In The Supreme Court of the United Kingdom

ON APPEAL

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

(ENGLAND & WALES)

UKSC 2013/0172

BETWEEN:

THE QUEEN

(on the application of HS2 ACTION ALLIANCE LIMITED)

Appellant

– and –

THE SECRETARY OF STATE FOR TRANSPORT

Respondent

CASE FOR THE APPELLANT

Introduction

1. This appeal arises out of HS2AA's claim for judicial review of the decisions issued by the Secretary of State for Transport ("**SST**") on 10 January 2012 in the Command Paper *High Speed Rail: Investing In Britain's Future – Decisions and Next Steps* (Cm 8247) ("**the DNS**") which sets out the Government's strategy for the promotion, construction and operation of a new national high speed rail network known as High Speed Two (**"HS2"**) from London to the West Midlands, Manchester and Leeds and its detailed proposals for Phase 1 of the route. Core Volume Tab 18

2. HS2 is a nationally important infrastructure project with huge potential to have major impacts on the environment, people and communities and (the Government contends) the economy. The Government describes it in its Phase 2 Consultation (July 2013, section 2.4) as "*redrawing the map of the* Appendix II Tab 49

UK" and in the DNS as "*the largest transport infrastructure investment in the UK for a generation, and, with the exception of HS1, is the first major new railway line since the Victorian era*".[1] At least ten sites of special scientific interest, more than fifty ancient woodlands, four Wildlife Trust reserves, and numerous local wildlife sites lie in the route proposed by the DNS. Over 170,000 households lie within a kilometre of it.

3. However, in the DNS the Government set out its plan for HS2 without a strategic environmental assessment which would have been required of a local plan or supplementary planning document for a local development project. It is clear that the DNS nonetheless has been followed in the subsequent development of Phases 1 and 2, will exert considerable influence over the Hybrid Bill process, by which development consent will be sought from Parliament. It is equally clear that Government intends that it should exert such an influence.

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4. A summary of the key elements in the development of HS2 and the chronology is set out in the Statement of Facts and Issues ("SFI"). It corresponds to a similar document provided to the Courts below by HS2AA and divides the process for convenience into a series of stages as follows:

(1) Stage 1: Initial development of the national strategy, culminating in HS2 Ltd's 2009 report and the Government's policy decision in March 2010 to proceed with high speed rail and to consult on the strategy and details (SFI paras. 5-17).

(2) Stage 2: The adoption by the Coalition Government of the March 2010 policy decision and commitment to formal public consultation (SFI paras. 18-24).

(3) Stage 3: the February 2011 consultation on the overall strategy for HS2 and the strategy/details for Phase 1 (SFI paras. 25-36).

(4) Stage 4: the January 2012 decisions on the overall strategy for HS2 and the strategy/details for Phase 1, set out in the DNS (SFI paras. 37-44).

(5) Stage 5: the consultation on and subsequent adoption of safeguarding

[1] DNS, p.11 (1).

directions, as anticipated in the DNS, to protect the route corridor adopted in the DNS from conflicting development (SFI paras. 45-48).

(6) Stage 6: consultation on the detail of Phase 2 (the principle is assumed, following the DNS). This began with the publication of the D's preferred route on 28 January 2013 and, following an informal consultation with "key stakeholders," is now the subject of formal public consultation which began on 17 July 2013 (following the conclusion of argument in the Court of Appeal) (SFI paras. 49-53).

(7) Stage 7: the High Speed Rail (Preparation) Bill ("the Preparation Bill"), which is currently before Parliament, and which proposes to authorise the SST to incur expenditure for a high speed railway network. Clause 1(2) of the Bill defines the network for these purposes in terms which are plainly influenced by the decision taken in the DNS, as is clear from para. 13 of the Explanatory Notes which state that this clause *"authorises expenditure in preparation for the whole of the network which is proposed in the 2012 Command Paper"* (SFI paras. 59-60).

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(8) Stage 8: Hybrid Bills to obtain project development consent for phases 1 and 2 (SFI paras. 54-58 & 61-65).

5. As explained below, the Government has and will continue to rely on the DNS in formulating the details of Phases 1 and 2 and to persuade Parliament to grant development consent for HS2. In particular, the decisions in the DNS that HS2 should take the form of a "Y" network, with a fork north of Birmingham creating two legs towards the Manchester and the Leeds, and that the mainline should avoid Heathrow Airport and the existing transport infrastructure corridor between London and the West Midlands alongside the M40, are being treated as conclusive. For example:

(1) The Preparation Bill defines the network in relation to which the Government is to be authorised to incur expenditure by reference to the "Y" network adopted in the DNS;

(2) the safeguarding direction issued to prevent conflicting development protects only the route corridor adopted in the DNS; and

(3) The draft Environmental Statement for Phase 1 makes clear that strategic alternatives to the "Y" network have already been discounted and that the only alternatives to be consulted upon relate to matters of detail within the parameters set by the DNS (see further below).

6. As noted, these decisions have not been informed by a strategic environmental assessment ("**SEA**") in accordance with the requirements of the SEA Directive. The Courts below unanimously rejected the SST's contention that there had been substantial compliance with the SEA Directive and the SST does not pursue that argument before the Supreme Court.[2] As Sullivan LJ noted in his judgment at [187], if SEA were required, *"it would be difficult to think of a more egregious breach of the Directive given the scale of the HS2 project and the likely extent of its effects on the environment"*.

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7. HS2AA contends that, as concluded by Sullivan LJ in his dissenting judgment, the SEA Directive applied to the DNS and required it to be subject to an SEA prior to its adoption. In accordance with the Court's own obligations under EU law, a quashing order should follow so that the SST is no longer able to rely upon the fruits of his failure to comply with the Directive in the continuing process of consultation or before Parliament in promoting the Hybrid Bills by which development consent is to be sought.

The issues in the appeal

8. As recorded by Sullivan LJ at [147], it was common ground before the Court of Appeal that the DNS is a *"plan or programme"* within the meaning of the SEA Directive. Whether the Directive was engaged depended upon whether it was *"required by administrative provisions"* within the meaning of Art. 2(a) and *"set the framework for future development consent"* of HS2 within the meaning of Art. 3(2)(a). This in turn depends upon the proper interpretation of these provisions of EU law which (especially in relation to the latter), for the reasons explained below, HS2AA submit is not *acte clair* or *acte éclaré* and therefore requires a reference to the CJEU pursuant to Art 267 of the

[2] See Ouseley J at [108]-[196], with whom Lord Dyson MR and Richards LJ expressed agreement at [72] of their judgment in the Court of Appeal See also Sullivan LJ at [186]-[187].

Treaty on the Functioning of the European Union (**"TFEU"**).

9. The SEA Directive is the EU's means of complying with its obligation under Article 7 of the UNECE *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (**"Aarhus Convention"**) to put in place a regulatory framework to secure effective public participation in the preparation of plans and programmes (see further below). Art. 7 of the Aarhus Convention is expressed to apply to all *"plans and programmes relating to the environment"*. There is no proviso to the effect that only those plans and programmes *"required by administrative provisions"* and/or which *"set the framework for development consent"* are subject to its requirements. HS2AA accordingly submit that if the effect of these provisos in Arts. 2(a) and 3(2)(a) of the SEA Directive is to exclude the DNS (which is agreed to be a *"plan or programme"* the subject of which has significant environmental effects) from the scope of the Directive, these provisos are contrary to the EU's international law obligations and should be struck down, with the consequence that the SEA Directive does apply to the DNS. Only the CJEU can rule that EU secondary legislation is invalid: see Case 414/85 ***Firma Foto Frost v. Hauptzollamt Lubeck-Ost*** [1988] 3 C.M.L.R. 57.

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10. A reference to the CJEU is therefore sought on this ground even if, contrary to our primary submission, the Court concludes that the interpretation of *"required by administrative provisions"* and/or *"set the framework for development consent"* is *acte clair* in the SST's favour. The Court of Appeal majority's only answer to this point was to interpret Art. 7 of the Aarhus Convention as applying only to those plans and programmes which set the framework for development consent: see Lord Dyson MR and Richards LJ at [67]. As explained below, such an interpretation puts an unwarranted gloss on the wording of Art. 7 and is contradicted by the UNECE's Guide to the Implementation of the Aarhus Convention and the case-law of the Aarhus Convention Compliance Committee (**"ACCC"**). It is in any event for the CJEU, and not a domestic court of a Member State, to interpret the scope of the international obligations in considering the validity of EU secondary legislation which purports to implement them: see Case C-366/10 ***Air Transport Association of America v. Secretary of State for Energy and***

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Climate Change [2012] C.M.L.R. 4 at [50]-[55].

11. A further question of EU law arises from the SST's contention that, even if the SEA Directive applied and there had been no substantial compliance, the Court should withhold relief. The Courts below unanimously rejected that contention,[3] and as Sullivan LJ noted at [186] the SST abandoned it in his oral submissions before the Court of Appeal, but the SST now seeks to revive it in the Supreme Court.

12. To the extent that the Court allows that argument to be revived, HS2AA's response, in summary, is that the Court's obligation under EU law is to grant an effective remedy where (as here) there has been a failure to comply with the substance of the rights conferred by a Directive, and that anything short of a quashing order would not be an effective remedy – given that otherwise it is inevitable that the DNS will continue to influence the Hybrid Bill process and consideration of the project proposals.

13. Against that background, our Case addresses the following issues in turn

(1) Overview, purposes and relevant provisions of the SEA Directive ;

(2) The meaning of *"required by administrative provisions"* in Art. 2(a);

(3) The meaning of *"set the framework for future development consent"* in Art. 3(2)(a);

(4) The invalidity of Art. 2(a) and/or Art 3(2)(a) if a harmonious interpretation with Article 7 of the Aarhus Convention cannot be achieved; and

(5) The requirement for an effective remedy if the SEA Directive applied and was therefore breached.

