Neutral Citation Number: [2013] EWCA Civ 920

Case Nos: C1/2013/0898, 0898(A), 0907, 0907(Y), 0915 and 0915(Y)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mr Justice Ouseley
[2013] EWHC 481 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2013

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE RICHARDS
and
LORD JUSTICE SULLIVAN

- -

Between:

(1) HS2 Action Alliance Limited **(2) Buckinghamshire County Council & Others** **(3) Heathrow Hub Limited & Another**	**Appellants**
- and -	
Secretary of State for Transport	**Respondent**

- -
- -

David Elvin QC and **Charles Banner** (instructed by **SJ Berwin LLP**) for **HS2 Action Alliance Limited**
Nathalie Lieven QC and **Kassie Smith QC** (instructed by **Harrison Grant**) for **Buckinghamshire County Council & Others**
Charles Banner (instructed by **Nabarro LLP**) for **Heathrow Hub Limited & Another**
Tim Mould QC, Jacqueline Lean and **Richard Turney** (instructed by **The Treasury Solicitor**) for the **Secretary of State**

Hearing dates: 10-13 June 2013

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Approved Judgment

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INTRODUCTION

1. In January 2012 the Secretary of State for Transport ("the SST") presented to Parliament a Command Paper (Cm 8247), "High Speed Rail: Investing in Britain's Future – Decisions and Next Steps" ("the DNS"), relating to a proposed high speed rail network to be built in two phases and known as High Speed 2 ("HS2"), to run initially between London and the West Midlands, and subsequently on to Leeds and Manchester in a Y-shaped network. The stated purpose of the document was to set out the decisions reached by the Government in the light of the prior national consultation, and to outline the programme for the immediate next stages of the project.

2. The DNS contained a "Summary of Decisions" (pages 37-38), which included the following under the sub-heading "Strategy":

> "**There is a compelling case for delivering a step-change in the capacity and performance of Britain's inter-city rail network to support economic growth over the coming decades** …
>
> **The construction of a national high speed rail network from London to Birmingham, Manchester and Leeds (the Y network) is the best means for enhancing rail capacity and performance on Britain's key north-south corridors** …
>
> …
>
> **A phased approach to undertaking the necessary design, legislative and construction steps is the best way to ensure that the benefits of high speed rail are realised at the earliest opportunity.** The Government will pursue a hybrid bill for each phase of the Y network. A single hybrid bill for the entire network would risk the overall delivery of the project.
>
> …
>
> **Route options for a direct spur link to Heathrow Airport should be developed to form part of Phase 2 of the Y network** …"

3. Under the sub-heading "London-West Midlands line of route", it was stated that the proposed route corridor was the best option for a new high speed line between London and the West Midlands but that a package of alterations to the proposed route should be made in order further to reduce its impacts on the local environment and communities. Later in the DNS it was stated that safeguarding directions would be issued to safeguard this Phase 1 route corridor and prevent the grant of planning permission for incompatible development. A package of compensation measures to assist those affected by blight but not covered by current statutory provisions was set

out in a separate ocument, the "Review of Property Impacts", published at the same time as the DNS.

4. The decisions in the DNS and the decision relating to the compensation measures were the subject of five separate claims for judicial review which were heard together by Ouseley J. His judgment, handed down on 15 March 2013, runs to 844 paragraphs and can fairly be described as a tour de force. He found that the consultation process in respect of the compensation decision was so unfair as to be unlawful. On all other grounds, however, he dismissed the claims.

The issues before this court

5. Three sets of claimants now appeal or make applications for permission to appeal to this court. They are HS2 Action Alliance Limited ("HS2AA", to adopt the judge's abbreviation); a group of local authorities led by Buckinghamshire County Council ("the Bucks CC Group"); and Heathrow Hub Limited ("HHL"). They pursue only some of the grounds rejected by Ouseley J. It is convenient to refer to those grounds by the numbering used by the judge, and to divide them into three groups: (1) grounds relating to the application of EU environmental directives; (2) grounds relating to the lawfulness of the consultation process; and (3) other grounds relating to the lawfulness of the decision to proceed with HS2.

6. In the first group of grounds, two directives fall for consideration. The first is Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (the Strategic Environmental Assessment Directive or "SEAD"). That directive has been transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004, but it is common ground that the relevant issues are best considered by reference to the terms of the directive itself. All the appellants contend that the decisions set out in the DNS to proceed with HS2 fell within the scope of the SEAD and were taken without carrying out the environmental assessment required by the directive. Ouseley J dealt with this as ground 1. He rejected it but granted permission to appeal in respect of it.

7. The second relevant directive is Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (the Environmental Impact Assessment Directive or "EIAD"). The contention advanced by the Bucks CC Group is that the Parliamentary hybrid bill procedure by which the SST intends to seek development consent for the two phases of HS2 is not capable of achieving the objectives of the directive, in particular as regards public participation in the decision-making procedures. This was dealt with as ground 3 by Ouseley J, who rejected it and refused permission to appeal in respect of it.

8. As to the second group, three grounds relating to the lawfulness of the consultation process are pursued before us. Grounds 5(a) and 5(b) concern points raised by the Bucks CC Group. The essence of ground 5(a) is that the consultation on the principle of HS2 was rendered unlawful by the fact that the details of only half the proposed route, namely Phase 1, had been published at the time. Ground 5(b) concerns the failure of the SST to re-consult 51M, the consortium of local authorities of which the Bucks CC Group formed part, in respect of further reports commissioned by the SST on the Optimised Alternative ("the OA") put forward in 51M's consultation response.

Ouseley J found against the claimants on both grounds. He refused permission to appeal on ground 5(a) but granted permission on ground 5(b).

9. Ground 8(b) concerns the consideration given by the SST to the consultation response of HHL. Various points were raised by HHL before Ouseley J and were rejected by him. The particular point pursued before us arises from the fact that a substantial part of HHL's response was omitted by mistake from consideration by the SST. The judge held that the omission did not render the consultation unlawful and that there was there no possibility that the decision would have been different if the full response had been considered. He refused permission to appeal on the point.

10. The third group of grounds consists of two further challenges pursued by the Bucks CC Group to the lawfulness of the decision to proceed with HS2. By ground 6 they contend that the decision was taken in breach of the public sector equality duty contained in section 149 of the Equality Act 2010. By ground 7(a) they advance a case that it was irrational of the SST to reach a decision on HS2 in the absence of a solution to the lack of capacity on the underground lines at Euston to cope with the additional passengers that HS2 would generate. Ouseley J rejected both grounds and refused permission to appeal in respect of them.

Further factual background

11. Before turning to the detail of those various grounds, we should say a little more about the factual background.

12. In January 2009 the SST incorporated HS2 Ltd and commissioned it to develop proposals for a new high speed railway between London and the West Midlands and potentially beyond. HS2 Ltd reported to the Government in December 2009. In the same month the SST announced to Parliament that a White Paper would be published, setting out plans which would include "route proposals, timescales and associated financial, economic and environmental assessments", to be followed by full public consultation.

13. A Command Paper (Cm 7827), "High Speed Rail", published in March 2010 together with HS2 Ltd's December 2009 report and other technical reports, set out the Government's proposed strategy for the development of a core high speed rail network linking London, Manchester and Leeds via Birmingham, with high speed connections northwards from the outset. It stressed the importance of formal public consultation on the Government's strategic proposals for high speed rail and on the detail of HS2 Ltd's recommended route between London and Birmingham. The Government would not make a final decision on its proposed strategy or on the detailed recommendations made by HS2 Ltd until it had received responses to the consultation exercises. If it then decided to take the matter forward, it contemplated seeking the necessary powers via a hybrid bill.

14. In May 2010 the Coalition Government affirmed its commitment to a high speed rail network but stated that it would have to be achieved in phases because of financial constraints. During 2010 various route options were considered, and the Government's preference for the Y network was announced in October 2010. In December 2010 the SST published the final preferred route for the London to

Birmingham sections, and announced that full public consultation on the high speed rail strategy and on the London to Birmingham route would start in February 2011.

15. The formal consultation was initiated in February 2011 by a document entitled "High Speed Rail: Investing in Britain's Future" ("the consultation document"). It was accompanied by an Appraisal of Sustainability of the proposed route between London and the West Midlands ("the AoS"), an Engineering Report and an Economic Case. The consultation document sought views on the proposed national high speed rail strategy described in Part 1 of the document and on the proposed line of route for an initial London-West Midlands line set out in Part 2. It listed seven broad questions on which such views were sought. The Executive Summary stated, under "Next steps":

> "The Secretary of State for Transport will announce the outcome of his consultation process and the Government's final decisions on its strategy for high speed rail before the end of 2011."

16. The consultation closed on 29 July 2011. Following consideration of the consultation responses, the DNS was published a little later than originally envisaged, in January 2012. We have referred above to the key decisions in it that triggered the claims for judicial review.

17. There have been various developments since the publication of the DNS.

18. The Government's preferred route for Phase 2 was published in January 2013 by means of a Command Paper (Cm 8508), "High Speed Rail: Investing in Britain's Future – Phase Two: The route to Leeds, Manchester and beyond", and related documents. There is to be an initial limited consultation, with a full public consultation to follow later in the year. The consultation is clearly intended to proceed on the basis of the Y network favoured in the DNS and to seek views on "route, station and depot options for Phase Two and how they might be further improved".

19. The SST's foreword to the January 2013 Command Paper on Phase 2 indicates the Government's planned timetable:

> "We are determined to get on and deliver HS2. We have already completed the consultation on the route for Phase One. In the year ahead we will begin seeking powers from Parliament to construct the London to West Midlands line. We plan to start construction in 2017 with the first high speed trains in service by 2026, just 13 years from now."

20. A paving bill, The High Speed Rail (Preparations) Bill, was introduced in the House of Commons on 13 May 2013. The explanatory notes explain that the bill authorises the SST to incur expenditure in preparation for a high speed rail network, and that it is thereby intended to ensure that the development of the proposed railway may proceed without delay. The power to incur expenditure will also allow the introduction of long-term schemes for acquisition of property or the provision of compensation to owners of property blighted by HS2.

21. Also in May 2013, there was published a draft Environmental Statement ("ES") in respect of Phase 1. The preface describes the nature of the exercise being undertaken:

> "High Speed Two (HS2) Ltd is consulting on draft environmental information that will be developed into the formal Environmental Statement (ES) for Phase One of HS2 …. This draft ES sets out the Proposed Scheme and its likely significant environmental effects at the current level of development of the Proposed Scheme ….
>
> Following the consultation and the continuing design development activity, the assessment of environmental impacts will be further refined to support the formal ES that will accompany the deposit of the hybrid bill for the Proposed Scheme in late 2013.
>
> This consultation provides the public with an opportunity to comment on the draft ES and comments will be considered during the process of finalising the formal ES. Public consultation will be undertaken on the formal ES during the passage of the hybrid bill …."

The draft contains a section on the "strategic and route-wide alternatives" considered by HS2 Ltd and the Department for Transport in the development of the HS2 proposals, including consideration of their environmental effects. The strategic alternatives fell into three main categories: modal alternatives, achieved by upgrading non-rail modes of transport (air travel, new motorways, and selective enhancement of the road network), conventional rail-based alternatives, and high speed rail alternatives to the proposed Y network. The preface states that the formal ES will include further and/or fuller details on the alternatives that have been studied.

GROUNDS RELATING TO THE APPLICATION OF EU DIRECTIVES

The relevant provisions of the SEAD and the EIAD

22. Although the SEAD and the EIAD are the subject of separate grounds, there is a relationship between the two directives and it is helpful to set out their relevant provisions before moving to consider the specific issues that arise in relation to each of them.

The SEAD

23. The objective of the SEAD is set out in Article 1:

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

> carried out of certain plans and programmes which are likely to have significant effects on the environment."

24. Further light is cast on the objective by recitals (4) and (5):

> "(4) Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption.
>
> (5) The adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework in which to operate by the inclusion of the relevant environmental information into decision making. The inclusion of a wider set of factors in decision making should contribute to more sustainable and effective solutions."

25. Relevant definitions are contained in Article 2. In particular:

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

26. Article 3 concerns the scope of the directive. It provides, so far as material:

> "1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.
>
> 2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,
>
> (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC …."

Directive 85/337/EEC was the predecessor of the current EIAD. The projects listed in Annex I to each version of that directive include "construction of lines for long-distance railway traffic".

27. The substantive requirements of the SEAD in respect of plans and programmes include the preparation of an environmental report. Thus, Article 5 provides:

> "1. When an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I."

28. By Article 8, the environmental report prepared pursuant to Article 5, together with the opinions expressed in consultations pursuant to Article 6, "shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative process".

The EIAD

29. The EIAD applies, by Article 1(1), to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment. In the ordinary course, the provisions of the directive would apply directly to the development consent procedures for the HS2 project. But Article 1(4) lays down an exception for projects authorised by national legislation:

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

The question in ground 3 is whether the hybrid bill procedure is capable of achieving the objectives of the EIAD so as to come within that exception.

30. The effect of Article 4 is that each phase of HS2, as a project listed in Annex I to the EIAD, would require an environmental impact assessment in accordance with Articles 5 to 10. Article 5 relates to the provision of information by the developer, which by Article 5(3) must include at least "(a) a description of the project comprising information on the site, design and size of the project, (b) a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects; (c) the data required to identify and assess the main effects which the project is likely to have on the environment; (d) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects; (e) a non-technical summary of the information referred to in points (a) to (d)".

31. Article 6 sets out requirements as to public participation, on which the arguments in ground 3 focus. Article 6(2) requires that the public shall be informed of the

following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided: (a) the request for development consent; (b) the fact that the project is subject to an environmental impact assessment procedure; (c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions; (d) the nature of possible decisions or, where there is one, the draft decision; (e) an indication of the availability of the information gathered pursuant to Article 5; (f) an indication of the times and places at which, and the means by which, the relevant information will be made available; and (g) details of the arrangements for public participation made pursuant to Article 6(5). Further requirements are set out in Article 6(4)-(6), as follows:

> "4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.
>
> 5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.
>
> 6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article."

The relationship between the SEAD and the EIAD

32. The foreword to the European Commission's guidance document, "Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment", describes the relationship between the two directives in this way:

> "[The SEAD] is an important step forward in European environmental law. At the moment, major projects likely to have an impact on the environment must be assessed under [the EIAD]. However, this assessment takes place at a stage when options for significant change are often limited. Decisions on the site of a project, or on the choice of alternatives, may already have been taken in the context of plans for a whole sector or geographical area. [The SEAD] plugs this gap by requiring the environmental effects of a broad range of plans and programmes to be assessed, so that they can be taken into account while plans are actually being developed, and in due

> course adopted. The public must also be consulted on the draft plans and on the environmental assessment and their views must be taken into account."

A September 2009 report by the Commission on the application and effectiveness of the SEAD describes the two directives as "to a large extent complementary: the SEA is 'up-stream' and identifies the best options at an early planning stage, and the EIA is 'down-stream' and refers to the projects that are coming through at a later stage".

