2 will be fixed. This is contrary to:

(1) common law requirements of fair consultation. See e.g. ***R v. North and East Devon Health Authority ex parte Coughlan*** [2001] Q.B. 213 at [108] **[CAB/3/38]**:

> "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168."

(2) the requirement in Article 6(2)-(3) of the Aarhus Convention which requires that the public to be informed *"in an adequate, timely, and effective manner"* of development engaging the Convention (which HS2 does) and to be given *"sufficient time... to prepare and participate effectively during the environmental decision-making"*. This is a directly effective right under EU law since Art. 6 of the Aarhus Convention is incorporated into the SEA Directive by preamble (20) and Art. 6.

134. Secondly, D erred in law in failing to re-consult in relation to CA's Optimised Alternative, for the reasons given in CA's Grounds of Claim.

135. Thirdly, the DNS contained several previously unheralded changes to the London-West Midlands route for HS2 on which the public had not been given the opportunity to comment. In addition to the examples relied upon in CA's Grounds of Claim (which C adopts but does not repeat here), C notes that the *Review of Possible refinements to the proposed HS2 London to West Midlands Route* accompanying the DNS states at [4.3.7] – [4.3.8] **[CJB/4/20/1583]**:

> "Further investigation in response to consultation identified that the proposed tunnel from Amersham to the M25 would pass directly through an important aquifer. Whilst modern tunnel design can overcome many associated issues of construction within aquifers there would remain a risk to the drinking water supply during the construction phase. This revision would significantly re-align this tunnel below ground to avoid the aquifer, and merge the two tunnels in this section into a single longer tunnel, avoiding the need for a section of deep cutting to the north of Amersham.
>
> The route would enter the tunnel at Mantles Wood, close to the location of the portal of the Little Missenden tunnel on the consultation route and emerge, as with the consultation route, inside the M25. The tunnel would pass underneath the River Misbourne, Shardeloes Registered Parks and Gardens and Chalfont St Giles. It would require the construction of up to six intervention shafts on the surface to provide ventilation and access in the event of an emergency. The exact locations for and the

design of intervention shafts would form part of the next stage of design, should a decision be taken to proceed with this option."

136. This revised tunnel proposal would have very substantial implications including, among other things (see the witness statement of Thomas Crane [**CDB/5**] at [39] onwards):

(1) destroying most of the ancient woodlands of Mantles Wood (east of Little Missenden) and Sibley's Coppice (South Heath) and fragmenting more of those ancient woodlands than the route consulted on;

(2) bringing the route closer to South Heath, where the northern extension to the green tunnel will be above current ground level so that spoil will have to be deposited on it;

(3) while avoiding water mains, sewage pipes and associated water infrastructure, the tunnel goes through (rather an as announced, avoiding) the aquifer;

(4) exposing the route from South Heath northwards for approximately 2.5 kilometres, so that the route and trains will run above ground, increasing visual and noise pollution.

137. Given the scale and significance of these changes, D acted unlawfully in failing to re-consult those most directly affected prior to incorporating them in the DNS. In particular:

(1) Whether the post-consultation amendments were of such significance that fairness required them to be consulted upon is a matter for the Court to decide for itself. The question is not simply whether D was reasonably entitled to conclude that they were not of such significance. This is because the Court is the arbiter of what fairness requires in any particular case: see eg. ***Mackay v. Secretary of State for Justice*** [2011] EWCA Civ 522 per Gross LJ at [28].

(2) What is required by way of re-consultation on changes must depend on the circumstances of the case. A national consultation on a nationally important infrastructure project having the potential for significant impacts on the areas in which it is to be located should not be approached in the same manner, for example, as a health authority consultation for the reorganisation of local health services. See ***R (Smith) v. East Kent Hospital NHS Trust*** [2002] EWHC 2640 (Admin) at [42]-[43], where Silber J held :

> "in determining whether there should be a further consultation, I should also bear in mind the statement of Keene J (as he then was) in *R v. London Borough of Islington ex parte East* [1966] ELR 74 at 88D that "the extent and method of consultation must depend on the circumstances ... Underlining what is required must be the concept of fairness which in turn implies that those with a right to be consulted must be given an adequate opportunity to express their views and so influence the decision maker". The concept of fairness forms the basis of the comments of Megarry J, of Hodgson J and of the Divisional Court that I have quoted, because a right to be

consulted is not of any value if the consulting party does not consult on the most basic features of a proposal that he ultimately wished to adopt, even though he has previously consulted on something totally different.

43. A matter of crucial importance in determining whether the defendants in this case should have re-consulted on the proposals under challenge was the nature and extent of the difference between what was consulted on in the consultation paper and the proposal accepted in the March 2002 decision. Clearly, if all the fundamental aspects of the decision under challenge had not been consulted on but ought to have been, that would indicate a breach of the duty to consult, while at the other extreme, trivial changes do not require further consideration. In approaching this issue, it is necessary to bear in mind not only the strong obligation of the defendants to consult, but also the dangers and consequence of too readily requiring re-consultation, as those dangers also flow from the underlying concept of fairness, which underpins the duty to consult."

(3) In support of the point in subpara. (2) above, it is important to note that in the case of a hybrid bill, individual petitions which may only be made following second reading in the House of Commons may not take issue with the principle of the Bill. The scope for objecting to the proposals which have emerged from the DNS is far more limited than would be the case of proposals taken forward under legislative schemes such as the Transport and Works Act 1992 or Planning Act 2008. The consultation of the public prior to the adoption of the policy in the DNS was therefore important in terms of the ability of those likely to be affected by the proposals to be consulted.