Overview, purposes and relevant provisions of the SEA Directive

(i) Overview and purposes of the SEA Directive

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14. The SEA Directive is transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004 ("**the SEA**

Regulations"), which insofar as is possible have to be interpreted in a manner that is consistent with the Directive: ***Marleasing SA v. La Comercial Internacional de Alimentacion SA*** Case 10/89 [1992] 2 C.M.L.R. 305. Authorities Tab 43

15. The objective of the SEA Directive is relevant to its interpretation and is set out in Article 1:

> "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"

16. The requirement for plans and programmes to be subjected to SEA is an important step forward in EU environmental law,[4] building on the earlier requirement for applications for development consent to be subject to environmental impact assessment ("**EIA**") pursuant to the EIA Directive, which was first enacted in 1987 and recently re-enacted in codified form by Directive 2011/92/EU ("**the EIA Directive**") following various amendments to the original version. As the Director General of the Commission's Environmental Directorate stated in the foreword to the Commission's Guidance on SEA, *Implementation of Directive 2001/42 on the assessment of certain plans and programmes on the environment* (**"the Commission Guidance"**), the SEA process is designed to ensure there is an environmental assessment before site specific applications are made and before options may become more limited: Core Authorities Tab 42; Authorities Tab 27

> "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

[3] See Ouseley J at [189], Lord Dyson MR and Richards LJ at [72] and Sullivan LJ at [186]-[187].

[4] And is the EU's means of giving effect to its international law obligation under Art. 7 of the Aarhus Convention to have in place a proper regulatory framework to secure public participation in the preparation of plans and programmes: see below.

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."

17. Para. 4 to the preamble to the SEA Directive states:

"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."

18. Para. 10 of the preamble provides further insight into the SEA Directive's purpose (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..."[5]

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19. 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."

Core Authorities Tab 11

20. A purposive approach is to be taken to the interpretation of the SEA Directive: see ***Walton v. Scottish Ministers*** [2013] P.T.S.R. 51 per Lord Reed at [20]-[21]. See also Case C-567/10 ***Inter-Environnement Bruxelles ASBL v. Région de Bruxelles-Capitale*** [2012] Env. L.R. 30, where the CJEU held at [37] that the provisions which delimit the Directive's scope:

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

[5] Annex I of the EIA Directive, to which this passage refers, specifically lists railway projects as being within its scope.

be interpreted broadly."

21. The considerable extent to which the CJEU will strive to give the SEA Directive an interpretation which gives the fullest effect to its objectives, even to the extent of an apparent distortion of the language used in the Directive, can be seen from the its decision in ***Inter-Environnement Bruxelles*** that a plan or programme could be *"required"* by legislative, regulatory or administrative provisions (thus engaging the SEA Directive) even if its adoption was not mandatory but discretionary (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 scope of the SEA Directive

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

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> "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."

23. The reference to Directive 85/337/EEC is to the EIA Directive, which has now been consolidated into Directive 2011/92/EU. It is common ground that a long distance railway such as HS2 is a project which falls within Annexes I or II therein.[6]

24. It is notable that, unlike the EIA Directive (see article 1(5)) there is no exemption for a plan or programme in the legislative context.

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[6] The list of projects in Annex I of the EIA Directive includes, at [7(a)], *"construction of lines for long distance railway traffic"*. The list of projects in Annex II includes, at [10(h)] *"elevated and underground railways used exclusively or mainly for passenger transport"*.

25. 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 (emphasis added):

> ""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..."

26. 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.

27. Although it was common ground before the Court of Appeal that the DNS is a *"plan or programme"* within the meaning of the SEA Directive (see Sullivan LJ at [147]), the following observations are made about the meaning of this term since it may inform the Court's consideration of what was intended by the controversial terms *"required by administrative provisions"* and *"set the framework for future development consent"*:

(1) Although "plan or programme" is not defined in the SEA Directive, Art. 3(2) makes it clear that it is much wider than the concept of a town and country planning development plan. The earliest *travaux préparatoires* of the SEA Directive of 4 December 1996 show that the original proposal was to be applicable to town and country planning only, but was subsequently widened.

(2) The *travaux* for 20 July 2000 [Recommendation for Second Reading] drew a distinction between *"policy: the inspiration and guidance for action"* (which the SEA Directive was not intended to cover) and *"plan a set of co-ordinated and timed objectives for the implementation of the policy"* and *"programme. a set of projects in a*

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particular area", which were intended to be subject to the SEA Directive. The term *"policy"* in this context plainly does not cover the full extent of the concept of 'policy' in the UK which on any view extends to documents that are *"plans"* or *"programmes"* such as development plan policies.[7] Instead, it is more apt to cover high-level, free-standing government policy (e.g. for deficit reduction in the national finances).

(3) The Commission Guidance 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

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> "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 Commission 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 suggests 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.

[7] Ouseley J. appeared to accept this at [92].

28. In the present case, the SST's concession before the Court of Appeal that the DNS is a *"plan or programme"* was properly made since it sets out a set of co-ordinated and timed objectives for the implementation of the Government's high speed rail strategy (and is thus within the interpretation of 'plan' advanced in the *travaux* and in the Commission Guidance). Read fairly and as a whole, it is a formal statement of Government policy which goes beyond aspiration 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. It is clearly guiding, and was intended to guide, the Government's further development of the project and of the proposals to be included in the Bill, including the EIA of the Hybrid Bill proposals which is already under way.

(iii) The obligations imposed by the SEA Directive

29. If SEA is required, then the plan or programme may not be adopted without first complying with the requirements for the production of a compliant environmental report and conducting consultation on this in parallel with consultation on the draft plan or programme itself. Article 4 stipulates:

> "1. The environmental assessment referred to in Article 3 shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure.
>
> 2. The requirements of this Directive shall either be integrated into existing procedures in Member States for the adoption of plans and programmes or incorporated in procedures established to comply with this Directive."

30. Article 2(b) defines *"environmental assessment"* for these purposes as:

> "... "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."

31. Article 5(1) states that, where an environmental assessment is required:

> "... 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." [8]

32. Annex I sets out that the environmental report prepared for the purposes of SEA must include:[9]

"(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."

33. A footnote states that the likely significant effects to be assessed under Annex I(f):

"should include secondary, cumulative, synergistic, short, medium and

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[8] Transposed by Reg. 12 of the SEA Regulations.
[9] Transposed by Schedule 2 of the SEA Regulations.

long-term permanent and temporary, positive and negative effects".

34. The Commission 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." The consideration of alternatives is a central means by which the SEA Directive seeks to ensure that plans and programmes are shaped by environmental assessment.

35. Art 5(1) of the SEA Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives. Accordingly, as noted in [5.12] of the Commission Guidance the likely significant environmental effects of both the plan/programme and of the reasonable alternatives must be *"identified, described, and evaluated in a comparable way"* and *"the information referred to in Annex I should thus be provided for the alternatives chosen"*. See also ***Heard v. Broadland DC*** [2012] Env. L.R. 23, at [54], [57] and [71], where the purported SEA of the Broadland Core Strategy had not complied with the SEA Directive since the assessment of alternatives had not been undertaken on the same basis as the preferred option. What was required by the Directive was, in Ouseley J's judgment, *"an equal examination of the alternatives which it is reasonable to select for examination alongside whatever, even at the outset, may be a preferred option"* because it was part of the purpose of SEA *"to test whether what may start out as preferred should still end up as preferred after a fair and public analysis of what the authority regards as reasonable alternatives"* [71].

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36. The duty is not simply to assess all reasonable alternatives but also to explain the reasons for selecting the alternatives dealt with: see Annex I(h). Unless this is done, the reader of the environmental report will be unable to understand the basis for selecting the alternatives and whether all "reasonable" alternatives had been complied with: see ***Heard*** per Ouseley J at [66]. Ouseley J also held in ***Heard*** that a purposive interpretation of the SEA Directive required an outline of the reasons for the selection of the preferred option ahead of the alternatives (even though this was not an explicit requirement of the Directive): see [68]-[69].

37. Article 6 of the SEA Directive[10] requires that the environmental report is subject to consultation with certain designated authorities (in England, English Heritage, Natural England and the Environment Agency) and the general public so that they have (Article 6(2)) "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 submission of the draft plan or programme for adoption.

38. Article 8 provides:

> "The environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of any transboundary consultations entered into pursuant to Article 7 shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure."[11]

39. The SST does not challenge the findings of Ouseley J, upheld by the Court of Appeal, that there was neither complete nor substantial compliance with these obligations prior to the adoption of the DNS, in particular due to the failure to subject the reasonable alternatives to the "Y" network or the limited connection to Heathrow Airport by means of a "spur", to an equivalent environmental assessment to the SST's preferred alignment and to subject that assessment to public consultation in accordance with Article 6.

The meaning of *"required by administrative provisions"* in Art. 2(a)

(i) The authorities to date

40. There is no CJEU authority on the meaning of *"administrative provisions"* in Art 2(a) of the SEA Directive or what the term *"required"* means in this context. In ***Walton***, Lord Carnwath noted at [99] that *"there may be some uncertainty"* as to what the term means. Core Authorities Tab 11

41. The related term *"required by... legislative provisions"* was considered in ***Inter-Environnement Bruxelles***. One of the questions referred was: Core Authorities Tab 6

> "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

[10] Transposed by Reg. 13 of the SEA Regulations.
[11] See also to similar effect regs. 5(1) and 8 of the SEA Regulations.

compulsory...?"

42. In answering this question in the negative, and in so doing rejecting the submissions of the UK Government, the CJEU held (emphasis 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 *Valčiukiene 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."

43. The term *"required by legislative provisions"* 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. It is likely that the CJEU would take a similarly broad approach to the interpretation of *"required by administrative provisions"*.

