IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL

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

(ENGLAND AND 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 RESPONDENT

Introduction

1. The target of this appeal is the Command Paper *High Speed Rail: Investing in Britain's Future – Decisions and Next Steps* (Cm 8247) presented to Parliament by the Secretary of State on 10 January 2012 **[the 'DNS']**. Appendix 1/7/595-714

2. The principal issue in this appeal is whether the DNS is a plan or programme that is subject to the procedure for strategic environmental assessment established by Directive 2011/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment **['the SEAD']** (and transposed into national law by the Environmental Assessment of Plans and Programmes Regulations 2004/1633). Authorities CB Tab 1 Authorities Tab 3

3. In order to require strategic environmental assessment under the procedure set out in articles 4 to 9 of the SEAD, the DNS must both fall within the 'definition' of 'plans and programmes' in article 2(a) of the SEAD and within its scope as stated in article 3 of the SEAD. On the facts, the issues are whether the DNS -

   (1) sets the framework for the legislative decisions of Parliament whether to enact Bills for Phases 1 and 2 of HS2 and so grant development consent for those projects (in the form of deemed planning permission).

Appendix 1/5/292-444

(2) is required by administrative provisions, by virtue of the presentation to Parliament on 11 March 2010 of the Command Paper *High Speed Rail*[1].

4. The Respondent's case is that –

(1) neither of these issues merits a reference to the CJEU.

(2) the DNS fulfils neither (i) nor (ii) in paragraph 3 above.

5. The Respondent's case addresses the following issues –

(1) Material Facts
(2) Setting the Framework
(3) Required by Administrative Provisions
(4) Aarhus
(5) Reference
(6) Effective Remedy

(1) Material Facts

Core Volume Tab 5

6. The factual background to this appeal is set out in the Statement of Facts and Issues.

Appendix 1/7/595-714

7. In the DNS, the Secretary of State informed Parliament that, following public consultation:

(1) the Government had decided to pursue a policy of developing a new high capacity, high speed railway between London, Birmingham, Leeds and Manchester, with intermediate stations in the East Midlands and South Yorkshire and links to the Channel Tunnel via HS1 and to Heathrow Airport (the Y network).

(2) the Government had decided that it should promote the railway in 2 phases, the first phase from London to the West Midlands (with a link via HS1 to the Channel Tunnel) and the second phase from the West Midlands to Leeds and Manchester (with a direct link to Heathrow Airport).

(3) the Government would seek legislative powers in the form of hybrid Bills for the construction and operation of the railway in those two phases: Phase 1 (London to West Midlands) and Phase 2 (West Midlands to Manchester and Leeds).

[1] The Appellant does not contend that the DNS was required by legislative or regulatory provisions.

(4) following consideration (informed by an Appraisal of Sustainability) of a preferred route for Phase 1 and a number of alternatives (including a route via Heathrow Airport), the Government had decided on a proposed route to promote for Phase 1. Appendix 2/2/28/151 1-1876

(5) the Government proposed to introduce a hybrid Bill by the end of 2013, seeking the necessary powers for the construction and operation of a high speed railway on that proposed Phase 1 route.

8. The Government's legislative programme for the current session of Parliament includes –

(1) The High Speed Rail (Preparation) Bill to enable preparatory works in advance of the proposed hybrid Bills (paragraph 59/60 of the SFI). Core Volume Tab 5

(2) A hybrid Bill seeking powers for the construction and operation of the HS2 Phase 1 project.

9. Upon enactment, the hybrid Bill would confer development consent (in the form of a deemed planning permission) for the construction and operation of a high speed railway on the line of the proposed route for Phase 1 of HS2.

10. Such a 'project' requires assessment of its environmental impacts under Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment **['the EIAD']**. It falls within the categories of projects for which environmental impact assessment is mandatory prior to the grant or refusal of development consent under the EIAD (the construction of lines for long distance railway traffic – paragraph 7(a) of Annex 1 of Directive). Authorities CB Tab 2

11. Article 1(4) of the EIAD disapplies its own procedures in the case of projects the details of which are adopted by a specific act of national legislation, provided that the objectives of the EIAD, including that of supplying information, are achieved through the legislative process.

12. Parliamentary Standing Orders applicable to hybrid Bills authorising works on specific land require the preparation and deposit for inspection of an environment statement **['the ES']**, the contents of which must fulfil the requirements of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 **["the 2011 EIA Regulations"]** (which in turn transpose the requirements of the EIAD). Under recently approved amendments to Parliamentary Standing Orders, following deposit of the ES there follows a period of at least 8 weeks during which the public may comment on the ES. The public's comments must then be reported to an independent assessor appointed by Parliament who shall prepare a report summarizing the issues raised by those comments. The assessor's report shall then be Authorities Tab 5 Authorities Tab 7

submitted to the House and Second Reading may not take place until at least 14 days have elapsed.

13. Those arrangements will be applicable to the hybrid Bill for each phase of HS2.

14. Amongst the categories of 'environmental information' that the promoter must include in the ES are (i) an outline of the main alternatives studied by the applicant and an indication of the main reasons for the choice made, taking into account the environmental effects; and (ii) a description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long term, permanent and temporary, positive and negative effects of the development. See Standing Order 27A and Schedule 4 Part 1 paragraphs 2 and 4 to the 2011 EIA Regulations.

Authorities Tabs 5 & 7

15. In May 2013, the Respondent published for public consultation a draft of the ES which is to be prepared and deposited with the hybrid Bill for the HS2 Phase 1 project in accordance with Standing Order 27A. Chapter 7 of Volume 1 of the draft ES set out the background to and considered strategic and route wide alternatives to the HS2 project. Under the heading 'Work in Progress', the Preface to Volume 1 stated that the formal ES would provide 'further and/or fuller details' on the alternatives that have been studied. Chapter 4 of Volume 1 of the draft ES described the process, scope and methodology of environmental assessment for the Phase 1 project. Section 4.3 dealt with 'cumulative effects'. The Preface to Volume 1 said that, in order to assess the cumulative environmental effects of both Phase 1 and Phase 2, it was intended, in the formal ES to be deposited with the hybrid Bill for Phase 1, to draw upon the Appraisal of Sustainability for Phase 2.

Appendix 2/4/47/2629-50

Appendix 2/4/47/2604-5

Appendix 2/4/47/2611-18

Appendix 2/4/47/2604 -5

16. Public consultation on the Government's preferred route for Phase 2 of HS2 began on 17 July 2013, following publication of the Command Paper *'High Speed Rail: Investing in Britain's Future – Phase Two: The Route to Leeds, Manchester and Beyond'*. An Appraisal of Sustainability for Phase 2 has been published: *High Speed Rail: Consultation on the route from West Midlands to Manchester, Leeds and beyond Sustainability Statement*.

17. The DNS at [6.23] and [6.24] set out the Government's position that it is under no obligation to undertake an environmental assessment of its high speed rail proposals under the SEAD, but that it had been appropriate for the Appraisal of Sustainability for the Phase 1 route (published as part of the February 2011 Public Consultation) to apply the principles of strategic environmental assessment 'to the degree necessary for this stage in the project'.

Appendix 1/6/696

18. In his judgment, Ouseley J addressed the issue whether the Appraisal of Sustainability for the Phase 1 Route substantially complied with the SEAD, on

A the assumption that (contrary to his conclusion in [103]) the DNS was a plan or programme for a Y shaped high speed railway that required strategic environment assessment in accordance with the SEAD. Appendix 1/4/101-120

B 19. In [172] Ouseley J concluded that the Appraisal of Sustainability did not so comply essentially for 2 reasons. In [167], however, Ouseley J said that *'in relation to Phase 1 and alternatives'*, he would not have regarded there as being substantial non-compliance if the issue was confined to whether the C Appraisal of Sustainability for the Phase 1 route and the February 2011 Consultation Document complied substantially with the SEAD. Appendix 1/4/116-7

D **(2) Setting the Framework**

Approach and Context

E 20. Article 1 of the SEAD states that its objective is to be achieved by ensuring that an environmental assessment is carried out of *'certain plans and programmes which are likely to have significant effects on the environment'*. Authorities CB Tab 1

F 21. It is not in issue that the terms used in the SEAD should be interpreted flexibly and in such a way as will further the Directive's objective which is stated in article 1. See the judgment of the Court of Appeal at [35]-[36]. Appendix 1/3/16-7

G 22. Strictly speaking, the SEAD does not provide a definition of the term *"plans or programmes"*. Article 2(a) of the SEAD qualifies the term. It does not define it. It is clear that the SEAD embraces within its scope plans or programmes whose subject matter ranges more widely than conventional town and country H planning and development plans. Article 3(2) mentions plans and programmes which are prepared for a wide range of purposes, including *"transport"*. Authorities CB Tab 1

23. The DNS sets out, explains and seeks to justify the Government's policy and I proposals for the HS2 high speed rail network. It has two broad, interrelated aspects:

J (1) A high speed rail strategy, that developing the Y network is best placed to deliver the national transport planning and wider socio-economic objectives upon which there had been consultation and that this should now be pursued as a matter of national policy.

K (2) A proposal to seeks legislative powers to develop a high speed railway.

L 24. As a matter of ordinary language, therefore, the DNS can reasonably be characterised as including a plan or programme prepared for transport. The DNS proposes the development of a high speed railway in two phases. The

development of each phase of that railway is likely to have significant environmental effects. Each will be an EIAD Annex 1 project. By virtue of article 1(4) of the EIAD, the decision by Parliament whether to grant development consent for each phase must be made subject to environmental impact assessment which fulfils the objectives of the EIAD.

Authorities CB Tab 2

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Article 3 of the SEAD

25. Article 3 of the SEAD (entitled "Scope") sets out the rules which govern whether any given plan or programme falls within the scope of the strategic environmental assessment process required under articles 4 to 9 of that Directive. There are 2 broad categories of plan or programme that do so –

Authorities CB Tab 1

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D

(1) Those that fall within article 3(2), for which SEA is mandatory;

(2) Other plans or programmes that are determined by member states to require SEA on a case by case basis in accordance with article 3(3)-(5).

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26. The issue in this appeal is whether the DNS falls within article 3(2)(a) of the SEAD. It is not suggested that article 3(3)-(5) is engaged.

