



## HS2: The challenge continues...

High Speed 2 (HS2), with support from all three main political parties, is being progressed by way of a Hybrid Bill through Parliament.

Hybrid Bills are used to promote works of public importance that affect specific private or local interests. This is not the only procedure by which HS2 could be approved, but is considered by the Government to be the most appropriate, and similar procedures were used in other large scale rail projects such as the Channel Tunnel line and Crossrail. However, it has been, and remains, under attack by well-funded and motivated objectors under the HS2 Action Alliance.

The judicial review proceedings brought by HS2 Action Alliance, Buckinghamshire County Council and Heathrow Hub were considered by the Court of Appeal in June and judgment handed down on 24th July.

Whilst each of the 7 grounds of appeal were rejected, leave to appeal to the Supreme Court was granted in respect of one ground and Sullivan LJ's dissenting judgment could well give rise to a reference to the European Court of Justice (ECJ). The key issue is whether the environmental impacts of HS2 have been considered in order to secure compliance with the Strategic Environmental Assessment (SEA) and Environmental Impact Assessment (EIA) Directives.

### Grounds of Appeal

The appeal focused on:

- whether the Government's initial Command Paper "High Speed Rail: Investing in Britain's Future: Decisions and Next Steps" falls within the scope of the Strategic Environmental Assessment Directive or "SEAD";
- whether the use of the hybrid bill procedure to secure HS2 is able to satisfy the requirements of the Environmental Impact Assessment Directive or "EIAD" requirements; and
- the lawfulness of the HS2 consultation process

### Issue for the Supreme Court

The SEA Directive requires environmental assessment of certain plans or programmes to identify potential environmental effects before consent for a specific project is issued. The objectors had argued that the Government's 2012 Command Paper confirming its decision to proceed with HS2 was a plan or programme that would set the framework for the project and as a result it fell within the SEA Directive.

Despite the objectors not being granted leave to appeal on the SEA ground itself, they have been permitted to appeal the principle that the Hybrid Bill procedure complies with the EIAD requirements of adequate public participation in the environmental decision-making process. As the SEAD and EIAD are so closely linked, the Supreme Court will have to look at the SEA point again.

One of the functions of SEA is to enable public participation in the assessment of alternatives at a strategic level. Where this is done, it should ensure compliance with this particular element of the EIA Directive.

The question the HS2 challenge has given rise to is how this compliance can be secured for large scale strategic projects in instances where SEA has not been done.

The focus of any appeal is likely to be on how, if at all, the Hybrid Bill procedure relates to both SEA and EIA and the judges' conclusion that SEA was not required. Sullivan LJ's dissenting comment that "if ... 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." indicates the scale of the issue that will be before the Supreme Court.

### Discussion of the European Directives

#### SEA

The CA considered the purpose of the SEAD and EIAD, the interaction between them, and the scope of the Command Paper. It found that to fall within the SEAD and therefore require SEA, the Command Paper would have to have a *legally* influencing factor on the decision making body when considering whether or not to grant development consent. The

decision making body for HS2 is Parliament. As a Command Paper cannot limit Parliament's discretion, it is not a plan or programme for the purposes of the SEAD.

This can be contrasted with the National Policy Statements (NPS) issued as part of the Nationally Significant Infrastructure Project (NSIP) consenting regime. The NPS set the policy framework for the consenting of NSIPs (such as new nuclear and offshore wind) and were subject to SEA. Had HS2 been progressed under this regime then the policy document supporting HS2 would have had to be subject to SEA. Furthermore, had the Government chosen to seek consent for HS2 through either the Transport and Works Act or as a NSIP under the Planning Act 2008, it would have been required to consider existing Government policy (with the NPS) in its decision making. Whilst existing policy will still be relevant, it does not have the same status in the Hybrid Bill procedure.

## EIA

Consideration was also given to the parliamentary procedure of Hybrid Bills and its ability to achieve the public participation objectives contained in Article 6 of the EIAD.

The Court held that the Hybrid Bill procedure fulfils the public participation objectives of the EIAD. This, it concluded, was achieved not only through the legislative process itself (indirectly through democratically elected representatives) but also through representations being made by parties directly affected by the scheme at Committee Stage. The Court found that this process is bolstered by the fact that public comments on the content of the Environmental Statement are also presented to Parliament in a Command Paper so MPs can take them into account when voting or suggesting amendments to the Bill. This is the same procedure used for the Crossrail Act.

Whilst the Court concluded that the Hybrid Bill procedure did meet the public participation requirements of the EIAD, there is a stark difference in the level of consultation required from promoters of NSIPs under the Planning Act 2008 compared to the Hybrid Bill procedure. Promoters of NSIPs would be entitled to look on enviously at what could be seen as the relatively light touch approach Government has adopted for the HS2 Hybrid Bill.

## Conclusion

The objectors to HS2 are adamant that they are going to pursue this matter up to the Supreme Court.

The interpretation of both the SEAD and EIAD have for many years been a fertile ground for challenge and the law in both these areas has evolved significantly. This case has the potential to require a change in approach to Hybrid Bills and may make them less attractive as a means of securing consent, both for large scale transport and other projects.

Set against the Government's timetable for securing Royal Assent in 2015, an appeal to the Supreme Court and possible ECJ reference will be very unwelcome.

## Contacts

Elizabeth Dunn, Craig Whelton and Stephen Humphreys are part of Burges Salmon's Planning team.



**Elizabeth Dunn**  
Partner

+44(0)117 902 2738  
elizabeth.dunn@burges-salmon.com



**Craig Whelton**  
Senior Associate

+44(0)117 902 2790  
craig.whelton@burges-salmon.com



**Stephen Humphreys**  
Solicitor

+44(0)117 902 2709  
stephen.humphreys@burges-salmon.com

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400  
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

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