44. The Commission Guidance states at [3.16]:

> "Administrative provisions are formal requirements for ensuring that action is taken which are not normally made using the same procedures as would be needed for new laws and which do not necessarily have the full force of law. Some provisions of 'soft law' might count under this heading. Extent of formalities in its preparation and capacity to be enforced may be used as indications to determine whether a particular provision is an 'administrative provision' in the sense of the Directive. Administrative provisions are by definition not necessarily binding, but for the Directive to apply, plans and programmes prepared or adopted under them must be *required* by them, as is the case with legislative or regulatory provisions."

Authorities Tab 27

45. The reference in the penultimate line to the term *"required"* must now be read in the light of the CJEU's judgment in ***Inter-Environnement Bruxelles***. What is clear from the remainder of this passage, however, is that the Commission's view is that administrative provisions do not need to be binding. There is nothing in the CJEU's case-law which indicates that the CJEU considers the Commission to be incorrect in this regard.

Core Authorities Tab 11

46. In ***Walton***, 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 Lord Kerr and Lord Dyson). The point did not need to be and was not determined by the Supreme Court in ***Walton***, nor was a reference sought or considered, since the appeal was dismissed on other grounds.

(ii) <u>*Submissions*</u>

Core Volume Tab 5

47. As set out in the Statement of Facts and Issues, the March 2010 Command Paper set out a clear framework for the formal public consultation on, and determination of, the national strategy for high speed rail, including the Y network, and the details of Phase 1 including the route corridor and stations. It identified the issues to be considered, the preferred options, the competent authority (i.e. the Secretary of State) and the procedure to be followed for "formal" public consultation and the adoption of final decisions thereafter in the form of the DNS. This was on any view a formal process which can be contrasted with the relatively informal process which led to the adoption of the MTS by NESTRANS in ***Walton***: Lord Reed at [33]-[34]. Even that was considered by Lord Reed to be *"arguably"* sufficient to engage Art 2(a) at [61]-[62]. The position in the present case is considerably stronger.

48. There is no requirement for legal enforceability: see the Commission Guidance and ***Inter-Environnement Bruxelles***.

49. In ***Inter-Environnement Bruxelles***, the CJEU held at [31] that a plan or programme should be treated as *"required by legislative or regulatory provisions"* within the meaning of Art 2(a) where its 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"*. Applying this logic to the *"administrative provisions"* limb of Art 2(a) in the context of the present case, if the March 2010 Command Paper is an *"administrative provision"* which determined the competent authority for adopting the plan/programme and the procedure for preparing it, then by the same token Art 2(a) is engaged. This was the case with the DNS.[12]

50. To the extent that, contrary to the above, it were necessary to show a degree of legally enforceable regulation of the process by which the DNS was to be adopted, this existed in the form of the Government's Code of Practice on Consultation, which was engaged by the requirement in the March 2010 Command Paper for *"formal"* public consultation (see SFI para. 10) and common law rules relating to fair consultation. Appendix II Tab 15

51. Further, the DNS was required in the sense that the Government had generated a legitimate expectation in EU and/or domestic law, and thus a 'requirement' even in the conventional (pre ***Inter-Environnement Bruxelles***) sense of the word, 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

[12] See the findings of Ouseley J. at [67] that the March 2010 Command Paper was "capable of being an administrative provision within the SEAD" and at [69] that "the body which was to reach the decision was identified, that the topics for decision were set out, that the process in

"announce my decisions in January" following consideration of the consultation responses received;

(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. The expectation was that no decision would be taken without carrying out the process described in the March 2010 Command Paper;

Authorities Tab 22

52. It is one of the general principles of EU administrative law that legitimate expectations[13] should be protected (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 at [21]-[27], Case T-203/96 ***Embassy Limousines & Services v. European Parliament*** [1998] E.C.R. II-4239 at [73]-[75] and Cases 46/98 & 91/98 ***CEMR v. Commission*** [2000] E.C.R. II-4239 at [64], [69], [82]-[84];

Authorities Tab 44
Authorities Tab 40
Authorities Tab 36

53. The DNS described its purpose at [1]-[3] 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.

54. At first instance, Ouseley J., whilst accepting that the contrary was arguable at [106], held that the DNS was not *"required by administrative provisions"* for the following reasons:

Core Volume Tab 15

> "68. … A mere statement of intent, or of policy, by Government that it will produce a plan is not a requirement on Government, in any sense, that it produce a plan. A real degree of formality, control and non-statutory administrative need for a process culminating in a decision is required.
>
> …
>
> 70. The Command Paper contained no requirements in any sense of that

terms of further work and consultation was clear, as were the steps likely to be taken after the DNS."

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

word. Government was entirely free to change its mind on whether it wished to proceed to such a decision, or to change the nature of the decisions consulted on, or to omit the further work; it could change the topics and scope of the consultation process.

71. The DNS was not regulated by the Command Paper, for the same reasons. I assume that the Command Paper created a legitimate expectation that there would be consultation if the process envisaged by the Paper were undertaken, but that does not make the DNS something regulated by the Command Paper. Regulation, if such it be, of part of the process by which it was produced does not make the ultimate outcome, the putative plan, a decision which is regulated by, required in that sense by, the Command Paper.

72. The phrase "provided for" does not mean to my mind merely "envisaged by" or "anticipated as a result of". It connotes more of a sense of formality, control and non-statutory administrative need or obligation, as in "regulated by", leading to the taking of a decision, than is found in the announcement of an optional process which can be begun, changed or abandoned at will. The need for some form of formality in the process and outcome is not satisfied by the common consequence that, if pursued, there will be consultation, whether covered by common law or by a general Government Code. The Government could have changed its mind on how and on what it consulted, even on whether it would do so."

55. HS2AA submits that Ouseley J. was wrong to treat as determinative the fact that the Government was free to change its mind on whether to proceed with the commitments set out in the March 2010 Command Paper. In particular:

(1) His approach is inconsistent with the decision of the CJEU in ***Inter-Environnement Bruxelles*** that *"required"* should not be read in its conventional sense. The Belgian authority in that case was free at any stage to abandon its proposed adoption of its non-compulsory plan, as would any authority preparing a plan or programme the adoption of which was not mandatory. The crucial factor for the CJEU was to avoid an interpretation of Art 2(a) which would restrict the scope of the scrutiny of plans and programmes that have an effect on the environment: see CJEU at [29]-[30] (an approach which is consistent with the need to strive for harmonious interpretation with Art 7 of the Aarhus Convention: see further below). The environmental effects of a plan/programme do not depend upon whether its adoption could have been aborted. Accordingly, the purposive considerations that led the CJEU to conclude in ***Inter-Environnement Bruxelles*** that the plan in that case should be treated as *"required by legislative or regulatory*

provisions" apply with equal force in the present case.

(2) It is also inconsistent with the Commission Guidance (see above) which makes clear that the Commission's' interpretation of *"required by administrative provisions"* is that enforceability is not necessary.

(3) In reaching this conclusion, Ouseley J. attached too much significance at [72] to the use of *"provided for"* in the question referred to the CJEU in ***Inter-Environnement Bruxelles***. This phrase does not feature in the language of the SEA Directive and is only referred to in passing in the operative part of the CJEU's judgment. It is in any event clear from the CJEU's approach to the word *"required"* that, insofar as it intended the term *"provided for"* to have any significance, it should not be interpreted restrictively.

Core Volume Tab 14

56. In the Court of Appeal, Sullivan LJ accepted these criticisms, holding at [181]-[182]:

> "181. The fact that the 2010 Command Paper was a statement of Government policy on High Speed Rail (see paragraph 69 of Ouseley J's judgment) does not mean that this particular policy statement did not "require", in the sense in which the CJEU interpreted that word in *Inter-Environnement Bruxelles* (see paragraph 162 (2) above), the preparation of a document which was in due course produced in the form of the DNS in which, following the process of public consultation described in the policy statement, the Government's decisions on the matters identified in the policy statement would be announced in accordance with the process which was set out in the statement.
>
> 182. The fact that the Government could (subject to any issues of legitimate expectation, e.g. as to the nature and extent of the proposed consultation process) change or abandon the process at will (see paragraph 72 of Ouseley J's judgment) does not mean that the DNS which was in fact prepared and adopted by the Government in accordance with the process described in the 2010 Command Paper was not "required" by that process. Governments may abandon plans or programmes that are "required" by administrative rather than legislative provisions while they are in preparation or even after they have been adopted, but the mere possibility that this may happen does not place a plan or programme outside the scope of the SEAD if it has in fact been prepared and adopted in accordance with an administrative requirement. While there were some alterations to the procedure set out in the 2010 Command Paper, e.g. the decision to proceed with two hybrid bills rather than one, the process described in the 2010 Command Paper was, in substance, followed by the Government in its preparation and adoption of the DNS. For these reasons, I conclude that an

SEA was required."

57. Lord Dyson MR and Richards LJ held at [71]:

> "We share the concerns expressed by Sullivan LJ about that reasoning *[of Ouseley J]*. If we had concluded that the DNS was a plan or programme that set the framework for future development consent, we would have inclined to the view that it should properly be treated as a plan or programme "required by ... administrative provisions" within the meaning of Article 2(a), adopting an appropriately broad and purposive interpretation of that provision. In the event, however, it is unnecessary for us to decide the point or, therefore, to consider whether it is a point on which a reference to the CJEU would be appropriate."

58. It is submitted that the conclusion of Sullivan LJ is correct and that the position is sufficiently clear following ***Inter-Environnement Bruxelles*** that this issue can be decided in HS2AA's favour without the need for a reference to the CJEU.

59. At the very least, however, the more restrictive interpretation of *"required by administrative provisions"* for which the SST contends cannot be said to be *acte clair*, given (i) the difficulty which the Supreme Court had with this issue in ***Walton***, Lord Reed expressing the view at [61]-[62] that the two countervailing interpretations were both arguable, (ii) the recognition of Ouseley J. at [106] that the opposite interpretation to that which he had adopted was arguable and (iii) the clear conclusion of Sullivan LJ and the similar inclination of Lord Dyson MR and Richards LJ in favour of HS2AA's interpretation.