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27. The material parts of article 3(2) are as follows –

> *"2. .....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 for projects listed in Annexes I and II to Directive 85/337/EC..."*

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28. Directive 85/337/EC is now codified under the EIAD.

I

29. The CJEU has recently observed (in the context of the EIAD) that *"while it is established case law that the scope of Directive 85/337 is wide and its purpose very broad ..., a purposive interpretation of the directive cannot, in any event, disregard the clearly expressed intention of the legislature of the European Union"*: see Brussels Hoofdstedelijk Gewest v Vlaams Gewest [2011] Env LR 26 at [29].

Authorities Tab 35

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30. The SEAD's concept of *"set[ting] the framework for future development consent of projects"* must be given effect. In order for article 3(1) of the SEAD to apply to the DNS, by virtue of article 3(2)(a) the plan or programme must be found to set the framework for Parliament's decisions as to whether to enact the

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proposed hybrid Bills and grant development consent for the Phase 1 and Phase 2 projects.

The Parties' Contentions

31. The Appellant describes the meaning of that phrase as *'critical to the outcome of the appeal'* (see the printed case at [63]). The Appellant submits that-

(1) There is no CJEU authority on its meaning.

(2) The only guidance in the authorities is in [64]-[65] of the Opinion of the Advocate General in Terre Wallonne ABSL & Inter-Environnement Wallonie ASBL v Region Wallonne [2010] ECR I-5611. Authorities CB Tab 7

(3) At [68] that this Court should now refer the meaning of that phrase in article 3(2)(a) of the SEAD to the CJEU. Indeed, the Appellant asserts [81]-[82] that failure to make that reference would be a source of surprise to the CJEU and risk infraction proceedings or a damages claim.

32. The Respondent submits that-

(1) The case for a reference on the meaning of 'set the framework for future development consent' in article 3(2)(a) of the SEAD is not made out.

(2) The meaning of the phrase was the subject of the Advocate General's Opinion and the CJEU's decision in Terre Wallonne ABSL & Inter-Environnement Wallonie ASBL v Region Wallonne [2010] ECR I-5611. Authorities CB Tab 7 Further guidance as to its meaning is given by the CJEU in Inter-Environnement Bruxelles ASBL v Region de Bruxelles-Capitale [2012] Env LR 30. Authorities CB Tab 6

(3) The guidance given by the CJEU in Terre Wallonne and Bruxelles is sufficiently clear to enable the national court to decide whether the DNS sets the framework for Parliament's future decision whether to give development consent for HS2 through enactment of the proposed hybrid Bills.

(4) The Master of the Rolls and Richards LJ were correct to conclude that the issue in the present case is a narrow one as to the application of the guidance given by the CJEU in Terre Wallonne and Bruxelles to the facts of this case.

(5) That issue is whether, given Parliament's freedom in the performance of its legislative function to accept or reject the Government's case for promoting a High Speed Rail Bill as it sees fit, the DNS will set the framework for Parliament's decision whether to enact the Bill and thereby grant development consent.

(6) Applying the guidance of the CJEU in Terre Wallonne at [54], that is an issue for the national court to resolve.

(7) The majority in the Court of Appeal is correct and should be upheld.

The Judgment of the Court of Appeal

Appendix 1/3/16 & 23

33. All members of the Court of Appeal agreed that the crucial question is whether the DNS is a plan or programme which sets the framework for future development consent: see [34] and [50].

34. The majority in the Court of Appeal concluded that -

(1) They were "*not satisfied that the DNS can be said to have such an influence on Parliament's decision-making process as to amount to a plan or programme which sets the framework*" [60].

Appendix 1/3/26

(2) It would not be appropriate to make a reference (with all the inevitable delay that this would entail) "*because there is sufficient guidance in the CJEU jurisprudence as to the broad approach that should be adopted. What separates the parties on this issue is more concerned with how that approach should be applied in the particular circumstances of this case*" [64].

35. Sullivan LJ (dissenting) concluded (at [188]) that –

(1) The issue that divided the Court was *"a very narrow one: whether the DNS does not set the framework for the development consent of HS2 because the decision whether to grant development consent is to be taken by Parliament"*.

Appendix 1/3/66

(2) There was insufficient guidance in the CJEU jurisprudence on the meaning of *'set the framework'* and *"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"*.

36. The narrowness of the issue between the majority and Sullivan LJ is evident from [172], where Sullivan LJ adopted the test posed by the Master of the Rolls and Lord Justice Richards in [55], as the basis for judging whether a plan or programme will have sufficiently potent influence on future development consent decisions for projects to be regarded as setting the framework for such decisions:

Appendix 1/3/61

> *"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".

37. The Appellant adopts that test: see [68] of the printed case. Core Volume Tab 6

38. It was in the application of that test to the facts that the Court of Appeal divided. The views of the Master of the Rolls and Richards LJ are set out at [55]-[60]. Appendix 1/3/24-6

39. Sullivan LJ's view [172]-[174] that the DNS *"will…influence Parliament's decision to give development consent via the hybrid bill process"* was based on the impact on that decision of Parliament of the convention of ministerial responsibility - Appendix 1/3/61-2

> *"173…..The well-established convention of collective ministerial responsibility will ensure that the plan prepared by the Government (the DNS) will in fact have a very significant influence upon Parliament's decision-making process in respect of a Government Bill."*

40. It is clear from [173]-[174] that it was this factor alone that led Sullivan LJ to conclude (contrary to the Master of the Rolls and Richards LJ) that there was cogent evidence that there is a real likelihood that the DNS will influence the decision of Parliament to give development consent for HS2 through enactment of the proposed hybrid Bill.

<u>*Submissions*</u>

41. In order to test whether that is a sustainable basis for Sullivan LJ's conclusion, we turn to the established constitutional position. It is necessary to address two matters –

    (1) The role of a Command Paper within the legislative process.

    (2) The debate at Second Reading on a Government Bill.

<u>*Command Paper*</u>

42. A Command Paper is a paper formally presented to Parliament. In practice, responsibility for its presentation is that of the Minister in charge of the relevant department, in the present case, the Secretary of State for Transport. A Command Paper is a paper that is considered by the Government to be of interest to Parliament but is not required by statute to be presented. Erskine May (24th edition pages 131/2) states –

Authorities Tab 10

"Statements of government policy or proposals for government legislation or administrative action are often laid before Parliament in this form."

43. The DNS fulfils both functions. It states to Parliament, following public consultation, the Government's policy for high speed rail and its proposals to introduce Bills seeking powers to develop a high speed rail network in two phases. It explains the Government's stated intention to invoke the legislative function of Parliament with a view to realising the aims of its policy and the objectives of its high speed rail strategy. It is informative. Whilst it is intended to be persuasive, the degree to which it may influence Parliament's future decisions is dependent upon the willingness of Parliament to accept its findings and conclusions, which is a matter for Parliament.

Second Reading

44. Proceedings on a public bill at Second Reading are explained in Erskine May (24th Edition) at pages 547-550[2]. See in particular –

Authorities Tab 10

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

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

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

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

[2] Second Reading is one of the 'public stages' of a hybrid Bill.

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

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

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

D 45. There is no suggestion that a Command Paper which sets out the policy behind a Government Bill or explains the Government's reasons for introducing the bill, enjoys any particular role or attracts any particular weight at Second Reading. In [95] Ouseley J said – Appendix 1/4/98

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"…the decision maker on the applications for development consent is to be Parliament. Its decisions are legally and formally untrammelled by the statements of Government policy. It is entirely free to accept or
F *reject them as it sees fit. If it agrees with the view expressed by Government, then it will of course give effect to that view; and if it disagrees with those views, it will decide otherwise. The fact that Parliament will consider the detailed work done by Government, and*
G *will no doubt give consideration to the views it has expressed, is very different from Parliament having to set its decision within the framework of criteria or policies which Government pronounces. Parliament's views are not trammelled by those pronouncements; no*
H *proper justification for disagreeing is required or it: it can just disagree. The policy and judgments in the DNS, which could be a framework for the decision maker in some contexts, are not such a framework here."*

I 46. We submit that is an accurate and irrefutable analysis of the role of the DNS, both legally and (insofar as it may be anticipated) factually, in proceedings on Second Reading of the hybrid Bill for Phase 1.

J 47. We rely on the reasoning of the Master of the Rolls and Richards LJ in [55]-60], in particular – Appendix 1/3/24-6

"56…the DNS will have no <u>legal</u> influence on Parliament. Parliament is
K *not obliged to comply with it or even to have regard to it in reaching its decision on whether to give consent to the development. Nor is it appropriate or possible for the court to assess the degree of influence the DNS is likely to have as a matter of fact on Parliament's decision*
L *making process. Sullivan LJ accepts that it would be inappropriate for the court to speculate as to the likely effect of the Government whip.*

We agree, but in our view the point goes much wider than that. Parliament is constitutionally sovereign and free to accept or reject statements of Government policy as it see fit, and the court should not seek to second guess what Parliament will do. Moreover the decision whether to give consent to the project as outlined in the DNS is very controversial and politically sensitive. No final decision has yet been taken as to the form or length of debate that is to take place in Parliament.

…59…A significant number of MPs represent constituencies which are affected by the proposed project. Who knows what position they and others will take in the debate and how many will oppose the hybrid bill? Even if it were constitutionally appropriate for the court to assess the likely degree of influence of the DNS, the court is not equipped to make such an assessment."

48. The reasoning of both Ouseley J and of the majority in the Court of Appeal is founded upon the established constitutional position as to the sovereignty of Parliament in the performance of its legislative function and its freedom at Second Reading to accept or reject the Government's policy case in support of a Bill as its sees fit.

49. In our respectful submission, in the light of that established constitutional position, Sullivan LJ's reliance on the doctrine of collective ministerial responsibility as the basis for his contrary view is insupportable. The doctrine of collective ministerial responsibility does not affect that established constitutional position.

50. Moreover, even if we are to assume that all MPs who hold ministerial office at the Second Reading debate on the proposed hybrid Bill for Phase 1 vote in favour of the Bill, they will do so in order to support the policy of the Bill. That policy derives no special significance in the legislative process from the mere fact that it has been articulated in January 2012 in the DNS. It cannot be suggested that ministers' predisposition as MPs to support the policy of the Bill at Second Reading amounts to the kind of influence envisaged by Advocate General Kokott in her Opinion in Terre Wallonne.

