Landmark CHAMBERS

UKELA

Strategic Environmental Assessment after HS2

David Elvin QC

HS2: background (1)

- January 2009 High Speed Two Limited established to advise on "*the development of proposals for a new railway from London to the West Midlands and potentially beyond*"
- December 2009 HS2 Ltd report - *High Speed Rail – London to the West Midlands and Beyond*
- 15 December 2009 Secretary of State's statement to Parliament
- 11 March 2010 DfT Command Paper *High Speed Rail* (Cm 7827) set out the Government's response including its acceptance of the case for
  - "initial core high speed network should link London to Birmingham, Manchester, the East Midlands, Sheffield and Leeds, and be capable of carrying trains at up to 250 miles per hour. This Y-shaped network of around 335 miles… would bring the West Midlands within about half an hour of London, and deliver journey times of around 75 minutes from Leeds, Sheffield and Manchester to the capital. HS2 Ltd's work has shown that as a first step a high speed line from London to Birmingham would offer high value for money as the foundation for such a network, delivering more than £2 of benefits for every £1 spent…"

HS2: background (2)

- Part 3 "***The Way Forward***" of the Command Paper included detailed proposals for "***Engagement and Consultation" and "Planning Consents and Construction***" ending with "***Formal Consultation***". The paper acknowledged the need "*to understand better the concerns and interests of those potentially*" and to
  - "provide an opportunity for all interested parties to express their view on HS2 Ltd's recommended route and on the mitigation measures that HS2 Ltd proposes to reduce any potential adverse impacts on individuals, communities and the environment".
- To inform the consultation, alongside the consultation paper there would be
  - "… a full Appraisal of Sustainability which will take into account the conclusions of the further work that has been commissioned from HS2 Ltd, as well as detailed maps and descriptions of the proposed route."
- The HS2 project was adopted by the new Coalition Government in May 2010
- Following consideration of a link to Heathrow and several further announcements, consultation began in Feb 2011
- The AOS only assessed the impacts of Phase 1 and did not consider Phase 2 or the cumulative impacts of the Y, nor their reasonable alternatives

HS2: background (3)

- 10 Jan 2012 DfT published *High Speed Rail: Investing in Britain's Future - Decisions and Next Steps* (Cm 8247) setting out the Government's high speed rail strategy, a summary of its decisions, the Government's review of evidence from consultation responses and proposed next steps
- 9 July 2013 DfT issued the Safeguarding Direction for the Phase 1 route, reissued on 24 October 2013 and most recently 26 June 2014
- 28 Jan 2013 preferred route for Phase 2 announced
- 17 July 2013 Phase 2 consultation opened
- May-June 2013 consultation on draft EIA for Phase 1
- 21 Nov 2013 High Speed Rail (Preparation) Act 2013
- 25 Nov 2013 Phase 1 Bill deposited in the House of Commons with EIA
- 25 Nov 2013 to 27 Feb 2014 ES consultation period (extended x2)
- 28 April 2014 Phase 1 Bill received Second Reading
- 1 July 2014 HoC Select Committee hearings began, with locus issues and progressing with Petitions from Birmingham

SEA legislation

- Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment
- Environmental Assessment of Plans and Programmes Regulations 2004.
- Purpose of the SEAD – 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"
- Broad purposive approach to be taken to the SEAD –
  - ***Walton v. Scottish Ministers*** [2013] P.T.S.R. 51, Lord Reed at [20]-[21]
  - ***Inter-Environnement Bruxelles ASBL v. Région de Bruxelles-Capitale*** Case C-567/10 [2012] Env. L.R. 30 at [37] -
    - "… 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."

Legislative purpose

- Commission **Report on the Effectiveness of the Directive on Strategic Environmental Assessment** (2009) at [4.1]:
  - "The two Directives are to a large extent complementary: the SEA is "up-stream" and identifies the best options at an early planning stage, and the EIA is "down-stream" and refers to the projects that are coming through at a later stage."
- Useful warning in **Aarhus Implementation Guide** (2nd ed. 2013) with regard to the Pillar II articles, that they -
  - "serve as a reminder to public authorities that it is vitally important to allow public participation to do its job fully. While it may be tempting to cut corners to reach a result that might appear on the surface to be the best, there are countless cases where unexpected or hidden factors became apparent only through a public participation process, with the result that potentially costly mistakes were avoided"

High Speed Rail:

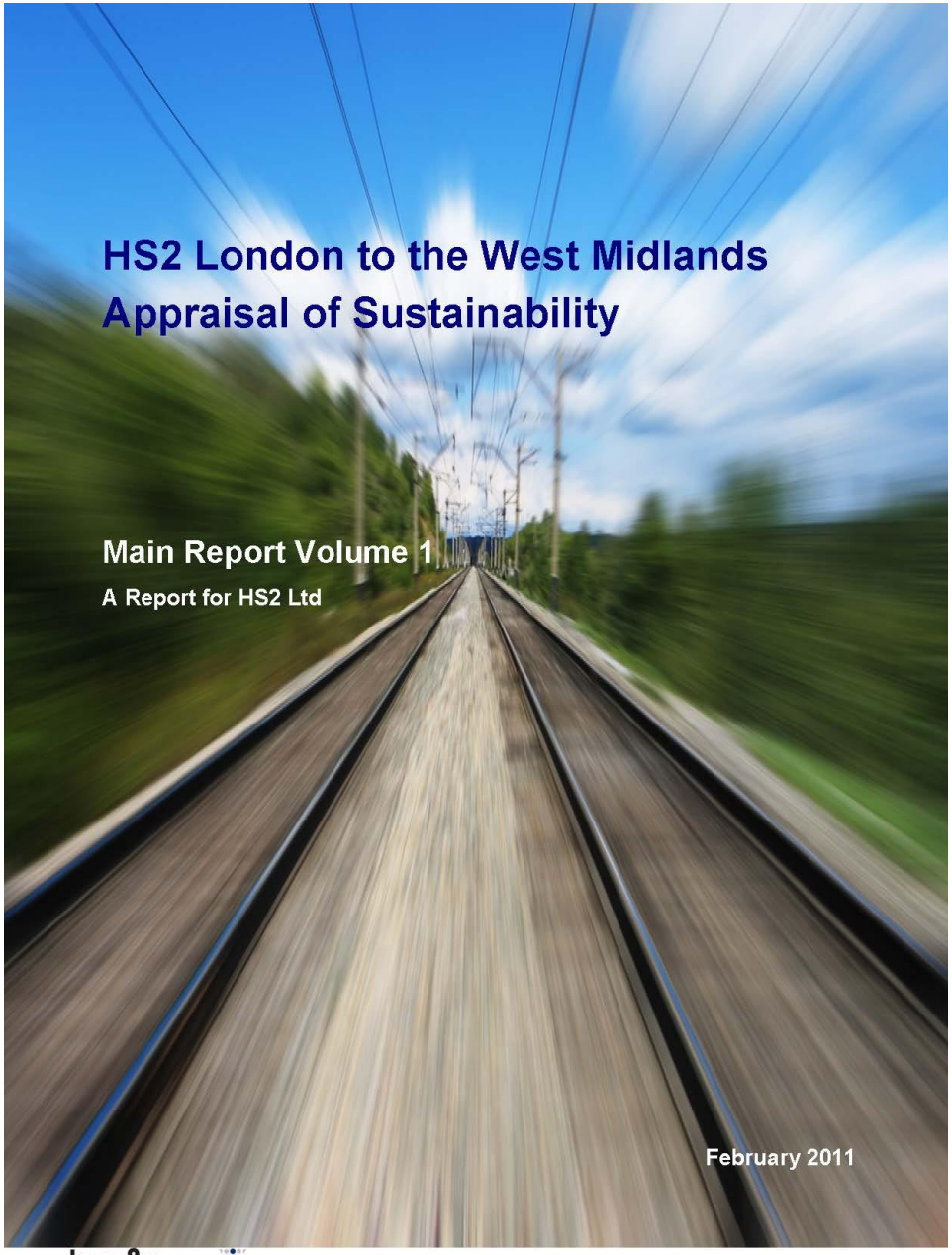
Investing in Britain's Future – Decisions and Next Steps

Presented to Parliament
by the Secretary of State for Transport
by Command of Her Majesty
January 2012

Cm 8247

£29.75

HS2 London to the West Midlands Appraisal of Sustainability



Main Report Volume 1

A Report for HS2 Ltd

February 2011

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Issues

- Was the DNS a "*plan or programme … required by legislative, regulatory or administrative provisions*" within art 2 [Juliet Munn's paper]
- Did the DNS "set the framework" for EIA development, i.e. the HS2 project (an EIA Annex I project)
- In the event that SEA was required, had there been substantial compliance with the requirements of the Directive/Regulations particularly with regard to the assessment of reasonable alternatives
- Additionally, the local authorities contended that the proposed Parliamentary procedure did not comply with the legislative exemption in art. 1(4) of the EIA Directive

Progress through the Courts (1)