60. The case for a reference is supported by the observations of the *Study concerning the report on the application and effectiveness of the SEA Directive (2001/42/EC)* (April 2009), commissioned by the EU Commission, which comments at p.50 that *"neither the Directive itself nor the SEA Guidance provides clear and unambiguous criteria for how to interpret the* ["required by administrative provisions"] *qualification when deciding to apply the SEA requirement"* and goes on to note at p.51 that *"Member State experience shows some problems related to the interpretation of what is meant by the wording 'administrative provisions"*, referring to differing approaches in various Member States. The Report states at p.52 that correctness of the approach in Denmark of exempting a transport investment

Authorities Tab 31

plan from SEA because the *"duty to deliver"* it *"has not been formulated in law and/or administrative provision"* is questionable having regard to the objectives of the SEA Directive and the fact that due to this practice *"when seen from an environmental perspective it clearly becomes unacceptable that the most far reaching infrastructure decisions in Denmark are not assessed with regard to their impact on the environment at the strategic planning level"*.

Authorities Tab 25

61. If the Court is not satisfied of the correctness of HS2AA's interpretation, therefore, the following questions merit reference to the CJEU pursuant to Art. 267 TFEU:

(1) In order for a plan or programme to be *"required by administrative provisions"* within the meaning of Art 2(a) of the SEA Directive, must the administrative provisions be legally binding or is it sufficient that the provisions anticipate and clearly set out a procedure and decision-making process intended to be followed albeit that it leaves some scope for change by the authority proposing to adopt the plan or programme?

(2) If, following the publication of a report by the national Government which announced a decision and intention to subject proposals for a plan or programme to formal public consultation and which identified the body that will prepare the plan or programme and the issues to be covered, does the adoption (with some changes, largely anticipated by the report) following the consultation process set out in the report, of a final decision by the Government fall to be considered as *"required by administrative provisions"* within the meaning of Art 2(a) of the SEA Directive?

62. A full list of potential questions for reference on all the issues in this appeal is set out in the Annex to this Printed Case.

The meaning of *"set the framework for future development consent"* in Art. 3(2)(a)

63. It is submitted that the meaning of this phrase is critical to the outcome of the appeal, as it was in the Courts below. There is no CJEU authority on the meaning of this term. There also appears to be significant variations in its transposition and application within the Member States. The only guidance in

the authorities is in the opinion of Advocate General Kokott in ***Terre-Wallone ASBL & Inter-Environnement Wallone ASBL v. Région Wallone*** Cases C-105/09 & C-110/09 [2010] E.C.R. I-5611 (emphasis added): Core Authorities Tab 10

> "64. 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'.
>
> 65. 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."

64. These observations were cited with approval by Lord Reed in ***Walton*** **[BA/30]** at [17], although the meaning of *"set the framework for development consent"* was not there in issue. Core Authorities Tab 11

65. HS2AA submits that, applying the necessary broad interpretation of this term, the proper conclusion is that DNS sets the framework for the grant of development consent for HS2 by Parliament. The DNS will at the very least shape and influence both the contents of the Hybrid Bill and the consideration by Parliament as to whether to grant development consent for HS2 and if so in what form (i.e. what route, etc). In particular:

(1) It will shape the form and terms of the Bill proposals and the EIA to be carried out. For example -

i. The authority to be conferred upon the SST by the High Speed (Preparation) Bill once enacted to incur expenditure on HS2 is defined by reference to the "Y" network selected by the DNS (as opposed to the alternative alignments which were discounted, such as the inverted 'A', the 'S' or the reverse 'E');

ii. Similarly, the draft ES for Phase 1 treats the "Y" network as a given and Chapter 6 of the Non-Technical Statement describes, by reference to the decisions taken in the DNS, how

"strategic" and *"route-wide"* alternatives have previously been *"ruled out"*. Only with regard to *"local alternatives"* is it said that *"alternatives are still being considered"* in some areas (at p.25);

iii. The public consultation on Phase 2 launched on 17 July 2013 (SFI paras. 49-53) plainly arises out of, and is based, on the decisions made in the DNS. This public consultation paper was not before the Court of Appeal since it was issued between conclusion of argument and judgment (though the earlier preferred route was) but it is agreed that it would be useful for the Court to see extracts from this document as indicative of the progress of the project and its relationship to the DNS. It does not invite responses on the principle of Phase 2 nor does it consider alternative options for high speed rail north of Birmingham. The principle of the 'Y' to Leeds and Manchester, adopted in the DNS, is taken as the established starting point.

(2) It will also influence the scope of the options available to Parliament in is ultimate decision on whether to enact the Hybrid Bills. The prospect of Parliament of its own volition working up the details of the alternative configurations discounted by the DNS, such as the inverted 'A', 'S' or the reverse 'E', and adopting those by way of an amendment to the Bill, appears fanciful. It appears virtually inevitable that Parliament will be presented with a choice between a route based upon the "Y" configuration or refusing to grant consent for HS2.

(3) Given the cross-party support for HS2, and the nature of the DNS, even if as a matter of strict constitutional principle the development control decision will be a matter for Parliament's unfettered discretion, the DNS will at the very least influence or guide the decision (all the more so if the vote is whipped as the SST says it will be). It is unrealistic to suggest otherwise. Whilst constitutional law recognises the separate roles of Parliament and Government, it also recognises that the executive (as both the author of the DNS and the promoter of the Bills) is entitled to influence or guide the members of the

legislature as it seeks to do so here. In this context, it is of note that even statutory development plans in the planning context, the paradigm example of a plan subject to SEA, are not binding on the planning authority. Whilst the authority must have regard to the plan it is not obliged to reach a decision which accords with plan policies (if material considerations indicate otherwise): see s. 38(6) of the Planning and Compulsory Purchase Act 2004.

(4) The effect of the safeguarding directions issued by the Secretary of State under Article 25 of the Town and Country Planning (Development Management Procedure) (England) Order 2010 and s. 74 of the Town and Country Planning Act 1990 (see SFI paras. 45-48), as heralded by p.111 of the DNS, is that the DNS is able to influence development control decisions up and down the route of Phase 1 since the very purpose of the safeguarding directions is to enable the Government to prevent the grant of planning permission for any development which would conflict with the route corridor adopted in the DNS.[14] For example, an application for an urban extension to the east of Lichfield in or near the location of the Phase 1 route adopted in the DNS (see e.g. the junctions plan indicating the line of the route near Lichfield), which might otherwise have obtained planning permission on the basis that it is the most environmentally sustainable way of meeting housing needs in the area, could be prevented from obtaining permission by D due to its conflict with the DNS. Quite apart from the HS2 development consents to be given by Parliament, therefore, the DNS is setting the framework for EIA development in the conventional town and country planning context, in that it is in law a relevant consideration in the determination of planning applications along the proposed route of Phase 1.

Authorities Tab 6

66. At first instance, Ouseley J. held at [96]-[100] that in order to "set the framework for future development consent" a plan or programme had to be "more than merely persuasive by its quality and detail, but guiding and telling because of its stated role in the hierarchy of relevant considerations" [96] and

that in the present case, because the body responsible for granting development consent was Parliament, which "is entirely free to disregard" the DNS [98], that test could not be satisfied.

Core Volume Tab 14

67. In the Court of Appeal, Lord Dyson MR and Richards LJ held at [48]-[64]:

(1) The passage quoted above from AG Kokott's opinion in **Terre Wallone**, suggested that, for a plan or programme to "set the framework" it needed to "prevent appropriate account from being taken of environmental effects", and it was "difficult to see how a plan or programme could prevent appropriate account being taken unless it had some legal effect" [49]. The idea that a plan or programme had to have legal influence was also supported by the CJEU's judgment in **Inter-Environnement Bruxelles** at [30], and by the use of the terms "set" and "framework" ([51]-[52] per Lord Dyson MR and Richards LJ). Accordingly, a plan or programme which "sets the framework" is "something which narrows the discretion which the decision-maker would otherwise enjoy" [55]. This test was not satisfied in the present case because the DNS will have no legal influence on Parliament [56].

(2) They did not restrict "framework" to cases of legal influence only and held that they *"would not, however rule out the possibility that the plan or programme may set the framework where it has sufficiently potent factual influence, but... not where the decision-maker is Parliament"* [55]. They added -

> "But in our view, there must at least be cogent evidence that there is a real likelihood that a plan or programme will influence the decision if it is to be regarded as setting the framework. There is nothing in the jurisprudence to indicate that a mere possibility will suffice."

This DNS did not set the framework here because the Court could not predict in advance the likely degree of influence that the DNS would have on Parliament [57]-[60].

Appendix II Tab 40

[14] See the consultation paper on the draft safeguarding direction, which stated that the direction's objective would be "to ensure that new developments along the route do not impact on the ability to build or operate HS2 or lead to excessive additional costs.

(3) The fact that, on this approach, there would be a gap in the environmental protection secured by the SEA Directive, because it does not apply to plans or programmes concerning projects for which the body subsequently responsible for granting development consent is the national legislature, did not shed light on the interpretation of *"set the framework"* [62].

(4) A reference to the CJEU on this issue was inappropriate, having regard to *"the inevitable delay that this would entail"* and because *there is sufficient guidance in the CJEU jurisprudence as to the broad approach that should be adopted"*. The issue was one of application of that approach on the facts of the present case [64].

68. HS2AA respectfully adopts but does not repeat the dissenting judgment of Sullivan LJ on this issue at [151]-[179]. It is submitted that the appropriate course of action is now for a reference to be made to the CJEU on the meaning of *"set the framework for development consent"* within Art 3(2)(a). The potential questions to be referred include:

(1) In order for a plan or programme to *"set the framework for development consent of projects listed in Annexes I and II to Directive 85/337/EEC"* within Article 3(2)(a) of the SEA Directive, does its significance to the development consent decision need to be formally required by law, or is it sufficient that the plan or programme will, or is likely to, influence the decision-maker in granting development consent?

