



CROSSRAIL INFORMATION PAPER

B8 – COMPLIANCE WITH THE EIA DIRECTIVE AND ECHR

This paper sets out the Promoter's position on compliance with the EIA Directive and the European Convention on Human Rights (ECHR).

It will be of particular relevance to those interested in compliance with the EIA Directive and ECHR.

This is not intended to replace or alter the text of the paper itself and it is important that you read the paper in order to have a full understanding of the subject. If you have any queries about this paper, please contact either your regular Petition Negotiator at CLRL or the Crossrail helpdesk, who will be able to direct your query to the relevant person at CLRL. The helpdesk can be reached at:

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APPROVED

Version 1 – 10/01/08

B8 – COMPLIANCE WITH THE EIA DIRECTIVE AND ECHR

1. Introduction

1.1 This Information Paper sets out the Promoter's position on:

- compliance with Council Directive 85/337/EC¹ on the Assessment of the Effects of Certain Public and Private Projects on the Environment (“the EIA Directive”); and
- the European Convention on Human Rights (“ECHR”).

2. Compliance with the EIA Directive²

2.1 The EIA Directive provides an express provision relating to the consent for projects, such as Crossrail, which are granted by national legislation. That provision is Article 1(5) which provides:

“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”.

Article 1(5) requires that the objectives of the EIA Directive are met through the legislative process³. The Bill process adopted meets the requirements of the European Court that the legislation should be⁴:

“a measure adopted by a parliament after public parliamentary debate constitutes a specific act of national legislation within the meaning of that provision where the legislative process has enabled the objectives pursued by the Directive, including that of supplying information, to be achieved, and the information available to the parliament at the time when the details of the project were adopted was equivalent to that which would have been submitted to the competent authority in an ordinary procedure for granting consent for a project.”

2.2 In addition the Parliamentary procedures for the submission of Hybrid Bills contained in the Standing Orders of each House of Parliament relating to private business apply to the Crossrail Bill. Standing Order 27A requires that when a Bill which authorises the carrying out of works is submitted for approval through the Parliamentary process, it shall be accompanied by an Environmental Statement (ES) containing the information referred to in Part II of Schedule 4 to the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999 No. 293) (“the EIA Regulations”); and so much of the information referred to in Part 1 of that Schedule as is reasonably required to

¹ As amended by Directive 97/11/EC and, as from 25 June 2005, by Directive 2003/35/EC. The amendments made by 2003/35/EC therefore do not apply to the Environmental Statement (February 2005) and the Supplementary Environmental Statement (May 2005) both of which were published prior to 25 June 2005.

² See paragraphs 1.2.5-1.2.8 of Volume 1 of the main ES, February 2005.

³ See the judgments of the European Court of Justice, for example, in *World Wildlife Fund v. Autonome Provinz Bozen* Case C-435/97 [2000] 2 P.L.R. 1, especially paragraphs. 57-59 and *Grand Duchy of Luxembourg v. Linster* Case C-287/98 [2000] E.C.R. I-6917, paragraphs 54-59.

⁴ *Grand Duchy of Luxembourg v. Linster*, above, at paragraph 59.

assess the environmental effect of the works and as the Promoter can reasonably be expected to compile.

2.3 The process used for the passage of the Crossrail Bill through Parliament has complied with the Standing Orders, which have been applied in such a manner as to ensure compliance with all the requirements of the EIA Directive. This approach enables the objectives of EIA Directive to be achieved through the Hybrid Bill legislative process.

2.4 The main Crossrail ES published in February 2005, the various Additional Provision Environmental Statements and Supplementary Environmental Statements published since have therefore been prepared in accordance with the requirements of the EIA Directive, Standing Order 27A and the EIA Regulations. These documents have been prepared and provided for the purpose of enabling an assessment to be made of the likely significant impacts on the environment arising from Crossrail during the passage of the Bill through Parliament. They provide stakeholders and the public with the information required by the EIA Directive so that they can make informed representations to Parliament, as appropriate, on the environmental impacts of granting development consent for Crossrail.

2.5 Publicity and consultation on the Environmental Statements and the Supplementary Environmental Statements has been carried out in accordance with Article 6 of the EIA Directive. Any outstanding requirements of the EIA Directive will be complied with prior to Royal Assent for the Crossrail Bill. The reasons for the granting of consent for the project by Parliament required by Article 9 of the EIA Directive are set out in a command paper published in November 2007 entitled: Government Overview of the case for Crossrail and its Environmental Impacts (Cm 7250)⁵.

2.6 Chapter 3 of the main Crossrail Environmental Statement describes the principles of the assessment methodology used for that purpose.