Ground 1: the applicability of the SEAD

33. The case for the appellants, on which Mr Elvin QC took the lead before us, is that the DNS fell within the scope of the SEAD as a "plan or programme" which was "required by … administrative provisions" and which "set the framework for future development consent" of the HS2 project, within Articles 2(a) and 3(2) of the directive, yet the SST failed to carry out the environmental assessment required by the directive. Ouseley J held that the DNS did not fall within the scope of the directive and that ground 1 failed for that reason. He went on to hold that if, contrary to that view, the directive did apply, there had been a failure substantially to comply with it and the extent of non-compliance was such that he would have declined to exercise his discretion to refuse relief.

34. It seems to us that the crucial question is whether the DNS was a plan or programme which set the framework for future development consent. That is therefore the question to which we turn first.

Is the DNS a plan or programme which sets the framework?

35. It is common ground that the terms used in the SEAD should be interpreted flexibly and in such a way as will further its objective which is stated in Article 1. In *Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale* [2012] 2 CMLR 909 at para 37, the CJEU said: "the provisions which delimit the Directive's scope, in particular those setting out the definitions of the measures envisaged by the Directive, must be interpreted broadly." In *Terre wallonne ASBL v Région wallonne* [2010] ECR I-5611, Advocate General Kokott said:

> "29. … According to Article 1, the objective of the SEA Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes by ensuring that an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.
>
> 30. The interpretation of the pair of terms 'plans' and 'projects' should consequently ensure that measures likely to have significant effects on the environment undergo an environmental assessment."

36. The correctness of this approach is not in doubt. It is one which Ouseley J had in mind and purported to apply: see paras 65 to 67, 93 and 99 of his judgment.

37. There has been some consideration in the CJEU of what is meant by "plans and programmes which set the framework for future development consent of projects". The most comprehensive was that given by Advocate General Kokott in *Terre wallonne.* The issue in that case was whether, in the context of action programmes pursuant to the Nitrates Directive, decisions were taken which so affected the subsequent development consent of projects that the programmes required an environmental assessment. It was therefore necessary to consider the meaning of the terms "plan" and "programme" and the circumstances in which they set a framework for development consent of projects. The Advocate General said:

> "60. The term 'framework' must reflect the objective of taking into account the environmental effects of any decision laying down requirements for the future development consent of projects even as that decision is being taken.
>
> 61. It is unclear, however, how strongly the requirements of plans and programmes must influence individual projects in order for those requirements to set a framework.
>
> 62. During the legislative procedure the Netherlands and Austria proposed that it should be made clear that the framework must *determine* the location, nature or size of projects requiring environmental assessment. In other words, very specific, conclusive requirements would have been needed to trigger an environmental assessment. As this proposal was not accepted, the concept of 'framework' is not restricted to the determination of those factors.
>
> 63. The view of the Czech Republic is based on a similarly narrow understanding of the setting of a framework. It calls for certain projects to be explicitly or implicitly the subject of the plan or programme
>
> 64. Plans and programmes may, however, influence the development consent of individual projects in very different ways and, in so doing, prevent appropriate account from being taken of environmental effects. Consequently, the SEA Directive is based on a very broad concept of 'framework'.
>
> 65. This becomes particularly clear in a criterion taken into account by the Member States when they appraise the likely significance of the environmental effects of plans or programmes in accordance with Article 3(5): they are to take account of the *degree* to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size

> and operating conditions or by allocating resources (first indent of point 1 of Annex II). The term 'framework' must therefore be construed flexibly. It does not require any conclusive determinations, but also covers forms of influence that leave room for some discretion.
>
> 66. … The wording [of point 1 of Annex II] implies that the various characteristics may be concerned in varying intensity and, therefore, possibly not at all. This alone is consistent with the 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.
>
> 67. To summarise, it can therefore be said that a plan or programme sets a framework in so far as decisions are taken which influence any subsequent development consent of projects, in particular with regard to location, nature, size and operating conditions or by allocating resources."

38. The court dealt with the issue in less detail, but said at para 55:

> "In the light of all of the above considerations, the answer to the first question is that an action programme adopted pursuant to Article 5(1) of Directive 91/676 is in principle a plan or programme covered by Article 3(2)(a) of Directive 2001/42 since it constitutes a 'plan' or 'programme' within the meaning of Article 2(a) of the latter directive and contains measures compliance with which is a requirement for issue of the consent that may be granted for carrying out projects listed in Annexes I and II to Directive 85/337."

39. In *Inter-Environnement Bruxelles,* the court had to consider whether the repeal of a specific land use plan prepared under the Brussels Town and Country Planning Code fell within the scope of the SEAD. Although the directive refers to "modifications" to plans or programmes, but does not expressly refer to repeals, the court held that repeals were capable of falling within the scope of the directive. This is a good example of the court adopting a broad purposive interpretation. At para 30, the court said:

> "Consequently, such an interpretation of Article 2(a) of Directive 2001/42, by appreciably restricting the directive's scope, would compromise, in part, the practical effect of the directive, having regard to its objective, which consists in providing for a high level of protection of the environment (see, to this effect, *Valčiukienė v Pakruojo rajono savivaldybe* (C-295/10) [2012] Env. L.R. 11 at [42]). That interpretation would thus run counter to the directive's aim of establishing a procedure for scrutinising measures likely to have significant effects on the environment, which define the criteria and the

> detailed rules for the development of land and normally concern a multiplicity of projects whose implementation is subject to compliance with the rules and procedures provided for by those measures."

40. Ouseley J decided that the DNS is not a plan or programme setting the framework within the meaning of Article 3(2)(b) of the SEAD essentially because it will not have a sufficiently potent effect on the decision-maker (Parliament) which will be free to agree or disagree with it as it sees fit. The relevant passage in his judgment is:

> "93. The crucial issue is whether, on a purposive construction of the SEAD, these DNS decisions set a framework for subsequent decision-making on development consents, laying down rules or criteria or policy guidance, for it. The purpose of SEA is to ensure that the decision on development consent is not affected by earlier plans which through the framework, the rules or criteria or policies they contain, weigh one way or another against the application when the earlier plans have not themselves been assessed for likely significant environmental effects. The significant environmental effects have to be assessed at a time when they can play their full part in the decision; they cannot be left unassessed so that the development decision is made when the framework in the plan has sold the pass. A plan framework tilts the balance, creates presumptions, and urges weight to be given to various factors. I accept that a land use development plan is a very good example of a plan or programme, though is not the only sort of plan to which the SEAD applies.
>
> 94. There are, to my mind, two different forms of decision, although the Claimants regard the distinction as illusory. A decision that the Government will favour applications being made to it for high speed rail developments in sections to create a network shaped as a Y and starting at Euston would be a framework for the grant of development consents, and would be a plan for SEAD purposes. The weighting of the arguments in its favour would be clear; the way in which Government would approach the application of its own policy would be clear. The same would apply to a National Policy Statement on a nationally significant infrastructure project. In that sort of decision-making structure, the decision-maker is not entirely free to go which ever way it sees fit, but is constrained by the policy or framework to set the decision in the context of the plan, even if entitled ultimately to reject the proposal. A plan is not the less a plan because an application for development consent, though compliant with it, might be rejected if out weighed by other factors.

> 95. But that is different here: 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 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 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 proper justification for disagreeing is required of 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.
>
> 96. The very concept of a framework, rules, criteria or policy, which guide the outcome of an application for development consent, as a plan which requires SEA even before development project EIA, presupposes that the plan will have an effect on the approach which has to be considered at the development consent stage, and that that effect will be more than merely persuasive by its quality and detail, but guiding and telling because of its stated role in the hierarchy of relevant considerations. That simply is not the case here."

41. At para 97, the judge gave a particular reason for rejecting the answer given by Mr Elvin QC to these points, but since Mr Mould QC does not rely on para 97 we say no more about it. He continued:

> "98. … I cannot accept the concept of a framework or plan as falling within the SEAD where the decision-maker is entirely free to disregard it. The purpose of the SEAD is to deal with the problem which arises when that freedom of future decision-making is constrained by a plan framework.
>
> 99. Mr Elvin's response that the project would be whipped through Parliament, and so what Government wants is in reality very influential with the decision-maker, is no answer at all. The need for SEAD, and the judgment as to whether a document is a plan on a purposive construction of the SEAD, does not apply to that sort of interaction between policy maker and decision-maker…..it would be wrong for the Court to rule that Parliament, whipped or not, is not constitutionally free to reach whatever

> conclusion it wishes, and to weigh Government policy entirely as it sees fit.
>
> 100. … The question is what effect it has on the way in which the decision on development consent will be taken. It has no formal, stated significance for how the factors relevant to the decision should be weighted, either in itself or from some external statement about it, nor could it effectively do so given that Parliament is to be the decision-maker"

42. Mr Elvin challenges this reasoning and conclusion. The following is a summary of his submissions. On a broad flexible interpretation, the DNS sets the framework for the grant of development consent for HS2 by Parliament. This is because, at the very least, it will shape and influence both the contents of the hybrid bills and the consideration by Parliament of whether to grant development consent for HS2 and if so in what form (ie what route etc). In all likelihood, it will shape the project as it proceeds through Parliament, since it is unlikely that Parliament will abandon the form of proposals in the DNS which have been worked up and consulted on over an extended period of time. Given the all-party support for HS2 and the fact that the debate in Parliament will be the subject of a three-line whip, even if as a matter of strict constitutional principle the development control decision will be a matter for Parliament's unfettered discretion, the DNS will at the very least influence or guide the decision.

43. Mr Elvin submits that the judge's interpretation runs contrary to the purpose of the SEAD. The degree of influence that a plan or programme may have is relevant not to whether the SEAD is engaged, but, in those cases where it is engaged, to the level of detail required. Article 5(2) provides that the environmental report:

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

44. He also submits that the approach of the judge fails to take account of the separate criterion under Article 2(a) for the plan or programme to be "required by legislative, regulatory or administrative provisions". The SEAD has been designed so that the extent to which a plan or programme is subject to legislative, regulatory or administrative provisions is a matter for separate consideration under Article 2(a). By interpreting the term "set the framework for development consent" as requiring the plan or programme to have a formally stated role in the hierarchy of material considerations, Mr Elvin says that the judge has elided such consideration with Article 3(2)(a). This is contrary to the terms of the SEAD and has resulted in too inflexible an approach to Article 3(2)(a).

45. Mr Elvin adds that the judge's approach means that an assessment for SEAD purposes will never be required where the body granting development consent is the national legislature. If this is right, there is a significant gap in the environmental protection that the SEAD is intended to secure. It is noteworthy that Article 1(4) of the EIAD

provides a specific exemption from the application of that Directive to projects adopted by "a specific act of national legislation", but no such express exemption is provided in the SEAD. It is clear from the terms of Article 2(a) that no such exemption was intended in the SEAD.

46. Finally, Mr Elvin submits that the SEAD must be interpreted harmoniously with the United Nations Economic Commission for Europe's Convention on access to information, public participation in decision-making and access to justice in environmental matters ("the Aarhus Convention"), Article 7 of which provides:

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

He says that it would be incompatible with the obligation imposed by Article 7 to exclude plans and programmes such as the DNS from the public consultation requirement in Article 6(2) of the SEAD. It is no answer to say that there will be public participation in accordance with the EIAD, since by then it will be too late to consider the strategic alternatives to the project.

47. In considering these submissions, we bear in mind that (i) the terms of the SEAD should be interpreted broadly and, so far as possible, in a way which will promote the objects of the directive; and (ii) it is obvious that the HS2 project is one which is likely to have significant effects on the environment.

48. Since we are concerned with the interpretation of an EU instrument, it is right that we should start with the relevant EU jurisprudence to which we have already referred. It is clear (and common ground) that, as stated by the Advocate General in *Terre wallonne*, a plan or programme which sets the framework is not required to determine conclusively the factors of the project that are likely to have an environmental effect. Still less is it required to determine conclusively whether development consent should be given for the project. It is sufficient that the plan or programme has an "influence" on those factors or on whether consent is given. The Advocate General said that plans or programmes may influence the development consent in "very different ways". The question that arises in this case is what kind or degree of influence is required for a plan or programme to set the framework within the meaning of Article 3(2)(a) of the SEAD. Some assistance is provided by two CJEU decisions to which we have referred.

49. Thus, at para 64 of her opinion in *Terre wallonne*, the Advocate General said that plans and programmes "may influence the development consent ... and, in so doing, prevent appropriate account from being taken of environmental effects". This suggests that, if the plan or programme does not prevent appropriate account from

being taken, it does not have the requisite influence to set the framework. It is difficult to see how a plan or programme could *prevent* appropriate account being taken unless it had some legal effect. Para 66 refers to "preliminary decisions for the development consent of projects" as being subject to environmental assessment if they are likely to have significant effects on the environment. A preliminary decision has legal effect even if it may subsequently be revoked. We accept that it would be wrong to place too much weight on the precise language used by the Advocate General in these two paragraphs. But in our view, they provide a useful pointer as to the kind of influence that she envisaged as being required.

50. There is no suggestion that the court in *Terre wallonne* disagreed with the analysis given by the Advocate General. At para 55 of its judgment, the court gave as the reason for concluding that the action programme was in principle a plan or programme within the scope of Article 3(2)(a) that it contained measures "compliance with which is a requirement for issue of the consent". It is true that the court did not say that a plan or programme which does *not* contain measures compliance with which is a requirement for the issue of consent does not for that reason set a framework within the meaning of Article 3(2)(a). But at the very least it can be said that this statement by the court is of an example of legal influence of the highest order.

51. The idea that the plan or programme should contain measures which have some legal influence is also to be found in para 30 of the judgment of the court in *Inter-Environnement Bruxelles*, where the court referred to measures "which define the criteria and the detailed rules for the development of land" which normally concern a multiplicity of projects whose implementation is "subject to compliance with the rules and procedures provided for by those measures". Here too, the court is using the language of legal influence. It is true that the court was considering the meaning of the terms "required by" and "modifications" in the directive and not the meaning of "framework". But the language of the second sentence of para 30 is carefully expressed. It is a general statement by the court of the meaning of "plans and programme which set the framework". Although the meaning of this phrase was not in issue in that case, in our view that is not a good reason for not giving weight to this careful statement by the court. Ouseley J must have had this passage in mind when he wrote para 93 of his judgment (as well as para 88 which we have not quoted). It may also be noted that at para 39 of its judgment in *Inter-Environnement Bruxelles* the court stated that a repealing measure may give rise to significant effects on the environment "because … such a measure necessarily entails a modification of the legal reference framework …".

52. Moreover, the words "set" and "framework" are in our view of some significance. The word "set" connotes the idea that the plan or programme fixes or establishes the framework. It suggests that the plan or programme must have been the product of a decision which is intended to have real effect and influence on whether development consent is given and if so on what terms. And a "framework" for future development consent is, as a matter of ordinary language, something that sets out the ground rules which the decision-maker must follow or to which he must at least have regard when deciding whether to give consent for the development. That is why it is not surprising that at para 30 of its judgment in *Inter-Environnement Bruxelles* the court referred to measures which define the criteria and the detailed rules for the development of land.

53. Paradigm cases of plans and programmes which set the framework for a development consent are (i) a statutory development plan with which a proposed development should generally accord and (ii) a national policy statement under section 5 of the Planning Act 2008 (see section 5(5) in particular). That is because they prescribe relevant criteria and/or detailed rules. They set the framework for future development consent because the decision-maker is obliged to comply with them or at least to have regard to them as material considerations. They have a real legal influence even though the decision-maker has some discretion to depart from them.