(2) In what if any circumstances can a plan or programme adopted by the national Government *"set the framework for development consent"* within the meaning of Art 3(2)(a) of the SEA Directive when it concerns a project or projects for which the body responsible for granting development consent is the national legislature?

69. The following submissions are advanced as to why a reference should be made (and why the majority approach in the Court of Appeal should not be upheld).

70. First, the consequence of the majority's reasoning is that a plan or programme cannot *"set the framework for development consent"* if it concerns a project or projects for which the body subsequently responsible for granting development consent is a national legislature. That is not a mere question of application of established principles, confined to the facts of the case. It is a far-reaching question which has pan-EU consequences. The majority's reasoning would be equally applicable to a plan or programme adopted by the Government of another EU Member State for a major infrastructure project for which development consent was to be obtained from the national legislature. The prospect of a new road, railway, nuclear power station, or airport being promoted in this manner is by no means far-fetched. Examples of major projects being granted development consent by the Belgian and Luxembourg legislatures can be seen from Case C-287/98 ***Luxembourg v. Linster*** [2000] E.C.R. I-6917 and Case C-182/10 ***Marie-Noëlle Solvay and Others v. Région Wallonne*** [2012] Env. L.R. 27. The pan-European consequences of the majority's interpretation of *"set the framework"* militate heavily in favour of making a reference pursuant to Art. 267.

Core Authorities Tabs 8-9

71. Secondly, in contrast to SEA, Art 1(5) of the EIA Directive provides a limited exemption for projects adopted by *"a specific act of national legislation"*:

Core Authorities Tab 2

> "(5) 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."

72. The CJEU has interpreted this exemption as applicable only if the legislative process has enabled the objectives of the EIA Directive to be satisfied in any event: see ***Linster*** at [59] and ***Solvay*** at [33]-[43]. This strongly suggests that:

(1) Where EU legislation seeks to provide an exemption to EU environmental law where the body granting development consent is the national legislature, it expressly provides to that effect. There is no such provision in the SEA Directive;

(2) Such exemptions are in any event interpreted narrowly by the CJEU owing to the risk that the objectives of the EU legislation in question might otherwise be undermined;

(3) Since the purposes of the SEA is to provide a higher-level, "up-

stream", assessment of environmental impacts at an earlier stage in the process leading to project specific applications, it would be contrary to that purpose to exclude from "up-stream" assessments leading to legislative consent procedures when the EIA directive requires the equivalent to EIA to be achieved in the legislative context. See the Commission's *Report on the Effectiveness of the Directive on Strategic Environmental Assessment* (2009), quoted above.

73. Thirdly, the approach of the Court of Appeal majority and Ouseley J. in treating *"set the framework"* as connoting a plan or programme which has legal influence, in the sense of being something which the development consent decision-maker is legally required to take into account, is contrary to the structure of the SEA Directive. The legal context of a plan or programme falls to be considered not under Art. 3(2)(a), but under Art. 2(a) and the proviso that it should be *"required by legislative, regulatory or administrative provisions"* (itself interpreted liberally, as discussed above).

74. Fourthly, as the majority accepted at [49], it would be inappropriate to place too much weight on the precise language used by AG Kokott in ***Terre Wallone***. The passage in question is plainly capable of being read either way, as [166]-[168] of the judgment of Sullivan LJ at demonstrates. In particular, her observations at [65], quoted above, are consistent with the view that the degree of influence that a plan or programme may have is relevant not to whether the SEA Directive is engaged but to the question of whether the plan or programme is likely to have significant environmental effects so as to require SEA[15] and to the level of detail required of any SEA: see Art 5(2), which states that the environmental report -

> "shall include the information that may reasonably be required taking into account.... the contents and level of detail in the plan or programme, its stage in the decision making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

75. Further, as AG Kokott noted in ***Terre Wallone*** at [43], [65]-[66], Annex II of the SEA Directive is helpful in interpreting the Directive (although it is not

[15] Where the need for SEA is subject to screening: see Art 3(5) and Annex I, first indent, which requires consideration of *"the degree to which the plan or programme sets a framework"*.

directly applicable here). It applies in cases where there is a discretion to require SEA based on the likely significant effect of the plan or programme (where it is not within Art. 3(2) but 3(5)). Annex II lists the following factors as relevant to the question whether an SEA should be required in such cases:

"1. The characteristics of plans and programmes, having regard, in particular, to

- 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,
- the degree to which the plan or programme influences other plans and programmes including those in a hierarchy,
- the relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development,
- environmental problems relevant to the plan or programme,
- the relevance of the plan or programme for the implementation of Community legislation on the environment (e.g. plans and programmes linked to waste-management or water protection).

2. Characteristics of the effects and of the area likely to be affected, having regard, in particular, to

- the probability, duration, frequency and reversibility of the effects,
- the cumulative nature of the effects,
- the transboundary nature of the effects,
- the risks to human health or the environment (e.g. due to accidents),
- the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected),
- the value and vulnerability of the area likely to be affected due to:
- special natural characteristics or cultural heritage,
- exceeded environmental quality standards or limit values,
- intensive land-use,
- the effects on areas or landscapes which have a recognised national, Community or international protection status."

76. The first indent of para. 1 refers to the degree to which the plan or programme sets a framework and this supports the view that the issue is a matter of degree. Given the environmental context, there may be an analogy to be

drawn with the precautionary principle (where the degree of risk and nature/extent of harm are balanced), namely that the greater the scope for environmental effects and significance of the contents of the plan, the less influence it may need in setting the framework (and vice-versa) to trigger SEA. On that approach, the majority approach in the Court of Appeal should be rejected on the basis that HS2 and the DNS have scope for major impacts (both positive and negative)[16] and that there is sufficient evidence of influence from the circumstances of the DNS, the role of the Government and the Bill process to regard it as setting the framework (as Sullivan LJ held).

77. Fifthly, given the degree to which the CJEU strove to interpret the meaning of the word *"required"* in ***Inter-Environnement Bruxelles*** in order to avoid cutting down the scope of the SEA Directive and thereby undermining its effect, it is very unlikely that the CJEU would share the view of the majority of the Court of Appeal that the gap in strategic environmental protection which their interpretation would leave is of little or no persuasive force.

78. Sixthly, ***Inter-Environnement Bruxelles*** is an important reminder of the CJEU's capacity to reach a conclusion which judges in the national courts might find surprising or counter-intuitive. Note the example of ***O'Byrne v. Aventis Pasteur MSD Ltd*** [2008] 4 All E.R. 881, where four members of the Appellate Committee, consistently with all four judgments below, considered the issue of EU law in that case to be clear beyond reasonable argument and would have dismissed the appeal. Although a reference to the CJEU was nonetheless made as a result of Lord Rodger of Earlsferry's dissent, Lord Hoffmann (with whom Lord Hope and Walker and Lady Hale agreed) predicted at [21] that the CJEU might *"be able to shorten the proceedings by giving a summary reasoned order"* in line with the majority view. In the event, the CJEU preferred Lord Rodger's interpretation to that of the eight national judges whose view, but for his dissent, would have prevailed without a reference: see [2010] 1 W.L.R. 1412.[17]

Authorities Tab 15

Authorities Tab 16

[16] As in EIA, assessment is concerned with all environmental impacts not simply adverse impacts.

[17] See the comments of Lord Brown of Eaton-Under-Heywood on this as an illustration of the significance of a dissent in cases where a reference is sought, in Burrows, Johnston &

79. Seventhly, unlike the Court of Appeal, the Supreme Court is obliged to make a reference pursuant to Art. 267 TFEU unless this issue is *acte clair* or *acte éclaré*. It is respectfully submitted that the Court of Appeal, in refusing to make a reference, failed to apply the principles set down by the CJEU in Case C-283/81 ***CILFIT srl v. Ministero della Sanita*** [1983] 1 C.M.L.R. 472. In particular:

Core Authorities Tab 5

(1) The majority confused two distinct principles set out in ***CILFIT***: (i) *acte clair*, where the interpretation of the EU law provision in question is, on the face of that provision, *"so obvious as to leave no scope for any reasonable doubt"* and (ii) *acte éclaré*, where *"previous decisions of the Court have already dealt with the point of law in question"*. On a fair reading of the majority's judgment, it is clear that they did not consider that the term *"set the framework"* in Art 3(2)(a) was sufficiently clear on its face as to be *acte clair* without regard to CJEU case-law (which it self-evidently is not). What persuaded them was the opinion of AG Kokott in ***Terre Wallone*** and [30] of the CJEU's judgment in ***Inter-Environnement Bruxelles***. Neither of these, however, are capable of satisfying the test for *acte éclaré*. That test requires there to be a decision *of the Court* which *deals with the point of law in question*. AG Kokott's opinion was not a decision of the Court and in any event does not deal with the specific question raised in the present case - namely whether and in what circumstances the SEA Directive applies to a plan or programme concerning a project for which the body subsequently responsible for granting development consent is a legislature. Further, ***Inter-Environnement Bruxelles*** did not purport to deal with point of law in question here, namely the meaning of *"set the framework"* – the section of the judgment in which [30] was located was dealing with Question 2 in that case, which concerned a different issue relating to a different provision of the SEA Directive:

> "Must the word 'required' in Art. 2(a) of that directive be understood as excluding from the definition of "plans and programmes" plans which are provided for by legislative

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Zimmerman (Eds.) *Judge and Jurist Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press, 2013) at pp. 32-33.

provisions but the adoption of which is not compulsory, such as the specific land use plans referred to by Article 40 of the [Belgian planning code]?".

(2) Insofar as the majority was influenced by *"all the delay that* [a reference] *would entail"*, that is not a relevant consideration under the ***CILFIT*** criteria. In any event, any such delay could have been avoided by the SST by complying with the SEA Directive prior to the adoption of the DNS (as HS2AA had requested him to do on multiple occasions), and the long term public interest in ensuring that HS2 proceeds in accordance with the law outweighs the short term inconvenience of awaiting a ruling from the CJEU.