Authorities
CB Tab 7

51. In summary, unless the Court is able to identify evidence that Parliament's decision whether to give the proposed hybrid Bill for Phase 1 a second reading will be in some way trammelled by the DNS, the Court cannot properly conclude that the DNS will set the framework for Parliament's decision whether to give development consent. In our submission, the Court is quite unable to make that finding.

CJEU Authorities

52. The majority founded their approach to the concept of 'set the framework for future development consent' in [55] (on the application of which to the facts here the Court of Appeal was very narrowly divided) upon the two decisions of the CJEU-

(1) Terre Wallonne ABSL & Inter-Environnement Wallonie ASBL v Region Wallonne [2010] ECR I-5611 — Authorities CB Tab 7

(2) Inter-Environnement Bruxelles ASBL v Region de Bruxelles-Capitale [2012] Env LR 30. — Authorities CB Tab 6

53. We respectfully adopt the majority of the Court of Appeal's analysis of those decisions in [48]-[54]. We submit that the conclusions in [55] are supported by those CJEU authorities and should be upheld. There is, in truth, little if any significant disagreement between the majority and Sullivan LJ as to the nature and extent of the guidance that is given by those authorities on what is meant by *'set the framework for future development consent'* in article 3(2)(a) of the SEAD. So it is that the Court of Appeal was able to agree on the formulation of the appropriate test to be applied to the facts of this case, in order to determine whether or not the DNS can reasonably be said to fall within the scope of article 3(2)(a) as a plan or programme that sets the framework for future development consent. — Appendix 1/3/22-4

54. We submit that the test formulated by the majority in the Court of Appeal in [55] (and endorsed by Sullivan LJ) is consistent with these authorities. It reflects the analysis by the Advocate General in her Opinion and the practical guidance given by the CJEU at [45] and [54] in Terre Wallonne. It accords with the general statement by the CJEU at [30] in Bruxelles.

55. We have the following additional submissions in respect of those 2 cases.

Terre Wallonne

56. The issue for the CJEU's determination was whether a statutory action programme for the sustainable management of nitrogen in agriculture set the framework for future development consent of intensive livestock installations listed in paragraph 17 of Annex 1 to the EIAD and so fell within the scope of article 3(2)(a) of the SEAD (Judgment [30] Question 1 and [34]). — Authorities CB Tab 7

57. The CJEU addressed that issue in [43]-[55] under the heading "Application of Article 3(2)(a) of Directive 2001/42". It was the decisive issue in the case [56].

58. Advocate General Kokott's analysis of that issue focused upon the interrelationship between the SEAD and the EIAD – A

> *"31. The specific objective pursued by the assessment of plans and programmes is evident from the legislative background: the SEA Directive complements the EIA Directive, which is more than ten years older and concerns the consideration of effects on the environment when development consent is granted for projects.* B
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> *32. The application of the EIA Directive revealed that, at the time of the assessment of projects, major effects on the environment are already established on the basis of earlier planning measures. Whilst it is true that those effects can thus be examined during the environmental impact assessment, they cannot be taken fully into account when development consent is given for the project. It is therefore appropriate for such effects on the environment to be examined at the time of preparatory measures and taken into account in that context."* C D E

59. That analysis of the specific objective of the SEAD is reflected in the Advocate General's discussion of the concept of 'framework' in article 3 of the SEAD, which is at [60]-[67] of her Opinion. In particular, a recurring theme of those paragraphs is that a 'framework' setting plan or programme is one that prevents, curtails or narrows the scope of and assessment of environmental effects of the project or projects in question that the development consent decision maker would otherwise have to take into consideration in accordance with articles 4 to 8 of the EIAD. F G

60. For the reasons given in [42] to [51] above, the DNS will not so affect Parliament's consideration of the environmental effects of the Phase 1 and Phase 2 projects in the performance of its legislative function in respect of the proposed hybrid Bills. H

61. Thus, in [61] of her Opinion the Advocate General refers to "*the environmental effects of any decision laying down requirements for the future development consent of projects*". In [64] she says that there are many different ways in which a plan or programme may "*prevent appropriate account*" being taken of environmental effects (i.e.. by the development consent decision maker). It is clear from [64] that it is not enough that a plan or programme may "influence" the future development consent decision for a project. Its "influence" must be such as to "prevent" appropriate account from being taken of the environmental effects of the project at the stage of development consent. I J K

62. In [65] the Advocate General equates the concept of "framework" with "determinations" (albeit that such determinations may leave open room for a degree of discretion on the part of the development control decision maker). L

A The analysis in [65] is apt to describe the function of the statutory development plan in development consent decisions governed by section 38(6) of the Planning and Compulsory Purchase Act 2004[3]. No such influence may sensibly be claimed for the DNS in Parliament's decision on the proposed hybrid Bill. B The DNS does not leave Parliament with "room for some discretion". Parliament's discretion is untrammelled by the DNS.

63. The same analysis applies to the Advocate General's reference in [66] to "*the* C *objective of making all preliminary decisions for the development consent of projects subject to an environmental assessment if they are likely to have significant effects on the environment*": and to her summary in [67] that a plan or programme sets the framework "*insofar as decisions are taken which* D *influence any subsequent development consent of projects…*".

64. It is to be noted that at [59], the Advocate General draws the distinction between the *relevance* of the action programme to Annex 1 projects and the E decisive question whether that relevance suffices for the setting of a *framework* for the future development consent for such projects. By the same logic, the DNS is clearly relevant to the proposed hybrid Bill for the construction and operation of HS2 (hence its presentation to Parliament in the form of a F Command Paper). It explains why the Government has decided to promote HS2, why the Government favours HS2 over alternative strategies, and the selection of the proposed Y network and route for Phase 1. It also explains how the Government proposes to take forward the promotion of the HS2 project, in G particular through the inclusion of a hybrid Bill in the Government's legislative programme for the current session of Parliament. It does not follow that the DNS sets the framework for Parliament's decision whether or not to enact the Bill.

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65. In summary, the clear focus of the Advocate General's analysis of the concept of framework was on identifying those plans or programmes that would curtail the full consideration of the environmental effects of a project that the I development consent decision maker would otherwise be able and indeed required to undertake under articles 4 to 8 of the EIAD.

66. That clear focus is reinforced by her application of her analysis to the question J whether the Belgian nitrate action programme did 'set the framework' for future development consent for intensive livestock installations in that case: [80]-[81].

67. In [80] the Advocate General refers to article 8 of the EIAD, which provides K that, in the case of projects requiring environmental impact assessment, all the results of the assessment must be taken into consideration in the development consent procedure. Consequently, when granting development consent for intensive livestock installations, the decision maker must consider whether the

L

[3] [3] and [65(3)] of the Appellant's case.

manure arising from operation of the proposed facility can be appropriately stored and disposed of.

68. As is explained in [81], it is that scope of the assessment required under article 8 of the EIAD that leads to the conclusion that the nitrate action programme sets the framework –

> *"In the context of such consideration, the framework set by the action programme has at least the effect that it must be possible for the installation to be operated in accordance with the provisions of the programme. At the same time, however, development consent can hardly be refused on grounds of the pollution of waters by nitrate from agriculture if the project complies with the rules of the programme. Certain alternatives, which are harmful to the environment as gauged by the objects of the action programme, are thus excluded and others, which possibly afford water greater protection, do not have to be examined and taken into consideration."*

69. The contrast between, on the one hand, the content and purpose of the action programme there described in the context of a future development consent decision under article 8 of the EIAD and, on the other hand, the content and purpose of the DNS in the context of Parliament's consideration of the environmental effects of the Phase 1 project, is clear –

(1) The action programme had the effect of excluding from the scope of the development control decision maker's consideration a number of environmental factors (certain alternatives, the competing merits of other means of avoiding or controlling pollution of waters than that laid down by the action programme) which might otherwise have influenced the development control decision maker's decision whether to grant development consent under article 8 of the EIAD.

(2) In contrast, the DNS has no such effect on Parliament's consideration of any posited environmental factors that might influence its decision whether to grant development consent for Phase 1 or Phase 2 of HS2 (paragraph 60 above).

70. In Terre Wallonne, the CJEU did not expressly adopt Advocate General Kokott's analysis of the concept of 'framework' in [60] to [67] of her Opinion. Nevertheless, the CJEU clearly gave practical effect to that analysis in –

(1) Its guidance on the approach to be followed in order to establish whether action programmes set the framework for future development consent of projects listed in Annexes I and II to the EIAD [45].

(2) Its application of that approach to the facts of that case [46] to [55].

71. We rely on [45] and [54] as being plainly intended by the CJEU as statements of general guidance on the question whether a posited "plan or programme" sets the framework for future development consent of Annex 1 or Annex 2 projects within article 3(2)(a) of the SEAD –

> *45. It is necessary to examine the content and purpose of those programmes, taking into account the scope of the environmental assessment of projects as provided for by [the EIAD].*
>
> ....
>
> *55. In such a situation,* ***the existence and scope of which it is nevertheless for the national court to assess in the light of the action programme concerned****, it must be held that the action programme is to be regarded, in respect of those measures, as setting the framework for future development consent of projects listed in Annexes I and II to Directive 85/337 within the meaning of Article 3(2)(a) of Directive 2001/42."*
>
> (emphasis added)

72. As to [45], we have explained why, in our submission, an examination of the content and purpose of the DNS, taking into account Parliament's untrammelled powers as to the scope of its consideration of the environmental effects of the Phase 1 and Phase 2 projects, does not support the conclusion that it sets the framework for future development consent of those projects.

73. That submission may be simply illustrated-.

(1) The formal ES submitted on presentation to Parliament of the hybrid Bill for Phase 1 will contain an outline of alternatives to HS2 studied by the Respondent and the main reasons for his choice, taking account of environmental effects ([15] above).

(2) It is reasonable to anticipate that the 51M consortium will (i) respond to the ES with a detailed case in favour of the asserted comparative advantages (economic, social and environmental) of their Optimised Alternative proposal over HS2; and (ii) lobby MPs on that basis.