- **First instance**: Ouseley J [2013] EWHC 481: the *Appraisal of Sustainability* accompanying the DNS did not amount to SEA (it failed to consider reasonable alternatives but the SEA Directive was not engaged: the DNS ws not a "plan or programme" which "set the framework for development consent" (Parliament's decision was not constrained by the DNS) and which was "required by administrative provisions" (those questions being closely linked).
- **Court of Appeal** [2013] P.T.S.R. 1194
  - Lord Dyson MR and Richards LJ: the DNS does not "set the framework for development consent". AG's Opinion in ***Terre Wallonne ASBL v Region Wallonne*** [2012] 2 CMLR 909 and CJEU judgment in ***Inter-Environnement Bruxelles ASBL v. Région de Bruxelles-Capitale*** [2012] Env. L.R. 30: should have either a legal influence or "*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*" [55] - here, decision maker is sovereign Parliament.
  - Sullivan LJ: dissented on SEA (there was sufficient evidence of influence) and supported a reference to the CJEU.

Progress through the Courts (2)

- **Supreme Court**: judgments supported the view that for a document to be a plan or programme which "sets the framework" for EIA project consents it has to be one which legally constrains the process, not one which merely influences it. The SC rejected the view that art 7 of the Aarhus Convention required a broader interpretation. See -
  - Lord Carnwath JSC at [38]-[42]
  - Lord Sumption JSC at [120]-[126]
  - Lady Hale DPSC at [130]:

    "HS2 will be the largest infrastructure project carried out in this country since the development of the railways in the 19th century. Whatever the economic and social benefits it may bring, it will undoubtedly have a major impact upon the environment."
- Note Lord Neuberger PSC's (supported by Mord Mance JSC) strong criticism of the result in ***Inter-Environnement Bruxelles*** and that he would have referred this issue back to the CJEU to reconsider it had it been necessary [189]

Setting the framework (1)

- SC took a narrower view than the CA, effectively agreeing with Ouseley J. that to "set a framework" a plan or programme must legally constrain the options for the consent of an EIA project**.**
- Lord Carnwath [34]-[52]
  - "The purpose is more specific, that is to prevent major effects on the environment being predetermined by earlier planning measures before the EIA stage is reached." [35]
  - "… something which does not simply define the project, or describe its merits, but which sets the criteria by which it is to be determined by the authority responsible for approving it. The purpose is to ensure that the decision on development consent is not constrained by earlier plans which have not themselves been assessed for likely significant environmental effects." [36]
  - "In relation to an ordinary planning proposal, the development plan is an obvious example of such a plan or programme… Even if as in the UK it is not prescriptive, it none the less defines the criteria by which the application is to be determined, and thus sets the framework for the grant of consent." [37]

Setting the framework (2)

- Lord Carnwath [34]-[52]
  - "[The DNS] … is a very elaborate description of the HS2 project, including the thinking behind it and the Government's reasons for rejecting alternatives. In one sense, it might be seen as helping to set the framework for the subsequent debate, and it is intended to influence its result. But it does not in any way constrain the decision-making process of the authority responsible, which in this case is Parliament. [38]
  - Cited Ouseley J at [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."

Setting the framework (3)

- Lord Sumption summarised the approach pithily at [122]-[123]
  - "The object is to deal with cases where the environmental impact assessment prepared under the EIA Directive at the stage when development consent is granted is wholly or partly pre-empted, because some relevant factor is governed by a framework of planning policy adopted at an earlier stage."
  - "What it means is that the policy framework must operate as a constraint on the discretion of the authority charged with making the subsequent decision about development consent. It must at least limit the range of discretionary factors which can be taken into account in making that decision, or affect the weight to be attached to them. Thus a development plan may set the framework for future development consent although the only obligation of the planning authority in dealing with development consent is to take account of it. In that sense the development plan may be described as influential rather than determinative. "
  - "… it cannot be enough that a statement or rule is influential in some broader sense, for example because it presents a highly persuasive view of the merits of the project which the decision maker is perfectly free to ignore but likely in practice to accept…"

Reasonable alternatives (1)

- Primary duty in Art. 5(1)/reg. 12(1) and (2)
- ***St Albans City and District Council v. Secretary of State for Communities & Local Government*** [2010] JPL 70 – failure to consider alternatives to late modification
- ***Save Historic Newmarket Ltd v. Forest Heath DC*** [2011] JPL 1233 – failure in the final report to consider any alternatives to changing housing position and no summary or reference back in the ER to the options process considered earlier
- ***Heard v. Broadland District Council*** [2012] Env LR 23 - Broadland DC and South Norfolk DC JCS unlawful because the SEA undertaken did not explain (i) which reasonable alternatives to urban growth had been selected for examination and why; and (ii) it had not examined reasonable alternatives in the same depth as the preferred option.