80. In the *Study concerning the report on the application and effectiveness of the SEA Directive (2001/42/EC)* (April 2009), commissioned by the EU Commission, pp. 56-58 show that is a wide variety of differing approaches taken by Member States to the interpretation of "set the framework". The comparative table at p. 57 shows that, whilst France takes a prescriptive approach, based it appears on legal effects, Germany takes a much broader approach:

Authorities Tab 31

> "Plans and programmes set a framework for the decision on the admissibility of projects if they contain elements that are significant for future development consent, in particular with regard to the need, size, location, nature, operating conditions or allocation of resources."

The Netherlands also take a broad approach:

> "SEA is mandatory if the plan is the framework for a decision that later on will be subject to an EIA (screening). A plan shall, in any event, be considered the framework for such a decision if that plan:
>
> a. designates a site or route for those activities, or
>
> b. one or more sites or routes are considered for those activities."

These differences in approach strengthen the need for an authoritative interpretation by the CJEU. So too does the criticism made at p.52 of this Commission Report of the practice in Denmark of not subjecting the transport investment plans which are submitted in draft by the Danish Ministry of Transport to Parliament and which are *"expected by members of Parliament's Transport Committee as a regular tool for planning future investments"*. The

Report notes:

> "When seen from an environmental perspective it clearly becomes unacceptable that the most far reaching infrastructure decisions in Denmark are not assessed with regard to their impact on the environment at the strategic planning level.
>
> This practice eludes basic considerations such as whether the objectives of the investment plan has struck the right balance between transport modes or whether at all is has been taken into consideration, as well as the extent to which general mobility needs may be met in a more prudent manner by drawing into attention considerations of impacts on the environment. These problems are all the more relevant in this context because any other formal plan or programme in which such issues are systematically considered is not required according to Danish law or practices.
>
> It may be questioned whether this practice in Denmark complies with the wording and the spirit of the SEA Directive. Furthermore, the question that may be posed in this context may be whether semi-constitutional practises in principle may exempt plans and programmes from the Directive's requirements. A parallel to this problem has so far found its solution in the EIA Directive by virtue of the art. 1(5) exemption for projects the details of which are determined by a specific piece of legislation"

The same or similar objections could be made in respect of the Court of Appeal's interpretation of *"set the framework for development consent"*

81. For all these reasons, this is manifestly an issue on which a reference should be made to the CJEU. It is submitted that the CJEU would be surprised to learn that the courts of a Member State had decided to assume responsibility for answering a question of such clear arguability and pan-European significance without first making a reference, and would share the opinion of Sullivan LJ at [188] that:

> ". . it is for the CJEU, and not the domestic Court of an individual member state, to decide whether the fact that a member state chooses to adopt a process of granting development consent for a major project which will have a significant environmental effect by way of an act of national legislation is sufficient, of itself, to place the Government's adoption of its plan or programme outwith the scope of the European-wide strategic environmental protection conferred by the SEAD."

82. Were a reference not to be made and the Commission or the CJEU were subsequently to take this view and conclude that this was a manifest case for a reference, that could raise the prospect of infraction proceedings (see e.g.

Authorities
Tab 39

Case C-379/10 ***Commission v. Italy***, 24 November 2011) or a damages action (see Case C-224/01 ***Köbler v. Austria*** [2003] 3 C.M.L.R. 28).

Authorities Tab 42

The invalidity of Art. 2(a) and/or Art 3(2)(a) if a harmonious interpretation with Article 7 of the Aarhus Convention cannot be achieved

(i) Article 7 of the Aarhus Convention

83. The Aarhus Convention was signed on 25 June 1998, three years prior to the adoption of the SEA Directive. The original signatories include the EU, which subsequently ratified the Convention on 17 February 2005.

84. Article 7 of the Aarhus Convention provides:

> **"Public participation concerning plans, programmes and policies relating to the environment**
>
> Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment."

Core Authorities Tab 3

85. The term *"plans and programmes"* in Art. 7 of the Aarhus Convention is not defined. Importantly, there is no proviso that only those plans and programmes that are *"required by legislative, regulatory or administrative provisions"* and *"set the framework for future development consent of projects"* need be subject to public participation. There is a clear obligation on states parties to provide for public participation during the preparation of all *"plans and programmes relating to the environment"*. That obligation is not contingent upon the adoption of any subsequent measure by the UNECE or the Aarhus Convention institutions. Art 7 of itself requires action to be taken.

86. As noted above, Lord Dyson MR and Richards LJ in the present case interpreted Art. 7 of the Aarhus Convention as applying only to those plans and programmes which *"set the framework for future development consent"*: see [67] of their judgment.

87. That interpretation puts a gloss on Art. 7 and seeks to interpret the Convention by reference to a proviso contained in the SEA Directive notwithstanding that (i) the Directive post-dated the Convention and (ii) under EU law the Directive is required to be interpreted harmoniously with the Convention, and not vice versa (see further below). It is also contradicted by the UNECE's Guidance to the Aarhus Convention, *The Aarhus Convention: An Implementation Guide* (2nd Edition, 2013), the authors of which include the current Chair of the ACCC (Jonas Ebbeson), which states at p. 181 that *"a plan, programme or policy may be considered as "relating to the environment"* [for the purposes of Art. 7] *regardless of whether it "sets the framework" for a development consent for any project or not"*.

Authorities
Tab 54

88. On p. 182, the following observation is made (emphasis added):

> **"Plans, programmes and policies relating to the environment**
>
> The following types of plans, programmes and policies may be considered as "relating to the environment":
>
> - Those which "may have a significant effect on the environment" and require SEA *[pursuant to the SEA Directive]*.
> - Those which "may have a significant effect on the environment" but do not require SEA, <u>for example, those that do not set the framework for a development consent</u>.
> - Those which "may have effect on the environment" but the effect is not "significant", for example, those that determine the use of small areas.
> - Those intended to help to protect the environment."

89. On p. 180, referring to the above passage, the Implementation Guide expresses the view that, given the wider terms of Art. 7, the SEA Directive *"cannot be considered as fully implementing"* Art. 7 and needs to be *"supplemented by other procedures"* – contrary to what the European Parliament and Council assumed to be the case when enacting the Public Participation Directive (see below).

90. Moreover, the case-law of the ACCC indicates that, in its view, Art. 7 applies to plans and programmes <u>regardless</u> of whether they *"set the framework for future development consent"* or are *"required by legislative, regulatory or administrative provisions"*. The ACCC is a body of experts charged by Art.

15 of the Aarhus Convention with responsibility for reviewing the compliance of the States Parties.

91. In ***Walton***, Lord Carnwath held at para. 100 that *"the decisions of the Committee deserve respect on issues relating to standards of public participation"*. Similarly, AG Kokott in Case C-260/11 ***Edwards v. Environment Agency*** opined at para. 8: *"In considering the requirements of the Convention reference should be made to the decision-making practice of the Aarhus Convention Compliance Committee"* (at paras. 44-46 she went on to review the ACCC's case-law in some detail).

92. The following Compliance Committee decisions are of relevance here:

(1) The ACCC's Draft Findings in ACCC/C/2012/68 *concerning the compliance by the United Kingdom and the European Union* (30 July 2013), in relation to the adoption by the UK of a National Renewable Energy Plan (**"NREAP"**) to increase the use of energy from renewable resources, as required by Directive 2009/28/EU. At para. 59, the Compliance Committee noted the UK Government's uncontested observation that *"the NREAP does not set the framework for the determination of consent applications for renewable energy projects and an SEA is not required"* but at para. 100 it nonetheless went on to hold that *"NREAPs are plans or programmes under article 7 of the Convention"*, before concluding on the facts that the UK had failed to comply with Art. 7 of the Aarhus Convention prior to adopting the NREAP. Whilst the ACCC's findings are currently only in draft, the UK Government's letter of response dated 27 August 2013 does not request that this conclusion be revisited.

Authorities Tab 49

(2) The ACCC's Findings in ACCC/C/2010/54 concerning compliance by the European Union (29 June 2012), upholding a complaint that the EU was in breach by not having *"a proper regulatory framework and/or other instructions to ensure implementation of article 7 of the Convention by its member States... with respect to the adoption of NREAPs"* pursuant Directive 2009/28/EU (see [85]), noting at [77] that the EU *"chose not to apply the SEA Directive to NREAPs by its member States"*.

Authorities Tab 50

(3) The ACCC's Findings in ACCC/C/2005/12 *with regard to compliance by Albania* (31 July 2007), which concerned *inter alia* Decision No. 8 of the Council of Territorial Adjustment of the Republic of Albania instructing various Ministries to co-ordinate work to progress certain projects within an industrial and energy park (see [31]). There was no suggestion that this Decision was required by legislative, regulatory or administrative provisions, or that it set the framework for future development consent of the projects in question. At [72]-[74] the ACCC considered that the Decision was nonetheless subject to Art. 7 of the Convention because *"this was a decision by a public authority that a particular piece of land should be used for a particular purpose, even if further decisions would be needed before any of the planned activities could go ahead"* [72]. This was due to the Decision's importance *"both in paving the way for more specific decisions on future projects and in preventing other potentially conflicting uses of the land"* [ibid.]. (This is an equally apt description of the DNS, which paves the way for more specific decisions on HS2 and, by heralding the safeguarding directions which are now in place, prevents potentially conflicting uses of the land along the proposed route).

Authorities Tab 51

93. Accordingly, it is submitted that Sullivan LJ was right at [178] when he expressed disagreement with the view of Lord Dyson MR and Richards LJ that Article 7 of the Aarhus Convention does not apply to plans or programmes which do not set the framework for development consent. The consequence of this for the interpretation and/or the validity of Art 2(a) and 3(2)(a) of the SEA Directive is discussed below.