(3) Under Standing Orders, the issue of the alleged comparative advantages of the Optimised Alternative will require to be reported by an independent assessor to Parliament for consideration at the Second Reading debate on the hybrid Bill. A Member may then table a

reasoned amendment proposing rejection of the Bill on the grounds that the Optimised Alternative offers a superior means of meeting the policy objectives of the Bill.

(4) The DNS does not contain any measures which purport to limit, constrain, restrict or avoid Parliament taking full account of the asserted comparative advantages of the Optimised Alternative in the debate on that reasoned amendment.

(5) The same analysis applies to a reasoned amendment based on Heathrow Hub Limited's alternative proposal for a route for Phase 1 via a station at Iver.

(6) The same analysis applies to a reasoned alternative based on the asserted unacceptable cumulative environmental effects of the Y Network.

(7) The same analysis applies to reasoned alternative based on an asserted alternative configuration for the proposed high speed rail network.

74. As to [54], the guidance of the CJEU is clear: it is for the national court to determine whether, in the circumstances of the given case, a posited "plan or programme" sets the framework for future development consent of Annex 1 or Annex 2 projects within article 3(2)(a) of the SEAD. That is the issue that arose for decision before both Ouseley J and the Court of Appeal. There is no sustainable basis for a reference to the CJEU on that issue before this Court.

Bruxelles

Authorities CB Tab 6

75. Unlike Terre Wallonne, neither of the questions posed in Bruxelles *required* the CJEU to explain or to apply the concept of 'set the framework' in article 3(2)(a) of the SEAD.

76. Nevertheless –

(1) In [13]-[17] the CJEU recognised that the significance of the questions that it was called upon to answer, in respect of the repeal or modification of land use plans, lay in the propensity of such action to amend the framework set by such plans for the future development consent for projects.

(2) In [20] the CJEU referred to its decision in Terre Wallonne.

(3) The propensity for a 'measure' repealing a plan or programme necessarily to entail a modification of the 'legal reference framework' for future development consent for projects formed an essential part of the CJEU's reasoning in concluding that such a measure must be subject to an environmental assessment within the meaning of article 3 of the SEAD : see [33] and [39].

77. In this context, the CJEU's formulation of the SEAD's "aim" in [30] was rightly characterized by the majority in the Court of Appeal as *"carefully expressed. It is a general statement by the court of the meaning of "plans and programmes which set the framework"* to which weight should be given. Indeed that "*general statement*" has been repeated by the CJEU in subsequent cases: see Case C-43/10 Nomarchiaki Aftodioikisi Aitoloakarnanias v Ipourgos Perivallontos, Khorotaxias kai Dimosion Ergon [2013] Env. L.R. 21 at [95]. Authorities Tab 45

78. Moreover, that *"general statement"* by the CJEU is consistent with the Advocate General's explanation in Terre Wallonne of the interrelationship between the EIAD and SEAD, her analysis of the concept of 'framework', and the CJEU's formulation of the approach to be followed by the national court in order to determine whether a plan or programme does set the framework for future development consent for Annexe 1 projects within the meaning of article 3(2)(a) of the SEAD.

Commission Guidance

79. We ask the Court to note also [3.23] of the Commission Guidance which is consistent with the general statement given by the CJEU at [30] of Bruxelles -

> *"The meaning of 'set the framework for future development consent' is crucial to the interpretation of the Directive, although there is no definition in the text. The words would normally mean that the plan or programme contains criteria or conditions which guide the way the consenting authority decides an application for development consent. Such criteria could place limits on the type of activity or development which is to be permitted in a given area; or they could contain conditions which must be met by the applicant if permission is to be granted; or they could be designed to preserve certain characteristics of the area concerned (such as the mixture of land uses which promotes the economic vitality of the area)."*

Authorities Tab 27

Response to the Appellant's Case

80. In response to [65] of the printed case- Core Volume Tab 6

(1) The relevant question is not whether the DNS sets a framework for the formulation of the project. The relevant question is whether the DNS

sets the framework for the decision of Parliament whether to grant development consent for the project. For the reasons given above, we submit that the DNS does not have that effect.

(2) It is clear from the established Parliamentary proceedings for second reading of a public bill that the 'options available to Parliament' in deciding whether to allow the bill to proceed (and in what terms) are not limited by the terms of the DNS. Thus (as submitted above) it will be open to a Member to table a reasoned amendment proposing that the Bill not be given a second reading on the grounds that (i) there is an alternative, superior means of delivering the objectives of the Government's policy or proposals; (ii) the environmental disbenefits of HS2 are such as to outweigh the advantages that are claimed for the proposed high speed rail network; and/or (iii) alternative routes for the proposed railway have not been properly assessed or persuasively discounted.

(3) All members of the Court of Appeal rejected the submission that the question whether the DNS sets the framework for Parliament's decision on the proposed hybrid Bill could or should be answered by reference to expressions of party support for HS2 or the fact that the vote is expected to be whipped. The issue is whether the DNS sets the framework for Parliament's decision. The fact that there may be cross party support for HS2 and the likelihood of a whipped vote gives no indication of the extent to which the DNS is likely to influence proceedings in Parliament.

(4) The issue raised by article 3(2)(a) of the SEAD is whether the DNS sets the framework for the decision by Parliament whether to grant development consent for the Phase 1 project. As Ouseley J said in [100], the fact that the DNS has provided the basis for safeguarding the line of the proposed Phase 1 route is not relevant to that issue. The safeguarding of the proposed route does not constitute development consent for the Phase 1 project.

Appendix 1/4/99

Core Volume Tab 6

81. In [68], the Appellant advances two issues that are contended to merit a reference to the CJEU. That contention is developed in more detail in [70] to [82] of the printed case.

82. On the approach of the Court of Appeal, the first question [61(1)] does not require to be resolved in order to determine this appeal. On that approach, it is resolved by the guidance given in Terre Wallonne. As to [74] of the printed case, all members of the Court of Appeal approached the Opinion of the Advocate General in Terre Wallonne conscious of the need not to attach too much weight to her precise language. The majority did take account of the

degree of influence: they were willing to accept that a sufficiently potent factual influence may justify the conclusion that a plan or programme does set the framework for future development consent of project: see [55]. Appendix 1/3/24

83. The answer to the second question [61(2)] is also resolved by Terre Wallonne. It is for the national court to determine whether a posited "plan or programme" adopted by a national government sets the framework for future development consent of projects within the meaning of article 3(2)(a), where the decision maker is to be the national legislature. *Ex hypothesi*, the national court is better equipped than the CJEU to determine that question on the basis of the national constitutional and legislative arrangements that govern the making of that development consent decision.

84. As to [70] of the printed case, it is clear both from article 3 of the SEAD and from the CJEU authorities, that the mandatory requirement under article 3(2)(a) to submit a plan or programme to strategic environmental assessment arises in relation to those plans and programmes which set the framework for future development consent for Annex 1 and Annex 2 projects. Where a plan or programme does not do so, that mandatory requirement does not arise. In Terre Wallonne at [54], the CJEU made clear that question was for the national courts to resolve. Core Volume Tab 6; Authorities CB Vol 7

85. It is the question posed in [61(2)] that principally troubled Sullivan LJ: see [188]. His concern was that the effect of the majority's decision would be to "*carve out an exclusion*" from the SEAD where the development consent decision maker is to be Parliament [174]. The Appellant relies on the same point in [71]-[72] of the printed case. Appendix 1/3/66

86. In our respectful submission, that is not a fair analysis of the majority's decision. As to [71]-[72] of the printed case, the reasoning of the majority in the Court of Appeal does not provide *"an exemption from EU environmental law"* – Core Volume Tab 6

(1) The majority has reached its decision in accordance with the terms of the SEAD, guided by the CJEU authorities.

(2) In order to determine whether by virtue of article 3(2)(a), the DNS falls within the scope of the SEAD, it is necessary to ask whether it sets the framework for future development consent for Annex 1 and Annex 2 projects. Whether the answer to that question is in the affirmative or the negative does not amount to the provision of an exemption to EU environmental law.

(3) The SEAD's specific objective is to complement the EIAD: it is consistent with that specific objective that an 'earlier planning measure', which does *not* prevent full account of the environmental effects of a project being taken by the development consent decision

maker in accordance with the EIAD, is determined not to set the framework for the grant of development consent under article 8 of the EIAD. See [31] and [32] of the Advocate General's Opinion in Terre Wallonne. In that case, the project in question is not thereby exempted from environmental assessment, since the decision whether to grant development consent, unaffected by a framework set by a plan or programme, must meet the objectives of the EIAD.

Authorities CB Tab 7

(4) Article 1 of the SEAD states that its objective is to ensure that an environmental assessment is carried out of *certain* plans and programmes which are likely to have significant effects on the environment. Article 3(2)(a) identifies those plans and programmes that fall within that objective.

(5) For the reasons given by the majority of the Court of Appeal in [62], the differing requirements of the SEAD and the EIAD in respect of the extent of assessment of alternatives do not shed light on the answer to the question whether the DNS sets the framework within article 3(2)(a). Whether that so called 'gap' requires to be closed is a matter for amending legislation. Contrary to Sullivan LJ's approach in [159], it is not for the court to seek to close the gap with a view to improving the extent or quality of assessment of alternatives beyond that which is required under the current terms of the EIAD.

Appendix 1/3/27

Appendix 1/3/56

(6) The absence from the SEAD of an equivalent 'exclusionary' provision to article 1(4) of the EIAD is unremarkable. The SEAD expressly contemplates the adoption of a plan or programme through legislation: see the first indent of article 2(a) of the SEAD. The absence of the equivalent to article 1(4) of the EIAD simply means that the procedures set out in articles 4 to 9 of the SEAD are applicable to the production of such a plan or programme.

7. Paragraph 73 of the printed case is incorrect. Both the terms of articles 2 and 3 of the SEAD, the CJEU authorities and the Commission guidance show that the question whether a plan or programme sets the framework for future development consent must be answered in order to determine whether the plan or programme requires SEA under article 3(1). Whether the law requires the development consent decision to give effect to, or to have regard to, the plan or programme under consideration is plainly relevant to that question.

Core Volume Tab 6

88. For all these reasons, we respectfully invite the Court to conclude -

(1) That it is not necessary to refer the meaning of *"set the framework for development consent"* in article 3(2)(a) of the SEAD to the CJEU.