(4) The significance of the post-consultation amendments needs to be judged from the perspective of the consultees and the nature of the proposals since the issue is whether they have had a fair opportunity to comment. A change might not be particularly significant when viewed against at the HS2 route as a whole (whether Phase 1 alone or Phases 1-2 together), but be of considerable significance for those affected by the change, in which case it would be unfair if they were not consulted prior to a final decision being taken. The post-consultation amendments in the present case fall into this category.

Ground 5: Unlawful failure to take into certain consultation responses

138. By letter dated 20 July 2012, D revealed that over 400 consultation responses had been omitted from the analysis undertaken by Dialogue by Design (**"DbyD"**), who had been appointed by D to analyse the consultation responses for her in order to inform her decision on the final strategy for HS2. The omitted responses included those of C, Cherwell District Council (one of the CAs) and HHL.

139. In his third w/s, Phillip Graham asserts for the D at [293], [297] & [299] that the consultation response of Cherwell DC was reviewed directly by officials at the DfT despite its omission from the DbyD analysis (see also [278]). Notably, however, Mr Graham confirms at [300] of his w/s that HHL's consultation response was not read and considered

by Department for Transport officials. On any view, therefore Heathrow Hub's consultation response was omitted altogether from consideration by D or those acting on her behalf prior to her reaching her decisions. C agrees and adopts the HHL's submissions to the effect that this was a manifest error of law.

140. This legal defect in itself merits the quashing of the entire DNS. The failure to take into account material considerations in considering the alternative routing advocated by HHL strikes through the heart of the DNS, given the fundamental differences in the Heathrow Hub route and that adopted in the DNS, and the potentially wide ranging differences in their environmental and other effects.

Reference to the CJEU pursuant to Article 267 TFEU

(i) Legal framework

141. Art. 267 TFEU **[CAB/1/1]** provides, insofar as is relevant:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court."

142. In ***CILFIT srl v. Ministero della Sanita*** Case C-283/81 [1983] 1 C.M.L.R. 472 **[CAB/1/13]**, the CJEU held:

> "a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community."

143. Whilst Art. 267 imposes no express obligation to refer on national courts that are subject to a right of appeal, first instance courts retain a wide discretion to refer. In circumstances where there are no significant disputes of fact requiring determination at first instance and where it is readily apparent that the case turns on an issue or issues of EU law that are not *acte clair*, it is often appropriate for a reference to be made at first instance without the

delay and expense of appellate litigation. See Case C-210/06 ***Cartesio Oktató és Szolgáltató bt*** [2008] E.C.R. I-9641 **[CAB/2/244]** , where, in ruling that Art. 267 (then Art. 234 EC) prohibited national rules enabling an appellate court to vary an order for reference or to set it aside and order the referring court to resume the domestic law proceedings, held at [88]:

> "Article 234 EC gives national courts the right – and, where appropriate, imposes on them the obligation – to make a reference for a preliminary ruling, as soon as the national court perceives either of its own motion or at the request of the parties that the substance of the dispute raises one of the points referred to in the first paragraph of Article 234 EC. It follows that national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of Community law, or consideration of their validity, necessitating a decision on their part"

144. See also the Opinion of Advocate General Poiares Maduro at [19]:

> "The possibility for a lower court in any Member State to interact directly with the Court of Justice is vital to the uniform interpretation and the effective application of Community law".

(ii) Submissions

145. Grounds 1, 2 and 3 above turn on the proper interpretation of the SEA, EIA and Habitats Directives respectively.

146. C's primary case, as articulated above, is that the issues raised by Grounds 1-3 are *acte clair* in its favour and therefore no reference is required in order for the Court to determine the claim and quash the DNS.

147. In the alternative, however, it is submitted that the converse is not true. In other words, for the reasons set out above it cannot be said that, applying the ***CILFIT*** test, it is *"so obvious as to leave no scope for any reasonable doubt"* that:

(1) the DNS is not a *"plan or programme"* that is *"required by administrative provisions"* within the meaning of the SEA Directive (bearing in mind in particular that the concepts of a *"plan or programme"* and *"administrative provisions"* are autonomous concepts of EU law the interpretation of which is ultimately for the CJEU and that the concept of *"administrative provisions"* as opposed to *"legislative"* and *"regulatory"* provisions has not been specifically considered by the CJEU in its caselaw on SEA thus far);

(2) the Hybrid Bill process is compatible with the EIA Directive;

(3) the DNS is not a *"plan"* within the meaning of the Habitats Directive; and

(4) the duty of sincere co-operation under Article 4(3) TEU does not necessitate the quashing of the DNS in the light of the breaches of EU law outlined above.

148. It may therefore be appropriate for a reference to be made. In particular, given the existence of three protective costs orders in the conjoined claims and the obvious need for a timely determination of the claims, the additional cost and delay of waiting until the case reaches the Court of Appeal or the Supreme Court before a reference is made support the view that in the event that the claim is found to turn upon an issue or issues of EU law which are not *acte clair*, a reference ought to be made now rather than on appeal. Such an approach would be consistent with the overriding objective under CPR Part 1 which provides that dealing with a case justly includes, so far as practicable, *"saving expense"* and *"ensuring that it is dealt with expeditiously"*.

Conclusion

149. For any or all of the above reasons, C requests that the Court

(1) grants permission to proceed with the claim;

(2) allows the claim (whether or not having first made a reference to the CJEU pursuant to Art. 267 TFEU);

(3) quashes the DNS; and

(4) orders the Defendant to pay the Claimant's costs of the claim.

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5 November 2012