(ii) The relationship between Art 7 of the Aarhus Convention and the SEA Directive

94. Prior to the EU's accession to the Aarhus Convention in 2005, the European Parliament and Council enacted the Public Participation Directive 2003/35/EC in order to amend EU environmental legislation so as to achieve compliance with the EU's obligations under the Convention. Significantly, the Public Participation Directive did not amend the SEA Directive because it was already considered to be compliant with the obligation under Article 7 of the Convention to secure effective public participation during the preparation of plans and programmes: see Recital (10) and Art 2(5) of the Public

Authorities Tab 24

Participation Directive.[18] Art. 2 did, however, make provision for effective public participation in relation to certain other plans and programmes required by EU legislation listed in Annex I, which were not covered by the SEA Directive.

95. It is well-established that EU legislation must, so far as possible, be interpreted in a manner which is harmonious with international agreements to which the EU is a party: see Case C-341/95 ***Bettati v. Safety Hi-Tech*** [1996] E.C.R. I-3989 at [20]. This is the case regardless of whether the EU legislation in question was originally intended to implement the international agreement: see Case C-61/94 ***Commission v. Germany*** [1996] E.C.R. I-3989 at [52]. Authorities Tab 34 Authorities Tab 37

96. Where harmonious interpretation is not possible, the legislation in question may be invalid: see Case C-366/10 ***Air Transport Association of America v. Secretary of State for Energy and Climate Change*** [2012] C.M.L.R. 4 at [50]-[55]: Authorities Tab 32

> "50 It should also be pointed out that, by virtue of art. 216(2) TFEU , where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, they prevail over acts of the European Union (see, to this effect, *Commission of the European Communities v Germany* (C-61/94) *[1996] E.C.R. I-3989;* [1997] 1 C.M.L.R. 281 at [52]; *Algemene Scheeps Agentuur Dordrecht BV v Inspecteur der Belastingdienst - Douanedistrict Rotterdam* (C-311/04) [2006] E.C.R. I-609 at [25]; *International Association of Independent Tanker Owners (Intertanko) v Secretary of State for Transport (C-308/06)* [2008] E.C.R. I-4057; [2008] 3 C.M.L.R. 9 at [42]; and *Kadi v Council of the European Union* (C-402/05 P & C-415/05 P) [2008] E.C.R. I-6351; [2008] 3 C.M.L.R. 41 at [307]).
>
> 51 It follows that the validity of an act of the European Union may be affected by the fact that it is incompatible with such rules of international law. Where such invalidity is pleaded before a national court, the Court of Justice ascertains, as is requested of it by the referring court's first question, whether certain conditions are satisfied in the case before it, in order to determine whether, pursuant to art.267 TFEU , the validity of the

[18] Note para. 11 of the Draft Statement of the Council's Reasons in relation to the draft Public Participation Directive (26 March 2002), which stated that Art. 2(5) "exempts from applying the directive when a public participation procedure is carried out under Directive 2001/42/EEC on the assessment of plans and programmes or under Directive 2000/60/EC on Community action in the field of the water policy, as these directives already contain procedures meeting the requirements of the Århus convention." Authorities Tab 29

act of EU law concerned may be assessed in the light of the rules of international law relied upon (see, to this effect, *Intertanko* [2008] 3 C.M.L.R. 9 at [43]).

52 First, the European Union must be bound by those rules (see *International Fruit Co NV v Produktschap voor Groenten en Fruit (No 3)* (21–24/72) [1972] E.C.R. 1219; [1975] 2 C.M.L.R. 1 at [7], and *Intertanko* [2008] 3 C.M.L.R. 9 at [44]).

53 Secondly, the Court can examine the validity of an act of EU law in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this (see *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) v Council of the European Union* (C-120/06 P & C-121/06 P) [2008] E.C.R. I-6513 at [110]).

54 Finally, where the nature and the broad logic of the treaty in question permit the validity of the act of EU law to be reviewed in the light of the provisions of that treaty, it is also necessary that the provisions of that treaty which are relied upon for the purpose of examining the validity of the act of EU law appear, as regards their content, to be unconditional and sufficiently precise (see *IATA* [2006] 2 C.M.L.R. 20 at [39], and *Intertanko* [2008] 3 C.M.L.R. *9* at [45]).

55 Such a condition is fulfilled where the provision relied upon contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see *Demirel v Stadt Schwabisch Gmund (12/86)* [1987] E.C.R. 3719; [1989] 1 C.M.L.R. 421 at [14]; *Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la région v Électricité de France (EDF) (C-213/03)* [2004] E.C.R. I-7357; [2004] 3 C.M.L.R. 19 at [39]; and *Lesoochranárske zoskupenie VLK v Ministerstvo ivotného prostredia Slovenskej republiky* (C-240/09) [2011] 2 C.M.L.R. 43 at [44] and the case law cited).

56 It must accordingly be ascertained in the case of the provisions of the treaties mentioned by the referring court whether the conditions as recalled in [52]–[54] of the present judgment are in fact met."

97. It is clear from the terms of [51] and [56] that the conditions referred to at [52]-[55] are matters for the CJEU and not the courts of the Member States. Moreover, as with the principle of harmonious interpretation, the CJEU's jurisdiction to invalidate EU legislation on the grounds of inconsistency with an international obligation is not confined to legislation which was originally intended to implement that obligation.

98. As noted above, only the CJEU has jurisdiction to rule EU legislation invalid. It may declare only part of a directive invalid whilst leaving the remainder in place: see ***Association Belge des Consommateurs Test-Achats ASBL v. Conseil des Ministres*** (C-236/09) [2011] 2 C.M.L.R. 38.

Authorities Tab 33

(iii) Submissions

99. Art. 7 of the Aarhus Convention imposes a clear, precise and unconditional obligation on the EU to make provision, or in the words of the ACCC in ACCC/C/2010/54 (above) to have *"a proper regulatory framework"*, for effective public participation in the preparation of plans and programmes. Indeed, the Public Participation Directive is itself an acknowledgment that Art. 7 of the Convention imposed an obligation which the EU legislature had to give effect. It is clear from the terms of Recital 10 and Art. 2 of the Public Participation Directive that, the EU Parliament and Council would have amended the SEA Directive had they considered that the scope of the SEA Directive excluded certain plans and programmes which were subject to Art. 7 of the Aarhus Convention (other than those specific plans and programmes listed in Annex I of the Public Participation Directive and to which Art. 2 extended an obligation to secure effective public participation).

100. If the provisos in Art. 2(a) and/or Art 3(2)(a) of the SEA Directive, that only those plans or programmes which are *"required by legislative, regulatory or administrative provisions"* and which *"set the framework for development consent"*, are given an interpretation which excludes a plan or programme in the nature of the DNS, the result would be a serious shortfall in the ability of the SEA Directive to meet the EU's obligation under Art. 7 of the Aarhus Convention, which does not contain these provisos, to provide a proper regulatory framework for effective public participation in the preparation of plans and programmes.

101. In accordance with the principle of harmonious interpretation of EU legislation with the EU's international obligations, this is a further reason for taking a liberal approach of the interpretation of Arts. 2(a) and 3(2)(a), so as to ensure as far as possible that these provisos do not exclude plans or programmes which are subject to Art. 7 of the Aarhus Convention.

102. If, however, it is concluded that Arts. 2(a) and/or 3(2)(a) cannot be interpreted in a way that would bring within the SEA Directive scope a plan or programme the process for or adoption of which was not binding on the plan-making authority and/or which related to a project for which the body subsequently responsible for granting development consent was a national

legislature, the result is that the EU is in breach of its obligations under Art. 7 the Aarhus Convention (just as it was in ACCC/C/2010/54 when as a result of choosing not to apply the SEA Directive to NREAPs it had failed in its obligation to have *"a proper regulatory framework"* for requiring effective public participation in their adoption). In that case, HS2AA would seek a ruling from the CJEU that the terms *"required by legislative, regulatory or administrative provisions"* and/or *"set the framework for development consent"* should be invalidated, with the consequence that the SEA Directive would apply to the DNS. Whilst this is a matter for the jurisdiction of the CJEU and not the Supreme Court, it is submitted that the necessary criteria for such a ruling, set out in ***Air Transport Association of America***, would be satisfied.

103. In the Court of Appeal the SST argued that in ***Inter-Environnement Bruxelles*** AG Kokott at [22]-[24] considered and rejected an argument to the effect that the term *"required"* in Art. 2(a) of the SEA Directive should be interpreted liberally in order to achieve consistency with Art. 7 of the Aarhus Convention. In the Court of Appeal, Lord Dyson MR and Richards LJ in the Court of Appeal noted that argument at [63] but did not express a definitive view on it. Sullivan LJ rejected it unequivocally at [176] and it is submitted the Court should uphold his rejection of the SST's submission for the following reasons:

(1) AG Kokott's Opinion at [22]-[24] supported her conclusion at [30] that the word *"required"* in Art 2(a) excluded a plan or programme the adoption of which is not compulsory – a conclusion which was unequivocally rejected by the CJEU. Having decided that a purposive interpretation of the SEA Directive dictated giving the word *"required"* a much more flexible meaning that would include non-compulsory plans and programmes (contrary to AG Kokott's suggestion), it did not need to go on to consider whether this result would in any event be necessary in order to avoid a conflict with Art 7 of Aarhus. The CJEU was thus unpersuaded by AG Kokott's Opinion and did not express a view on Art 7.

(2) AG Kokott's reasoning at [22]-[24] was based upon her view that the SEA Directive was not *"designed to transpose art 7 of the Aarhus*

Convention" [23]. However, the principles that (i) all EU secondary legislation should insofar as possible be interpreted harmoniously with treaties to which the EU law is party, and (ii) to the extent that such harmonious interpretation is not possible the legislation may be invalid, do not depend on that legislation being intended to implement the treaty in question: see ***Commission v. Germany*** and ***Air Transport Association of America*** (above), which AG Kokott did not consider.