(2) That the majority in the Court of Appeal were correct to conclude that the DNS does not set the framework for the future decisions of Parliament whether to grant development consent for phase 1 and phase 2 of HS2 through enactment of the proposed hybrid Bills.

(3) Required by administrative provisions

89. The Appellant's case is that the DNS was "*required by administrative provisions*" because the March 2010 Command Paper "*set a clear framework for the formal consultation on, and determination of, the national strategy for high speed rail...*" (printed case at [47]). The Appellant also alleges that there was a legitimate expectation that, after consultation, the Government would publish its confirmed final strategy for HS2 (printed case at [51]). These matters are said to amount to administrative provisions which required the production of the DNS.

Core Volume Tab 6

90. Ouseley J held that the DNS was not "required by administrative provisions": see [67] to [72]. In the Court of Appeal, Sullivan LJ disagreed (at [181] to [182]). The Master of the Rolls and Richards LJ shared Sullivan LJ's concerns, but in light of their finding that the DNS did not "set the framework", found it unnecessary to decide the point or to consider whether a reference should be made on this point to the CJEU (at [71]).

Appendix 1/4/90-1

Appendix 1/3/64

Appendix 1/3/28-9

91. The Respondent accepts that the question of whether a plan or programme is "required by administrative provisions" is to some extent interlinked with the question of whether the plan or programme sets the framework for development consent: see Walton v Scottish Ministers [2013] PTSR 51, at [59]; Ouseley J's judgment at [65]; and Sullivan LJ's judgment at [150]. The Respondent also accepts that it is at least arguable that the 2010 Command Paper is an "administrative provision" within the meaning of the SEAD. However, the Respondent submits that the DNS was not "required" by the March 2010 Command Paper or otherwise.

Authorities CB Tab 11

Appendix 1/4/89

Appendix 1/3/54

Submissions

Meaning of "required..."

92. The Secretary of State makes the following observations as to the meaning of "required" in the context of article 2(a) -

(1) In Terre Wallonne, Advocate General Kokott said *"Freely taken political decisions on legislative proposals are not therefore subject to the obligation to carry out assessments"*.

Authorities CB Tab 7

Authorities CB Tab 6

(2) In Bruxelles, the CJEU held that the word "required" did not limit the scope of the SEAD to those plans and programmes whose adoption is compulsory under the relevant national legislative or administrative system [28]-[29].

(3) Nonetheless, the CJEU found 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'" [31].

Authorities CB Tab 11

(4) In Walton, Lord Reed JSC rejected the contention that the decision to construct a particular road (the Fastlink) was the modification of a transport strategy (the MTS) which required an SEA because there were no legislative or regulatory provisions *"requiring the development in the Ministers' thinking about the project to be implemented by means of the formal adoption of a plan or programme, or the modification of such a document"* (at [68]).

(5) In Walton, Lord Carnwath JSC registered his "serious doubts" as to whether the MTS was "required" within the meaning of article 2(a). His lordship noted that *"some level of formality is needed: the administrative provisions must be such as to identify both the competent authorities and the procedure for preparation and adoption. Given the relatively informal character of the NESTRANS exercise, it is not clear to me what "administrative provisions" could be relied on as fulfilling that criterion"* [99].

93. The Respondent therefore submits that the concept of a plan or programme being "required" connotes the need for some formality in its preparation or adoption, whether the source of that formality is legislative, regulatory or administrative, and whether or not the adoption of the plan or programme is compulsory. Such plans or programmes can be readily distinguished from "freely taken political decisions" (Terre Wallonne) or developments in the Government's thinking about particular projects (Walton).

Application to the March 2010 Command Paper

94. For the material facts in respect of the March 2010 Command Paper, see Ouseley J's judgment at [42]-[54]. In particular, the proposed development of the high speed rail network was subject to significant changes following the May 2010 general election and the formation of the Coalition Government. The Coalition Agreement supported the proposal for a new high speed rail network. However, HS2 Limited was asked to carry out further work on connections to Heathrow, the link to HS1, and the comparative businesses cases for a "Y" and "S" configuration (Ouseley J, [49]).

Appendix 1/4/82-7

95. The consultation process announced in December 2010 and starting in February 2011 was thus for a modified strategy from that envisaged by the previous government in March 2010. In the words of Ouseley J, by the March 2010 Command Paper, the "*Government simply announced its intention as to how it then envisaged proceeding towards the implementation of its high speed rail strategy*" ([73]). With each modification from March 2010 onwards, in respect of the scheme itself, the consultation process, and the proposed process for securing consent, the Government simply announced those changes as new, freely taken political decisions.

Appendix 1/4/91

96. For example, in March 2010 the Government had said that if it remained of the view, following consultation, that it should construct the route, it would seek consent through a single hybrid Bill (10.7). The Coalition Government disagreed and announced that it would pursue two separate hybrid Bills, one for each phase. It has since laid before Parliament the High Speed Rail (Preparation) Bill to enable preparatory works in advance of the proposed hybrid Bills (paragraph 59/60 of the SFI) – another freely taken political decision departing from the intentions described in the March 2010 Command Paper.

Appendix 1/5/431

Appendix 2/3/45/2591

Application to Code of Practice on Consultation and/or broader legitimate expectation doctrine

97. The Appellant submits that the DNS was "required" also through the regulation of the consultation process in the Government's Code of Practice on Consultation (printed case at [50]) and through a legitimate expectation that a final strategy for HS2 would be published following consultation (printed case at [51]).

Core Volume Tab 6

98. It is of course correct to say that all Government decisions will be "regulated" by the basic tenets of administrative law. If the Government chooses to carry out a consultation exercise, it must do so fairly. However, we submit, this general 'regulation' is plainly not what is envisaged by the SEAD and by the CJEU in Bruxelles. Because any competent authority within the EU would be subject to such principles of administrative law, the words "required by..." would be deprived of all meaning. See in this regard Ouseley J's judgment at [72]. See also Lord Carnwath in Walton as to an "*administrative provision*" in this context needing "*some level of formality*" (above).

Appendix 1/4/29

Authorities CB Tab 11

99. In any event, it cannot properly be said that anyone had a legitimate expectation that a scheme for a high speed railway would be pursued. The outcome of the consultation exercise may have been that the Government decided not to promote a new railway at all. It is fanciful to suggest that an aggrieved supporter of high speed rail could have required the Government to adopt some form of high speed rail strategy at that point.

100. For these reasons, the Respondent submits that Ouseley J was correct to reject the Appellant's submissions that the DNS was "required by administrative provisions". Accordingly the DNS falls outside the definition of 'plans and programmes' in article 2(a) of the SEAD.

(4) Aarhus

Introduction

101. The Appellant argues, relying on the principle of harmonious interpretation of EU legislation with the EU's international obligations, that article 7 of the Aarhus Convention is a "*further reason*" for taking a "*liberal approach*" to the interpretation of articles 2(a) and 3(2)(a) of the SEAD (printed case at [101]). The contention being that "*as far as possible the scope of the SEAD be interpreted not to exclude plans or programmes subject to article 7 of the Convention*" (ibid). Alternatively, and somewhat more boldly, the submission is now made that if the SEAD cannot be so interpreted articles 2(a) and 3(2)(a) of the SEAD itself are invalid (printed case at [102]).

Core Volume Tab 6

102. These arguments are basically flawed for the reasons which are set out below.

The chronology

103. It is important at the outset to have in mind the chronology as it is of importance in any consideration of the relationship between article 7 of the Aarhus Convention and the SEAD[4].

DATE	EVENT	COMMENT
25 June 1998	The United Nations Economic Commission for Europe ("UNECE") Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters was adopted in the Danish city of Aarhus.	It was signed by, among others, the EU and the UK.
27 June 2001	Date of the adoption of the SEAD.	The SEAD nowhere in its recitals or the text of its provisions makes any mention of, or reference to, the Aarhus Convention. That is

4 The Appellant's printed case is partial and misleading on this, see e.g. [83] which says that the Aarhus Convention was signed 3 years before the adoption of the SEAD but fails to point out that the Convention was yet to enter force by the time the SEAD was adopted.

		not surprising as the Aarhus Convention was not yet in force.
30 October 2001	The Aarhus Convention enters into force	
21 May 2003	UNECE adopts the Kyiv (SEA) Protocol at an Extraordinary meeting of the Parties to the Espoo (EIA) Convention[5], during the Ministerial 'Environment for Europe' Conference, Kyiv. The full title is the "Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context"	See http://www.unece.org/env/eia/about/history.html *"Negotiation of the Protocol began just as the European Parliament and Council of the European Union (EU) adopted the SEA Directive (European Union Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment) in May and June 2001. The SEA Directive greatly influenced the negotiation of the Protocol".* As explained further below this contains a definition of plans and programmes to be subject to SEA identical to that in the SEAD. EU and UK are signatories.
26 May 2003	Date of adoption of the Public Participation Directive (Directive 2003/35/EC), hereafter "the Public Participation Directive".	This Directive was aimed at aligning EU law with the Aarhus Convention, and in particular article 7: see recitals (5); (6); (8) (10) and (12) and article 1. The relationship of this Directive with the SEAD is considered below.
17 February 2005	EU approves the Aarhus Convention	See Council Decision 2005/370/EC
23 February 2005	The UK ratifies the Aarhus Convention	
12 November 2008	EU approves the Kyiv (SEA) Protocol.	Protocol not yet ratified by UK[6]
10 July 2010	The Kyiv (SEA) Protocol enters into force.	

[5] The Espoo Convention is another UNECE convention; dealing with EIA in a transboundary context and which entered into force in 1991.

[6] See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4-b&chapter=27&lang=en

Crucial distinction between the objects of article 7 of the Aarhus Convention and the SEAD

104. The chronology points to a crucial distinction between the purposes of on the one hand article 7 of the Aarhus Convention and on the other hand the SEAD. This distinction is one that the Appellant's case fails to have regard to; and is the principal reason why its case on article 7 is basically flawed. The distinction is this:

Authorities CB Tab 3

(1) Article 7 of the Aarhus Convention is, as its title makes clear, concerned with "*Public participation concerning plans, programmes and policies*[7] *relating to the environment*" (emphasis added). Thus article 7 requires that the Parties "*make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment*".

Authorities CB Tab 1

(2) The SEAD, while also encompassing requirements for public participation, has a different objective (see article 1) namely of requiring "*an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment*", an SEA.