2.7 The principle purposes of the Crossrail environmental assessment have been to:

- identify the potential environmental impacts associated with the construction and operation of Crossrail;
- identify mitigation measures in relation to significant adverse environmental impacts arising during the construction and operation of Crossrail; and
- predict the magnitude and significance of any residual impacts; and
- assess the appropriateness of Crossrail versus the main alternatives.

2.8 See also:

- Appendix A1 of the main Environmental Statement which sets out the relevant requirements of the EIA Regulations;

⁵ See the Minister's speech on Third Reading, *Hansard (Commons)* 13 Dec 2007: Column 552.

- Appendix A2 of the main Environmental Statement which sets out the detailed assessment methodologies which have been used to assess impacts in relation each environmental topic except for traffic and transport, which is dealt with in Appendices 8a-d of the main Environmental Statement;
- Section 6 of the main Environmental Statement which provides an outline of the main alternatives to Crossrail studied by the Promoter and gives the main reasons for the choice of Crossrail over those main alternatives, taking account of environmental effects;
- Appendix B1 of the main Environmental Statement which describes mitigation measures; and
- Information Paper D2, Control of Environmental Impacts which explains the Promoter's approach to dealing with environmental impacts and their regulation.

Allegations of deficiencies in the EIA process

2.9 A number of parties that are opposed to the proposals for Crossrail have challenged the adequacy of the Environmental Statements. While the Department and those experts advising it have produced an Environmental Statement and supporting documents which it is considered complies with the Directive, nonetheless some have disagreed with what has been done e.g. in respect of the terms of the assessment, its scope or its conclusions. It is to be expected in the context of EIA of a project as large as Crossrail that there will be differences of view and this is why the process allows those interested in the project to express their own views as part of the consultation process. However, the fact that there are differing views as to the terms of the environmental information or disagreements as to the assessment or its conclusions does not invalidate the EIA process⁶.

2.10 In particular some claim that the Environmental Statements do not provide detailed consideration of alternatives. Under the EIA Directive, the duty to assess alternatives relates to the project as a whole and is only a limited duty. The requirement (in paragraph 2 of Annex IV of the Directive) is to give:

⁶ See e.g. *R (Blewett) v Derbyshire County Council* [2004] Env LR 29 (Sullivan J) at paragraphs 39, 41, 42 and 68, Dyson LJ in *R (Jones) v Mansfield BC* [2004] Env. L.R. 21 at paragraphs 17 ff and Ouseley J. in *R (Bedford & Clare) v. Islington LBC & Arsenal FC* [2003] Env LR 22 at paragraph 203. As Sullivan J. stated at paragraph 68 of *Blewett* -

"68. ... it does illustrate a tendency on the part of claimants opposed to the grant of planning permission to focus upon deficiencies in environmental statements, as revealed by the consultation process prescribed by the Regulations, and to contend that because the document did not contain all the information required by Sch.4 it was therefore not an environmental statement and the local planning authority had no power to grant planning permission. Unless it can be said that the deficiencies are so serious that the document cannot be described as, in substance, an environmental statement for the purposes of the Regulations, such an approach is in my judgment misconceived. It is important that decisions on EIA applications are made on the basis of 'full information', but the Regulations are not based on the premise that the environmental statement will necessarily contain the full information. The process is designed to identify any deficiencies in the environmental statement so that the local planning authority has the full picture, so far as it can be ascertained, when it comes to consider the 'environmental information' of which the statement will be but a part."

“An outline of the main alternatives studied by the developer and an indication of the main reasons for this choice, taking into account the environmental effects”.

2.11 The reasons for the limitations in the EIA Directive on alternatives, to “an outline” of the “main alternatives” studied, with an “indication of the main reasons” for the choice, is easy to understand. An environmental statement which set out in full the details of all alternatives studied by the developer would be a massive and unwieldy document which would be confusing to members of the public who would be presented with a vast amount of detail not only relating to the scheme being progressed but all the alternatives to it. This would be a barrier to effective consultation with the public. As such the obligation under the EIA Directive is limited to an outline consideration of alternatives⁷.

2.12 The main alternatives to Crossrail (including whole route alternatives and alternative options for the central route and the eastern and western corridors) are outlined in Chapter 6 of the main Environmental Statement⁸. The Government is satisfied that it has fully met the requirements of the EIA Directive and has made submissions to this effect to the House of Commons Select Committee⁹.