54. As the Advocate General recognised in *Terre wallonne,* there are different degrees of influence. At one end of the spectrum is the plan or programme which conclusively determines whether consent is given and all material conditions. Such a plan or programme clearly sets the framework. It is an example of legal influence of highest order. At the other end of the spectrum is the plan or programme which identifies various development options, but which states that the decision-maker is free to accept or reject all or any of the options. This may be unrealistic, but it is at least theoretically possible. Such a plan is neither legally nor factually influential in the ultimate planning decision. And there are many points between these two extremes on the spectrum of influence.

55. We have earlier emphasised the idea that a plan or programme which sets the framework should have some legal influence on the subsequent decision. We think that the judge captured the essence of it at para 96 of his judgment. It is something which narrows the discretion which the decision-maker would otherwise enjoy. We would not, however, rule out the possibility that a plan or programme may set the framework where it has sufficiently potent factual influence, but (as we shall explain) not where the decision-maker is Parliament. If it is *clear* that the decision-maker will follow the recommendations contained in a plan or programme and the measures are likely to have significant effects on the environment, then the mere fact that the decision-maker is not legally obliged to make a decision in accordance with the plan or programme might not be a sufficient reason for holding that the plan or programme does not set the framework. But in our view, there must at least be cogent evidence that there is a real likelihood that a plan or programme will influence the decision if it is to be regarded as setting the framework. There is nothing in the jurisprudence to indicate that a mere possibility will suffice.

56. For the reasons given by the judge, the DNS will have no *legal* influence on Parliament. Parliament is 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-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 sees 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.

57. In a letter dated 20 February 2012, the Treasury Solicitor said that it was for Parliament, not the Secretary of State to determine the Parliamentary process, but the Secretary of State expected a hybrid bill for Phase 1 to be introduced into the House of Commons and to proceed to a Second Reading, during which there would be a full debate, subject to Government whip, on the principle of the bill. If the bill was given a Second Reading, the House would refer the bill to Select Committee, having set out its terms of reference. Based on proceedings in respect of the Channel Tunnel Rail Link and Crossrail Bills, the Secretary of State expected that the terms of reference would exclude formal consideration of the principle of the bill. It is clear, however, from the extensive material that has been placed before the court (including what Mr Mould told us on instructions) that the Government's views as to the precise nature of the process are continuing to evolve. As described in para 21 above, a draft ES in respect of Phase 1 was published in May of this year. It is intended to submit the formal ES in accordance with Standing Order 27A when the hybrid bill for Phase 1 is introduced. The draft ES includes a discussion of the main alternatives to the entire HS2 project that were considered by HS2 Ltd and the Department for Transport, taking account of their environmental effects.

58. When considering the question whether the hybrid bill procedure satisfied the requirements of the EIAD, the judge said:

> "268. In my judgment, it is impossible to say with certainty how Parliament will approach its task, either as a matter of procedure or substance. Standing Order 27A may or may not be revised. The Select Committee may or may not be given a remit as in the Crossrail Bill, even if it appears very unlikely that it would be invited to consider or recommend on petitions which went to the very principle of the Bill. Whether any persons or bodies who are entitled to participate within the terms of the EIAD will be refused locus at the Select Committee stage, remains unknown. Mr Mould is however right that rules limiting the scope of and participation by the public in an oral hearing stage (i.e. here the Select Committee) are not incompatible of themselves with the EIAD.
>
> 269. In substance, the manner in which ES consultation responses are made available to and considered by Parliament is unresolved. More obviously, the nature and substance of the debates in Committee and at Second and Third Readings are unknown. The Houses of Parliament may or may not be invited to provide reasons for their decisions. It is therefore impossible at this stage to say that the overall process will or will not satisfy the EIAD requirements."

59. In our view, this reasoning applies with equal force to the question whether the DNS is likely to have potent influence on the decision of Parliament whether to grant consent to the development. 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.

60. For these reasons, we are 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.

61. We should deal with some of Mr Elvin's other points. First, it will be apparent from what we have said thus far that we do not accept that the degree of influence that a plan or programme may have is irrelevant to whether the directive is engaged. We have attempted to apply, in particular, the guidance provided by the Advocate General in *Terre wallonne.* Article 5(2) is not material. Secondly, we reject Mr Elvin's point that the judge elided Articles 2(a) and 3(2)(a). They raise separate considerations, but we do not accept that the judge confused the two in his treatment of Article 3(2)(a).

62. Thirdly, we need to address the submission that the judge's approach means that there is a substantial gap in the environmental protection that the SEAD is intended to secure, if the directive does not apply where the body granting consent is the national legislature. It is true that the SEAD provides more environmental protection than the EIAD, in the sense that it requires an environmental assessment of "reasonable alternatives" in the case of plans or programmes setting the framework (Article 5(1)), whereas the EIAD requires "an outline of the main alternatives considered by the developer and an indication of the main reasons for his choice, taking into account the environmental effects" (Article 5(3)(d)). We were told that the Commission is considering amendments to the EIAD in the light of the requirements of the SEAD. But the fact that the SEAD requires more for framework plans or programmes cannot of itself be a good reason for treating something as a framework plan or programme. The question that must be asked in each case is whether a plan or programme sufficiently influences any subsequent development consent. In our view, the presence of a "gap" does not shed light on the answer to that question.

63. Fourthly, we turn to the point based on Article 7 of the Aarhus Convention. We are prepared to assume that the SEAD should be interpreted harmoniously with the Aarhus Convention, although there may be some doubt about this: see *Inter-Environnement v Bruxelles* per the Advocate General at paras 22 to 24 of her Opinion. But our conclusion that the DNS is not a plan or programme setting the framework for future development consent does not in our view involve any incompatibility with Article 7. If a plan or programme does not set the framework, it is difficult to see how Article 7 can have been intended to apply to it. In such a case, the requisite degree of public participation can be achieved through compliance with the requirements of the EIAD in the development consent procedure for a specific project.

64. We have given careful thought to whether the meaning of "plans and programmes setting the framework" is a point on which we should make a reference to the CJEU. We have reached the conclusion that it would not be appropriate for us 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.

Was the DNS "required by … administrative provisions"?

65. The appellants' case on this aspect of the SEAD is, in summary, that the March 2010 Command Paper (para 13 above) was an "administrative provision" and that the DNS

was "required by" it, within the meaning of Article 2(a). This is said to accord with a broad purposive interpretation of the directive.

66. There is no direct authority on the "administrative provisions" limb of Article 2(a). The Commission's guidance document on implementation of the SEAD states at para 3.16:

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

67. That must now be read subject to the broad approach taken by the CJEU in *Inter-Environnement Bruxelles* towards the term "required". The court stated at para 31 that:

> "… plans and programmes whose adoption is *regulated* by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required' within the meaning, and for the application, of Directive 2001/42 …" (our emphasis).

68. In *Walton v The Scottish Ministers* [2012] UKSC 44, at para 99, Lord Carnwath observed:

> "There may be some uncertainty as to what in the definition is meant by 'administrative', as opposed to 'legislative or regulatory', provisions. However, it seems 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."

69. The appellants' submission is that the March 2010 Command Paper determined the competent authority for adopting the plan or programme and the procedure for preparing it. To the extent that it is necessary to show a degree of legally enforceable regulation of the process by which the DNS was to be adopted, this existed in the form of the Government's Code of Practice on Consultation, which was engaged by the requirement in the Command Paper for formal public consultation. The DNS was also required in the sense that the Government had generated a legitimate expectation that following consultation it would publish its confirmed final strategy for HS2. The

appellants' interpretation is also said to be necessary in order to achieve compatibility with Article 7 of the Aarhus Convention.

70. Ouseley J considered this issue at paras 55-73 of his judgment. His reasons for rejecting the claimants' case included the following:

> "69. … The Command Paper was … a statement of Government policy on high speed rail, and of the stages by which, subject to consultation and further work, the policy was to be put into effect, by laying a Bill before Parliament for its decision. It was a statement by the developer as to how and why it would proceed with what project.
>
> 70. The Command Paper contained no requirements in any sense of that word. Government was entirely free to change its mind on whether it wished to proceed to such a decision, or to change the nature of the decisions consulted on, or to omit the further work; it could change the topics and scope of the consultation process.
>
> 71. The DNS was not regulated by the Command Paper, for the same reasons. I assume that the Command Paper created a legitimate expectation that there would be consultation if the process envisaged by the Paper were undertaken, but that does not make the DNS something regulated by the Command Paper. Regulation, if such it be, of part of the process by which it was produced does not make the ultimate outcome, the putative plan, a decision which is regulated by, required in that sense by, the Command Paper.
>
> 72. The phrase 'provided for' does not mean to my mind 'envisaged by' or 'anticipated as a result of'. It connotes more of a sense of formality, control and non-statutory administrative need or obligation, as in 'regulated by', leading to the taking of a decision, than is found in the announcement of an optional process which can be begun, changed or abandoned at will. The need for some form of formality in the process and outcome is not satisfied by the common consequence that, if pursued, there will be consultation, whether covered by common law or by a general Government Code. The Government could have changed its mind on how and on what it consulted, even on whether it would do so.
>
> 73. Taking what the Command Paper said was to happen, it did not in my view require, in the broad sense, anything. Government simply announced its intention as to how it then envisaged proceeding towards the implementation of its high speed rail strategy."

71. We share the concerns expressed by Sullivan LJ about that reasoning. If we had concluded that the DNS was a plan or programme that set the framework for future

development consent, we would have inclined to the view that it should properly be treated as a plan or programme "required by … administrative provisions" within the meaning of Article 2(a), adopting an appropriately broad and purposive interpretation of that provision. In the event, however, it is unnecessary for us to decide the point or, therefore, to consider whether it is a point on which a reference to the CJEU would be appropriate.

Substantial compliance and relief

72. Our conclusion that the DNS does not fall within the scope of the SEAD makes it unnecessary for us to give detailed consideration to the issues raised by the SST's respondent's notice as to whether there was substantial compliance with the requirements of the directive and whether relief should be refused in any event in the exercise of the court's discretion. Ouseley J dealt with those issues at paras 108-189 of his judgment. Suffice it to say that we agree with the judge's conclusions on them.

Conclusion on ground 1

73. For the reasons given above we would dismiss all the appeals on ground 1.

Ground 3: compatibility of the hybrid bill procedure with the EIAD

74. By this ground, which is pursued before us by the Bucks CC Group, it is contended that the Parliamentary hybrid bill procedures are incapable of complying with the objectives of the EIAD and that the court should intervene so to hold at this stage, rather than awaiting an EU law challenge to the legislation after its enactment. Ouseley J considered this ground at paras 243-276 of his judgment.

75. As mentioned above, by Article 1(4) the EIAD does not apply to "projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process". Ouseley J's summary, at paras 248-251, of the effect of the relevant decisions of the CJEU concerning this provision is not in dispute. It is common ground that, in order to fall within Article 1(4), the procedure adopted for the hybrid bill must achieve the objectives of the EIAD. The issue between the parties is whether the hybrid bill process, in which the principle of the bill will be established at the Second Reading stage, is capable of achieving the public participation objectives contained in Article 6 of the EIAD.

76. In her Opinion in *Boxus v Région wallonne* [2012] Env LR 14, Advocate General Sharpston explained the rationale behind Article 1(5) of the predecessor directive, which is identical to Article 1(4) of the present EIAD, in these terms:

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

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

77. At paragraphs 79-80 she said that where the legislative process functions normally and correctly, it provides, through the operation of representative democracy, the same safeguards as those that would have been required under the EIAD. The process of scrutiny by the legislature may well be unlike the process set out in Articles 5 to 10 of the EIAD. National courts must consider whether the legislative process has functioned correctly and adequately. At paragraph 84 she said that in order to assess whether the legislative process has functioned adequately in a particular case, the national court will need to examine three matters:

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

78. On behalf of the Bucks CC Group, Ms Lieven QC accepted that the hybrid bill procedure is capable of complying with (a) and (c) above. She submitted, however, that the process, in which the principle of the bill would be established at Second Reading, would not be capable of complying with the requirements for public participation contained in Article 6(4) and 6(6), which we have set out above but repeat here for convenience:

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

> in environmental decision-making subject to the provisions of this Article."

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

80. Further procedural arrangements were made by Parliament when considering the Crossrail Bill, but they are not relevant for present purposes because the proposition at the core of Ms Lieven's submissions was that while a procedure such as that adopted in the Crossrail Bill would enable the public to express comments and opinions on the ES and thereby to participate in the environmental decision-making process, it would not enable them to participate *effectively* at the only stage of the process when the principle of the bill would be in issue, at Second Reading of the bill. She rightly accepted that participation by way of written submissions was capable of being effective participation for the purpose of Article 6. Article 6(5) makes it clear that the public may be consulted by making arrangements for written representations. An oral hearing is not a prerequisite of effective participation.

81. In addition to expressing comments and opinions in response to the ES, members of the public will be able to make representations direct to their Member of Parliament. When asked why this process of public participation would be different in substance from the process which would be adopted by a local planning authority when determining an application for planning permission falling within the EIAD, in which the Planning Officer's report would summarise both the contents of the ES and the responses to the ES, and copies of the ES and the responses to it would be available for members to consider if they wished to read the documents in full, Ms Lieven submitted that there were differences between a debate at Second Reading and a discussion at a Council meeting; moreover the Planning Officer was the Council's professional adviser, whereas the Government, which would be responsible for preparing the Command Paper, was the promoter of the project.

82. While we accept that there are differences between proceedings in Parliament and proceedings in a Council Chamber, they are not such as to persuade us that a procedure based on that which Parliament chose to adopt when it considered the Crossrail Bill would be incapable of giving the public an opportunity to participate effectively in the environmental decision-making process. Article 1(4), as it has been interpreted by the CJEU in cases such as *Boxus*, envisages that the objectives pursued by the EIAD are in principle capable of being met by a legislative process. We agree with Ouseley J's conclusion in para 271 of his judgment that:

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

83. Owing to the importance of the issue and the linkage discussed above between the EIAD and the SEAD, we would grant the Bucks CC Group permission to appeal on ground 3. For the reasons set out above, however, we would dismiss the appeal on this ground.

GROUNDS RELATING TO THE CONSULTATION PROCESS

Ground 5(a): lawfulness of consultation on the principle of HS2

84. The case for the Bucks CC Group on ground 5(a) is that the consultation on the principle of HS2, that is on the principle of the Y network as a whole, was unlawful because proposed route details were published only for Phase 1 (between London and the West Midlands). It is said that this approach was fundamentally unfair to those potentially affected by Phase 2, who had no way of knowing the nature or scale of any detrimental impacts on them and of responding accordingly in relation to the principle of HS2. Any future consultation on Phase 2 would not take place at a formative stage as required by the case-law, since the principle of HS2 would already have been established and the only points that consultees would be able to raise would concern minor changes and mitigation. Further, the approach adopted meant that in deciding to proceed with HS2 the SST took into account all the benefits of the project but only half the disbenefits. Ms Lieven conceded that it was open to the SST to consult on the principle alone, but submitted that the vice of what happened here was that the SST made a decision to proceed with the whole route regardless of the environmental consequences of Phase 2 and of any consultation responses in respect of Phase 2.