105. It is necessary to explore this distinction further. There are a number of points to be made.

106. First, under article 7 of the Aarhus Convention it is not possible to complain that a plan or programme was not the subject of an SEA. Article 7 does not require an SEA to be carried out in respect of a plan or programme. Instead it requires that there *is public participation* in the preparation of plans and programmes. While that can be achieved via an SEA procedure it need not be.

107. That this is so is supported by both editions of the UNECE's Guidance to the Aarhus Convention, *The Aarhus Convention: An Implementation Guide*[8]. Thus the Implementation Guide (1st Edition, 2000) at p. 144 says (emphases added):

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7 As is explained in Annex I to this case the legislative history of the SEAD shows a deliberate choice was made to exclude from its scope "policies".

8 In Case C-182/10 Solvay v Region Wallonne [2012] 2 C.M.L.R. 19 [Authorities CB Tab 9], the CJEU held (at [27]-[28]) that the Implementation Guide (2000) was to be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the convention. However, the observations in the implementation guide have no binding force and they do not have the normative effect of the provisions of the Convention. Therefore, the implementation guide is a relevant aid to interpretation of the Convention and EU law implementing it, albeit it is not binding on the courts. Similarly, in Case C-204/09 Flachglas Torgau GmbH v Germany [2013] Q.B. 212 [Authorities Tab 57] the CJEU (Grand Chamber) said at [58] said of the Implementation Guide (2000) "[w]hile not entirely

A

> *"... the Convention does not oblige Parties to undertake assessments, a legal basis for the consideration of the environmental aspects of plans, programmes and policies is a prerequisite for the application of article 7 .... Thus, proper public participation procedures in the context of strategic environmental assessment (SEA) is one method of implementing article 7 (see box[9]). SEA provides public authorities with a process for integrating the consideration of environmental impacts into the development of plans, programmes and policies. It is, therefore, one possible implementation method ...*
> *... The requirement to take the outcome of public participation into account ...may be satisfied through the establishment of national SEA procedures.*
> *In 1996 the European Community adopted a proposal for a Council Directive on the assessment of the effects of certain plans and programmes on the environment, COM/96/0511 Final—SYN 96/0304 (SEA proposal). The purpose of the SEA proposal was to ensure that the environmental consequences of plans and programmes were identified and assessed before adoption. The proposal covered a range of public plans and programmes in several areas such as transport, energy, waste, water, industry, telecommunications, tourism, town and country planning, and land use. It outlined the procedure to be followed and the content of the assessment. The proposal contained provisions for the public to give its opinion and for the results of public participation to be taken into account during the adoption procedure of the plans and programmes. In October 1998, the European Parliament completed the first reading of the SEA proposal. The Commission amended it in February 1999. The negotiations at Council level were proceeding during late 1999. UN/ECE has also discussed the idea of SEA as the subject of the next multilateral environmental agreement under its auspices".*

Authorities Tab 53

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108. A footnote at the end of this text (no. 149) says:

> *"A protocol to either Convention[10] raises problems—to the Aarhus Convention because SEA is not only about public participation ... It would seem to be most appropriate for SEA to be the subject of a new convention."*

I

J

109. The 2nd edition of the Implementation Guide (2013), some very selective parts of which the Appellant seeks to rely on (see [87] – [89] of the Appellant's

Core Volume Tab 6

K

valueless, therefore, the evidence derived from the Implementation Guide should not be viewed as in any way decisive".

9 The box on p. 115 again emphasises SEA is a way of implementing Article 7 but not itself a requirement of it. It notes that not all UNECE countries have a legal requirement for SEA at all; and some have only informal procedures for SEA.

L

10 The Aarhus Convention or the Espoo Convention.

printed case[11]), is even clearer on this. The most relevant passages are at p. 118 -119:

Authorities Tab 54

> *"The scope of application of the second pillar of the Aarhus Convention is, however, different and rather broader than the scope of environmental assessment. For example … article 7 applies to plans and programmes "relating to the environment", which is a much broader concept than plans and programmes "likely to have significant environmental effects" and which are usually subject to SEA (see the commentary to article 7).*
> *Moreover, the Aarhus Convention does not require an environmental assessment to be carried out. The Aarhus Convention does not stipulate that an environmental assessment must be a mandatory part of public participation procedures nor does it regulate the situations where environmental assessment is required. However, if an environmental assessment is carried out (either EIA or SEA) then the public participation provisions of the Convention will apply (see the commentary to articles 6 and 7).*
> *Thus, one can conclude that while public participation is in fact a mandatory part of environmental assessment, an environmental assessment is not a mandatory part of a public participation procedure under the Aarhus Convention, as the Convention covers a broader scope ...*
> *While environmental assessment in the form of EIA or SEA plays an important role in facilitating the effectiveness of public participation under articles 6 and 7 of the Convention, EIA and SEA procedures, as currently regulated at the national and international level, cannot be considered to fully implement the Convention's public participation requirements (see the commentary to articles 6 and 7). However, environmental assessment is a very useful tool in ensuring effective public participation in decision-making: without environmental assessment documentation, the public usually have no easy access to reports or studies evaluating the environmental and health risks of an activity. Thus, such documentation helps the public to develop and express their own science-based opinions on the proposed activity, plan or policy."*

110. It is thus clear from the Implementation Guides (2000) and (2013) that:

(1) Article 7 of the Aarhus Convention does not require there to be SEA of plans and programmes.

(2) The objective of article 7 is public participation not environmental assessment; and that is all it requires.

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11 The references in the Appellant's printed case to pp. 180 – 182 of the Implementation Guide (2013) read properly in the context of what is said earlier in the document further support the notion that article 7 has a different focus to SEA, and is wider in scope. SEA is again emphasised as being merely *a* way to assist in the implementation of article 7. The Court is asked to read pp. 180 – 182 in full. [Authorities Tab 54]

(3) SEA is seen as, at most, one possible way of transposing/implementing the requirements of article 7 for public participation.

(4) The scope of article 7, and hence the applicability of the requirement for public participation, may be wider and different from that of the SEAD.

111. Given the above, there is, it is contended, nothing in any of the arguments at [83] – [104] of the Appellant's printed case relying on the Aarhus Convention. Core Volume Tab 6

112. Second, even if (contrary to the view of the majority in the Court of Appeal [63]) the DNS did fall within the scope of article 7 of the Aarhus Convention, what article 7 would then have required in respect of the DNS was that there be public participation during its preparation. The DNS was preceded by full and very wide-ranging consultation; see the judgment of Ouseley J. at [2] – [5]; [46] – [53]; [303] – [306] and the judgment of the majority in the Court of Appeal at [13] – [18]. Moreover, while in the Courts below the Appellant and the other claimants/appellants sought to argue that this consultation was in various technical ways defective, all those arguments failed and are not the subject of any appeal to this Court. Thus, so far as the Aarhus Convention is concerned there can be no question but that the DNS was compliant with article 7. It is not open to the Appellant before this Court to argue that the consultation, and other public participation, undertaken in respect of the DNS was not compliant with article 7 of the Aarhus Convention; and it does not so argue. Instead what the Appellant seeks to do is to rely on article 7 to support a contention that an SEA was required for the DNS under the SEAD. That is a *non-sequitur* as explained above. Article 7 has nothing to say about whether SEA is required, only whether public participation is required. Appendix 1/4/69-70, 85-7, 151-2. Appendix 1/3/10-11

113. Third, the above matters provide the crucial context to any arguments about the relationship of the SEAD and the Aarhus Convention. The Appellant makes the submission that the European Parliament and Council "assumed" that the SEAD fully implemented article 7 whereas the Implementation Guide (2013) says the SEAD cannot be seen as fully implementing article 7: see [89] and [94] of the printed case. This submission though misunderstands the position: Core Volume Tab 6

(1) The scope of article 7 of the Convention is indeed wider than that of the SEAD (see above). The Implementation Guide (2013) says, as the Appellant points out, that article 7 applies to plans and programmes not within the scope of the SEAD. That though does not mean that the scope of the SEAD should be stretched to match that of article 7, still less does it mean that it is in some way invalid. The objectives, and requirements, of the two instruments are different; and, unsurprisingly, so is their scope.

Authorities Tab 24

(2) Article 2 of the Public Participation Directive sought to align EU law with article 7 of the Aarhus Convention. It did so by requiring public participation, *not* environmental assessment, in respect of the plans and programmes listed in Annex I: see especially article 2(2). That was because, of course, what article 7 requires is public participation

Authorities CB Tab 3

(3) Article 2(5) excluded the application of the public participation requirements in article 2 to plans and programmes listed in Annex I which are already subject to public participation procedures through, inter alia, the SEAD. The reason for this is clear; SEA is as the Implementation Guide (2000) and (2013) recognises *a* way of implementing the requirement for public participation in respect of certain plans and programmes. Where SEA is required by the SEAD that is good enough for article 7 purposes and no further public participation is needed. For other plans and programmes, not already subject to public participation procedures through the SEAD (or other Directives listed in article 2(5)), the requirement for public participation was transposed via article 2. See also Recital (10) of the SEAD which explains this clearly.

Authorities Tab 24

114. Fourth, given the above analysis there is no proper basis upon which it can be argued that a harmonious interpretation is required as between the scope of article 7 of Aarhus and the SEAD. The Appellant's case is, to use an idiom, like comparing apples and oranges. The position is made even clearer when one looks at the Kyiv (SEA) Protocol[12]. This, unlike the Aarhus Convention, is a UNECE instrument actually concerned with SEA, albeit in a transboundary context. The definition of plans and programmes for the purposes of that Protocol closely mirrors the SEAD: see articles 2(5) and 4 of that Protocol. If there is any scope for harmonious interpretation it is between the SEAD and this Protocol; not the SEAD and the Aarhus Convention.