Compliance with the terms of the EIA process

3.1 In order to ensure that the project is carried out in accordance with the basis of the EIA process, the parameters assessed and the mitigation measures adopted the Government has developed various control and mitigation strategies, most notably the Environmental Minimum Requirements (EMR)¹⁰. The EMR will consist of a Construction Code, a Planning and Heritage Memorandum, an Environmental Memorandum and the undertakings and assurances given to Parliament and to petitioners during the passage of the Bill. Further information on the EMRs can be found in Information Paper D2, Control of Environmental Impacts which explains the Promoter’s approach to dealing with environmental impacts and their regulation.

3.2 The controls contained in the EMR are a key element of the Government’s overall strategy for ensuring that impacts which have been assessed in the Crossrail ES are not exceeded unless this:

- Results from a change in circumstances which was not likely at the time of the ES; or

⁷ The Government’s position on the consideration of alternatives is more fully set out in the letters contained in Appendix D of command paper 7250 (Government Overview of the Case for Crossrail and its Environmental Impacts) and in the transcripts of evidence given in Committee on 20 March 2007 paragraphs. 21025-21027 and 21144-21147 and 28 March 2007 paragraph 21423.

⁸ In response to a specific point raised by petitioners, Chapter 6 of SES1 and Section 3.5 of SES3 also provided further information on alternatives to the Hanbury Street shaft.

⁹ See the transcripts for Day 79 (20 March 2007) paragraphs. 21025-21027 and 21144-21147; and Day 81 (28 March 2007) paragraph 21423.

¹⁰ See in particular Information Papers D1 ‘Crossrail Construction Code’ and D2 ‘Control of Environmental Impacts’.

- Would not be likely to have significant environmental impacts (meaning significant adverse impacts where the change is a modification to the current project); or
- Would be subject to a separate consent process (and therefore further EIA if required).

3.3 The Government has provided important undertakings to Parliament in relation to the enforcement of the EMR. On the first day of the Select Committee (17 January 2006)¹¹ the Government gave an undertaking in the following terms:

“Chairman, in accordance with paragraph 2.5 of information paper D2 on the control of environmental impacts, on behalf of the Secretary of State I now give an undertaking to Parliament in these terms: insofar as the environmental minimum requirements are not directly enforceable against any person appointed as a nominated undertaker or to whom the powers of the Bill are devolved under clause 53 of the Bill [now clause 60], he will take such steps as he considers are reasonable and necessary to secure compliance with those requirements.”

3.4 On Day 82 (10 July 2007)¹² the Government gave a further undertaking in the light of an amendment to the Bill as follows:

‘in any case where a statutory undertaker is carrying out development for or in connection with the Crossrail project in reliance on the planning permission enjoyed in consequence of the provision of the Bill, of which the marginal note is extension of permitted development rights. The Secretary of State undertakes to take such steps as he considers are reasonable and necessary to secure compliance with such of the Environmental Minimum Requirements as he considers relate to that development and are not directly enforceable against that undertaking.’

4. Compliance with the ECHR

4.1 The Secretary of State for Transport has confirmed, as required under section 19(1)(a) of the Human Rights Act 1998, that in her view the provisions of the Crossrail Bill are compatible with the ECHR . This remains the Government’s position. The principle provisions engaged by the Bill and the project appear to be those under Article 8 (right to respect for home, family and private life) and Article 1 of the 1st Protocol (right to the peaceful enjoyment of possessions).

4.2 With regard to Article 8 and Article 1 of the 1st Protocol of the ECHR it is considered that interference with these rights is justified by the considerable public benefits of Crossrail. There is a compelling case in the public interest¹³ which makes the level of interference proportionate (in article 8 terms) and such as to strike a fair balance with the interference of Article 1 Protocol 1 rights. These are sufficient to outweigh the impact of Crossrail on the petitioner’s private

¹¹ Day 1, paragraph 112 (Mr D Elvin QC).

¹² Day 82, paragraph 21686 (Mr T Mould QC).

¹³ To use the language of national policy on compulsory purchase found in ODPM Circular 06/04 paragraph 17.

proprietary rights, when considered in the context of the right to claim compensation for compulsory purchase, the many undertakings and assurances given by the Promoter and amendments made in the case of individual petitioners required by the Select Committee.

4.2 The Crossrail Bill does not engage rights to a fair trial under Article 6 of the ECHR as the Bill process concerns the passage of legislation and not the determination of civil rights. In any event the petitioning process and hearings before the Select Committee have ensured that those affected have had a proper and fair opportunity to present their concerns to Parliament. The exercise by the Promoter of powers conferred by the Bill, including the power to extend time limits for the exercise of compulsory purchase powers and/or for the carrying out of development pursuant to deemed planning permission, will be subject to judicial review. To the extent that the Promoter's exercise of such powers may engage the petitioner's civil rights, the availability of judicial review is sufficient to safeguard its rights under Article 6 of the ECHR.