85. Ouseley J dealt with this issue at paras 309-333 of his judgment. In his conclusion he first accepted a submission by Mr Mould that the SST has a wide discretion as to the scope and structure of a consultation of this nature. He continued:

> "327. … It is not inherently so unfair as to be unlawful to have a first stage at which the principle of a proposal is considered, followed by a second stage for consultation on the detail of its impact. Although I accept without hesitation that knowledge of the detail can affect the nature and degree of opposition to the principle, and that the results of the consultation in all probability would have shown greater opposition in principle if the routes to the north had been identified in detail, that does not make such a process so unfair here as to be unlawful.
>
> 328. As Mr Mould pointed out, what happened in this process was that in fact the detail of Phase 1 was considered alongside the principle of the Y network. It would have been lawful for the detail to have been consulted upon after consultation on the principle. It cannot then be unlawful for principle and detail to go together in relation to Phase 1 in the first consultation. That

> neither makes it unfair for the SST not to do the same expressly in Phase 2 for eventual Phase 2 consultees, nor does it make it unfair for the Phase 1 consultees who objected in principle not to have the benefit of the probable greater degree of opposition that publication of the details of the routes to the north would have engendered."

86. We agree with those reasons. The case advanced by Ms Lieven does not sit comfortably with her concession that the SST could lawfully have consulted on the principle of the Y network without any route details at all. The fact that the SST chose to consult at the same time on the details of the Phase 1 route did not make the consultation on the principle unfair, even though it meant that more detailed responses could be given by those affected by Phase 1 than by those potentially affected by routes to the north of Phase 1.

87. Nor do we accept Ms Lieven's submission that, by the time it comes to consultation on the Phase 2 route, the pass will have been sold because the principle of the Y network will already have been established. Whilst the SST has decided in principle in favour of the Y network and to proceed with Phase 1, proceeding with Phase 1 cannot be said to make Phase 2 inevitable. The DNS states that there is a strong case for proceeding with Phase 1 even as a stand-alone project, though the case for it is reinforced by its role as the foundation for a second phase (see paragraph 49 of the section on "The Government's High Speed Rail Strategy"; see also Part II, "Review of Evidence from Consultation Responses", at paragraph 3.29). If a future consultation on Phase 2, although directed at the route rather than at the principle of the Y network, resulted in responses going to the principle, the SST would have to take those responses into account and would be free to reconsider the principle even if Phase 1 had gone ahead. In any event, the ultimate decision-maker in respect of both Phase 1 and Phase 2 will be Parliament, before which all questions of principle as well as of detail can be raised (see our discussion of the EIAD, above). All this reflects the further reasoning of Ouseley J at paras 329-332.

88. Accordingly, the judge was in our view plainly correct to dismiss this ground of challenge, and in the circumstances we refuse permission to appeal in relation to it.

Ground 5(b): treatment of the Optimised Alternative (OA)

89. Ground 5(b) relates to the SST's treatment of the OA put forward as part of 51M's consultation response. The OA involved enhancements to the existing West Coast Main Line (the WCML) as an alternative to HS2. It was based on one of the alternatives, known as RP2, evaluated in a study by Atkins Consulting which was published with the consultation document itself. It was developed by Mr Christopher Stokes, the strategic rail consultant engaged by 51M, who considered that the Atkins Consulting study had failed to optimise the alternatives the study evaluated.

The factual background to ground 5(b)

90. We were taken to the witness statements and documentary material in evidence before Ouseley J, but no issue was taken with the judge's detailed exposition of the relevant facts, at paras 335-360, and we need only set out the main points here.

91. The OA was based on a series of incremental changes (lengthening most WCML trains to 12 coaches, reconfiguring one coach to standard class, and infrastructure upgrades at three specific locations). The benefits claimed for it included a capacity increase on standard class by 215%, well above the background growth in demand that was forecast for the route, with the ability to deliver additional capacity more quickly, at much less cost and more flexibly than HS2.

92. After the close of consultation, in response to a request by the leader of Buckinghamshire County Council for an early meeting to discuss the OA, the relevant official at the Department for Transport, Mr Philip Graham, wrote:

> "If any clarification of the material provided by the 51M Group is required then we will be in touch. Out of fairness to all consultees, however, we are now limiting our engagement with interested parties given that the consultation has closed."

93. The SST did not seek clarification of the OA but commissioned reports on the OA from Atkins Consulting and Network Rail in relation to it. The focus of the challenge is the report from Network Rail, on which we will therefore concentrate. The report was produced in November 2011. It made various criticisms of the OA, concluding that although the proposals provided additional capacity on the WCML, for a variety of reasons they were not the best long-term strategy for the route. A particular reason was the failure of the OA to solve the capacity problem on suburban commuter services:

> "The additional capacity provided by the 51M outputs does not match the demand profile on the route as it leaves over 1,300 people standing on the suburban services in the high-peak hour in 2026, increasing to approximately 2,200 in 2035. This is a worse situation that today, as approximately 800 people currently stand in the high-peak hour on these services. Therefore, this option does not solve the main driver for a capacity intervention on the route, which is the overcrowding on suburban services at the southern end of the route in the peak."

94. The DNS made explicit reference to the Atkins Consulting and Network Rail reports in its Part II review of evidence from the consultation responses. It summarised the competing views in relation to alternatives to HS2, including the argument that enhancements to existing lines such as were proposed in the OA would be sufficient to accommodate the forecast level of growth. It then stated:

> "3.80 Atkins has updated its appraisal of the economic case for the strategic alternatives to HS2. Its report is published alongside this document. Atkins's work shows that the options for upgrading the West Coast Main Line between London and Birmingham to provide additional capacity would have strong benefit cost ratios …. However, as discussed below, the approach of upgrading the existing network would be incapable of matching the scale of the benefits that could be provided by a new high speed rail line, and would not be able to effectively

> address the high levels of crowding forecast on suburban services on this route.
>
> …
>
> 3.83 In addition to Atkins's economic analysis, to inform its consideration, and given the strong interest in this issue shown in consultation responses, the Government commissioned advice from Network Rail, as the custodian of the existing network, on the costs, deliverability and impact of the main enhancement proposals developed by Atkins or proposed in consultation responses.
>
> 3.84 Network Rail's assessment of the alternatives to HS2 prepared by Atkins and the 51M group found that:
>
> - Neither proposal would provide sufficient capacity to meet forecast demand on the suburban commuter services at the south end of the West Coast Main Line;
>
> …
>
> 3.85 The analysis by Network Rail indicates that even if inter-city demand growth can be accommodated through an approach of this kind, albeit at some cost and with high levels of crowding on many peak services, doing so would squeeze out the potential for capacity enhancements vital in supporting suburban commuter markets ….
>
> 3.86 Network Rail's analysis also highlights potential problems with crowding levels on long-distance services over the long term. Under Rail Package 2 peak load factors across all West Coast Main Line long-distance services are forecast by Network Rail to rise as high as 92 per cent. The load factors on long-distance services under the 51M proposal would be lower (though still higher than today), but this would be counterbalanced by higher levels of crowding on suburban services …."

The case for the appellants on ground 5(b)

95. What is said on behalf of the appellants is that the SST's case for rejecting the OA can be seen from those passages to have turned crucially on acceptance of the Network Rail report; yet 51M were given no opportunity to comment on the report and had no knowledge of it prior to publication of the DNS. It is submitted that this was procedurally unfair and that the unfairness was compounded by the fact that suburban overcrowding had not been a significant part of the Government's case in the consultation document: the focus on commuter services in the DNS came out of the blue and amounted to a shifting of the goalposts.

96. Mr Stokes states in his first witness statement that his reports on the OA concentrated primarily on long distance services, reflecting the focus of the material published as part of the consultation process, but that if overcrowding on commuter services into London had been a principal concern then solutions could have been proposed for them. He gives a summary response to each of the points made in the Network Rail report in respect of the OA, together with a more detailed response to the point about commuter capacity. His grievance is encapsulated in paragraph 71 of the witness statement:

> "As stated above, the 51m alternative did not make comprehensive proposals for the Euston outer suburban services, as this was clearly not a major issue in the February 2011 consultation. Furthermore, our ability to develop a fully worked up, detailed alternative has been constrained both by resources and cost and also by the lack of detailed data on the passenger loadings for individual trains. However, we have now considered this issue and have been able to develop a clear, deliverable strategy for increasing commuter capacity on this corridor, which meets the criticisms made by Network Rail and the DfT."

There is a response to this in the third witness statement of Mr Graham on behalf of the SST, criticised in turn by Mr Stokes in his third witness statement. It is unnecessary, however, to refer to the evidence in any greater detail for present purposes.

97. In support of her submissions as to procedural unfairness, Ms Lieven relied on *R (Edwards) v Environment Agency* [2006] EWCA Civ 877, [2007] Env LR 9. The claimant in that case argued that the consultation exercise leading to the grant of a pollution prevention and control permit had been unlawful by reason of the Environment Agency's non-disclosure of two internal reports which considered the details of a desk top study on the effects of atmospheric emissions. On the question whether internal workings of a decision-maker needed to be disclosed as part of a public consultation, Auld LJ, in a judgment with which the other members of the court agreed, referred at para 91 to the speech of Lord Diplock in *Bushell v Secretary of State for the Environment* [1981] AC 75, in which Lord Diplock said that that the collective knowledge and expertise of the civil servants in a government department were to be treated as the minister's own knowledge and expertise and that, whilst the minister had to be prepared to disclose the reasons for his decision, he was under no obligation to disclose to objectors and give them an opportunity of commenting on advice, expert or otherwise, which he received from his department in the course of making up his mind. Lord Diplock's observations were approved in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, though Lord Clyde in that case expressed an important qualification that parties should be allowed to comment if "some significant factual material of which the parties might not be aware comes to his notice through departmental inquiry". Auld LJ built on this, stating at para 94 that if in the course of decision-making a decision-maker becomes aware of a new factor, as in *Interbrew SA v Competition Commission* [2001] EWHC Admin 367, or some internal material of potential significance to the decision to be made, as in *R v Secretary of State for*

Health, ex p. United States Tobacco International Inc [1992] QB 353, "fairness may demand that the party or parties concerned should be given an opportunity to deal with it". Those points were repeated in his conclusions on the duty of fairness, at paras 102-103.

98. Applying the relevant principles to the facts of the case, it was held in *Edwards*, at para 106, that non-disclosure of the two reports "left the public in ignorance, until the Agency's grant of the permit, of the only full information as to the extent of the low level emissions of dust and the only information at all on their possible impact on the environment"; that such material was potentially material to the Agency's decision and to members of the public who were seeking to influence it, and that the judge at first instance had been correct to hold that failure by the Agency to disclose it at the time was a breach of its common law duty of fairness. Nevertheless the court went on to find that the judge had been entitled to refuse relief in the exercise of his discretion.

99. Ms Lieven submitted that there was a close analogy between *Edwards* and the present case. As in *Edwards*, the report in issue here was factual in nature, not policy-related; and it was concerned with specialist information which consultees did not have and which they had no way of addressing in the absence of disclosure. There was, in short, a similar unfairness in failing to disclose the report in advance of the decision.

100. Ms Lieven also cited *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311, [2007] Env LR 29, applying the language in that case in support of her submission that the consultation took place here at "the critical stage in the formulation of Government policy", that non-disclosure of the Network Rail report meant that "something went 'clearly and radically' wrong" with the decision-making process, and that the "empty husk" of the consultation document was to be contrasted with the Network Rail report containing the "kernel" of the suburban capacity issue (see the *Greenpeace* case at paras 51, 63 and 97).

101. More generally, Ms Lieven submitted that the balance in the present case was plainly in favour of consulting further at least with 51M on the Network Rail report before the decision was made. Given the scale of the HS2 project and the great environmental harm it would cause, alternatives giving rise to much lesser impacts needed to be considered fully and fairly; and the OA was accepted to be the principal such alternative. The consultation exercise was, moreover, the only opportunity 51M would have to put forward the detailed case in support of the OA. In addition to the question of fairness to 51M, Ms Lieven pointed to the importance of the consultation process to good decision-making, and the fundamental importance of the SST having all the material needed for a properly informed decision.

Discussion of ground 5(b)

102. Ouseley J set out his conclusion on ground 5(b) at paras 381-406. For the reasons given below, we agree with him that the non-disclosure of the Network Rail report did not make the consultation unfair and unlawful.

103. We do not accept that the SST's reliance on commuter capacity amounted to a shifting of the goalposts between the consultation document and the DNS. Chapter 1 of the consultation document contained a section headed "The capacity challenge" (paragraphs 1.35 *et seq.*) which referred to the growth in demand not only in long-

distance travel but also in the services of franchised London and South East operators and regional operators. Under the sub-heading "The long-term capacity challenge", it referred at paragraph 1.45 to nearer-term measures identified to address existing capacity concerns, including Crossrail and the lengthening of longer-distance suburban commuter trains, and it stated in paragraph 1.46 that in the long term it was unlikely that these enhancements would be sufficient. Chapter 2, setting out the case for HS2, contained a section on "Capacity" which included the following:

> "2.34 The Government's proposed high speed rail network would deliver a transformational capacity increase to the key north-south routes out of London and between major cities in the Midlands and the North. This would be achieved in four key ways:
>
> …
>
> - As a result of transferring long-distance services to new high-speed lines, significant amounts of capacity would be released on the conventional network enabling the provision of additional commuter, regional and freight services;
>
> - Increased levels of segregation between fast and slow services would allow more efficient use to be made of available capacity on all lines.
>
> 2.35 It is particularly important to note that such a network would not only deliver capacity improvements for those people travelling on the new lines themselves. For example, on the London-West Midlands corridor, a new high speed line would release capacity on the West Coast Main Line for additional passenger services to towns and cities such as Northampton, Coventry, Rugby, and Milton Keynes ….
>
> 2.36 The Government's favoured Y-shaped network would also release substantial capacity on the East Coast and Midland Main Lines, permitting an increase in commuter and regional traffic on these routes – especially on the crowded southern sections, where significant growth in commuter demand has been forecast …."

104. Consultees should therefore have been aware that capacity on commuter services, including suburban services, was one of the points of concern and that the release of capacity for such services was being put forward as an advantage of HS2. These were matters that it was open to them to address when putting forward any alternatives to HS2 as part of their consultation responses. Indeed, it should have been obvious that any alternative proposal involving use of the existing lines needed to consider the effect on commuter capacity as well as capacity on long-distance services.

105. Thus, although it is understandable that Mr Stokes, constrained by resources and costs, chose to concentrate on long-distance services, he cannot legitimately complain

that the issue of capacity on commuter services came as a bolt out of the blue. In so far as he also complains about a constraint created by lack of passenger loading data, it is sufficient to note that the failure to provide passenger loading data was the subject of a separate ground of challenge, ground 5(c), which the judge considered and rejected at paras 407-443 and in relation to which there is no appeal or application for permission to appeal.