Authorities Tab 52

115. Fifth, the Respondent also relies upon the opinion of the Advocate General in Bruxelles (see above). She said:

> *"22 At the hearing, Inter-Environment Bruxelles and Others also relied on the public participation provided for in art.7 of the Aarhus Convention 11 and art.2 of Directive 2003/35. Under that convention, the public is to be given the opportunity to participate in all plans and programmes relating to the environment, but an environmental report is not expressly required. If it were the case that the SEA Directive transposed that international law obligation in its entirety in respect of*

Authorities CB Tab 6

12 As is explained further in the annex to this case the legislative history of the SEAD began with the Commission's proposal COM(96) 511 final. This is referred to in the Implementation Guide (2000). The proposal makes no mention of the Aarhus Convention, it does though refer extensively to the Espoo Convention under the auspices of which the Kyiv Protocol was later adopted.

the European Union, there would be good reason to apply it above and beyond the wording of the SEA Directive , that is to say to all plans and programmes relating to the environment.

23 However, the SEA Directive does not contain any indication that it is designed to transpose art.7 of the Aarhus Convention. Rather, recital 10 in the preamble to Directive 2003/35 shows that, in this regard, the Convention is to be transposed only in relation to plans and programmes under EU law—more specifically by Directive 2003/35 in relation to certain measures but, in future, by specific rules laid down in the relevant legislative act. Article 2(5) of Directive 2003/35 simply makes it clear that an environmental assessment in accordance with the SEA Directive is sufficient from the point of view of public participation. 13

24 The objectives of art.7 of the Aarhus Convention do not therefore justify an interpretation of the SEA Directive that is contrary to the recognisable intention of the legislature."

116. This is entirely consistent with, and supports, the above analysis. The Appellant says that in that case the CJEU reached a different view from the Advocate General on the scope of the SEAD. That is indeed so. However, it was no part of the CJEU's judgment to suggest that the Aarhus Convention required a broad interpretation be given to the scope of the SEAD or to suggest that in this regard it disagreed with the Advocate General's view that in answering the question referred, as to the scope of the SEAD, article 7 of the Aarhus Convention was irrelevant.

The validity argument

117. The Appellant's alternative case that articles 2(a) and/or 3(2)(a) of the SEAD are invalid because they are narrower in scope than article 7 of the Aarhus Convention is thus also, for the reasons set out above, without foundation. There is thus no need to consider these matter in any detail as no issue of invalidity can possibly arise given the above analysis. There are, however, three short points that should be made about the Appellant's wider case on invalidity:

(1) The Appellant's printed case makes extensive citation from Case C-366/10 Air Transport Association of America. The relevant principles applicable, however, are more concisely and helpfully set out in [53] – [54] of the decision of the General Court Case T-338/08 Stichting Natuur en Milieu & Pesticide Action Network Europe v Commission and Case T-396/09 Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v Commission (judgment of 14 June 2012), which case was directly concerned with when the Aarhus Convention could be relied on to invalidate EU legislation. In relation to the SEAD the judgment in Stichting Natuur at [54] is inapplicable as it

Authorities Tab 32

Authorities Tab 47

was not (see above) introduced to implement the Aarhus Convention and makes no an express renvoi to any provisions of that Convention. The validity of the SEAD could thus only ever be considered in the light of the Aarhus Convention if (see Stichting Natuurat [53]):

i. the nature and the broad logic of the Convention did not preclude this; and

ii. (more importantly for these purposes) the provisions of that Convention in issue "*appear, as regards their content, to be unconditional and sufficiently precise*" (see [53] in Stichting Natuur). As the Appellant's printed case explains this requires that the provision of the Convention being relied on is not subject to the adoption of a subsequent measure.

(2) Not all provisions of the Aarhus Convention are so "*unconditional and sufficiently precise*", se e.g. C-240/09 Lesoochranarske Zoskupenie VLK v Ministerstvo Zivotneho Prostredia Slovenskej Republiky [2012] Q.B. 606 where the Grand Chamber of the CJEU held that article 9(3) of the Aarhus Convention *"was subject in its implementation or effects to the adoption of a subsequent measure and was not therefore capable of having direct effect"*. The position is *a fortiori* with article 7: as was made clear by the text of the Implementation Guides (2000) and (2013) there are various ways in which the requirement for public participation can be transposed.

Authorities Tab 58

Authorities Tabs 53 & 54

(3) The Appellant makes the submission that only the CJEU may rule EU legislation invalid: see e.g. the printed case at [98]. That is correct, however, the converse of this is that national courts may rule EU legislation to be valid: See ***References to the European Court*** (2002) Anderson at [5-060] " ... *the exclusive jurisdiction of the European Court extends only to the declaration of invalidity of a Community act. A national court is fully entitled to consider the validity of such an act, come to the conclusion that it is valid and determine the case on that basis without a preliminary reference*": See also Case 314/85 Firma Foto Frost v Hauptzollamt Lubeck-Ost [1987] ECR 4199 at para. 14.

Authorities Tab 60

Authorities Tab 41

(5) Reference

118. We now summarise our submissions on the question of a reference.

119. The Appellant's case is replete with suggestions that the issues between the parties require a reference to the CJEU under article 267 of the Treaty on the Functioning of the European Union ("TFEU"). Given the delay inherent in the

making of a reference (18 – 24 months at least[13]) references are very often sought by those whose ultimate aim it is to frustrate a proposed development.

120. This Court is obliged to make a reference to the CJEU on a question of the interpretation (as opposed to application) of EU law where-

(1) The Court considers that a decision on the question is necessary to enable it to give judgment (article 267 of the TFEU); and

Authorities Tab 25

(2) The answer is not *acte clair* (that is where the *"correct application of Community law [is] so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved"* see Case C-283/81 CILFIT srl v. Ministero della Sanita [1983] 1 C.M.L.R. 472) or *acte éclaré* (that is where a *"previous decisions of the Court have already dealt with the point of law in question"*).

Authorities CB Tab 5

121. The Respondent contends that the issues arising under the SEAD should not be referred for these reasons.

122. First, in respect of the SEAD, the issue that arises in this case is as to the scope of that Directive. The Advocates General and the CJEU have in a number of recent cases examined this issue and laid down guidance: see Terre Wallonne; Bruxelles; Case C-177/11 Syllogos Ellinon Poleodomon kai Chorotakton v Ypourgos Perivallontos, Chorotaxias & Dimosion Ergon and Others (unrep 21 June 2012); and Case C-43/10 Nomarchiaki Aftodioikisi. The CJEU has in Bruxelles at [30], set out what the majority in the Court of Appeal in this case called a *"carefully expressed … general statement … of the meaning in the SEAD of "plans and programme which set the framework"* (see [51]). Moreover, that general statement has been repeated in subsequent cases, see e.g. Nomarchiaki at [95]. The matters sought by the Appellants to be referred are, it is submitted, *acte éclaré* as *"previous decisions of the Court have already dealt with the point of law in question"*. The Appellant seeks to avoid that conclusion by re-defining the issue of law between the parties in an overly narrow and artificial way (see the printed case at [79(1)]).

Authorities CB Tab 7

Authorities CB Tab 6

Authorities Tab 45

Core Volume Tab 6

123. Second, the CJEU has made clear that the assessment of whether, in the light of its general statements, any particular plan or programme does fall within the SEAD is *"for the national court to assess"* (see Terre Wallonne at [54]). The autonomous meaning of a plan or programme which "sets the framework" for

Authorities CB Tab 7

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13 In the recent case of R (Edwards) v Environment Agency the Supreme Court made a reference on 15 December 2010; the CJEU gave judgment on 11 April 2013; that is to say nearly 2 and ½ years. The Supreme Court heard argument on the appeal again in July 2013. As is the position in a not inconsiderable number of cases, notwithstanding the reference that has been made to and answered by the CJEU, the parties disagree about who has won.

future development consent within article 3(2) of the SEAD has been clarified in the CJEU cases referred to. The question whether any particular plan or programme is within the scope of the SEAD is now a question for the national authorities (including the national courts) to determine. It cannot be appropriate that the CJEU must receive a reference from a national court, on each occasion that the latter is called upon to consider whether one of the many plans or programmes throughout the Member States falls within the scope of the SEAD. The Appellant is incorrect, at [81] of its printed case, to submit that only the CJEU is able to determine if the DNS is a "plan or programme" within the scope of the SEAD. The CJEU has in its case law opined on the meaning of the concepts in issue in this appeal. Their application to the facts of this case is for this Court not the CJEU.

Core Volume Tab 6

124. The Appellant also relies upon a study ([80] of its printed case) which is said to show a wide variety of differing approaches by Member States to "set the framework". The Appellant suggests that this further supports the need for a reference.

125. In our submission, this document does not support the need for a reference for 3 reasons-

(1) The study pre-dates all the CJEU cases that have laid down general statements as to the meaning of "set the framework" and "plans or programmes" (see above).

Authorities Tab 31

(2) The study itself, which was commissioned by the Commission, says [page 48] that it is the Member States who are *"required to decide whether a plan or programme must be subject to the assessment requirements of the Directive"* (see [5.2] and [5.3], pp. 48 – 50).

(3) Differing practice, if it still exists, does not in any event justify a reference. Rather the Commission has powers to infract a Member State if it believes it is failing to apply the SEAD in accordance with the general statements laid down by the CJEU in the case law referred to above.

126. Third, we draw attention to the Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of the Directive on Strategic Environmental Assessment (Directive 2001/42/EC) (*COM/2009/0469 final*). That report indicates that the determination of whether a particular plan or programme falls within the scope of the SEAD is to be determined at Member State level. Thus it is said:

Authorities Tab 28

"3.2. Determination of the scope of application of the Directive
In general, most MS have not encountered problems in determining the scope of application of the SEA Directive. Most of them report that their model is based on a combined approach, whereby the list of P&P to be assessed is supplemented by a case-by-case approach to determine whether an assessment is needed"

127. Fourth, the mere fact that at different levels of the judicial system Judges have taken a different view on a question of EU law does not require a reference: see this Court's decision in Office of Fair Trading v Abbey National plc [2010] 1 A.C. 696 at [115]. In this case, Ouseley J. and the majority in the Court of Appeal (Richards LJ and the Master of the Rolls) were of the view that, having regard to the decided CJEU cases, the SEAD did not apply to the DNS. Sullivan LJ took a different view, but based on a very narrow disagreement as to the nature of the influence of the DNS in the Parliamentary process. For the reasons given above, we respectfully submit that he based his view on a clearly flawed understanding of the relationship between the Aarhus Convention and the SEAD.