104. A question for the CJEU on this issue might be:

> If the words *"required by legislative, regulatory or administrative provisions"* in Art. 2(a) and/or the words *"set the framework for future development consent"* in Art. 3(2)(a) of the SEA Directive are to interpreted in a way that would exclude from the Directive's scope a plan or programme the process for or adoption of which was not binding on the plan-making authority and/or which related to a project for which the body subsequently responsible for granting development consent was a national legislature, are either or both of those provisions invalid on account of their inconsistency with the EU's obligations under Art. 7 the Aarhus Convention?

The requirement for an effective remedy if the SEA Directive applied and was therefore breached

105. HS2AA submits that Ouseley J and the Court of Appeal were correct to conclude that, in the event that the SEA Directive applied to the DNS, the defects in the AoS as an SEA were too great to justify the withholding of relief.[19]

106. Where a plan or programme has been adopted in breach of the SEA Directive, the starting point is that it should be quashed having regard to:

(1) 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

Authorities Tab 25

[19] See Ouseley J at [189], Lord Dyson MR and Richards LJ at [72] and Sullivan LJ at [186]-[187].

accordance with the SEA Directive), 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];

Authorities Tab 26

(2) The Supreme Court's duty of sincere co-operation under Art. 4(3) of the Treaty on European Union (**"TEU"**) to *"ensure fulfilment of the obligations...resulting from the acts or the institutions of the Union's objectives"*;

Authorities Tab 26

(3) Art. 19(1) TEU, which provides that *"Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union Law"* (this provision was inserted by the Treaty of Lisbon and thus indicates an intention by Member States to further emphasise the principle of effective protection of EU law rights); and

Authorities Tab 23

(4) Article 47 of the EU Charter of Fundamental Rights, which pursuant to Art 6(1) TEU has *"the same legal value as the Treaties"*, and which provides:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal..."

Core Authorities Tab 7

107. In Case C-41/11 ***Inter-Environnement Wallonie ASBL v. Region Wallonne*** [2012] 2 C.M.L.R. 623, the CJEU held:

> "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."

108. See also ***Berkeley v. Secretary of State*** [2001] 2 A.C. 603, where Lord Bingham emphasised at p. 608C-E (regarding the consequences of non-compliance with the EIA Directive in the context of the predecessor to Article 4(3) TFEU, Article 10 of the EC Treaty) that *"unless a violation is so negligible as to be truly de minimis and the prescribed procedure has in all essentials been followed"* the duty of sincere co-operation would *"point towards an order to quash as the proper response to a contravention such as admittedly occurred in this case"*. Lord Hoffmann also held at p. 616D-E:

Authorities Tab 13

"... 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. ..."

109. ***Berkeley*** has to be read in context (where there was a complete failure to consider EIA) and in the light of the approach in ***Walton***. Lord Carnwath, in particular, reviewed the position in some detail at paras. 103-140[20] and made it 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. However, the question of the exercise of the Court's discretion turned on substantial compliance with the EU right or duty. Having reviewed the authorities, Lord Carnwath, with whom the rest of the Court agreed, held at [139]:

Core Authorities Tab 11

"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."

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[20] Lord Carnwath's views were agreed by Lord Reed at [81], Lord Hope at [156] and Lord Kerr and Lord Dyson at [157].

Authorities Tab 46

110. The authorities considered by Lord Carnwath included Case C-201/02 ***R (Wells) v. Secretary of State for Transport, Local Government and the Regions*** [2004] 1 C.M.L.R. 31, where the CJEU held 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, 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 , para.[31])."

111. Those principles have often been repeated by the CJEU, most recently in ***Inter-Environnement Wallonie***. It is thus clear that procedural autonomy is subject to the overriding principles of equivalence and effectiveness.

112. The broader proposition advanced by the SST, to the effect that even where effect has not been given to the substance of the obligations under EU law the Court may decline to quash, is contrary to Art 4(3) and the principle of

effectiveness, and to the right to an effective remedy under Art 19 TEU[21] and Art 47 of the Charter of Fundamental Rights. At the very least, the position cannot be said to be *acte clair* or *acte éclaré* in the SST's favour and would raise a further referable question, namely:

> In circumstances where, in proceedings which have been commenced in accordance with the applicable time limit, the court of a member state has concluded the competent authority of that state has, in reaching a particular decision, failed to give effect to the substance of directly effective rights conferred by a Directive, is that court obliged under Art. 288 TFEU, Art. 4(3) TEU, Art. 19 TEU and/or Art. 47 of the Charter of Fundamental Rights to nullify the effect of that decision?

113. It is submitted, however, that the case-law referred to above indicates that the answer is clearly "yes" and therefore that a reference is not required on this question.

114. 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 consultation which complies with Articles 6-7. There has not been substantial compliance and the public has been unable to enjoy the substance of the rights conferred.

115. The scale, likely impacts and permanence of HS2 makes it particularly important 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 of options is done on the basis of a complete and lawful environmental assessment, given the irrevocable nature of the SST'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 the SST to undertake SEA in accordance with the requirements of the Directive.[22] Indeed, the SST's recent comments

[21] Added by the Lisbon Treaty, which must have been intended to add greater weight to the principle of sincere co-operation under Art 4(3) which was already in existence.
[22] See the judgment of Sullivan LJ at [186].

placing significantly greater emphasis than before on capacity rather than travel time as being the justification for over £40bn on HS2 (stating that *"The reason we need HS2 isn't for its speed"* but *"the main reason we need HS" is a heart bypass for the clogged arteries of our transport system"*)[23] indicate that SEA of the relative environmental impacts of the route adopted in the DNS compared to alternatives previously discounted for their impact on travel time, such as running HS2 via Heathrow and along the existing transport infrastructure corridor next to the M40, could have a real and lasting effect in ensuring that the best decisions are made.

116. The SST does not assert, 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: see ***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.

Authorities
Tab 18

117. The failure to carry out SEA cannot be remedied at the EIA stage for a number of reasons:

(1) It is carried out too late in the process, since the SEA process is designed to influence choices about matters such as the nature, design and location of projects and not bolted onto the EIA process when such decisions have been made;

(2) In respect of the defects here, they cannot be remedied after the event unless the Government undertakes to halt the Bill process, undertake the assessment, consult widely and genuinely reconsider its decisions in the light of the findings of the Environmental Report;

(3) The requirements of EIA differ significantly from SEA in that there is no requirement to assess reasonable alternatives to the same standard and at the same time as the preferred option, merely to give "*an outline*

[23] *"High Speed Two"*, speech by Rt Hon Patrick McLoughlin MP, 11 September 2013 <https://www.gov.uk/government/speeches/high-speed-two>

of the main alternatives studied by the developer and an indication of the main reasons for his choice". (EIA Directive Annex IV para. 2)

118. The suggestion advanced by the SST in the Court of Appeal that, even if the DNS were quashed, it would be open to him simply to promote the hybrid Bills is of no assistance. In the case of any plan or programme, it would be remain possible for a project to be promoted if that plan or programme were quashed. If this were a reason for withholding relief, then a breach of the SEA Directive would hardly ever result in a quashing order. What matters is that whilst a plan or programme remains extant, it is capable of influencing decisions on development consent for future projects falling within its scope, as is the case here. If the plan/programme is quashed owing to a breach of the SEA Directive, those future projects may still come forward in isolation but the decision on whether to grant them development consent will not be influenced by the non-compliant plan/programme.

119. It follows that a quashing order should be granted in the event that the SEA Directive is held to apply to the DNS.

Conclusion

120. For all these reasons, HS2AA respectfully asks the Court to allow the appeal and quash the DNS, whether or not having first made a reference to the CJEU under Article 267 TFEU.

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ANNEX: POSSIBLE QUESTIONS TO BE REFERRED TO THE CJEU

A

(1) In order for a plan or programme to be *"required by administrative provisions"* within the meaning of Art 2(a) of the SEA Directive, must the administrative provisions be legally binding or is it sufficient that the provisions anticipate and clearly set out a procedure and decision-making process intended to be followed albeit that it leaves some scope for change by the authority proposing to adopt the plan or programme?

B

(2) If, following the publication of a report by the national Government which announced a decision and intention to subject proposals for a plan or programme to formal public consultation and which identified the body that will prepare the plan or programme and the issues to be covered, does the adoption (with some changes, largely anticipated by the report) following the consultation process set out in the report, of a final decision by the Government fall to be considered as *"required by administrative provisions"* within the meaning of Art 2(a) of the SEA Directive?

C

(3) In order for a plan or programme to *"set the framework for development consent of projects listed in Annexes I and II to Directive 85/337/EEC"* within Article 3(2)(a) of the SEA Directive, does its significance to the development consent decision need to be formally required by law, or is it sufficient that the plan or programme will, or is likely to, influence the decision-maker in granting development consent?

D

(4) In what if any circumstances can a plan or programme adopted by the national Government *"set the framework for development consent"* within the meaning of Art 3(2)(a) of the SEA Directive when it concerns a project or projects for which the body responsible for granting development consent is the national legislature?

E

(5) If the words *"required by legislative, regulatory or administrative provisions"* in Art. 2(a) and/or the words *"set the framework for future development consent"* in Art. 3(2)(a) of the SEA Directive are to interpreted in a way that would exclude from the Directive's scope a plan or programme the process for or adoption of which was not binding on the plan-making authority and/or which related to a project for which the body subsequently responsible for granting development consent was a national legislature, are either or both of those provisions invalid on account of their inconsistency with the EU's obligations under Art. 7 the Aarhus Convention?

F

(6) In circumstances where, in proceedings which have been commenced in accordance with the applicable time limit, the court of a member state has concluded the competent authority of that state has, in reaching a particular decision, failed to give effect to the substance of directly effective rights conferred by a Directive, is that court obliged under Art. 288 TFEU, Art. 4(3) TEU, Art. 19 TEU and/or Art. 47 of the Charter of Fundamental Rights to nullify the effect of that decision?

G

H