106. It also appears to us that the appellants' case overstates the role that commuter capacity played in the DNS itself. It is true that the issue assumed greater importance in the DNS than in the consultation document, but there was no fundamental shift in thinking. The SST did not adopt Network Rail's description of overcrowding on suburban services as "the main driver" for a capacity intervention on the WCML route. Consideration continued to be given to the mix of capacity considerations referred to in the consultation document. For example, the section of the DNS on "The Government's High Speed Rail Strategy" referred at paragraphs 5-6 to capacity constraints on key north-south inter-city rail routes, and developed the point as follows at paragraphs 17-18:

> "17. The fastest increase in demand on the rail network in recent years has been in long-distance travel, and this growth is forecast to continue. Growing demand is placing increasing pressure on the capacity of Britain's key rail routes. The Government's assessment is that the short-term fix of further upgrading of the existing network is not a sustainable long-term approach for our key north-south lines. A new strategic approach is required.
>
> 18. Given the limitations of Britain's mixed-use rail network, which combines commuter, inter-city and freight services sharing the same tracks and results in a sub-optimal utilisation of track capacity, growing demand for rail services will have wide-ranging impacts on passenger experience. Analysis by Network Rail indicates that the most significant pressures are likely to be seen first on commuter services, where the level of demand is highest and standing is already common, spreading to long-distance services as passenger numbers continue to grow. Any increases in passenger services on the most crowded lines will also limit the scope to respond to forecast growth in key rail freight markets, meaning that more lorries are likely to be seen on our roads and valuable decongestion and carbon reduction benefits will be foregone."

We have referred above to later passages in the DNS in which more detail is given about the Network Rail report.

107. Against that background, we do not consider that fairness required an opportunity to be given to 51M to comment on the Network Rail report before the SST reached the decisions set out in the DNS. Unlike the situation in *R (Edwards) v Environment Agency*, the report did not contain information that was needed by consultees before they were in a position to address the issue: 51M, through Mr Stokes, could have covered the issue of capacity on commuter services in its consultation response had it

so chosen. The SST commissioned the Network Rail report in order to *evaluate* 51M's consultation response; it was not a matter of seeking *clarification* of the response, and there was no breach of the promise to get back to 51M if clarification was required. The scale of the consultation exercise told against reopening the consultation, or going back to individual consultees, in the absence of a clear necessity for doing so, given the desirability of avoiding further delay in what was already an extended exercise; and the process of evaluation of consultation responses gave rise to no such necessity. Further, as the judge said at para 401, it is important to bear in mind that the consultation exercise was not one that would lead to an effective decision implementing a concrete proposal but was a consultation as to whether to proceed to the next stage, and the concrete decision, as to whether to grant development consent, had yet to be made, by a different decision-maker, Parliament. Thus Ms Lieven was wrong about the absence of a further opportunity to set out 51M's detailed case on the issue of commuter capacity: it will be open to Mr Stokes to put forward his response to the Network Rail report as part of the case advanced by 51M against the hybrid bill.

108. We therefore dismiss the appeal of the Bucks CC Group on this ground.

Ground 8(b): failure to consider part of HHL's consultation response

109. Prior to publication of the consultation paper, detailed consideration had been given by the SST to ways in which Heathrow could be served by HS2. There were three main options: (1) redirecting the preferred London to West Midlands route via Heathrow or a station near Heathrow; (2) a loop whereby trains would divert off the main route and stop at Heathrow before rejoining the main route; and (3) a spur link between the main route and Heathrow. The consultation paper, at paragraph 3.18, favoured option (3), the spur.

110. HHL's proposal was a variant of option (1), involving redirection of the preferred route to a station near Heathrow. It is summarised by Ouseley J at para 588:

> "HHL's concept of a Heathrow hub was for an interchange between the HS2 line, GWML [Great Western Main Line] and Crossrail, as well as coach services, on a greenfield site at or near the existing Iver Station. It would be constructed in Phase 1, and would necessarily involve a different alignment for part of HS2 both near Heathrow and further north, curving south west of the consultation route. HHL envisaged that this interchange would also be able to carry out the passenger processing functions of a terminal, so that the onward journey (some 3 miles) to the on-airport terminals would be made 'airside' and via fixed infrastructure in some form of people mover."

111. Because of a word limit on the online response proforma, HHL submitted a 10 page consultation response by email, taking issue with the proposed route for HS2 and the spur option, and advocating HHL's proposal for a Heathrow hub. Owing to errors within the Department, the full response was not included in the summary of consultation responses prepared for the SST and was not, as such, taken into consideration in reaching the decisions set out in the DNS. It should, however, be

noted that the response did not stand alone. In relation to the proposed Heathrow hub, the response referred to details already provided to the Department, and there were further communications and a meeting between HHL and officials prior to the issue of the DNS. HHL also made written and oral submissions, to which HS2 Ltd responded, to the Transport Select Committee's inquiry into the strategic case for high speed rail, which took place between the close of consultation and the issue of the DNS.

112. The DNS adhered to the spur option. The section on "The Government's High Speed Rail Strategy" dismissed the option of routing the main line via Heathrow in these terms:

> "69. One alternative which achieved particular prominence was an option for a direct route via Heathrow and the M40 corridor. The Government does not consider that this would offer a better solution than the route put forward for consultation. It would be impossible to locate a station close to one of Heathrow's main terminals, with the key potential station locations being either adjacent to the airport's Northern Perimeter Road, or some three miles further north, adjacent to the Great Western Main Line at Iver. Either of these possible locations would be some distance from Heathrow terminals and would entail new transit facilities to the terminal areas, providing a journey experience little better than an interchange. In addition, a direct route via Heathrow would entail increased construction costs and substantial journey time penalties for the great majority of HS2 passengers travelling to and from central London. For these reasons the Government does not support a route of this kind."(page 30)

113. In its Part II review of consultation responses, the DNS dealt with the matter at greater length. The section on serving Heathrow included the following:

> "4.30 There is a strong strategic case for directly linking HS2 and Heathrow. However, this leaves two important questions – whether to serve the airport through a station on the main HS2 line or on a spur, and at which stage in the project to introduce direct connectivity to Heathrow, thereby removing the need for passengers to interchange.
>
> 4.31 The case for running the main HS2 line via Heathrow was raised in consultation responses. HS2 Ltd has carefully looked at the case for serving Heathrow in this way. This is discussed in more detail in Chapter 5. The outcome of this further consideration, coupled with the evidence presented in consultation responses, has not altered the Government's conclusions. Whilst a through-route may bring benefits to the relatively small proportion of passengers who would use HS2 to access Heathrow, these would come at a loss of much larger benefits to the majority of passengers travelling into central London. HS2's projected passenger mix shows that many more

> people would be using the service to access London than Heathrow.
>
> 4.32 HS2 Ltd's analysis has also indicated that it is possible under the spur option to locate an HS2 station directly at one of Heathrow's main terminals, which would not be the case if the main route was diverted to serve the airport more closely. In addition, the extra costs associated with routing the main HS2 line closer to Heathrow could be higher than the costs of a spur to the airport from the main line. For these reasons, the Government favours a spur rather than a through route as the best option for providing direct high speed access to Heathrow.
>
> 4.33 A spur of this kind could, however, be designed to be capable of extension in the future into a loop back onto the main HS2 line …."

114. In a report by HS2 Ltd published with the DNS and entitled a "Review of HS2 London to Midlands Route Selection and Speed", the adoption of a through route via Heathrow in place of the consultation route was calculated to produce a journey time penalty of four minutes for non-stop trains and eight minutes for stopping trains.

115. HHL's case is that the SST's decision to favour the spur and to reject the through route via Heathrow was unlawful for failure to consider HHL's consultation response. The response was a relevant consideration, and HHL also had a legitimate expectation that it would be conscientiously considered, reinforced by an express promise (in a letter of 15 December 2011) that it would be given "due consideration". The failure to consider it should lead to the quashing of the decision unless the court is satisfied that the decision would inevitably have been the same if the response had been given the required conscientious consideration; and the court should not be so satisfied.

116. The issue was given detailed consideration by Ouseley J. His exposition of the facts and submissions, at paras 588-627, is considerably fuller than the outline given above. His conclusion, at paras 628-643, started with these observations:

> "628. I have given this detailed consideration but the nature of the submissions has required it. I start from the premise, set out at the start of this issue, that the SST failed to consider the important parts of the consultation response of a major consultee on an important aspect of the consultation. On the face of it that is not merely unfair, but sufficient to render at least part of the consultation unlawful. But if the points which were made in the response have in fact been considered, there is no unfairness or unlawfulness. It is upon that issue that the SST defends and is entitled to defend the decision.
>
> …
>
> 630. However, I have come to the firm conclusion that there was no point of significance omitted from consideration, which might have led to a different decision on the spur/hub. I accept

> that the submission to the SST contains the advice given by officials, and that the reasoning of the SST on the hub issue is set out in the DNS and the documents issued with it. The essence of the points HHL wished to make were in fact known to officials and adequately considered by the SST."

117. The judge went on to make further general observations and then to deal with the various specific points against the spur and in favour of the hub made in the consultation response. He concluded:

> "639. I find it impossible to conclude that, if the points against the spur, as made in the consultation response, had been considered as part of the consultation responses, they could have led to any different a conclusion in the DNS. The most important points are in fact answered in the decision documents directly or indirectly or were obvious factors the SST knew well. On two others (the travel direction and cost of the spurs), the failure to consider that consultees might not have been aware of that, could not show the consultation to have been carried out on the basis of insufficient information, and the points have now been clarified.
>
> 640. The only point on which there is no direct answer is (g), the effect of possible delay caused by spur trains joining the main line, although officials were aware of it. It was put forward at a very general level. I cannot conclude that this state of affairs leads to the consultation being so unfair as to be unlawful, or that there is the remotest prospect that the balance of advantage and disadvantage reached by the SST could be changed if this point, put in the general way it was by HHL, had been expressly and conscientiously considered by officials and the SST.
>
> 641. There is nothing in the benefits of the hub which added to what must already have been well known to officials for distillation in their advice to the SST."

118. In submitting to us that the judge's conclusion was wrong, Mr Banner made a number of points about context, including that the DNS itself stated that the decision had been reached in the light of "the evidence presented in consultation responses"; submitted that HHL's consultation response included points against the spur that were not made in other consultation responses nor made separately to the SST's officials (namely, the impact of spur trains on HS2 capacity, interchange penalties faced by airline passengers at Old Oak Common before the spur commenced, and points on the cost/benefit analysis); made a corresponding submission that HHL's consultation response included points in favour of the Heathrow hub that were not made in other consultation responses nor made separately to officials; and argued that pre-consultation knowledge of HHL's proposals was no substitute for consideration of the consultation response. In relation to the advantages of the Heathrow hub, he said that a key point in the consultation response was that the hub would provide not merely an airport interchange but "a co-located airport passenger processor (terminal) above the

station", meeting the point in the DNS that the proposed hub station would provide "a journey experience little better than an interchange" and raising a real possibility that the decision might have been different if the point had been conveyed to the SST. He also submitted that what mattered was the information taken into account by the SST himself, rather than what was said to officials or to the Transport Select Committee but not communicated to the SST directly or in briefings. He relied for that purpose on *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154, in which it was held that the knowledge of officials is not to be imputed by law to the minister.

119. Mr Banner's submissions have not persuaded us that there was any material error in Ouseley J's analysis. In our judgment, the judge was plainly correct to conclude that almost all the points in HHL's full consultation response were taken into account in any event by the SST and that there was nothing that might have led the SST to reach a different decision on the spur/hub issue if the response itself had been considered. The judge looked sufficiently at what was considered by the SST, not just by officials, and it is unnecessary in the circumstances for us to examine the reasoning in *R (National Association of Health Stores) v Department of Health*. It seems to us in any event that a primary reason for rejecting the hub, with its associated diversion of the main line away from the preferred route, was that it would bring benefits only to the relatively small proportion of passengers who would use HS2 to access Heathrow but would give rise to substantial journey time penalties to the great majority of HS2 passengers travelling to and from central London. We can see nothing in HHL's consultation response that, when placed in the scales against that powerful policy consideration, had the potential to tilt the balance in favour of the hub option.

120. As we have said, HHL needs permission to appeal on this ground. We refuse permission.

OTHER ISSUES RELATING TO THE LAWFULNESS OF THE DECISION

Ground 6: public sector equality duty

121. Ground 6 is based on the public sector equality duty in section 149 of the Equality Act 2010, which provides:

> "149(1) A public authority must, in the exercise of its functions, have due regard to the need to –
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

The relevant protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

122. The need to eliminate "other conduct that is prohibited by or under this Act", within section 149(1)(a), includes the need to eliminate indirect discrimination, upon which reliance is here placed. Indirect discrimination is defined in section 19:

> "19(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

123. The principles relating to the duty to have "due regard" within section 149 have been the subject of extensive consideration in the case law. We were referred specifically to *R (Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062 (Admin), *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), *R (Rahman) v Birmingham City Council* [2011] EWHC 944 (Admin), and *R (Williams & Dorrington) v Surrey County Council* [2012] EWHC 867 (QB). The passages to which our attention was directed in those cases draw in turn on a number of other cases. For present purposes we would emphasise two points that emerge from the material we were shown:

i) "Due regard" means the regard that is appropriate in all the particular circumstances in which the public authority is carrying out its function as a public authority. There must be a proper regard for all the statutory goals, in the context of the function that is being exercised at the time by the public authority. At the same time the public authority must also pay regard to any countervailing factors (e.g. economic factors) which, in the context of the function being exercised, it is proper and reasonable for the public authority to consider. (See in particular *R (Brown) v Secretary of State for Work and Pensions*, at para 82.)

ii) The duty to have due regard must be fulfilled before or at the time when a particular policy that will or might affect persons with a protected characteristic is being considered by the public authority in question.

> Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision was made are not enough to discharge the duty. (See in particular *R (Brown) v Secretary of State for Work and Pensions*, at para 91; see also *R (Kaur & Shah) v London Borough of Ealing*, at paras 23-24, where it is said that an equality impact assessment should be an integral part of the formation of a proposed policy.)

124. The Appraisal of Sustainability published with the consultation document included, at Appendix 4.2, a 25 page "Equality Impact Assessment: Screening Report". The purpose of the report was explained as follows:

> "1.1.1 The purpose of this screening report is to provide an initial appraisal of the extent to which groups vulnerable to discrimination and social exclusion may be differentially affected by the HS2 proposals between London and West Midlands. It identifies the priority equality groups to be considered and indicates the potential for significant adverse impacts, based on the sustainability appraisal work carried out to date.
>
> 1.1.2 The report was devised to help HS2 Ltd determine whether, and at what stage, a full Equality Impact Assessment (EqIA) is likely to be required for the Government's proposed route, either as a whole or at any specific locations affected by a particular scheme element."

125. In an overview of the EqIA process, the report stated at paragraph 2.1.4 that EqIA is generally carried out in two stages, starting with initial screening. If the screening shows that there could be a differential impact with potentially adverse effects, or that further information is required in order to draw robust conclusions, there must be a full assessment.