Authorities Tab 56

128. Finally, the Court is reminded of what was said by Advocate General Jacobs in Case C-338/95 Wiener S.I. GmbH v Hauptzollamt Emmerich [1998] 1 C.M.L.R. 1110 (and supported by later opinions of other Advocates General):

Authorities Tab 59

*"58 ... If the **CILFIT** judgment were applied strictly, then every question of Community law, ... would have to be referred by all courts of last instance.*
*59. It is true that there is nothing in the **CILFIT** judgment to suggest that it is not intended to apply to all questions of Community law. However, even if that may have been the correct view when **CILFIT** was decided, it is necessary to interpret article [267], like all other general provisions of Community law and in particular the provisions of the Treaty, in an evolutionary way. Indeed **CILFIT** itself refers, as has been seen, to the "state of evolution [of Community law] at the date on which the provision in question is to be applied".*
60. If an evolutionary approach is adopted to the interpretation of article [267], then it seems to me impossible to ignore a number of developments at least some of which should condition the interpretation of article 177 today ... Excessive resort to preliminary rulings seems therefore increasingly likely to prejudice the quality, the coherence, and even the accessibility, of the case law, and may therefore be counter-productive to the ultimate aim of ensuring the uniform application of the law throughout the European Union.
61. Even if those considerations were to be regarded as essentially pragmatic rather than matters of principle, another development which is unquestionably significant is the emergence in recent years of a body of case law developed by this Court to which national courts and tribunals can resort in resolving new questions of Community law. Experience has shown that, in particular in many technical fields, such

as customs and value added tax, national courts and tribunals are able to extrapolate from the principles developed in this Court's case law. Experience has shown that that case law now provides sufficient guidance to enable national courts and tribunals—and in particular specialised courts and tribunals—to decide many cases for themselves without the need for a reference …

…

*65. The one point on which the **CILFIT** conditions might in my view be reconsidered or refined is the statement that "an interpretation of a provision of Community law … involves a comparison of the different language versions". Although the Court preceded that statement by pointing out that "the different language versions are all equally authentic", I do not think that the **CILFIT** judgment should be regarded as requiring the national courts to examine any Community measure in every one of the official Community languages …[14] That would involve in many cases a disproportionate effort on the part of the national courts; moreover, reference to all the language versions of Community provisions is a method which appears rarely to be applied by the Court of Justice itself, although it is far better placed to do so than the national courts …"*

129. The Advocate General's observations were considered in Mirror Plc (formerly Mirror Group Newspapers Ltd) v Customs and Excise Commissioners [2001] 2 C.M.L.R. 33 where the Court of Appeal said that *"[a] reference will be least appropriate where there is an established body of case law which could readily be transposed to the facts of the instant case, of where the question turns on a narrow point considered in the light of a very specific set of facts …"* (see [52]). This is relevant here as-

Authorities Tab 55

(1) There is in respect of the issues raised under the SEA and EIA Directives an established body of case-law that can be applied to the facts of this case.

(2) The question under the SEAD, on which the Court of Appeal divided, turned on a *"narrow point considered in the light of a very specific set of facts"*.

(3) The Court of Appeal also said that the pre-requisite to a reference is a "real doubt" as to the answer to the EU law issues raised. That test is, we submit, appropriate in this case, given the CJEU case-law and the general guidance it gives as to the applicable approach to setting the framework. There is no real doubt as to the proper interpretation of EU law in this respect.

[14] There are now 24 official and working languages of the EU; at the time of Wiener it was 11.

(6) Effective remedy

130. If the Court were to conclude that either SEA was required, or that it was necessary to make a reference before that question could be resolved, the Respondent invites the Court to find that, in any event, the Appellant is not entitled to the relief sought – the quashing of the DNS. It would follow that it would be unnecessary to make the reference sought by the Appellant to resolve the case. In this respect, the Respondent invites the Court to depart from the reasoning of Ouseley J and the Court of Appeal.

131. The Respondent relies upon the following matters in these submissions:

(1) Ouseley J's findings as to the limited extent of substantial non-compliance with the SEAD.

(2) The required scope of environmental impact assessment to be carried out in respect of the phase 1 project in accordance with the objectives of the EIAD and for the purpose of the hybrid Bill.

Submissions

Limited non-compliance

132. Ouseley J found that the Appraisal of Sustainability for Phase 1 failed to comply with the requirements of the SEAD insofar as:

(1) There was no substantial assessment of the impacts of phase 2 (see [132]-[133]). Appendix 1/4/108

(2) There was no explicit rejection of alternatives to the Y network, or alternative design speeds, on the basis that they were not reasonable alternatives. Accordingly the Appraisal of Sustainability lacked reasons for the selection of reasonable alternatives which would have been required if the DNS was a plan or programme subject to the SEAD (see [165] and [172]); Appendix 1/4/115 & 117

(3) There was a lack of information in respect of the proposed spurs to Heathrow, and therefore no comparison between the preferred route of the spurs in the DNS and any of the Iver through route options (see [169] and [172]). Appendix 1/4/50-1

133. As to these findings –

(1) Strategic assessment of the impacts of Phase 2 has now been undertaken and published in *High Speed Rail: Consultation on the route from West Midlands to Manchester, Leeds and beyond Sustainability Statement*.

Appendix 1/5/360-70

Appendix 2/2/29/187 7-1941

Appendix 1/4/116

Appendix 1/7/663

(2) Alternative configurations to the Y network were the subject of consideration in the March 2010 Command Paper and in the "Strategic Alternatives to the Proposed 'Y' Network" study in February 2011. It is important to have in mind that the core route from London to Birmingham is common to each of those alternatives. At [167] Ouseley J found that the assessment of alternatives to the London to Birmingham route in Phase 1 was substantially compliant with the SEAD. The DNS noted (at [3.75]) that relatively few consultation responses discussed the merits of the Y configuration.

(3) Options for serving Heathrow have been the subject of extensive consideration in published reports. We repeat the point that Ouseley J found that the assessment of alternatives to the London to Birmingham route in Phase 1 was substantially compliant with the SEAD. The assessment fell short of the SEAD's requirements only insofar as the proposed spurs were concerned. The DNS considered the means of serving Heathrow in some detail.

Appendix 1/6/672-76

Assessment under the EIAD

134. The formal Environmental Statements for the hybrid Bills for both phases of HS2 must fulfill the objectives of the EIAD and comply with Parliamentary Standing Orders for that purpose. The question whether the objectives of the EIAD have been fulfilled through the legislative process will be justiciable following enactment.

Authorities Tab 45

135. In Nomarchiaki Aftodioikisi (above), the Advocate General said [175] that *"the production of the various environmental assessments under EU law need not be formalistic. Rather, the important factor is that the conditions laid down in the various rules are implemented. If this is done, it does not matter how the assessment in question is designated"*. Where the plan and project are largely congruent, it is possible for both SEA and EIA assessments to have the same scope: see [176].

Authorities CB Tab 11

136. The Respondent submits that this analysis is consistent with the approach of this Court in Walton. In Walton, Lord Carnwath JSC observed that a shortfall in the SEA procedure should not be treated as leading to automatic nullification of the measure *"regardless of whether it has caused any prejudice to anyone in*

practice, and regardless of the consequences for wider public interests" (at [138]). Lord Carnwath continued [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."*

137. In the present case -

(1) The consideration of alternatives in any SEA could properly be limited to alternatives which achieved the objectives of the putative plan – i.e. a high speed rail network: Ouseley J at [162]. Even if SEA were required, it did not require assessment of alternatives which were not high speed rail lines. Appendix 1/4/114-5

(2) In substance, a proper assessment of route alternatives to Phase 1 of HS2 has been carried out.

(3) The route of the Phase 1 project which is to be the subject of the hybrid Bill is substantially congruent with that approved in the DNS. Substantially the same railway proposal for phase 1 of HS2 will be subject to assessment under the EIAD as would have been subject to assessment under the SEAD.

(4) The SEAD requires an assessment of reasonable alternatives to the proposed plan or programme and the reasons for their rejection. The EIAD does not require the promoter to seek out further alternatives, but to outline and to explain the reasons for the rejection of the alternatives he has considered. In this case, no party has suggested that there are reasonable alternatives which fell to be assessed but which have not been considered at all. This reinforces the congruence of the two procedures in the circumstances as they now stand before the Court.

(5) The draft ES has publicised the Respondent's intention to provide further and/or fuller details on the alternatives that have been studied in the formal ES to be deposited with the hybrid Bill for phase 1 of HS2.

138. In these circumstances, we submit that the Court is able properly to be satisfied as stated by Lord Carnwath JSC in Walton [139]. The Appellant and the public may advance their cases on alternatives, the cumulative effects of the Y network and the overall effects of phases 1 and 2 of HS2 in the context of the legislative process. Alternatives will be able to be considered through the process of environmental impact assessment in accordance with the objectives of the EIAD. The Appellant and the public will enjoy the substance of the rights accorded to them by European environmental law.

139. By contrast, the relief sought by the Appellant would have a serious adverse impact on public administration. The quashing of the DNS would effectively annul a very extensive and valuable national process of public consultation and risk significant delay to the legislative process for a major component of the Government's current legislative programme.

140. In those circumstances, the Respondent invites the Court to find that, were the DNS within the scope of the SEAD and thereby subject to SEA prior to 'adoption', it would not quash the DNS for the lack of substantial compliance with SEA procedures. Accordingly, the Court would find that it is unnecessary to refer any question to the CJEU to dispose of this appeal.

Conclusion

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

REASONS

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

(2) Because the DNS falls outside the scope of article 3 of the SEAD.

(3) Because the DNS does not set the framework for future development consent for projects comprising Phase 1 and Phase 2 of HS2.

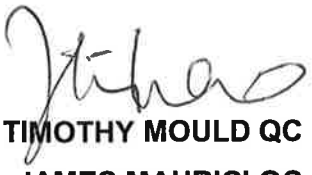
(4) Because the majority of the Court of Appeal was correct so to hold.

(5) Because the DNS is not a plan or programme within the meaning of article 2 of the SEAD.

(6) Because the DNS was not required by the March 2010 Command Paper.

(7) Because the SEAD does not apply to the DNS.

(8) Because the Appellant has and will be able to enjoy the rights conferred under the complementary SEAD and EIAD through the proposed development consent process for Phase 1 and Phase 2 of HS2.



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