Reasonable alternatives (2)

- Followed by Ouseley J. in ***(R (Buckinghamshire County Council) v Secretary of State for Transport*** [2013] EWHC 481 (Admin) who found breach of alternatives duty and lack of substantial compliance applying ***Walton v. Scottish Ministers*** at [137]-[139] (Lord Carnwath)
- There would have been failure to assess alternatives to the strategic "Y" network [165] and to the Heathrow spur [169] had SEA applied but there was no requirement to assess alternative *objectives* -

  > "That selection [of alternatives] is made taking into account the objectives of the plan. Alternative objectives do not have to be explained nor, for these purposes, the reasons why the objectives are thought worth achieving. It is alternative ways of meeting the objectives which are the focus of the SEA..." [162]

- The Court of Appeal agreed [2013] P.T.S.R. 1194 at [72] and [183]-[185].
- Not challenged by the Secretary of State in the Supreme Court [2014] 1 W.L.R. 324

Subsequent developments (1)

- ***R (Chalfont St Peter Parish Council) v. Chiltern District Council*** [2013] EWHC 1877 (Admin) – a "non-starter" did not have to be assessed.
- ***DB Schenker Rail (UK) Ltd v. Leeds City Council*** [2013] EWHC 2865 (Admin) plan of specific and limited scope (e.g. minerals) does not have to consider alternatives outside its scope such as housing
- ***R (West Kensington Estates) v. Hammersmith &Fulham LBC*** [2013] EWHC 2834 - alternatives considered and assessed in the plans' SAs. Inappropriate for SPD to introduce options not ventilated during the plan-making process itself. The SPD did not add to the options considered during plan-making nor did it favour an option previously rejected.
- ***Cogent Land LLP v Rochford DC*** [2013] JPL 170 – some scope to cure defects in environmental report provided had been adequate assessment prior to adoption
- ***Ashdown Forest Economic Development LLP v. Secretary of State*** [2014] EWHC 406 (Admin) Sales J took a broad approach to the assessment of reasonable alternatives even though research was needed but not yet undertaken as to the impact of traffic on a SAC/SPA

Subsequent developments (2)

- Lindblom J. is currently considering the challenge to the HS2 Phase 1 safeguarding directions (***R (HS2AA & Hillingdon LBC) v. Secretary of State***), brought on the basis that the directions, read in the context of their purpose, are intended to place a legal constraint on the grant of planning permission for EIA projects by LPAs which might affect the HS2 project. There was no assessment of reasonable alternatives.
- Government response to Consultation on Safeguarding HS2 (July 2013, CM 8672):
  - "4.3.2 Under the law, there is no requirement to conduct an SEA in respect of safeguarding. Neither the safeguarding directions nor the decision to make them are a 'plan or programme' within the terms of the SEA Directive because they do not set a framework for future development consent. Instead they <u>seek to ensure the proper planning of the area</u> for the railway and allow the government to comment on relevant planning applications. ."
- Ensure proper planning = setting the framework??


CHAIRPERSON

Subsequent developments (3)

- In July 2014 the Aarhus Compliance Committee declared admissible the complaint against the UK and the EU arising from the approach to applying article 7 found in the Supreme Court's judgment or, if it was correct, against the EU in respect of the adequacy of the scope of the SEA Directive
- The issue, placed before the SC in HS2, was the effect of art 7 of Aarhus on the approach to interpreting the SEAD harmoniously with Aarhus, to which the EU acceded in 2005. Art. 7 applies to all "plans and programmes relating to the environment" - no proviso limiting it to only those plans and programmes "*required by administrative provisions*" and/or which "*set the framework for development consent*". See Case C-61/94 ***Commission v. Germany*** [1996] E.C.R. I-3989 at [52] (need for harmonious interpretation even if accession post-dates the EU legislation).
- The Aarhus Implementation Guide (2nd ed., 2013) at p 180 suggests the SEA Directive "*cannot be considered as fully implementing*" Art. 7 and needs to be "*supplemented by other procedures*".

Questions

- How far does the concept of a legal constraint on project decision-making go in terms of setting the framework? Safeguarding directions?
- What are courts to make of the strong criticism by Lord Neuberger on ***Inter-Environnment Bruxelles*** if the issue of "required" falls for decision?
- If development plans set the framework because they constrain the decision, albeit not in mandatory fashion, then presumably other material considerations such as SPD can set the framework also (subject to meeting other criteria) or, indeed, national policy.
- What is the effect of art 7 of Aarhus on the approach to interpreting the SEAD harmoniously with Aarhus?

21 July 2014