126. In a section on the outcomes of the screening process, the area affected by the proposed redevelopment of Euston station as the HS2 terminus was one of two locations where a potential for significant adverse impacts to priority equality groups was identified. The matter was covered both in a table and in supporting text. We set out the supporting text because of the greater detail it contained:

> "3.4.2 The key potential impacts in the Euston area are summarised below:
>
> - Loss of social housing: The station footprint is likely to require the demolition of high-rise council blocks within the Regents Park Estate, which comprises approximately 190 residential dwellings. The confirmed demolitions could require the relocation of approximately 500 people (as calculated using the 2.36 national average occupancy). Some dwellings within the low-rise terraces along Cobourg St, Euston St and Melton Street would also require demolition. A further three high-rise

Council blocks (up to 170 dwellings) in the same area would be newly exposed to impacts from the railway.

- Loss of community facilities: No places of worship or culturally sensitive social facilities are likely to require demolition, although Euston Square Gardens, St James's Gardens, a hall at Regents Park Estate and the sports court adjacent to Maria Fidelis School are likely to be required during construction.

- Loss of commercial premises: The station footprint would require the relocation of several businesses, including a Post Office distribution centre, and a small business space site through the potential demolition of 20 commercial premises. The Post Office facility is likely to employ a high proportion of local people. The extent to which other employment losses would affect local job opportunities is yet to be established.

- Socio-economic characteristics: The area around Euston (the station and surrounding buildings) is classified as one of the 10% most deprived in terms of barriers to housing and services; crime and disorder; living environment; health deprivation and disability. Unemployment rates for the Regents Park Estate stood at 10% in 2001, which is higher than the 8% average for Camden.

- Population characteristics: an analysis using super output area data has identified a higher than average proportion of people of black, Chinese and, particularly, Asian population (34.4% compared with the borough average of 10.38%). There is also a slightly above average proportion of children aged between 0 and 4 (7.2% compared with the borough average of 6.0%). The proportion of 0-15 year olds within Regents Park ward is 19.8%, compared to a Borough average of 16.6%.

3.4.3 Given these indicators, it is considered highly likely that the residential and commercial demolitions and loss of public open space could disproportionately affect the Asian population as well as those with low socio-economic status. Preparation of a full EqIA could help to determine the scale of impact on the surrounding population and is therefore recommended …."

127. That recommendation was picked up in the final section of the screening report:

"4.1.1 A key recommendation of this screening report is that a more detailed analysis should be carried out across the whole

> scheme to identify potential for impacts on priority equality groups. To date, however, it has been possible to establish areas within which impacts on priority equality groups are potentially more likely. This should help to focus the scope for any further assessment to ensure that resources are allocated appropriately and the approach defined correctly.
>
> 4.1.2 Work to develop the full EqIA would take into account impacts across the route as a whole, but particular attention would need to be focused on the two geographical locations that the screening process has identified namely:
>
> - Euston
> - …."

128. A witness statement of Mr Peter Miller, Head of Environment at HS2 Ltd, states that HS2 and the Department for Transport recognise the impact upon residential properties and commercial facilities at Euston but also recognise the potential for redevelopment in this location that could follow on from HS2. They are supporting the development of an Opportunity Area Planning Framework for the Euston area within which it is anticipated that policies will be included to facilitate the mitigation of the works; and an EqIA will be undertaken on the emerging Framework. Mr Miller concludes his statement by saying that the project is committed to undertake an EqIA and that further work is proposed in parallel to the EIA.

129. Ms Lieven's submission was that there was a plain duty here to carry out a full EqIA before the decision on HS2 was taken, given the scale of the impact of the proposed works, involving the destruction of a community with a large ethnic minority population. It was a key recommendation of the screening report that a full EqIA be carried out; and there is evidence from the Leader of Camden Council that the impacts would in fact be even greater than those identified in the screening report. The duty was to carry out a full EqIA in the process of formation of the policy. To reach a decision on HS2 without one constituted a failure to have due regard to the section 149 goals. It was all the more important for the exercise to be gone through before any decision was taken, because only in that way could the SST have the full information needed in order to balance HS2 against the OA, which would not involve demolition of any properties at Euston.

130. In the course of submissions in reply on behalf of the Bucks CC Group, Miss Kassie Smith QC suggested that it was not apparent that *any* regard had been had to equality issues in reaching the decisions set out in the DNS. We reject that submission. There is no basis for inferring a failure to have regard to the screening report appended to the Appraisal of Sustainability itself; and one of the documents published with the DNS, namely "The Economic Case for HS2: Value for Money Statement", includes a reference to impacts on potentially vulnerable groups which, although brief in itself, must be derived from the screening report.

131. So the question comes down to whether, by having regard to the screening report but not carrying out a full EqIA before reaching the decisions set out in the DNS, the SST had due regard to the section 149 goals.

132. Ouseley J dealt with that question at paras 483-507. His reasoning turned in large part on the way he understood the case to have been advanced before him. He was told at one point that the case was based on section 149(1)(c), but he had difficulty in seeing how that provision related to the facts of the case or how it could be said that compliance with it required a full EqIA. He referred to belated reliance on section 149(1)(a), but considered such reliance to be equally misconceived: he said that the screening report showed due consideration being given to equality issues at this stage of the decision-making process, where the only relevant decision taken by the SST was that development consent would be sought from Parliament for a proposal adversely affecting the Euston location.

133. The judge understood that reliance on indirect discrimination under section 19 was a late and separate point, for which he refused permission to amend. He also saw no clear merit in it, observing at para 505 that "[t]he adverse effect is entirely related to the fact that individuals live there, and nothing to do with their ethnicity", and that the ethnic minority were disadvantaged "simply because of where they happen to live". On those matters he was, in our judgment, in error: we were assured by Ms Lieven that the argument on indirect discrimination was advanced as an integral part of the argument under section 149; and the argument that the Euston redevelopment would give rise to indirect discrimination through its disproportionate adverse impact on the ethnic minority community in the area is clearly not met by saying that they would be disadvantaged merely because of where they happen to live.

134. Notwithstanding those errors, however, we have no doubt that the judge was right to dismiss this ground of challenge. The screening report identified in considerable detail the potential disproportionate impact of the Euston redevelopment on the ethnic minority community in the area. This was one out of a very large number of considerations that had to be taken into account when deciding on the principle of HS2 and on whether to promote the project through the hybrid bill procedure. In this context we are satisfied that due regard was had to the section 149 goals, including the elimination of indirect discrimination, by taking the screening report into account when reaching the decisions (and this was clearly done at the stage of formulation of policy, not as a retrospective exercise of justification for a decision already taken). In the particular circumstances, the duty to have due regard did not require a full EqIA to be obtained at that stage. The full EqIA, like the full EIA, can await the detailed consideration to be given to Phase 1 in the hybrid bill procedure, where it can be taken properly into account in the course of the Parliamentary decision-making process.

135. We therefore refuse permission to appeal on this ground.

Ground 7(a): irrationality in view of underground capacity at Euston

136. By ground 7(a) the Bucks CC Group contends that it was irrational of the SST to decide to proceed with HS2 in the absence of a solution to the problem of lack of capacity of the underground lines at Euston, in particular the southbound Victoria line, to cope with the additional passengers HS2 would generate (both by way of new passengers and by way of diversion of existing passengers from King's Cross and St Pancras to Euston). The SST relied on the time-saving for passengers as an economic benefit of HS2, but in the absence of a solution much of that benefit would be lost

through queuing at the underground; and if a solution was identified, it should be factored into the cost-benefit analysis for HS2.

137. The factual material on which this ground is based is drawn in part from the consultation response of the Mayor of London. That response made the general point that there was insufficient capacity at Euston to deal with HS2 related demand, and additional capacity would be required; it could not be provided through upgrades or enhancements of existing lines alone; the HS2 network would more than double the number of people wishing to access the underground at Euston over the morning peak period; and any time savings on journeys by HS2 would be lost with people queuing to access the underground station unless further capacity was provided. The supporting analysis, based on forecasts by Transport for London (TfL), is summarised by the judge at para 512:

> "… According to TfL, general growth and HS2 would increase demand on the Victoria and Northern lines through Euston by about 250% in the three hour morning peak, by 2033. Some waiting times would exceed 10 minutes. Table 3 in the TfL consultation response showed significant increases attributable to Phase 1 in 2033, and the overall figures for onward underground travel from Euston nearly doubled with HS2 Phase 2. In its letter of 30 September 2011, taking up a point raised by HS2 at the Transport Select Committee, TfL estimated to HS2L that the waiting times for Victoria and Northern Line trains could reach 30 minutes, even after upgrades to the Victoria line. The Chelsea-Hackney link [referred to elsewhere as "Crossrail 2"] had to be in place before peak demands from HS2 occurred."

138. The DNS did not dispute TfL's figures but dealt somewhat obliquely with their implications. It stated:

> "5.30 A further concern raised was the potential impact of HS2 passengers on the London Underground at Euston station. In terms of network capacity for onward passenger travel, the number of passengers at Euston added by HS2 during the three hour morning peak is likely to be around 2% compared to the number of passengers already forecast to be on London Underground services passing through Euston. We are confident that Euston offers sufficient opportunity for accommodating these additional passengers; HS2 Ltd have advised us that they would work closely with TfL as part of its wider ongoing strategy for modernising and improving underground services."

The 2% figure is liable to create a misleading impression, since the main problem thrown up by TfL's figures relates to the number of passengers changing onto the underground at Euston, particularly onto the southbound Victoria line, rather than to the totality of those passing through Euston on underground services.

139. In his third witness statement on behalf of the SST, Mr Graham deals at some length with the issue of dispersal of HS2 passengers at Euston. He comments on the increase in passenger numbers on underground lines through Euston in the three hour morning peak, suggesting that the overall impact of HS2 would be limited relative to background growth. He notes that TfL's base case (without HS2) shows background growth on the Victoria and Northern lines reaching unacceptable levels of crowding (by TfL's standards) before 2033; and he states that with HS2 in place, terminating at Euston with an interchange station at Old Oak Common and the proposed enhancements to Euston station, TfL's figures show a relatively small increase in crowding on the Victoria line and a small reduction in crowding on the Northern line. He asserts that TfL's calculations on maximum and average wait times demonstrate that HS2 would not be the major contributor to rising wait times. Average wait times are expected to double on the Northern line, and more than double on the Victoria line, without HS2. With HS2 in place as previously described by him, average wait times on both lines would rise slightly more: in the case of the Northern line the increase would be marginal, in the case of the Victoria line it would be slightly larger but still not the major contributing factor. He accepts, however, that TfL's evidence highlighted the potential for future crowding and dispersal issues around Euston that would need to be considered and addressed with or without HS2, and he referred to various potential solutions, including a further upgrade to the Northern Line, removal of London Overground services from Euston, diversion of some WCML services onto Crossrail in west London, and the construction of Crossrail 2. Mr Graham summarises the SST's position in this way (at paragraph 371 of his witness statement):

> "The Secretary of State remains of the view, on the basis of the evidence set out above and engagement with TfL, since January 2012, that these issues are capable of being resolved through a number of options, some of which are already within the HS2 proposals, such as the Old Oak Common interchange and enhancements to the Euston underground ticket hall; some of which are under consideration by HS2 Ltd, such as a direct link between Euston and Euston Square Underground station; and others which are proposals which Transport for London should take forward, and are currently the subject of consideration."

140. Ms Lieven submits that this approach of leaving the matter over for future resolution was not good enough. In order to address the problem of overcrowding on the underground lines at Euston, the Government is going to have to pay in due course for a huge additional infrastructure project in London, which will fundamentally alter and undermine the business case for HS2. It was irrational of the SST to proceed with HS2 without identifying a solution and without taking into account the cost of that solution and its impact on the HS2 business case. Moreover, the effect of proceeding in that way has been to blight the area west of Euston, to create uncertainty until Crossrail 2 or an equivalent solution is faced up to, and to create the risk that, after the disruption caused by work on HS2, Euston will have to be dug up a second time in order to "retrofit" Crossrail 2 or its equivalent.

141. Ouseley J considered this issue comparatively briefly, at paras 510-527. He acknowledged the problem identified by Ms Lieven but did not accept that it was irrational for the SST to decide in the circumstances to proceed with HS2:

> "525. However, that does not make it irrational for the SST to promote legislation for HS2 when no definite solution has been identified, let alone committed for provision to a known timetable. Two judgments, at least, are possible. It would not be unreasonable to adopt the approach urged by Ms Lieven. Some might regard that as wise, and to leave matters as they stand as foolish. But that would not make doing so irrational and so unlawful. It would not be unreasonable for the approach urged by the SST to be adopted: the problem is acknowledged regardless of HS2, although sharpened by it; solutions are being worked on, possibilities have been identified, and time exists for them to be brought about. There is no need now for the solution to be committed. That is not irrational and some might regard it as wise. The risk that the solution might not be in place by the time that it was needed for HS2 passengers is pre-eminently a matter of political judgment, as is the weight to be given to that risk.
>
> 526. Which course is followed is for the political judgment of the SST in the first place. Parliament may or may not be persuaded to accept the current approach adopted by the SST. That is a matter for Parliament. That emphasises that this is not a judgment to be tested in the courts for rationality, but a political judgment, the wisdom or foolishness of which anyone can debate while holding reasonable but differing views. If a solution is not put in place as needed, that will have been because of political decisions. This does not involve ignoring any material considerations. I reject this aspect of the challenge."

142. We do not think that a complete answer to Ms Lieven's case on this issue is provided either by the prospective Parliamentary process or by pointing to the element of political judgment involved in the question. The focus is on the SST's decision, as set out in the DNS, to proceed with HS2, and that decision is conceded to be amenable to judicial review and is open in principle to challenge on the ground of irrationality even in relation to matters of judgment of this kind. We are satisfied, however, that the judge was correct to find that it was not irrational of the SST to decide to proceed with HS2 even though important work remained to be done in relation to the dispersal of passengers at Euston. A solution to the issue of overcrowding on the underground had to be found in any event, irrespective of HS2, and it was reasonable to proceed on the basis that the issue was capable of being resolved. Since a solution had to be found in any event, it was also reasonable to proceed on the basis that the costs of the solution did not need to be taken into account in the cost-benefit analysis for HS2 itself, so that it was unnecessary to wait until the solution and its associated costs were known.

143. For those reasons we agree with the conclusion reached by the judge, and we refuse permission to appeal on this ground.

CONCLUSION

144. In the result, we would dismiss the appeals on grounds 1, 3 and 5(b) and would refuse permission to appeal on all other grounds.

Lord Justice Sullivan:

INTRODUCTION

145. I agree with the Master of the Rolls and Richards LJ that, for the reasons given in their judgment, the appeals on grounds 3 and 5(b) should be dismissed, and that permission to appeal on all of the other grounds should be refused. For the reasons set out below, I do not agree with their conclusion that the appeals on ground 1 should be dismissed. I consider that an SEA was required.

GROUND 1
The applicability of the SEAD

146. The relevant provisions of the SEAD are set out in paragraphs 23-28 of the judgment of the Master of the Rolls and Richards LJ.

147. The Respondent accepts that the DNS:

i) is a plan or programme,

ii) which has been prepared and/or adopted by an authority at national level, the Government of the United Kingdom,

iii) for a transport project listed in Annex I to Directive 85/337 EEC, and now listed in Annex I to the EIAD.

148. Before Ouseley J the Respondent submitted that the DNS was not a plan or programme for the purposes of the SEAD because it:

i) was not 'required by administrative provisions' (Article 2(a)); and

ii) did not 'set the framework for future development consent' of the HS2 project (Article 3.2(a)).

149. Ouseley J accepted both of these submissions, although he accepted that it was arguable that the 2010 Command Paper was an "administrative provision" (paragraph 106 of his judgment). In paragraph 65 of his judgment Ouseley J said that it was easier to see whether a "plan" was "required by administrative action" once a decision had been reached as to whether it was a plan which fell within the scope of the SEAD.

> "If it is a plan within the Directive, it is easier to see that the necessary purposive construction or application of "required by administrative provision", would place that part also within the scope of the Directive. Otherwise the sort of plan at which the

> Directive is aimed would be the more likely to escape assessment in circumstances to which the objectives of the Directive apply. It is also easier to construe or apply the whole of the second limb of Article 2 (a) as one phrase to one process, rather than splitting it up. It is easier to recognise the species when it is in sight than to define it in two stages".

150. In his oral submissions Mr. Mould QC agreed that this was the appropriate approach (it echoes the view expressed by Lord Reed in paragraph 59 of his judgment in *Walton* that the two questions are to some extent interlinked) and accepted that if the Court did conclude that the DNS set the framework for future development consent of the HS2 project, then he would have difficulty in persuading the Court that the DNS was not "required by administrative provision". In his oral submissions, Mr. Mould did not press the argument advanced in his Skeleton Argument that the DNS was not "required", and submitted that the determining issue was whether the DNS "set the framework for future development consent" of the HS2 project. I agree with the Master of the Rolls and Lord Justice Richards that this is the crucial question.

"**Set the framework**"

151. The reason why the Respondent contends that the DNS does not set the framework for future development consent of the HS2 project is a procedural one. Development consent for a nationally important project such as HS2 could have been sought by way of the development consent procedure for nationally significant infrastructure projects under the Planning Act 2008, or by way of an order for a scheme of national significance under the Transport and Works Act 1992. If either of these procedures had been adopted, Mr. Mould accepted that the DNS would have "set the framework" for the development consent process because, even if it had not been formally adopted as a National Policy Statement under Part 2 of the 2008 Act, it would have been a material consideration which the decision-maker under the 2008 Act or the 1992 Act would have been under a legal obligation to take into account.

152. However, the Government is not seeking development consent for the HS2 project under the 2008 Act or the 1992 Act. It is seeking development consent from Parliament under the hybrid bill procedure. The Respondent submits that the DNS does not set the framework for development consent under that procedure because, as a matter of constitutional principle, Parliament will be free to give whatever weight, if any, it chooses to the DNS when deciding whether or not to pass the Bill giving development consent. That submission was accepted by Ouseley J in paragraphs 93-99 of his judgment. The Master of the Rolls and Lord Justice Richards agree with the judge's reasoning (paragraphs 55-60).

153. There is an important difference between the SEAD and the EIAD. Under the EIAD projects "the details of which are adopted by a specific act of national legislation" are specifically excluded from the scope of the Directive (see paragraph 75 above for the manner in which the CJEU has interpreted the ambit of that exclusion). There is no such exclusion in the SEAD. While we do not have details of the precise constitutional arrangements in the other member states, it is common ground that as a matter of general constitutional principle the legislatures of the member states are independent of the executive, and free, as a matter of constitutional law, to accept or reject legislation proposed by the executive.

154. Mr. Mould accepted that adopting the Respondent's approach to setting the framework would enable the governments of member states to avoid the need for the strategic environmental assessment of plans or projects which would otherwise be subject to the SEAD by promoting specific acts of national legislation as a means of obtaining development consent for major projects, even though development consents obtained via such legislative procedures are not expressly excluded from the scope of the SEAD.

155. Mr. Mould recognised that the apparent gap in strategic environmental protection was not desirable, but submitted that the gap was more apparent than real because, in those cases where the framework for development consent had not been set by an SEA, the gap could be, and in his submission would have to be, filled by a more extensive Environmental Statement (ES) under the EIAD. The content of the ES would have to respond to the fact that there was no strategic framework.

156. I do not accept that submission. Where an environmental assessment is required under the SEAD the environmental statement must identify, describe and evaluate "the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme": Article 5.1 SEAD, emphasis added. Under the EIAD the information about alternatives which must be provided by the developer must include at least

> "an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects": see Article 5.3 (d) and Annex IV of the EIAD, emphasis added.

157. The fact that a government promoting a project via national legislation might choose to fill the gap by providing more information about alternatives than the minimum required by Article 5.3(d) of the EIAD is no answer. If development consent is sought via a legislative process the EIAD does not require the executive promoting the project to fill the gap, and if the gap is not filled the legislature is free in such a process to give whatever weight, if any, it chooses to give to the omission.

158. In paragraph 4.1 of its 2009 Report on the Application and Effectiveness of the SEAD, in a passage cited by Lord Reed with approval in *Walton* at [14], the European Commission described the role of the two Directives as follows:

> "The two Directives are to a large extent complementary: the SEA is 'up stream' and identifies the best options at an early planning stage, and the EIA is 'down stream' and refers to projects that are coming through at a later stage."

Adopting the Respondent's approach to "set the framework" for future development consent would enable member states to choose a project as the "best option" at an early stage and to ensure that that project came through at the later stage, by pursuing it through a legislative process without having carried out an SEA of the "reasonable alternatives".

159. The Master of the Rolls and Lord Justice Richards deal with this issue in paragraph 62 of their judgment. It is common ground that the Respondent's approach to setting the framework does leave a gap in strategic environmental protection. While I agree with their view that the existence of this gap cannot of itself be a good reason for treating something as setting the framework, since it is common ground that the terms of the SEAD should be interpreted broadly and, so far as possible, in a way which will promote the objectives of the Directive (paragraph 47), I consider that the presence of the "gap" is a powerful reason to interpret the words "set the framework" in the Directive in such a way as to close the "gap", if it is possible to do so.

160. With this in mind, I turn to the two CJEU decisions which are of relevance to this issue: *Terre wallonne* and *Inter-Environnement Bruxelles.* Apart from Lord Reed's endorsement of the views expressed by Advocate General Kokott in paragraphs 64 and 65 of her Opinion in *Terre wallone* in paragraph 17 of his judgment in *Walton*, the domestic authorities discussed in paragraphs 34-38 of Ouseley J's judgment do not, in my view, take the matter any further.

161. The only discussion in *Terre wallonne* and *Inter-Environnement Bruxelles* of what is meant by the term "framework" in the Directive is contained in paragraphs 60-67 of Advocate General Kokott's Opinion in *Terre wallonne* (see paragraph 37 above). When considering that Opinion in detail it is important to bear in mind that in both *Terre wallonne* and *Inter-Environnement Bruxelles* the CJEU has, as with other cases in the environmental field (see for example the cases referred to in footnote 12 to paragraph 30 of the Advocate General's Opinion in *Terre wallone),* consistently adopted a purposive approach to the interpretation of the terms used in the SEAD in order to ensure that "the practical effect of the directive, having regard to its objective, which consists in providing for a high level of protection for the environment" is not frustrated: see paragraph 30 of the Court's judgment in *Inter-Environnement Bruxelles*.

162. This purposive approach to the interpretation of the SEAD is to be found in the following passages in the two cases:

(1) In *Terre wallone* Advocate General Kokott when dealing with the meaning of 'plan or programme' said in paragraph 30 of her Opinion that:

> "The interpretation of the pair of terms 'plans' and 'projects' should consequently ensure that measures likely to have significant effects on the environment undergo an environmental assessment. It is therefore advisable, as with the EIA Directive, to focus primarily on whether the measures in question may have significant effects on the environment. Legislation may have such effects, especially if it permits damage to be done to the environment."

In paragraph 35 the Advocate General concluded that the interpretation of 'plan' and 'programme' must be broad enough to include legislation because:

> "Significant effects on the environment can therefore be fully taken into account only if they are assessed in the case of all

> preparatory measures which may result in projects subsequently implemented having such effects."

The Court concluded that the mere fact that a measure was adopted by legislative means did not exclude it from the scope of the SEAD, and that

> "…as a result both of the characteristics they display and of the actual intention of the European Union legislature action programmes [to combat nitrate pollution in 'vulnerable zones'] are 'plans and programmes' within the meaning of [the SEAD]." (See paragraphs 41 and 42 of the Court's judgment).

(2) In *Inter-Environnement Bruxelles* the Court did not agree with Advocate General Kokott's Opinion (paragraphs 30 and 59) that the term 'required' in Article 2(a) of the SEAD did not include plans and programmes which were provided for by legislative provisions, but the drawing up of which was not compulsory; a restrictive interpretation of Article 2(a) which had been advanced by, inter alia, the UK Government. In paragraphs 28-31 of its judgment the Court said:

> "28. It must be stated that an interpretation which would result in excluding from the scope of Directive 2001/42 all plans and programmes, inter alia those concerning the development of land, whose adoption is, in the various national legal systems, regulated by rules of law, solely because their adoption is not compulsory in all circumstances, cannot be upheld.
>
> 30. The interpretation of Article 2(a) of Directive 2001/42 that is relied upon by the abovementioned governments would have the consequence of restricting considerably the scope of the scrutiny, established by the directive, of the environmental effects of plans and programmes concerning town and country planning of the Member States.
>
> 31. Consequently, such an interpretation of Article 2(a) of Directive 2001/42, by appreciably restricting the directive's scope, would compromise, in part, the practical effect of the directive, having regard to its objective, which consists in providing for a high level of protection of the environment (see, to this effect, *Valčiukienè v Pakruojo rajono savivaldybe* (C-295/10) [2012] Env. L.R. 11 at [42]). That interpretation would thus run counter to the directive's aim of establishing a procedure for scrutinising measures likely to have significant effects on the environment, which define the criteria and the detailed rules for the development of land and normally concern a multiplicity of projects whose implementation is subject to compliance with the rules and procedures provided for by those measures.

> 32. It follows that plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required' within the meaning, and for the application, of Directive 2001/42 and, accordingly, be subject to an assessment of their environmental effects in the circumstances which it lays down."

(3) In *Inter-Environnement Bruxelles* the Court had to consider whether the repeal of a specific land use plan prepared under the Brussels Town and Country Planning Code fell within the scope of the SEAD. Notwithstanding the fact that the Directive refers to 'modifications' to plans or programmes but does not expressly refer to repeals, the Court had no difficulty in concluding that repeals were capable of falling within the scope of the Directive.

> "36. It is to be noted first of all, as the national court has, that Directive 2001/42 refers expressly not to repealing measures but only to measures modifying plans and programmes.
>
> i. However, given the objective of Directive 2001/42, which consists in providing for a high level of protection of the environment, the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly.
>
> ii. In this regard, it is possible that the partial or total repeal of a plan or programme is likely to have significant effects on the environment, since it may involve a modification of the planning envisaged in the territories concerned.
>
> iii. Thus, a repealing measure may give rise to significant effects on the environment because, as has been observed by the Commission and by the Advocate General in points AG40 and AG41 of her Opinion, such a measure necessarily entails a modification of the legal reference framework and consequently alters the environmental effects which had, as the case may be, been assessed under the procedure prescribed by Directive 2001/42."

(4) In her Opinion in *Terre wallonne* Advocate General Kokott rejected a "narrow understanding of the setting of a framework" (see paragraph 63 of her Opinion), and said that the SEAD was "based on a very broad concept of 'framework'" because plans and programmes were capable of influencing the development consent of individual projects "in very different ways" (see paragraphs 64 and 67 of her Opinion).

163. If one looks in *Terre wallonne* and *Inter-Environnement Bruxelles* for statements of principle as to how the interpretation of the SEAD should be approached, rather than the manner in which those principles were applied to the particular factual characteristics of the plans or programmes under consideration by the Court, the overarching principle that emerges from both cases is that the terms in the SEAD - "plans and programmes", "modifications", "required" and "framework" - should all be given a broad and flexible meaning to ensure that the objective of the EU legislature, to provide for a high level of protection for the environment is achieved, and the practical effect of the Directive is not compromised.

164. An interpretation of "framework" in Article 3.2(a) which would enable the governments of member states to carve out an exemption from the SEAD for those projects for which they choose to obtain development consent by "specific acts of national legislation" would be contrary to the purposive approach to the interpretation of the directive adopted by the CJEU in *Terre wallone* and *Inter-Environement Bruxelles*. Standing back from the detailed arguments as to what constitutes a plan or programme within the scope of the SEAD, the "High Speed Rail Strategy" set out in the DNS is a prime candidate for an SEA if the objectives of the Directive, to provide for a high level of protection for the environment, and to ensure that certain plans and programmes which are "likely to have significant effects" on the environment are subject to an SEA, are not to be frustrated. The Respondent was not able to identify any current UK project which is likely to have more significant effects on the environment.

165. In paragraph 49 of their judgment the Master of the Rolls and Lord Justice Richards refer to the statement of the Advocate General in paragraph 64 of her Opinion in *Terre wallonne* that plans and programmes "may influence the development consent….and in so doing *prevent* appropriate account being taken of environmental effects." (their emphasis) I agree with their view that this suggests that if the plan or programme does not prevent appropriate account from being taken it does not have the requisite influence to set the framework. However, I do not share their view that "it is difficult to see how a plan or programme could *prevent* appropriate account from being taken unless it had some legal effect."

166. I endorse their view that it would be wrong to place too much weight on the precise language used by the Advocate General in the two paragraphs to which they refer. However, if one is seeking to derive useful pointers from the language in an Opinion in which the Advocate General was expressly rejecting a narrow understanding of the setting of a framework, and in which her emphasis was upon the very different ways in which plans or programmes may influence the development consent of individual projects, I think it much more likely that she was using the word "prevent" in the sense of "hinder", rather that "stop from happening" (see the Shorter OED); and in any event I would not think that any pointer as to the kind of influence she had in mind can be derived from the word *prevent* in isolation. The question is not whether the plan or programme prevents (in the sense of stops) account from being taken of environmental effects, but whether it *prevents appropriate account* from being taken. The answer to this question is very much a matter of fact and degree (see also paragraph 65 of the Advocate General's Opinion in which she refers to the *degree* (her emphasis) to which the plan or programme sets a framework). For my part, I do not find it difficult to see how a plan or programme that is required by administrative

rather than legislative or regulatory provisions can prevent appropriate account being taken of environmental effects even if it does not have legal effect.

167. When the Advocate General refers to "the 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" in paragraph 66 of her Opinion, her emphasis, in my judgment, is upon the word *all*. Preliminary decisions may, or may not, have legal effect, what matters for the purpose of setting a framework is whether they "influence any subsequent development consent": see paragraph 67 of the Advocate General's Opinion.

168. I agree with the Master of the Rolls and Lord Justice Richards (paragraph 50) that there is no suggestion that the Court in *Terre wallonne* disagreed with the Advocate General's analysis of the meaning of "set the framework". I further agree with their view that the language used by the Advocate General does provide a useful pointer to the kind of influence she envisaged as being required. In my judgment, paragraphs 60-67 of the Advocate General's Opinion if read as a whole do not provide any support for the conclusion that only legal influence will suffice.

169. The Master of the Rolls and Lord Justice Richards do not rule out the possibility that a plan or programme may set the framework where it has sufficiently potent influence (paragraph 55). Given the extent of common ground between us, I merely record my view that paragraph 55 of the Court's judgment in *Terre wallonne*, referred to by the Master of the Rolls and Lord Justice Richards in paragraph 50 (above) does not support the Respondent's submission that "influence" is confined to these circumstances where the decision-taker is under a legally enforceable obligation to have regard to the plan or programme in question. In *Terre wallonne* there was no dispute that the action programmes in question were required by Article 5 of Directive 91/1976 (the Nitrates Directive) to contain certain specific, mandatory measures (see paragraph 48 of the Court's judgment). The Belgian Government had argued that the application of fertilisers was not a project whose environmental impact had to be assessed, and that the action programme did not influence the development consent of intensive livestock projects because the content of the action programmes was determined by the Nitrates Directive (see paragraphs 58 and 68-69 of the Advocate General's Opinion). It was those arguments which were rejected by both the Advocate General and the Court.

170. The Respondent's case is not assisted by the passages in paragraphs 30 and 39 of the Court's judgment in *Inter-Environnement Bruxelles*, referred to by the Master of the Rolls and Lord Justice Richards in paragraph 51 (above). When considering what assistance can be derived from those passages it is important to bear in mind that in *Inter-Environnement Bruxelles* the Court was not considering the meaning of "framework", it was considering the meaning of the terms "required by" and "modifications". There was no dispute that the "specific land use plan" which had been repealed did "define the criteria and the detailed rules for the development of land". That is not surprising, the repealed plan had been prepared under the Brussels Town and Country Planning Code and land use development plans are the paradigms of "plans and programmes" for the purposes of the SEAD. As Mr. Elvin QC pointed out on behalf of HS2AA, the earliest *travaux preparatoires* in 1996 show that it was originally proposed that the Directive should be restricted to town and country planning plans and programmes, but by 2001 when the SEAD was adopted its scope

had been broadened to include other "plans and programmes". Since the particular plan in question had been adopted under a statutory planning code its repeal necessarily entailed a modification of the legal reference framework. The thrust of the Court's judgment in the two passages referred to in paragraph 51 (above) is not that legally binding obligations or modifications alone will suffice, but that the terms "required" and "modifications" should be broadly and flexibly interpreted so as not to compromise the practical effect of the SEAD.

171. The Respondent's reliance on these passages to cut down the Court's broad and flexible approach to the interpretation of terms in the SEAD elevates the manner in which the Court described its application of those broad principles to the particular, undisputed, factual characteristics of the plans or programmes which were under consideration in the two cases, into a statement of broad principle – that only a legal obligation to take a plan or programme into account will suffice – which, as a statement of broad principle, is contrary to a purposive interpretation of the Directive because it excludes major projects from the SEAD if they are adopted by specific acts of national legislation.

172. The SEAD clearly envisages that the framework for future development of projects may be set by plans and programmes which are "required" (see paragraph 162 (2) above) by administrative provisions, but are not required by either legislative or regulatory provisions. Plans and programmes which are required by administrative provisions may, or may not, have a defined legal role in the development consent process. If a project is likely to have significant environmental effects, and it is accepted that the HS2 project is likely to have such effects, what matters for the purpose of securing the objectives of the SEAD is whether the plan or programme is in fact capable of exerting a sufficient degree of influence over the development consent for the project in question. If it does have such an influence it will set the framework for future development consent. I gratefully adopt the test posed by the Master of the Rolls and Lord Justice Richards in paragraph 55 of their judgment:

> "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."

173. In my judgment, there is cogent evidence that there is a real likelihood that the DNS will influence Parliament's decision on HS2. Mr. Mould did not place any reliance on the distinction drawn by Ouseley J in paragraph 97 of his judgment between "the basis upon which the promoter of the project made his decision as to which project to promote, how and why, with the framework or policy structure within which the separate decision-maker will make its decision". In my judgment he was right not to do so. Such a distinction between a promoter and a separate decision-maker is entirely apt in the conventional development control decision-making process. When considering the status of the DNS in the hybrid bill procedure it must be recognised that the Government has a dual role. Having devised the "plan" the Government is not merely the promoter of the project, it will actively participate in the decision-making process under the hybrid bill procedure. Parliament is constitutionally distinct from the executive, but members of the Government are members of Parliament. All ministers are bound by the convention of collective ministerial responsibility: see

English Public Law, 2nd Edn by David Feldman at paragraph 3.30. While the Respondent has confirmed that the vote on the Second Reading of the hybrid bill will be a whipped vote, it is unnecessary, and I accept that it would be inappropriate for the Court, to speculate as to the likely effect of the whip. 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.

174. I accept that we cannot say with any *certainty* how Parliament will approach its task (paragraphs 57 and 58 of the judgment of the Master of the Rolls and Lord Justice Richards), but we do know enough, given the doctrine of collective ministerial responsibility, to be able properly to conclude that the DNS will, as the Government plainly intends that it shall, influence Parliament's decision to give development consent via the hybrid bill process. I accept that when considering matters of domestic law it is not the function of the Court to "second guess" what Parliament will do (paragraph 56 above). But the SEAD was adopted by the European legislature, and the approach adopted by the CJEU in its judgment in *Boxus* is a useful illustration, in the closely analogous context of the EIAD, of the national Court's duty to ensure compliance with the environmental protection that has been put in place by the European legislature. For the purpose of Article 1(5) of the EIAD it is not enough for a member state to demonstrate that a project has been adopted by a specific act of national legislation, the national court must look at "the entire legislative process" in order to verify that the project has in fact been adopted by the legislature in such a way that the objectives of the EIAD have been achieved: see paragraph 48 of the Court's judgment. I can see no justification for adopting a different approach to setting the framework for the purpose of the SEAD. In order to ensure that the objectives of the SEAD and the EIAD are achieved it is necessary for the national court to look at the substance, and not simply the constitutional formality, of the entire decision-making process. Indeed, in the case of the SEAD the need to look at the substance, rather than the constitutional form, of the decision-making process is even greater, precisely because there is no express "carve out" from the SEAD for national legislation. The effect of the Master of the Rolls and Lord Justice Richards' conclusion that a plan or programme may set the framework where it has a sufficiently potent influence, but not where the decision maker is Parliament (paragraph 55 above) is to carve out such an exclusion from the SEAD. For the reasons set out above, I consider that this would be contrary to the CJEU's purposive approach to the meaning of set the framework.

Aarhus

175. I accept Mr. Elvin's submission that the SEAD should be interpreted harmoniously with the United Nations Economic Commission for Europe's Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998 (the Aarhus Convention), Article 7 of which provides:

> "**Public participation concerning plans, programmes and policies relating to the environment**
>
> Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a

> transparent and fair framework, having provided the necessary information to the public. Within this framework article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment."

176. In paragraph 63 of their judgment the Master of the Rolls and Lord Justice Richards refer to paragraphs 22-24 of the Advocate General's Opinion in *Inter-Environnement Bruxelles* and suggest that there may be some doubt as to whether the SEAD should be interpreted harmoniously with the Aarhus Convention. In my view there is no doubt about this issue. Paragraphs 22-24 of the Advocate General's in *Inter-Environnement Bruxelles* formed part of the reasoning which led her to the conclusion, which the Court rejected, that the word "required" excluded plans and programmes the drawing up of which was not compulsory.

177. In the Aarhus Convention the term 'plans or programmes' is not defined, they must 'relate to the environment', but there is no requirement that they must contain measures, rules or procedures which must be complied with in the development consent process. Prior to the EU's ratification of the Aarhus Convention on 17th February 2005, the Public Participation Directive 2003/35/EC amended existing EU environmental legislation in order to achieve compliance with the Aarhus Convention. The SEAD was not amended because it was considered to be compliant with the obligations under Article 7: see recital (10) and Article 2(5) of the Public Participation Directive. It would not be compatible with the obligation imposed by Article 7 of the Aarhus Convention to exclude "plans or programmes" such as the DNS from the need to comply with the public consultation requirement in Article 6.2 of the SEAD that:

> "…the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure."

178. I am troubled by the conclusion of the Master of the Rolls and Lord Justice Richards that because the DNS does not, in their view, set the framework for future development consent it is difficult to see how Article 7 of Aarhus can have been intended to apply to it. We know that the Government did, in fact, engage in a comprehensive consultation exercise prior to adopting the DNS (see paragraphs 84-109 above). In my judgment, a conclusion that even if there had been no consultation prior to the adoption of the DNS there would have been no breach of Article 7 of Aarhus would not be in accordance with the purposive interpretation of EU environmental legislation that has been consistently adopted by the CJEU. For the reasons set out in paragraphs 156-158 above, it is no answer that there will have to be public participation in accordance with the EIAD. By the time that consultation takes place consideration of strategic alternatives will have been foreclosed by the legislative process and the pass will have been sold.

179. For these reasons I conclude that the DNS is a "plan" within the scope of the SEAD. It is not excluded from the scope of the Directive simply by reason of the fact that development consent is being sought via the hybrid bill process.

"**Required by administrative provision**"

180. Having reached that conclusion, I have no doubt that Mr. Mould's concession, that it would be difficult for him to resist a conclusion that the DNS is a "plan or programme" which was "required by administrative provision", namely the 2010 Command Paper, was correct (see paragraph 65 of Ouseley J's judgment cited in paragraph 149 above). Ouseley J accepted that a Command Paper issued under the Royal Prerogative was capable of being an administrative provision, and that the 2010 Command Paper was such a provision (see paragraph 67 of his judgment). He further accepted that the 2010 Command Paper (i) identified the body which was to reach the decision, (ii) set out the topics for decision, and (iii) set out the process which was to be followed in terms of further work, public consultation, and the further steps to be taken thereafter (see paragraph 69 of his judgment). Ouseley J concluded that the 2010 Command Paper did not "require" anything. I do not accept, and Mr. Mould did not seek to defend, Ouseley J's description of the 2010 Command Paper as "a statement by the developer as to how and why it would proceed with the project" (see paragraph 69 of Ouseley J's judgment). It was a statement by the Government, a national authority, as to the process which it would follow in its preparation and adoption as the competent authority of the "plan or programme" (the DNS) that falls within Article 3.2(a) of the SEAD.

181. The fact that the 2010 Command Paper was a statement of Government policy on High Speed Rail (see paragraph 69 of Ouseley J's judgment) does not mean that this particular policy statement did not "require", in the sense in which the CJEU interpreted that word in *Inter-Environnement Bruxelles* (see paragraph 162 (2) above), the preparation of a document which was in due course produced in the form of the DNS in which, following the process of public consultation described in the policy statement, the Government's decisions on the matters identified in the policy statement would be announced in accordance with the process which was set out in the statement.

182. The fact that the Government could (subject to any issues of legitimate expectation, e.g. as to the nature and extent of the proposed consultation process) change or abandon the process at will (see paragraph 72 of Ouseley J's judgment) does not mean that the DNS which was in fact prepared and adopted by the Government in accordance with the process described in the 2010 Command Paper was not "required" by that process. Governments may abandon plans or programmes that are "required" by administrative rather than legislative provisions while they are in preparation or even after they have been adopted, but the mere possibility that this may happen does not place a plan or programme outside the scope of the SEAD if it has in fact been prepared and adopted in accordance with an administrative requirement. While there were some alterations to the procedure set out in the 2010 Command Paper, e.g. the decision to proceed with two hybrid bills rather than one, the process described in the 2010 Command Paper was, in substance, followed by the Government in its preparation and adoption of the DNS. For these reasons, I conclude that an SEA was required.

Substantial Compliance

183. It is common ground that not only was no SEA prepared, but also that this is not a case where there has been some, albeit an imperfect, attempt to comply with the requirements of the SEAD. The Respondent has consistently maintained that an SEA is not required. The 'HS2 London to the West Midlands Appraisal of Sustainability' for Phase I of HS2 said, when describing the scope of the AoS, that the SEAD:

> "was key to determining the overall appraisal framework, although the scheme would not qualify as a plan or programme under the terms of the Directive." (paragraph 1.4.2)

184. In these circumstances it is not surprising that Ouseley J concluded that, if contrary to his view an SEA was required, there had not been substantial compliance with the SEAD (see paragraphs 125-172 of his judgment). Although there was a Respondent's Notice, supported by a Skeleton Argument, which challenged the judge's conclusion on this aspect of ground 1, Mr. Mould did not press the point in his oral submissions. While he did not formally abandon the Respondent's contention that there had been substantial compliance with the SEAD, Mr. Mould did not seek in his oral submissions to persuade us that the judge had erred on this point.

185. He was right not to do so. I endorse the view expressed by Ouseley J in paragraph 127 of his judgment. It would be remarkable if a body that had deliberately not set out to conduct an SEA had somehow managed to substantively comply with the requirements of the SEAD. In practice, save for rare and serendipitous cases, examples of substantial compliance will be confined to those cases where there has been at least some attempt to comply with the requirements of the SEAD. For the reasons set out in paragraphs 156 -158 (above) the fact that there will have to be compliance with the EIAD is not an answer to the need for there to have been substantial compliance with the SEAD.

Relief

186. In paragraph 189 of his judgment Ouseley J said that, on the assumption, which he rejected, that an SEA was required he would not have exercised his discretion to refuse relief. This aspect of the judgment was also the subject of a Respondent's Notice, but in his oral submissions Mr. Mould did not seek to persuade us that if, contrary to his submission, an SEA was required, relief should be refused even if there had not been substantial compliance with the SEAD. Again, he was right not to do so. While there is "an obvious and powerful public interest in the [Respondent] preparing the hybrid Bill for Parliament for it to reach its judgment on the benefits and cost of the proposal" (see paragraph 187 of Ouseley J's judgment) and any delay would be most regrettable, there is a powerful public interest in securing compliance with the SEAD. Where a "plan or programme" should, prior to its adoption, have been the subject of an SEA, the CJEU has made it clear that the national court must suspend or annul the plan or programme adopted in breach of the SEAD: see *Inter-Environnement Wallonie ASBL, Terre wallone ASBL v Region Wallone* [2012] 2 CMLR 21 at paragraph 47.

> "The fundamental objective of Directive 2001/42 would be disregarded if national courts did not adopt in such actions

> brought before them, and subject to the limits of procedural autonomy, the measures, provided for by their national law, that are appropriate for preventing such a plan or programme, including projects to be realised under that programme, from being implemented in the absence of an environmental assessment."

187. The SEAD applies to precisely those kinds of "plans or programmes" where it will be possible for the authority that has adopted the plan or programme to argue that the development consent process should not be delayed because of the public interest in the major project for which the plan or programme has set the framework being allowed to proceed. If, as I have concluded, an SEA is required and there has not been substantial compliance with the SEAD, it would be difficult to think of a more egregious breach of the Directive given the scale of the HS2 project and the likely extent of its effects on the environment.

Reference to the CJEU

188. For the reasons given in paragraphs 147-179 above, it will be apparent that I do not agree with the view of the Master of the Rolls and Lord Justice Richards that the meaning of "set the framework" (there is no suggestion that the DNS is not properly described as a "plan or programme", see paragraph 147 (i) above) is one on which there is sufficient guidance in the CJEU jurisprudence. It is true that the issue that divides us is 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. There are only two relevant authorities, both of them decisions of the CJEU. In only one of those authorities was the meaning of "set the framework" considered, and that consideration was by the Advocate General and not the Court. In my view 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.